WORKPLACE PRIVACY AND NEW TECHNOLOGIES: case study of ECHR jurisprudence as a guideline for time after COVID-19?

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CHAPTER 1

WORKPLACE PRIVACY AND NEW TECHNOLOGIES: case study of ECHR jurisprudence as a guideline for time after COVID-19?

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Abstract

By signing the Convention for the Protection of Human Rights and Fundamental Freedoms, the Republic of Croatia aims to harmonize its legislation with the ECHR jurisprudence, and seeks to fulfil this obligation by harmonizing existing laws and future legislation with ECHR practice. The indicative method of determining the impact of the Convention and the practice of the ECHR in the analysed case law of domestic courts indicates a tendency of increase number of references on the practice of the ECHR, but also higher degree of this practice by parties and proxies. Thus, our case law accepts the fact that the ECHR jurisprudence affirms the principle of precedent case law and thus case law as a formal source of law. Starting from the thesis that the modernization of labour legislation must take place in the direction of its Europeanization, we will analyse the jurisprudence of the ECHR and domestic courts in labour disputes defined by technological factors. Primarily, by presenting the practice of the ECHR and Croatian courts, we will point out the legal-logical decision-making mechanisms in this type of labour disputes. The secondary goal is to find an answer to the question of whether domestic jurisprudence meets the requirement of effective legal protection in this type of dispute. Last goal is to analyse whether we need to entirely rethought and transformed Workplace privacy and new technologies for a post–COVID-19 world.

Key words*: labour law, new technologies, case law, tendencies, Covid 19.*

JEL Classification: *O3, K0, J0*

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1. Discussion framework

Accelerated development of information technologies, means of communication and supervision at the beginning of XXI century has led to the processing of a large amount of different information in real time, which increases the risk of compromising the right to privacy. Developing an appropriate legal response to these risks is neither simple nor unambiguous. Moreover, legal analysis shows practical shortcomings, stativity and ambiguity of existing regulations. Therefore, there is a need for a more systematic and in-depth examination of the very idea of the right to employee privacy by presenting the jurisprudence of both domestic courts and the ECHR.

The first problems appear already in the attempt to define the key concepts of the paper. Therefore, having in mind the complexity and topicality of the problems dealt with in this paper, we consider it important to explain certain concepts ab initio in summary: new technologies; the right to privacy; employment and labour dispute.

New technologies should not be understood as a purely technical innovation, but also as an organizational innovation based on the so-called, “Intellectual technology”. Thus, new technologies must also be viewed as new production methods that consist of a combination of organizational procedures and technological decisions. Thus, understanding new technologies in the broadest sense, the question is whether digitalization will positively or negatively affect the position of employees, which depends primarily on the approach that employers and the state have to the benefits that digitalization brings. An empirical level (i.e. statistical data) shows that there is a significant number of unemployed in the Republic of Croatia. In addition, those who are employed have relatively low incomes compared to the EU average. These data, together with the fact that a large number work “illegally”, i.e. unreported, conditions the general feeling that someone is happy to have a job and consequently that these employees do not have much opportunity to control working conditions. In addition, union organization is very weak and exists with private employers only as an exception, mainly in privatized former state-owned enterprises. In addition, where they exist, unions are becoming weaker with fewer members, which ultimately means that the employee can only (as an individual) fight for their rights. In such circumstances, a large number of employees spend more and more time at work, is available to the employer and outside working hours (via email, mobile phone, GPS, etc.), so it is understandable that the boundary between business and private is becoming weaker, often for both sides.

