

The Impact of the ECHR on Employee's Privacy Protection

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Abstract:

This article explores the impact of the European Convention on Human Rights (ECHR) on the employee's privacy protection. The cases where the States in response to European Court of Human Rights (ECtHR) judgments adopted changes into their national labour law are considered as direct impact of the European Convention on Human Rights (ECHR), while the mechanisms elaborated by the ECtHR for the adjudication of cases involving employee's privacy as well as the set of positive obligations deduced from Article 8 are examined as the sources of indirect impact. We argue that the Court's approach to the matters of employee's testing and surveillance are applicable for the estimation of new challenges to privacy such as keylogging, screenshotting, geolocation and polygraph testing. This research permits us to affirm that Article 8 of the ECHR has great potential in the field of employment law.

Keywords: Private life; Employee; Covert video; ECtHR; Privacy.

1. Introduction.

In recent decades the topic of human rights in employment relations has become widely discussed¹, particularly in the light of Human Rights Act provisions in Britain and certain

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¹ Ewing, K. D., 'The Human Rights Act and Labour Law', in *Industrial Law Journal*, 27(4), 1998, 275-292; Collins, H., *Theories of rights as justifications for labour law*, in G Davidov, B Langille (eds.), *The Idea of Labour Law*, OUP, Oxford, 2011, 137; Mundlak, G., *Labor Rights and Human Rights: Why Don't the Two Tracks Meet?*, in *Comparative*

landmark judgments of the European Court of Human Rights (ECtHR). This paper was largely inspired by an intention to explore and summarise the factual and potential impact of Article 8 of the ECHR in the practical implementation of employee's privacy protection.

According to Article 8 of the ECHR everyone has the right to respect for his private and family life, his home and his correspondence. However, the ECtHR has gradually expanded the scope of this article to cover also protection of moral, psychological and physical integrity of a person², protection of the right to personal development³, to establish relationships with others (including relationships of a professional nature)⁴, to access a profession in the private sector⁵, and to receive information about occupational risks⁶.

In this paper we analyse the way the ECtHR considers the cases on employee's privacy under Article 8 of ECHR, focusing on its interpretation of the requirements set in Article 8(2), and summarise the contributions of the ECtHR to national employment law and practice. These research interests determine the structure of our paper: firstly we briefly outline the way the ECtHR may impact national employment policies (Paragraph 1), proceed with the analysis of the ECtHR's approach to the scope of employee's privacy at work and elaborate on the contributions of Article 8 to employment regulation in the sphere of the employee's privacy (Paragraph 2) and conclude with the considerations concerning the relevance of Article 8 for protection from unfair dismissal in cases when grounds for the dismissal stemmed from – or were based on - the breach of employee's privacy (Paragraph 3).

2. The ECtHR impact on National Employment Policies.

There are two main ways by which the ECtHR may influence national employment regulations: direct way - through the adoption by the respondent State of general measures, required by a particular judgment; and indirect one – by imposing upon the states the positive obligations of respecting the human rights at the workplace. The ECtHR also indirectly impacts national employment regulations with the establishment of the requirements to the due consideration of employment disputes at a national level.

The information on the direct impact of the ECtHR upon national employment legislation may be drawn from the final resolutions of the Council of Ministers (a body which ensures the execution of the ECtHR judgments)⁷. As an example of the direct impact of Article 8 on national employment law we may recall the following changes to the UK

Labor Law and Policy Journal, 34, 2012 237; Compa L., Solidarity and Human Rights, in *New Labor Forum*, 18, 2009, 38; Kolben, K., Labor Rights as Human Rights?, in *Virginia Journal of International Law*, 50, 2010.

² ECtHR, Brincat and others v. Malta, Raninen v. Finland (20972/92) 16/12/1997; Kyriakides v. Cyprus (39058/05) 16/10/2008.

³ ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09 January 2013, para. 65.

⁴ ECtHR, C. v. Belgium (21794/93) 07 August 1996, para. 25.

⁵ ECtHR, Sidabras and Džiautas v. Lithuania (55480/00, 59330/00) 27 July 2004, para. 47.

⁶ ECtHR, Brincat and others v. Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24 July 2014; Vilnes and others v. Norway (52806/09 22703/10) 05 December 2013.

⁷ <http://www.coe.int/en/web/execution/closed-cases> (Last access 20 august 2019).

legislation: the abolition of the possibility to dismiss service men for homosexuality⁸, the enactment of the legislation providing a regulatory framework for interceptions on private telecommunication networks and providing more detailed and foreseeable regulation of interceptions of other electronic communications⁹; inclusion of specific provisions about the disclosure of pictures from surveillance cameras to limit the retention and to restrict disclosure of images to third parties¹⁰. In other European countries we may trace the improvement of the protection of employees' private life in Portugal, where the legislation provided effective remedies in case of security investigations¹¹. In Sweden the statutory prohibition for covert filming in private places was adopted following the ECtHR judgment¹².

The indirect impact of Article 8 of ECHR upon national employment regulations can be illustrated through a more detailed analysis of the positive obligations States should implement while adopting policies effecting private life of employees. The ECtHR's conclusions about the due consideration of labour disputes involving the right to privacy also constitute an indirect source of influence upon national employment regulations. Both ways of indirect impacts will be discussed below.

3. Employee's Privacy Protection.

Employee's privacy is one of the most debated questions in labour law literature¹³. It is believed to be an inherent part of an individual's dignity and autonomy¹⁴. The establishment of the borders for the employer's interference with the life of an employee is the way to preserve this dignity and autonomy taken the initial dependence of the employee.