In this context, the issue of the right to privacy is becoming one of the burning issues of modern labour law practice. Namely, like all basic concepts, the phrase privacy is an “empty” concept that is filled with content only when placed in a particular social context. Namely, we certainly find the legal basis for the protection of privacy in the Constitution of the Republic of Croatia, on the basis of which privacy is guaranteed to every person and citizen (Articles 35 and 37). Moreover, Art. 8. The Convention, which analyses the right to privacy through ECHR practice, also recognizes a number of legal grounds on which citizens may suffer certain restrictions in respecting and

exercising their right to privacy. However, for the purpose of this paper, the right to privacy should be analysed as the right to protection of personal data in the workplace, protection against wiretapping (fixed or mobile), controlled surveillance via video surveillance, controlled surveillance via GPS, controlled identification of employees, controlled use of the Internet et seq., all in accordance with applicable regulations. It is clear that employees do not leave their right to privacy (...) every morning at the workplace, but it is debatable where are the limits of that right. Ultimately, there are also situations where employees may be sanctioned for something they did in private time, outside the business premises, which further complicates the issue of privacy, and the most obvious example is the judicial profession where there is a thin line between private and business domain of life. Although the basic act for labour regulations is the Labour Act (Art. 29), its rules in the subject domain represent more principles than clear practical guidelines, so most problems with employee privacy remain outside the focus of the LA. A more detailed regulation is the GDPR which regulates the collection, processing, use and protection of personal data and supervision over the processing of personal data in the Republic of Croatia, but also the Occupational Safety and Health Act (Art. 43). Also, the right to protection of personal data is prescribed by Art. 8. Of the Grapher of Fundamental Rights of the EU and Art. 16 of the Treaty on the Functioning of the European Union, as well as Art. 8. Conventions. The Republic of Croatia, as a member of the Council of Europe, is also a signatory to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) and the Additional Protocol to Convention 108 concerning Supervisory Authorities and International Data Exchange. As the Court of Justice has emphasized, the right to the protection of personal data is not an absolute right, but must be considered in relation to its importance in society. The protection of personal data is closely related to the protection of private and family life protected by Art. 7. Graphers. This link between the two fundamental rights is also evident in Regulation 216/679, which ensures that Member States will protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with regard to the processing of personal data.

Furthermore, employment relationship is a central and probably the most complex issue of labour law. The dominant part of production, service, creative and any other work that aims to provide the necessary goods and services in modern society, within the employee-employer relationship falls under the legal term employment relationship defined primarily by the provisions of LA. However, the aim of this paper is not to present the institute of employment in its entirety, since it would be impossible, but to point out the complexity of changes in the structure of modern society that are so layered that it is extremely difficult to give a complete and final definition of employment. It is a dynamic legal institution, which is constantly adapting to socio-economic and national circumstances, and even needs. For example, the consideration of subordination in employment raises the question of the difference between private and professional life. However, the same analysis indicates that a clear and precise demarcation of the private and professional spheres is not an easy task, because, exampli gratia, the increasingly flexible

understanding of working hours, due to the intensive development of different forms of work. In situations where the private and business aspects of life are firmly and spatially intertwined, one should strive to consider that violating the privacy of employees is prohibited in principle, but only to the extent that it is really necessary in order to exercise employment rights and obligations.

On the other hand, we find similar problems in trying to define a labour dispute. Namely, determining civil disputes in the provision of Art. 1. of the Law on Civil Procedure, explicitly states “labour dispute”. It should be noted, however, that neither the LCP nor the LA define the notion of labour dispute. On the contrary, the LCP, regulating a special procedure, uses the phrase “employment lawsuits” (Art. 433 - 437 of the LCP).

2. Relevant literature review

Empirically and literary analysis of the use of new technologies in labor relations is conceptualized in the works of a number of practitioners and theorists. From the point of view of research, the literature more or less communicates, in a consensual sense, about the positive effects, but also about the problems of using new technologies in labor law. Literature indicates that we are in the time of the strongest social transformations, so the old social and other everyday problems catch up with the new ones and together with them form extremely complex challenges to the protective functions of organized society towards workers and employers. However, the situations of new technologies in labor disputes has remained unresolved in the existing literature. From what has been said, we notice that the existing literature does not provide an answer, as well as useful explanations and appropriate approaches regarding the position of new technologies in the context of civil litigation. The aim of this analysis is to find an answer to the question of whether the existing legislative framework meets the requirement of effective legal protection from the perspective of relevant EU law standards. A limiting factor in the context of this analysis is the lack of well-established case law, given that regulations/problems are relatively recent and consequently results in modest court practice.

3. Methodological Approach

The paper is divided into five chapters.