Protecting the employee's privacy has become a particularly difficult task in the modern digitalised world¹⁵. The present analysis of the ECtHR's case law is intended to establish the

⁸ ECtHR - 31417/96, 32377/96 *Lustig-Prean and Beckett v. UK*, (27 September 1999); 33985/96, 33986/96 *Smith and Grady v. UK*, 27 September 1999.

⁹ *Halford*, Appl. No. 20605/92, Final Resolution CM/ResDH, (2007),15; ECtHR, *Liberty and Others*, Appl. No. 58243/00, Final Resolution CM/ResDH, (2011), 83.

¹⁰ *C.N.*, Appl. No. 4239/08, Final Resolution CM/ResDH, 2014, 34.

¹¹ ECtHR, *Antunes Rocha*, Appl. No. 64330/01, Final Resolution CM/ResDH, 2013, 230.

¹² ECtHR, *Söderman*, Appl. No. 5786/08, Final Resolution CM/ResDH, 2014, 106.

¹³ Hendrickx F., *From Digits to Robots: The Privacy-Autonomy Nexus in New Labor Law Machinery*, in *Comp. Lab. L. & Pol'y J.*, 40, 2018, 365; Martin K., *Understanding privacy online: Development of a social contract approach to privacy*, in *Journal of Business Ethics*, 137, 3, 2016, 551-569; Lam H., *Social media dilemmas in the employment context*, in *Employee Relations*, 38, 3, 2016, 420-437

¹⁴ Freedland M., *Data Protection And Employment In The European Union, An Analytical Study of the Law and Practice of Data Protection and the Employment Relationship in the EU and its Member States*, 1999, <http://ec.europa.eu/social/main.jsp?catId=708>, (last access 20 May 2019).

¹⁵ Parry E., Strohmeier S., *HRM in the digital age – digital changes and challenges of the HR profession*, in *Employee Relations*, 36 (4), 2014; Lynch P., *The Naked Employee: How Technology Is Compromising Workplace Privacy* in *Journal of Applied Management and Entrepreneurship*, 9(2), 2004, 116.

ECtHR approach to the issues of employee's privacy protection (searches, video surveillance, interception of calls, drug controls).

3.1. Framework for the Consideration of Cases on Employee's Privacy.

According to the ECtHR, the words "private life" and "home" should be interpreted as including certain professional or business activities or premises¹⁶. This approach permitted to spread the protection of privacy over the workplace and the ECtHR introduced a framework for considering cases concerning employees' privacy. In case of the interference the respondent state should demonstrate that it was in conformity with the requirements of Paragraph 2 of Article 8 (in case of public employees). In case of private employees, the state has to demonstrate that it fulfilled its positive obligation arising from Article 8 and/or that national courts correctly considered the case in line with the article¹⁷. In both cases the ECtHR firstly establishes if the employee had a legitimate expectation of privacy, which depends largely on the particular circumstances of the case¹⁸. Then the ECtHR considers if there had been an interference with the right to privacy and evaluates its lawfulness and necessity¹⁹. As the final step the ECtHR rigorously assesses the proportionality of the interference to the legitimate aim pursued by the employer²⁰.

The ECtHR examined in this way the claims on searches of working premises, monitoring of internet use, e-mails, and interception of the telephone calls²¹.

The reasonableness of the expectations of privacy in these cases depends, amongst other things, on the questions of whether the employee was informed about the fact that an interference with his right to privacy was possible; the presence of specific indications of the possibility of such interference; or the (permanent) nature and the impact of the interference²². The ECtHR found a violation as the applicants being public employees had a legitimate expectation of privacy and were not informed about the possibility of

¹⁶ ECtHR - 13710/88 Niemietz v. Germany, (16/12/1992), para. 31.

¹⁷ ECtHR, Köpke v. Germany (420/07) inadmissible 05/10/2010; Bărbulescu v. Romania (61496/08)12/01/2016.

¹⁸ See, for example, ECtHR, Halford v. United Kingdom (20605/92) 25/07/1997, para. 44 and Copland v. the United Kingdom (62617/00) 03/04/2007, para. 42.

¹⁹ ECtHR, Halford v. United Kingdom (20605/92) 25/07/1997; Copland v. the United Kingdom (62617/00) 03/04/2007; ECtHR, Peev v. Bulgaria, para. 43.

²⁰ ECtHR, Halford v. United Kingdom (20605/92) 25/07/1997; Copland v. the United Kingdom (62617/00) 03/04/2007; ECtHR, Peev v. Bulgaria, para. 43.

²¹ ECtHR - 20605/92 Halford v. United Kingdom, 25/07/1997; 62617/00 Copland v. the United Kingdom 03/04/2007; ECtHR - Peev v. Bulgaria, paras. 43.

²² Hendrickx F., Bever A.V., *Article 8 ECHR: judicial patterns of employment privacy protection* in Dorssemont F., Lörcher K., Schömann I. (eds.), *The European Convention on Human Rights and the Employment Relation*, 2013, 189.

searches/monitoring, the employer did not adopt the relevant regulations, thus the interference was not in accordance with the law.

“In accordance with the law”.

The ECtHR had stated that the phrase “in accordance with the law” requires, at a minimum, compliance with domestic law²³. The quality of that law is also relevant²⁴. It should be foreseeable and sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the State would be entitled to resort to measures affecting those rights²⁵.

In the view of the ECtHR in order to find the interference to be in accordance with law, the law in question should be accessible to the individual concerned²⁶ and be clearly formulated²⁷. In *Antunes Rocha v. Portugal*²⁸, which concerned the surveillance of the employee’s home for security reasons, the ECtHR found the violation of Article 8 as the legislation, permitting such surveillance, was “too vague” and “did not contain any control mechanisms or provide any safeguards for individuals”²⁹.