In order to make a more comprehensive analysis of the topic, after defining the terms, Chapters 2 and 3 indicate an overview of the relevant literature and methodological approach.

Chapter 4 analyses legal regulations and domestic case law. Significant emphasis was also placed on the analysis of the jurisprudence of the European Court of Human Rights in proceedings under Art. 8. of the Conventions, because we start from the assumption that knowledge about this can be the key to understanding the problems of this paper.

In the concluding remarks (Chapter 5), the findings of normative and

statistically descriptive analysis are synthesized, pointing out the complexity of the problem, and parallel initiating a dialogue on appropriate LA changes.

4. A relevant jurisprudence of ECHR and of domestic courts

The provision of means of work by the employer, including, for example, a computer system with internet access and a mobile phone, raises the issue of regulating the employer's right to monitor and control the employee's performance and the way in which the employee uses these means. From the employee's point of view, the basic means of work provided by the employer must be used to perform work tasks and perform work duties. Since the purpose of official means of communication is entirely related to the execution of business tasks, the employer as their owner has the right to control and restrict the use of these means. This type of control raises a number of contentious issues, two of which are particularly sensitive: first, whether employees have the right to use official means of communication for personal purposes and, if so, to what extent; and second is whether employers can legitimately supervise (control) employee behaviour using modern technology and, if possible, to what extent, under what conditions, and for what purposes. The ECHR didn't in Art. 8. defined the right to privacy or the right to private life bearing in mind its breadth and often the fact that it overlapping with other interests and rights that enjoy protection under, primarily, Art. 8. of the Conventions. Yet instead of offering clear definitions, the Court has identified different cases determining from case to case which aspects of life fall within the scope of protection of privacy in the context of employment always bearing in mind that the Convention is "a living instrument which, ..., must be interpreted in the light of today's conditions ".

4.1. Monitoring the use of telephones and the Internet in the workplace

Case Barbulescu v. Romania of 5 September 2017 (Grand Chamber - Judgment) dealt with the decision of a private company to dismiss an employee - the applicant - after monitoring his electronic communications and accessing their content. The applicant complained that his employer's decision was based on a violation of his privacy and that the domestic courts had not protected his right to respect for his private life and correspondence. The Grand Chamber, by eleven votes to six, concluded that there had been a violation of Art. 8. of the Convention, finding that the Romanian authorities had not adequately protected the applicant's right to respect for his private life and correspondence. Namely, in the said case, the Court reaffirmed that Art. 8. of the Convention was applicable to the applicant's case because communication in the workplace falls within the scope of the terms "private life" and "correspondence". He pointed out that, whether or not the applicant could reasonably have expected privacy given the employer's restrictive Internet use regulations known to him, the employer's instructions could not reduce private social life in the workplace to zero. There was still a right to respect for private life and the privacy of correspondence, despite the fact that it was limited to a certain extent. Although the monitoring measure of

the applicant's communication which resulted in his dismissal was taken by a private company, the domestic courts upheld its justification. The Court therefore concluded that the applicant's claim should be examined in the light of the State's positive obligations. Namely, the domestic authorities were obliged to strike a balance between competing interests - the applicant's right to respect for private life, on the one hand, and the employer's right to take measures to ensure smooth functioning of company, on the other. In assessing whether the domestic authorities had struck a fair balance between those interests, the Court first noted that the domestic courts had expressly invoked the applicant's right to respect for his private life and the applicable legal principles. The Court of Appeal also referred to the relevant European Union Directive and the principles set out therein, namely necessity, purpose specification, transparency, legitimacy, proportionality and security. The domestic courts also examined whether the disciplinary proceedings had been conducted in an adversarial manner and whether the applicant had an opportunity to present his arguments. However, the domestic courts had not established whether the applicant had been informed in advance of the possibility from his employer who was taking communication control measures, nor of the nature of such measures. Namely, the County Court simply noted that the employees' attention was drawn to the fact that one employee was fired for using the Internet, telephone and a photocopier for personal use. The Court of Appeal held that the applicant had thus been warned not to use the company's resources for personal use. However, the Court considered, following international and European standards, that the employer should have informed the employees before the supervisory measures began, that such notification could be considered prior notice within the meaning of those standards, especially because it was a supervision of correspondence. From the case file, the ECHR concluded that the applicant had not been previously informed of the scope and nature of the monitoring by his employer or of the possibility that the employer might have access to the actual content of his messages. As to the scope of the monitoring and the degree of interference with the applicant's privacy, this issue was not examined by any domestic court, although the employer recorded the content of all the applicant's communications during the real-time monitoring period and printed their content. The domestic courts did not sufficiently assess whether there were justifiable reasons justifying the monitoring of the applicant's communication. The County Court invoked the need to avoid damaging the company's information system or imposing liability on society in the event of illegal activities via the Internet. However, these examples can only be seen as theoretical, as there was no indication that the applicant had indeed exposed the company to any of these risks. Furthermore, no domestic court has sufficiently examined whether the objective the employer wanted to achieve could have been achieved by less intrusive methods than accessing the content of the communication. Moreover, no domestic court considered the seriousness of the consequences of the follow-up and disciplinary proceedings that followed, i.e. the fact that - by being dismissed - he received the most severe disciplinary sanction. Finally, the domestic courts did not determine at what point the employer accessed the content of the disputed communication. Taking into account the above considerations, the ECHR

concluded that the domestic authorities had not adequately protected the applicant's right to respect for his private life and correspondence and that they had consequently failed to strike a fair balance between competing interests. Therefore, there was a violation of Art. 8. of the Conventions. It is interesting to mention that the dissenting opinion in this case was given by as many as six judges. The essence of their opinion was the following: the domestic courts found that the applicant had received sufficient warnings to be able to know that his actions are monitored, which is why they consider that he could reasonably expect his activities to be monitored; the national authorities also took into account the applicant's right to respect for his private life and the employer's right to be involved in monitoring workers, including appropriate disciplinary powers; the employee has committed a disciplinary offense in violation of his or her employer's internal regulations prohibiting the use of computers for personal purposes; The legitimate aim pursued by the employer in following the applicant's communication was to "exercise the rights and duties to ensure the smooth running of the company", so it is not unreasonable for the employer to verify that his employees carry out their professional duties when using the equipment he has made available to them at the workplace and during working hours, taking into account also that the Court of Auditors found that supervising the applicant's communication was the only way for the employer to achieve that legitimate aim; the monitoring to which the applicant was subjected was limited in time, the employer only monitored the applicant's electronic communication and internet activity and not any other aspect of his private life; the evidence, the results of the follow-up procedure, was used exclusively for the purpose of disciplinary proceedings against the applicant, and only the persons involved in that procedure had access to the content. Finally, the applicant violated the relationship of trust between the employee and the employer by denying the use of his employers' resources for personal purposes. In view of the above, the six judges who gave a separate opinion concluded that there had been no breach of the applicant's right to respect for his private life and correspondence and that there had been no violation of Art. 8. of the Convention.

Although it is not a matter of direct supervision, the decision of the Constitutional Court of the Republic of Croatia is interesting. Namely, the Constitutional Court of the Republic of Croatia emphasizes that when it comes to labour relations, the relationship between employer and employee must be based on mutual trust and good faith behaviour. However, good faith conduct does not imply an absolute duty of loyalty to the employer, nor such a degree of discretion that the worker would be completely deprived of his right to freedom of expression, especially if he exercises his right in a way that does not constitute gross insult to the employer and it must be without offensive expressions. In the applicant's case, the comments she made on Facebook expressing her opinion on the organization of the defendant's work were not, in the opinion of the Constitutional Court, aimed at insulting the employer and were not of such intensity as to require the strictest termination of employment relationships. The Constitutional Court does not deprive the employer of the right to impose an extraordinary dismissal measure on an employee when due to a particularly serious breach of an employment

obligation or due to some other particularly important fact it is not possible to continue the employment, however, the courts are obliged to examine whether the legitimate aim it pursued - to protect the honour and reputation of the employer and whether it was possible to impose another, milder measure, or whether a fair balance was achieved between the employer's right to honour and reputation and the right of workers to freedom of opinion and expression. In the opinion of the Constitutional Court, the impugned judgment the Supreme Court failed to examine the proportionality of the measure of extraordinary dismissal imposed on the applicant and failed to strike a fair balance between the defendant's right to honour and reputation and the applicant's right to freedom of opinion and expression. Following the above, the Constitutional Court finds that in the specific case the applicant's right to freedom of opinion and expression guaranteed by Art. 38, par. 1 and 2 of the Constitution, i.e. Art. 10. of the Conventions was breached.