In certain cases, the ECtHR, having established the lack of relevant national legislation, has been satisfied by existing employer’s policies which themselves provide some privacy protection to its employees. For example, in cases of obligatory drug tests, such as in *Wretlung v. Sweden*³⁰, the ECtHR noted that the requirement of lawfulness in countries where labour issues were mainly regulated by the parties on the labour market can be satisfied by the establishment of relevant provisions in collective agreements or the employer’s policy³¹.

In *Köpke v. Germany* which concerned covert video surveillance of the cashier the ECtHR determined the lack of relevant legislation but was satisfied with the developed case-law of German courts³². These courts elaborated an algorithm for the consideration of similar cases which ensured a careful balancing of the rights of the employees and of the employers. Thus, even in the roman legal system countries where the precedent does not have the role of the source of law the requirement of “lawfulness” may be satisfied through the establishment of a national judicial approach to cases dealing with employee’s privacy.

A very curious example of such an approach to the “lawfulness” may be found in *Ribalda and others v. Spain*. The Chamber of the ECtHR decided in 2018 that the covert video recording of the supermarket employees constituted the violation because it did not comply with the requirements stipulated in the Spanish Personal Data Protection Act as the employees were not informed about the collection of private data³³. The Grand Chamber, reconsidering this case, distanced from the analysis of the lawfulness and pointed that non-compliance with the national law was “just one of the criteria to be taken into account in

²³ ECtHR, *Antović and Mirković v. Montenegro* (70838/13) 28.11.2017.

²⁴ ECtHR, *Malone v. The United Kingdom* (8691/79) 02/08/1984, para. 68.

²⁵ ECtHR - 8691/79 *Malone v. The United Kingdom*, (02/08/1984), paras. 68.

²⁶ ECtHR - 58341/00 *Madsen v. Denmark*, inadmissible (07/11/2002).

²⁷ ECtHR - 24029/07 *M.M. v. UK*, (13/11/2012), paras. 198.

²⁸ ECtHR - 64330/01 *Antunes Rocha v. Portugal*, (31.05.2005).

²⁹ ECtHR - 64330/01 *Antunes Rocha v. Portugal*, (31.05.2005), paras. 74-77.

³⁰ ECtHR - 46210/99 *Wretlung v. Sweden* inadmissible, (09.03.2004).

³¹ Similar conclusions can be found in ECtHR - 58341/00 *Madsen v. Denmark*, inadmissible (07.11.2002).

³² ECtHR, *Köpke v. Germany* (420/07) inadmissible 05/10/2010.

³³ ECtHR - 1874/13 8567/13 *López Ribalda and others v. Spain*, (09/01/2018), paras. 69.

order to assess the proportionality of a measure”³⁴. The results of further examination of the case demonstrate that the criterion of lawfulness is not decisive at all: the ECtHR found that domestic courts, even though they did not take into account the violation of the relevant national legislation by the employer, fulfilled the State’s positive obligations under the ECHR.

The reasoning of the ECtHR in this judgement is rather vague. It acknowledges that the boundaries between the State’s positive and negative obligations under the Convention do not lend themselves to precise definition and that the applicable principles are similar but, in the end, it significantly reduces the requirements for the compliance with the positive obligations. The applicable principles were indeed similar the criteria of lawfulness should have been taken into account by the national courts while assessing the interference with the right to privacy and should have been decisive (as it was in cases *Antović and Mirković v. Montenegro*³⁵ or *Radu v. Moldova* (2014). Deciding otherwise, in our opinion, might amount to unfair difference in treatment of employees who suffered the intrusion with their privacy rights and did not succeed to protect it according to the national law even though such protection should have been granted. We also believe that denying the underlying value of the lawfulness criteria leaves impermissibly broad the margin of appreciation of the states as far as private employees are concerned. It leaves with little sense the well elaborated by the ECtHR requirement to the quality of law, which should be “precise, certain, and foreseeable”.³⁶

Having said this let us proceed with the next criteria which is “necessity of the interference in the democratic society”.

Is the interference necessary in a democratic society?

Where the lawfulness of interference has been established, the ECtHR will turn to an analysis of its necessity in a democratic society. This test permits to balance the rights concerned (usually the employee’s privacy versus employer’s managerial rights) considering the particular circumstances of the case.

For instance, in the case *Yılmaz v. Turkey* (2019) the claimant was refused an appointment to a teaching post abroad on the grounds of security investigation results concerning his private life (his behavior at home and his wife's clothing style). Nonetheless, neither the Ministry of Education as an employer, nor the local courts provided any grounds or explanations that could justify the refusal to the claimant concerning the public-interest or specific public needs and features of educational and teaching services. In this case the ECtHR found a violation of Article 8 of ECHR explaining that while “...such interference had been in accordance with the law and had pursued one of the legitimate aims referred to in Article 8, [...] in any event it had not been necessary in a democratic society”³⁷. Thus, the ECtHR concluded that the use of security investigation results in the claimant's private life was not necessary for the post obligations of a teacher abroad. Such an interference

³⁴ ECtHR - 1874/13 8567/13 Grand Chamber, *López Ribalda and others v. Spain*, (17/10/2019), paras. 131.

³⁵ ECtHR - 70838/13 *Antović and Mirković v. Montenegro*, (28.11.2017).

³⁶ ECtHR - 24029/07 *M.M. v. UK*, (13/11/2012).

³⁷ ECtHR - 36607/06 *Yılmaz v. Turkey*, (04.06.2019).

constituted the violation of the right to respect of private life and was not in compliance with democratic values of the society despite its legitimate aims (such as public safety).

Another two cases (similar to each other) discussed below relate to data protection in the context of the employer's ability to gather urine samples for drug and alcohol tests. The fact scenarios in *Madsen v. Denmark*³⁸ and *Wretlund v. Sweden* are quite similar. In both applications the employees (Mr Madsen, passenger assistant, and Mr Wretlund, office cleaner at a nuclear plant) argued that the obligatory testing system itself amounted to the violation of their right for private life. Examining the necessity of interference in the democratic society, the ECtHR noted that the need to ensure public safety and the protection of the rights and freedoms of others justified adequate control measures like a random urine test. It is interesting to note that to substantiate this conclusion in *Madsen* the Court referred in its deliberations to the Guiding Principles on Drugs and Alcohol Testing Procedures for Worldwide Application in the Maritime Industry adopted by the joint ILO/WHO Committee on the Health of Seafarers in 1993³⁹.

Further the Court took into account the following circumstances, as established by the national courts:

- Employees were appropriately informed about the possibility of such tests being conducted;
- The frequency of tests;
- Advance notice;
- Coverage of all employees without any exception;

An examination of the factors set out above led the ECtHR to conclude that the assumed interferences were, in these instances, justifiable on the basis that they were “necessary in a democratic society” and declared each of the applications as being manifestly ill-founded⁴⁰.

The ECtHR's reasoning in these cases matters for Europe because in most of the European countries there are no express provisions concerning bodily privacy and approaches differ significantly between jurisdictions⁴¹.

The ECtHR's approach to the necessity of conducting drug tests on employees might provide general guidelines for finding a balance between the employee's right to privacy and

³⁸ ECtHR - 58341/00 *Madsen v. Denmark*, inadmissible (07 November 2002).

³⁹ *Ibid.*

⁴⁰ ECtHR, *Wretlund v. Sweden* (46210/99) inadmissible 09 March 2004, *Madsen v. Denmark* (58341/00) inadmissible 07 November 2002.

⁴¹ Verstraete, A. G., Pierce, A., *Workplace drug testing in Europe*, in *Forensic Science International*, 121(1), 2001, 114.

the employer's rights and help members of the CoE create a framework of protection based on the interpretation of the ECHR.

3.2. The ECtHR's Consideration of the Proportionality of the Interference.

Proportionality test is one of the most controversial issues in privacy cases in particular as far as private employees are concerned⁴². In cases concerning the positive obligations of the State under article 8 the Court verifies if the right to privacy is effectively protected and correctly balanced with the employer's rights by national courts. These are cases on dismissal of employees for non-compliance with their duties revealed by the means of video-surveillance (in *Köpke v. Germany*⁴³, *Lopez Ribalda and others v. Spain*⁴⁴) and by monitoring of private messages sent from corporate Yahoo messenger account (*Bărbulescu v. Romania*⁴⁵) and the access of employer to employee's files on computer (*Libert v. France*⁴⁶).

It is noteworthy that the two leading cases on employee's privacy were reconsidered by the Grand Chamber of the ECtHR. Thus in 2016 the Chamber did not find the violation of the article 8 in the case of an engineer, who was dismissed for the use of the company's Internet for personal purposes after his personal messages were read by the employer (*Barbulescu v. Romania*). The ECtHR concluded that the measure was proportionate as the employer did not have another method to verify whether the applicant infringed internal policy. It found that the employer acted within its disciplinary powers and pointed that the monitoring was limited in scope and proportionate⁴⁷. The Grand Chamber reconsidered the case and delivered the judgment in 2017. By 11 votes to 6 it decided that the State has violated its positive obligations under article 8 and included new factors which should be taken into account by national courts in such cases thus extending the proportionality exercise⁴⁸.

In the case *Lopez Ribalda and others v. Spain* the Chamber did not share the domestic courts' view on the proportionality of the measures adopted by the employer because these acts did not comply with the requirements stipulated in the Spanish Personal Data Protection Act. This led the Court to conclude that the domestic courts failed to strike a fair balance between the applicants' right to respect for their private life under Article 8 of the Convention and their employer's interest in the protection of its property rights⁴⁹. It was a good point for excluding the covert video surveillance at the workplace as such. Indeed, the employer always has other ways and less intrusive methods to establish the employees' misbehaviour.

⁴² See controversial judgments delivered by the Chambers and the Grand Chamber of the ECtHR in cases *Bărbulescu v. Romania* and *López Ribalda v. Spain*, and dissenting opinions of judges to each of these 4 judgments.

⁴³ ECtHR - 420/07 *Köpke v. Germany*, inadmissible (05 October 2010).

⁴⁴ ECtHR - application no. 1874/13 *López Ribalda v. Spain*, (09 January 2018).

⁴⁵ ECtHR - 61496/08 *Bărbulescu v. Romania*, (12 January 2016).

⁴⁶ ECtHR - application no. 588/13 *Libert v. France*, (22 February 2018).

⁴⁷ ECtHR - 61496/08 *Bărbulescu v. Romania*, (12 January 2016), para. 60.

⁴⁸ ECtHR - 61496/08 *Bărbulescu v. Romania*, (05 September 2017), para. 121.

⁴⁹ ECtHR - 1874/13 8567/13 *López ribalda and others v. Spain*, (09 January 2018), para. 69.

The Grand Chamber, on the contrary, approved the approach of the national courts in October 2019. It expressed a light criticism to Spanish courts for attaching little attention to the fact of employees' notification about the recording, but still concluded that there had been no violation of the ECHR.