Furthermore, from the audit understanding of the Supreme Court no. Revr-85/2014 follows that in case where the employer voluntarily puts a GPS device in the employee's vehicle, monitoring and tracking must be transparent to the employee or must have a purpose for which the employee is aware and the data should not be used for any other purpose. In the present case, the employer monitored its employees on the basis of a contract concluded with a licensed detective agency and on the basis of embedded GPS devices, and the Supreme Court took the view that tracking workers in this way was legal.

In the next case of the Supreme Court of the Republic of Croatia, the termination of the employment contract was assessed as legal the day after the employer hired a detective agency to monitor the workers because he had a justified suspicion that they violated the legal ban on competing with the employer. In the present case, on the basis of evidence gathered from the detective agency, the workers were dismissed from their employment.

Also, in the case before the Supreme Court of the Republic of Croatia it was indicated that the employer can tolerate the employee to conduct some private conversations from the official telephone during working hours and this behaviour could not be considered a violation of work obligations. The defendant's telephone and the damage suffered thereby by the defendant for private telephone conversations is not insignificant which is a justifiable reason for the termination of the employment contract.

4.2. Open personal files stored on your computer in the workplace

In the Case (Libert v. France), the applicant alleged that his employer had violated his right to privacy when he opened the files on his computer's hard drive without him being present. The applicant was suspended and, after returning to work, discovered that his work computer had been confiscated. He was informed that the person who had replaced him during the suspension had alerted his superiors to the documents which had attracted his attention on the applicant's work computer. The applicant was dismissed for items found on his computer. Since the applicant was employed by the State SNCF (Société nationale des chemins de fer - French National Railway Company),

he claimed that the public body had infringed his right to privacy. The Court considered whether his objections had a legal basis and concluded that - at the relevant time, domestic law allowed the employer, to a limited extent, to open files stored on the employee's work computer. The Court then considered whether the interference pursued a legitimate aim and found that it didn't. The Court acknowledged, however, that the interference was intended to protect the "rights" of others, i.e. those employers who would legitimately want to ensure that employees use the employer's computer equipment available to them for the purpose of performing their duties. Finally, the Court considered whether interference with the right to privacy was necessary in a democratic society: "The notion of necessity implies that interference corresponds to an urgent social need, and in particular that it is proportionate to the legitimate aim pursued .... domestic courts had to ensure that the employer introduced measures to monitor correspondence and other communications, regardless of the scope and duration of such measures, appropriate and sufficient safeguards against abuse. In this context, it emphasized that proportionality and procedural safeguards against arbitrariness were essential. ... French positive law contains provisions on the protection of privacy. The principle is that while an employer may open any professional files stored on the computer's hard drive that are available to employees for the performance of their duties, it may not secretly open files that are found to be personal "except in the case of serious risk problems or exceptional circumstances". Such files may be opened only in the presence of the employee concerned or after he has been duly summoned. "The Court notes that the computer files in this case were not clearly identified as personal. In these circumstances, the Court concluded that there had been no violation of the right to privacy under Art. 8 of the Convention.

4.3. Video surveillance in the workplace

In Köpke v. Germany from 5 October 2010 (decision on admissibility), the applicant, a supermarket cashier, was dismissed without notice of theft, following a secret video surveillance procedure carried out by her employer with the help of a private detective agency. She unsuccessfully challenged the dismissal before the domestic labour courts. Her constitutional complaint was also dismissed. The Court declared it inadmissible, as manifestly unfounded, the applicant's complaint under Art. 8. of the Convention, finding that the domestic authorities had struck a fair balance between the employee's right to respect for her private life and her employer's interest in protecting his property rights and the public interest in the proper administration of justice. The Court noted in particular that the measure od surveillance was limited in time (two weeks) and covered only the area around the cash register and was not available to the public. The visual data obtained were processed by a limited number of persons working for the detective agency and the employer's employees. They were used only in connection with the termination of her employment and proceedings before the labour courts. It therefore concluded that the interference with the applicant's private life was limited to what was necessary to achieve the objectives on which the video surveillance was based. The Court noted, however, in this case that the

competing interests in question could take on a different weight in the future, taking into account the extent to which intrusions into private life were made possible by new, increasingly sophisticated technologies.