These cases represent the lack of a solid approach to the proportionality analysis. It remains too much linked with the perception of the value of privacy by particular judges, all the judgments referred to above were accompanied by dissenting opinions of judges who balanced the rights of employees and employers in another way.

In 2018 the ECtHR considered the case *Libert v. France* where an applicant was dismissed after the seizure of his work computer had revealed the storage of pornographic files and forged certificates drawn up for third parties. In contrast with *Bărbulescu* case this application was considered in the light of the State's negative and positive obligations under Article 8 as the applicant was employed by a state-owned company. The ECtHR considered that the consultation of the applicant's files pursued a legitimate aim of protecting the rights of employers, who might legitimately ensure that the employees were using the working facilities in line with their obligations and relevant regulations. It considered the French law on workplace privacy protection and established that the existing legislation for the protection of such rights prohibits employers from opening files identified as being "private" (*prive*) in the absence of an employee. Here we have to note that the applicant marked the files in question as "personal" but not "private". These words can be easily regarded as synonyms. The ECtHR noted that "admittedly, in using the word "personal" rather than "private", the applicant used the same word as that found in the Court of Cassation's case-law to the effect that an employer cannot, in principle, open files identified as "personal" by the employee"⁵⁰. Despite this finding the ECtHR proceeded with the conclusion that there had been no violation, having considered the case in its "entirety" and has found the reasoning of the domestic courts as sufficient. It also drew attention to the amount of the storage space on the employee's work computer to store the files in question (1,562 files representing a volume of 787 megabytes).

We suppose that this reasoning is particularly confusing after the Grand Chamber judgment in *Bărbulescu*. The point of notification was the most important one in that judgment. It is not clear from the first sight why the ECtHR grants less protection to the personal files stored at the employer's computer than to the private messages sent through the employer's account. The ECtHR's reference to the "entirety" of the case doesn't explain much. In this case one of the reasons for a narrow approach to workplace privacy protection might be the nature of files discovered by the employer. While the *Bărbulescu* case was about personal messages with close relatives on sensitive private topics, the *Libert* case was about porno files and the evidence of fraud committed by the applicant. Supposedly, focusing on whether the words used to denote the files in question could be interpreted as reflecting the private nature of files instead of following the common sense in understanding the meaning of the words "private" or "personal" allowed the domestic court to find in favour of the employer. The discovery of the gross employee's misconduct during his suspension from

⁵⁰ *Ibid*, para. 52.

work seem to have indirectly served as an additional argument against him in all courts. The ECtHR supported the view of the domestic court, thus signalling that interpretation of the right to respect for private life at work can be very narrow and formal if employee's acts are non-compliant with corporate rules and regulations.

Similarly, in *Denisov v. Ukraine* (2018)⁵¹ the grounds for the dismissal had nothing to do with his private life, and the dismissal itself did not affect it (lower salary and loss of the prestigious position cannot be considered such). Mr. Denisov was dismissed from his role as president of the Kyiv Administrative Court of Appeal for a managerial inefficiency but continued to serve as a regular judge for the same Court. Therefore, his dismissal could hardly be regarded as a violation of Article 8 of the ECHR. This allowed the ECtHR to declare the complaint inadmissible under Article 8.

3.3. The General Impact of the ECtHR's Framework for the Consideration of Cases on Employee's Privacy.

Estimating the general impact of the ECtHR's framework for the consideration of cases on employee's privacy, discussed in Paras 2.1.-2.3., we assume that it is particularly valuable for the UK. English common law has been reluctant to recognise a general right to the protection of privacy⁵². In this system almost, absolute priority was given to management prerogative and almost no recognition to workers' private interests, however conceived. The introduction of new technologies, no doubt including techniques of surveillance, and the collection of information about workers have been treated as self-evident matters for untrammelled management prerogative⁵³.

The adoption of the Human Rights Act in 1998 challenged the traditional approach. Since then any interference with the employee's right to privacy should be justified by a legitimate aim, should be necessary for democratic society and proportionate to the aim pursued.

British courts have already dealt with privacy issues at work in the light of Article 8 of the ECHR (*McGowan v. Scottish Water* and *P. Atkinson v. Community Gateway Association*)⁵⁴. Although in both cases the EAT found in favour of employers and justified covert video surveillance of employee's home and the monitoring of private messages sent from employer's e-mail system, the application of ECHR standards evidences the step made towards employee's privacy protection. The research of proportionality of the interference in these cases was more in favour of employers as if balancing employer's rights to manage a business and the employee's right to private life British courts still follow the common law tradition to attach

⁵¹ GC - application no. 76639/11 *Denisov v. Ukraine*, (25 September 2018).

⁵² Deakin S. F., Morris G. S., *Labour law*. Hart publishing, Oxford, 2012, 386.

⁵³ Ford M., *Two conceptions of worker privacy*, in *Industrial Law Journal*, 31(2), 2002, 148.

⁵⁴ EATS - 0007/04, *McGowan v Scottish Water*; UNKEAT- 0457/12/BA Mr. P. Atkinson v. Community Gateway Association. It is interesting to note that in the light of the GC judgment in *Bărbulescu* the reading of privacy rights by EAT is not in line with the ECHR as national courts did not consider if the applicant was notified about the possibility of monitoring.

more weight to managerial prerogative. However, as Mark Twain once wrote: “The less there is to justify a traditional custom, the harder it is to get rid of it”⁵⁵.

4. Protection from Unfair Dismissal.

The possibility to claim the violation of the right to respect for private life in case of unfair dismissal is one of the most significant contributions of the ECtHR to the employment regulation.