In the case of López Ribalda and Others v. Spain from 17 October 2019, Ms Lopez and her four colleagues (the applicants) were employed as cashiers in a Spanish supermarket chain. After the manager determined discrepancies between the situation in the warehouse and daily sales, the owner of the chain decided to investigate potential thefts with the help of video surveillance. He set up visible and hidden cameras, informing workers only of those visible. The applicants were caught with hidden cameras stealing and helping customers and colleagues steal goods from the store, after which they were fired. Ultimately, all five applicants challenged the dismissal in court. However, the court before which the dispute was conducted assessed their dismissals as admissible or justified, and the video evidence as legal. In the proceedings before the ECHR, the applicants complained that their right to privacy under Art. 8. of the Conventions and the right to a fair trial under Art. 6. of the Conventions were violated. The ECHR concluded that, regardless of the fact that the owner of a private company is responsible for the disputed video surveillance, the state has a positive obligation to establish an appropriate balance between protecting the private lives of its citizens and the interests of the employer. Under Spanish law, individuals must be clearly informed about the collection and processing of personal data. However, despite the fact that the applicants were not warned of this, the domestic courts justified the secret video surveillance by the existence of a reasonable suspicion that thefts were taking place, where, in their view, there was no other (milder) way to prove the thefts. The ECHR recalled that in a similar situation, in the case of Köpke v. Germany, it found that there had been no violation of the rights of (secretly) recorded employees because, unlike Spanish, there were no clear provisions in German law on how to use video surveillance in such cases. But in this case, all employees were subjected to video surveillance, for several weeks, during all working hours. Furthermore, the ECHR disagreed with the Spanish courts as to the proportionality of the measures, especially given the explicit provisions of Spanish law on the information of persons under surveillance. He also considered that the protection of the employer's interests could be achieved by more lenient measures, for example, by providing applicants with general information on supervision. The ECHR therefore concluded that the Spanish courts had failed to strike a balance between the interests of all involved, to the detriment of the applicants, and their right to privacy. Although it found that video surveillance violated the applicants' right to privacy, the ECHR found that the use of surveillance camera footage in the court proceedings did not violate the right to a fair trial in a labour dispute, as evidence other than video was used.

When we talk about video surveillance, it is necessary to single out the decision of the Supreme Court no. Revr-1803/09. The worker challenged the dismissal due to the workers' misconduct due to a particularly serious injury recorded by a video camera located approximately 150 meters from the worker, which was recording toll booths on the highway. The video showed that the worker failed to register 10 vehicles and that he stole the money

obtained by collection. The recording was made without the employee's knowledge and without prior warning, so for that reason the employee in the procedure pointed out that it was illegal evidence. The Supreme Court essentially determined that the disputed recording referred to the recording of a public space, a motorway, the person of the worker who performed the work in the toll booth was not visible and in this particular case there was no violation of workers' privacy. Finally, the court took the view that the fact that the worker had not been previously warned of the recording did not make that recording illegal evidence and that the dismissal from workplace was permissible.

The situation is somewhat similar in the recent Supreme Court case, where a person's employment contract was justifiably terminated because it was registered through video surveillance that in the period: 16-18. September 2017 in the performance of his duties he committed 24 violations of employment obligations by failing to issue invoices for certain collected consumption, and taking cash from the cash register, etc., which was justifiably assessed by the employer as violations of employment obligations.

Regarding the legality of video surveillance recording, the decision of the Split County Court is also important. "… In such a state of affairs, when the worker knew of the existence of video surveillance in the workroom (kitchen), and taking into account the need for a fair balance between the worker's right to privacy and the employer's legitimate business interest to monitor the work process, this appellate court in the present case, believes that the video surveillance was allowed, and thus evidence by reviewing the recorded material with a video camera".