The research of relevant case law demonstrates that unfair dismissal and the right to respect for private life might be linked in two major ways:

- ‘preceding’ - when some peculiarities of an employee’s private life are used as a reason for the dismissal;
- ‘ensuing’ – when the dismissal brings about consequences that affect the dismissed person’s right to establish and develop relationships with others;

It is interesting to note that the Court itself prepared a classification of the relevance of article 8 to the dismissal cases. In *Denisov v. Ukraine*⁵⁶ the Grand Chamber established two ways in which a private-life issue would usually arise in such a dispute concerning dismissal: either because of the underlying reasons for the impugned measure (it was called “reason-based approach”) and because of the consequences for private life (“consequence-based approach”).

Below the main features of the two aforementioned ways will be described in finer details with all relevant ECtHR decisions analysed, and their effect in national law will be traced and illustrated.

3.1. ‘Preceding Link’: when Peculiarities of an Employee’s Private Life are used as a Reason for the Dismissal.

In *Denisov v. Ukraine* the ECtHR stated that complaints concerning the exercise of professional functions have been found to fall within the ambit of “private life” when factors relating to private life were regarded as qualifying criteria for the function in question and when the impugned measure was based on reasons encroaching upon the individual’s freedom of choice in the sphere of private life⁵⁷. Thus, the underlying reasons for the

⁵⁵ Twain, M., *The Adventures of Tom Sawyer-Literary Touchstone Edition*, 2005, 39.

⁵⁶ ECtHR - 76639/11 *Denisov v. Ukraine* GC, (25 September 2018).

⁵⁷ ECtHR, *Denisov v. Ukraine*, para. 103.

dismissal may be linked to the individual's private life and these reasons themselves may render Article 8 applicable⁵⁸.

In the opinion of the ECtHR⁵⁹ Article 8(2) imposes upon national authorities and courts the obligation to balance fairly the rights or freedoms concerned in the employment dispute. The ECtHR finds in favour of the State and confirms no violation of Article 8 in both court decisions and national law when it establishes that national courts proved that fair balance between the employee's right under the ECHR and the employer's interests had been attained⁶⁰. In contrast, the violation of Article 8 is found in cases where national courts did not take into account the consequences of a disciplinary dismissal in the applicant's private life⁶¹.

In the majority of cases concerning unfair dismissal the ECtHR assesses the fairness of the dismissal through the analyses of the availability of less restrictive sanctions at the employer's disposal, as well as their reasonableness, feasibility and applicability. The ECtHR takes into account all particular circumstances of the employee's situation and urges national courts and authorities to adopt the same approach. However, the result is not always easily predictable.

For example, in cases concerning employees of religious organizations, as in *Schüth v. Germany* and *Obst v. Germany*, the ECtHR required national courts to assess the breach of employee's duty of loyalty with regard to the nature of the post in question and to properly balance the interests involved in accordance with the principle of proportionality⁶². It pointed out that the State had a positive obligation to ensure the respect for private life fairly balancing it with the church's autonomy in considering the employment dispute, and that "...a more detailed examination was required when weighing the competing rights and interests at stake"⁶³. The decision in *Schüth* inspired the international academic community to publish their viewpoint on how factors affecting the balance between all interests involved in such cases may look like⁶⁴.

In contrast to dismissals of private employees, applications submitted by civil servants about unfair dismissals are considered in a deeper way as the ECtHR revises the grounds and the procedure of dismissal in the light of a fair balance between the state's full compliance with its negative obligations under Article 8(2), its interests as an employer and the

⁵⁸ *Ibid*, para. 106.

⁵⁹ ECtHR demonstrated many times that it believes this obligation to be a part of the interpretation of the idea of "interference by a public authority with the exercise of this right... necessary in a democratic society" which is established in article 8(2) as legitimate (though not specifically in regard to unfair dismissal cases). – See f.i. *Open Door and Dublin Well Woman v. Ireland* - 14234/88 14235/88 - Chamber Judgment (1992) ECHR 68; *Odièvre v. France* - 42326/98 (2003) ECHR, para. 40; *Evans v. the United Kingdom* - 6339/05 (2007) ECHR 265, etc.

⁶⁰ ECtHR, *Knauth v. Germany* - 41111/98 (2001) Inadmissible.

⁶¹ See, for example, ECtHR, *Ihsan Ay v. Turkey* (34288/04) 21/01/2014, where the applicant, a teacher, was dismissed when the employer's investigation revealed an erased criminal conviction.

⁶² ECtHR, *Schüth v. Germany* - 1620/03 (2010), para. 69; ECtHR, *Obst v. Germany* - 425/03 (2010).

⁶³ *Ibid*, para. 66-69.

⁶⁴ Some examples of factors that may affect the balance between all interests involved in such cases can be found in: Durham C., Kirkham D., *European Court of Human Rights Issues Rulings in Church Employment Cases*, in *Strasbourg Consortium*, 2010. Available at the following link: <https://www.strasbourgconsortium.org/index.php?pageId=14&linkId=306&contentId=2390&blurbId=1044> (last access 20 august 2019).

employee's rights under the ECHR. In such cases there is also a closer link between the law and practice because of the public nature of the employer, allowing the ECtHR judgement affect national situations more directly and promptly in many countries.

For example, before 2010 the Turkish legislation did not provide any options to review the decisions of revocation of judges made by the National Legal Service Council. In *Özpinar v. Turkey*⁶⁵ the ECtHR found that in the disciplinary procedure the applicant - a judge who was removed from the office for reasons partly related to her private life - was not given any protection against arbitrariness as required by Article 8 of the ECHR. This judgment had a significant impact on procedural rights of public employees: Turkey has amended certain provisions of the Constitution, providing the judicial review of decisions issued in disciplinary proceedings⁶⁶.

Other examples are the cases of *Lustig-Prean and Beckett v. United Kingdom*⁶⁷ and of *Smith and Grady v. UK*⁶⁸ where the applicants were dismissed based on the results of an investigation which included detailed interviews on their sexual orientation, sexual practices and even searches of the second applicant's locker. The investigation process was found to be of "an exceptionally intrusive character" incompatible with Article 8 of the ECHR. The impact of the dismissal on the right guaranteed by Article 8 was also considered. In response to these judgements the British government announced it would lift its ban on LGB military personnel, and, within just a month, in January 2000 it had done so⁶⁹. These judgments also influenced German employment regulation, where new provisions were drafted including protection from discrimination on the basis of sexual orientation⁷⁰.

At the same time, we shall not judge the entire situation with the influence of the ECtHR decisions in the UK by the two aforementioned cases, at least not more than their actual merits imply. Generally, the impact of ECtHR case law on the consideration of employment disputes in the UK is an interesting and quite specific example.

According to section 4 of the Human Rights Act, if a UK court finds that some legislative provision is incompatible with the ECHR, it is neither required nor allowed to override it. Instead, it issues a "declaration of incompatibility" which is actually a statement with no legal effect. It does not change the "validity, continuing operation or enforcement of the provision in respect of which it is given" and "is not binding on the parties to the proceedings in which it is made".

The Employment Appeal Tribunal (EAT) judging the fairness of the dismissal stated that public authority employer will not act reasonably under the Employment Rights Act 1996

⁶⁵ *Özpinar v. Turkey*, (66).

⁶⁶ See Action report of Turkey (updated as of 4 April 2017) for Arzu ÖZPINAR v. Turkey (20999/04). The judgment of 19 October 2010, final on 19 January 2011. Available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)73E](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)73E) (accessed 20 August 2019).

⁶⁷ *Lustig-Prean and Beckett v. UK.*, (8) para. 86, 98.

⁶⁸ ECtHR, *Smith and Grady v. UK* (1999) 33985/96, 33986/96.

⁶⁹ Kavey M. *The public faces of privacy: rewriting Lustig-Prean and Beckett v. United Kingdom*, in Brems E. (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR.*, 2013, 297.

⁷⁰ Oxford University, *The Legal Treatment of Homosexuals in the Armed Forces of Europe*, in *Oxford University Public Interest Law Submission*, 1-19.

section 98(4) if it violates its employee's Convention Rights, such as the right to privacy⁷¹. In the famous case *Pay v Lancashire Probation Service*⁷² both Employment Tribunal and EAT considered the dismissal of a probation officer closely engaged with the BDSM activities in the light of his ECHR rights to respect for private life and to freedom of expression. The EAT stated that the words "reasonably or unreasonably" in Section 98(4) of the Employment Rights Act should be interpreted by courts as including "having regard to the Applicant's Convention Rights" and considered the case in light of Article 8. The consideration, however, was too brief. The EAT upheld the Tribunal's conclusion that Article 8 was not engaged because the Applicant's activities had been public.

On one hand, these decisions of the ET and EAT were valued for the incorporation of the ECHR approach to the fairness of dismissal test into the UK law⁷³. However, on the other hand they brought about much discussion on a number of aspects, such as (a) no regard of the particularities of employment relation that may affect the interpretation of the right to privacy⁷⁴; (b) misconceived understanding of the right to private life established by the Article 8 of the ECHR as a right to act exclusively in spatial isolation⁷⁵; (c) validity of the courts' decision to apply broad reasonableness test to the employer's interference with a right instead of stricter test of proportionality normally used in connection with the application of the ECHR rights⁷⁶.

The ECtHR considered the case *Pay v UK*⁷⁷ in 2008 and, in contrast with British courts, adopted a different approach having found that conduct occurring outside a purely private place could still fall within the protection of Article 8 as 'private life'. This conclusion was due to the fact that the performances in question took place in a nightclub which was likely to be frequented only by like-minded people and that the published photographs were anonymised. Therefore, the approach of the ECtHR to the consideration of the limits of private life in the context of unfair dismissals is wider and more in favour of the employee.

Even though British courts retain the right not to be bound by the ECtHR judgements the reference in any similar cases to the logics of the ECtHR in domestic proceedings might provide the applicants with additional arguments. UK judges, however, are less optimistic. They express concerns that "...“Human Rights” points rarely add anything much to the numerous detailed and valuable employment rights conferred on workers⁷⁸ and that

⁷¹ *Pay v Lancashire Probation Service* (2003) All ER (D) 468 (Oct), para. 32. However, the employer's interference with the right to privacy under article 8 of the ECHR was considered justified.

⁷² *Ibid.*

⁷³ Vickers L., *Unfair Dismissal and Human Rights in Industrial Law Journal*. Vol. 33, 2004, 52.

⁷⁴ Collins H., *The Protection of Civil Liberties in the Workplace*, in *Modern Law Review*, 69, 2006, 619.

⁷⁵ Mantouvalou V., *Human Rights and Unfair Dismissal: Private Acts in Public Spaces*, in *Modern Law Review*, 71, 2008, 912.

⁷⁶ Mantouvalou V., *Private life and Dismissal: P. v. UK* in *Industrial Law Journal*, 38, 2009, 133-138.

⁷⁷ ECtHR, *Pay v UK* (32792/05) inadmissible 16 September 2008.