5. Concluding remarks

Modern information technology has brought changes in all areas of life and work. The degree of "digitization of everything" is so great that some authors have called the process a "digital revolution" and the modern economy a "digital economy". Over time, this process accelerates and changes begin to affect all segments of economic and social life, changes are increasingly complex, interact and accelerate, taking on a global character that poses new challenges, problems and issues to be addressed. However, due to the complexity of the process of globalization, development of technology, information systems and communications and related changes in all segments of economic and social life, at this time it is difficult to accurately predict future forms and contents of economic activities and the role of the state as legislator in new work processes.

It is undisputed that employees legitimately expect to be able to keep their private life private and that they are also entitled to a certain degree of privacy in their work environment. Yet, the speed at which these new technologies have been deployed is concerning. Fifty new apps and technologies have been released since the pandemic began, not accounting for existing, unchanged technologies that now are being marketed as workplace surveillance tools to combat COVID-19. Exempli causa, on June 16 alone,

both Fitbit and Amazon released new workplace surveillance tools. From an employer's perspective, this rapid deployment is driven mainly by the urge to bring workers back to the workplace. But the invasion of privacy that workers face is alarming, especially considering that the effectiveness of these technologies in mitigating the spread of COVID-19 has not yet been established.

Analysing the practice of ECHR, we see that it primarily determined whether there are certain internal rules by the employer that regulate the boundaries of business and private in a particular employment relationship. Precisely by considering whether the employee was (or could have been) informed of any restrictions, the Court determined whether the employee's expectations in each individual case were realistic or not. Their purpose, i.e. restrictions, is also important for the ECHR because it must be sufficiently legitimate and linked to the employment relationship in order to be accepted. Based on these parameters, the Court determined whether the employee in a particular case could realistically expect a certain degree of privacy in the workplace or not. Thus, it is clear from the analysed cases that the ECHR will assess the proportionality of the measures used to supervise employees and whether such measures pursue a legitimate aim before finding that there has been no violation of the right to privacy under Art. 8. of the Conventions.

From the Croatian perspective, we see that the decisions of higher courts made in the field of the right to privacy in labour relations paved the way for regular lower courts to properly apply regulations in this area, because ab initio there were confusion and doubts about the proper application of constitutional, convention and legal provisions. For now, although the normative-legal framework governing the issue of privacy rights in some segments is vague and inconsistent, the case law satisfactorily follows the dialectic of changes in this segment of the legal system. What is visible as a problem is the evaluation of information technologies as evidence in labour disputes. Namely, the Civil procedure act, as a basic procedural regulation, does not contain or elaborate the notion of illegally obtained evidence, although this notion is contained in the Constitution of the Republic of Croatia (Art. 29). However, what the jurisprudence indicates is that the legality of obtaining evidence in such situations should be assessed on a case-by-case basis, i.e. ad hoc. Specifically, according to the circumstances of the case, it is assessed whether obtained evidence violated the privacy of the workers. But even when it is violated, it is necessary to assess whether a right or interest of the employer is still stronger than the right of the worker to protect his privacy. In deciding whether certain evidence has been "obtained illegally", courts have greater discretion in deciding civil cases. The same position was taken by the ECHR in the case of Perić v. Croatia : „18. The requirements covered by the concept of a fair hearing are not necessarily identical in cases involving civil rights and duties, and in cases involving criminal liability. …Therefore, although these provisions are relevant outside the framework of criminal law (see mutatis mutandis, Albert and Le Compte v. Belgium, judgment of 10 February 1983, Series A. no. 58, 20, para. 39), Courts in civil proceedings have greater freedom than when deciding in criminal cases (see, Pitkanen v. Finland, no. 30508/96, par. 59, 9 March 2004). "

But ultimately the author's recommendation, and in order to avoid all potential disputes, is for the employer to set an accessible, clear and precise framework for protecting employee privacy because flat-rate restrictions on the "impossible that you didn't know" principle cannot and should not enjoy protection.

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