⁷⁸ Mummery LJ in: *Leach v Ofcom* (2012) IRLR 839, CA.

‘Strasbourg jurisprudence adopts a light touch when reviewing human rights in the context of the employment relationship’⁷⁹.

4.2. ‘Ensuing Link’: when the Dismissal Brings about Consequences that affect the Dismissed Person’s Right to establish and Develop Relationships with Others.

For the first time ECtHR explicitly referred to the right for respect of private life in cases on unfair dismissal in the middle 2000-s. Thus, in *Rainys and Gasparavicius v. Lithuania*⁸⁰ and *Sidabras and Dziutas v Lithuania*⁸¹ applicants having had the status of “former KGB officers”, impugned the dismissals and the ban on employment in the private sphere as violating their right under articles 8 and 14 of the ECHR. The ECtHR found that the dismissal and the ban on employment had affected directly the applicants' right to respect for private life⁸² and further found the violation of article 14 in conjunction with Article 8. This is the first explicit reference to the right for respect of private life in this category of cases of unfair dismissal. It paved the way for the appeal of unfair dismissals under the provisions of the ECHR and the reference to Article 8 is now usual practice⁸³ in such applications.

In the next decade the ECtHR turned to a much wider approach to employee’s right under Article 8 and for the first time in its practice required the state (as an employer) to ensure the reinstatement of its unfairly dismissed employee. The first case of this kind was *Oleksandr Volkov v. Ukraine*⁸⁴, where the applicant, - a judge of the Ukrainian Supreme Court, - had been dismissed for the “breach of oath”.

The ECtHR did consider dismissal from the office to constitute interference with the right to respect for private life (as it did in *Özpinar v. Turkey*) and found that it was not compatible with domestic law. However, this time ECtHR went even much further discovering that “the applicable domestic law itself failed to satisfy the requirements of foreseeability and provision of appropriate protection against arbitrariness”⁸⁵.

As a result of this judgement, Ukraine not only reinstated the applicant in 2015⁸⁶, but also introduced impressive measures to improve the legal framework for judicial discipline.

The remedy required from the State in this case is evidently revolutionary. On one hand, the possibility of such a prescription might render the protection of the rights of unfairly

⁷⁹ Elias LJ in: *Turner v East Midlands Trains* (2013) IRLR 114, CA.

⁸⁰ ECHR - 70665/01; 74345/01 *Rainys and Gasparavicius v. Lithuania*, (2005), 226.

⁸¹ ECHR - 50421/08 56213/08 - Chamber Judgment, *Sidabras and Dziutas v. Lithuania*, (2015), 603.

⁸² *Rainys and Gasparavicius v. Lithuania*, *op.cit.*, paras. 35.

⁸³ ECHR - 26652/02 *Žičkus v. Lithuania*, (2009), 562; ECHR - 1542/13 *Bečaj v. Albania*, (2014), inadmissible; ECHR - 43519/07 (Judgment (Merits and Just Satisfaction): Court (Third Section), *Milojević and others v. Serbia*, (2016), 32.

⁸⁴ *Oleksandr Volkov v. Ukraine*, (45).

⁸⁵ *Oleksandr Volkov v. Ukraine*, (45), para. 186.

⁸⁶ See information on the official site of the Ukrainian Supreme Court, [http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/\(documents\)/40758947BA3FE9EAC2257DE00054D6B5?OpenDocument&year=2015&month=02&](http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/40758947BA3FE9EAC2257DE00054D6B5?OpenDocument&year=2015&month=02&), (last access 20 April 2019).

dismissed applicants more efficient. On the other hand, it creates doubt as to whether the ECtHR remained within its subsidiary role as an international body.

The wide interpretation of article 8 as covering any case of unfair dismissal is, however, hardly possible. In the recent judgment the Grand Chamber has formulated “the borders” of such application. It said that where the applicant argues that the right to establish relations with others was violated as a result of unfair dismissal such violation should attain a certain threshold of severity. It is for the applicant to show convincingly that the threshold was attained in his or her case. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree. In particular, the Court said, an applicant’s suffering has to be assessed by comparing his or her life before and after the measure in question, subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case should be assessed as well. It underlined that such analysis would have to cover both the material and the non-material impact of the alleged measure and the allegations must be sufficiently raised before the domestic authorities⁸⁷.

Evidently this stance of the Court is the reaction upon the growing number of cases where applicants consider that any unfair dismissal leads to the violation of the article 8.

5. Conclusions.

The research of the ECtHR’s jurisprudence under Article 8 demonstrates that the Strasbourg bodies significantly contributed to national employment regulation establishing the standards of employees’ privacy protection, acknowledging a link between private life and employment and stating that unfair dismissal might violate the right to respect for private life. This acknowledgment, as noticed by scholars, “can shield an individual employee against employer domination”, a possibility that was absent in countries such as the United Kingdom before its incorporation of the ECHR⁸⁸.

We have highlighted the factual and potential impact of Article 8 on national employment regulation and demonstrated that human rights are, as Sir Bob Hepple once wrote “important ideological weapons in the development of labour law”⁸⁹ and that they are also practical tools in the legal practice. ideological weapons in the development of labour law”⁹⁰ and that they are also practical tools in the legal practice.

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⁸⁷ ECtHR - 76639/11 Denisov v. Ukraine GC, (25 September 2018), paras. 115-117.

⁸⁸ Mantouvalou V., *Human Rights and Unfair Dismissal: Private Acts in Public Spaces*, in *Modern Law Review*, 71, 2008, 939.

⁸⁹ Hepple B., *The future of labour law*, Indus. LJ, 24, 1995, 626.

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