UDC 349.2
DOI: 10.33270/04212202.45

Problems of legal regulation of control measures over employees

Igor M. Kravchenko*

Luhansk State University of Internal Affairs named after E. O. Didorenko
93400, 1 Donetska Str., Severodonetsk, Ukraine

Abstract

The study analyses the statutory provisions of national and European legislation, the practice of the ECHR and national courts in protecting employees' right to privacy in the performance of labour functions. The problem of preserving the "private autonomy" of employees when the employer exercises control over the performance of such functions using technical means and methods is investigated. The need for a normative definition of the limits of restrictions on workers' rights and freedoms in the context of such control has been argued. The purpose of the study is to substantiate the expediency of normative consolidation in the national legislation of certain guarantees for employees in the event of interference of the employer's economic (disciplinary) authorities in the sphere of their private autonomy during the use of technical means. The scientific originality of the study is conditioned by the fact that the issue of the legality of wiretapping telephone conversations, control over electronic correspondence and communication of employees in social networks during the performance of their work functions is part of a set of publications on the limits of employer intervention using technical means in the private life of employees. The subject of the study shows the relevance of the regulatory definition of private autonomy of employees and its boundaries by national legislation regarding legal guarantees against employer encroachments. Protection of the rights of employees during the performance of their work functions from interference by the disciplinary authorities of the employer in the sphere of their private autonomy, surveillance of communication in electronic information networks, the content of telephone conversations, electronic, and other correspondence cannot be effective without a regulatory definition of the permissible limits of such interference in the private life of employees

Keywords:

femployer; employee; employment contract; employee's workplace; essential working conditions; secrecy of correspondence; secrecy of telephone conversations; secrecy of electronic, telegraph, and other correspondence; audio surveillance (wiretapping) of the employee; protection of human and civil rights and freedoms; personal data

Article's History:
Received: 25.09.2021
Revised: 08.11.2021
Accepted: 30.11.2021

Suggest Citation:

Kravchenko, I.M. (2021). Problems of legal regulation of control measures over employees. *Law Journal of the National Academy of Internal Affairs*, 11(2), 45-55.

*Corresponding author

Introduction

The rapid development of technologies, and consequently – the expansion of technical capabilities for removing information from transport telecommunications and electronic information networks, public and hidden wiretapping, control over electronic correspondence and communication of individuals in social networks, considering the provision of state and public security, are becoming an integral part of modern life. The use of special means to monitor the lives of citizens helps to solve many problems: record (document) events and/or acts of persons; control the situation and/or prevent events that lead to negative consequences, etc. At the same time, it poses a threat to the privacy of every citizen's life.

The problem of expanding the scope of use of special means has become acute due to anti-terrorist and anti-epidemic measures, which provide for total control over the population of the state and/or its individual strata in almost all spheres of public, and sometimes personal life. In connection with the establishment of quarantine in Ukraine and the introduction of long-term restrictive anti-epidemic measures to prevent the spread of COVID-19 caused by the SARS-CoV-2 coronavirus on its territory, the issue of monitoring the performance of labour functions in conditions when all or a significant part of employees are forced to introduce a remote form of work [1] has been updated.

Unfortunately, the number of such threats and challenges to humanity will continue to increase. At the same time, a logical and fundamental question arises regarding the boundaries of the use of special means of control in such conditions, that is, the boundaries between the general public danger as a "public good" and private life as a "personal good" of a particular person [2].

Therefore, there is an extremely difficult, but urgent problem of fixing in the labour legislation such norms that would, on the one hand, provide an opportunity for the employer to control the performance of employees' duties, in particular using technical means of surveillance, and on the other – ensure the implementation of the labour rights and guarantees of employees provided for by the Constitution of Ukraine, in particular, the right to a personal zone at the time of performing their labour duties, not allowing actions that degrade their honour and dignity [3].

It is important that video surveillance, wiretapping and other measures of control over employees are not discriminatory, which now has various forms and manifestations [4-8].

Aspects of this problem became the subject of research by specialists of various branches of law. In particular, the issue of violation by employers of the right to respect for the private life of employees was considered by O.M. and O.V. Drozdovs [9], problems on the right to respect and secrecy of correspondence: O. Belichak, D. Bushkov, I. Vietuhova [10], D. Sergeyeva, I. Smolkova, N. Ustymenko, O. Fatyanov, V. Fedorenko [11], P. Shevchuk, et al.

At the same time, comprehensive research in the field of labour law on the problems of ensuring the right of employees to privacy and a personal zone at the time of performing their work duties is not enough.

Considering the existence of an objective need to regulate labour relations regarding the control powers of the employer over the performance of employees' duties through recordings of their telephone conversations with corporate phones, control over their electronic correspondence and communication in social networks, provided that their labour rights and guarantees are implemented, including the right to a personal zone at the time of performing such duties, *the purpose of this study* is a comprehensive analysis of theoretical and practical problems and the formulation of scientifically based conclusions and proposals for improving the current and prospective legislation in this area of law.

Presentation of Main Material

In the context of the economic crisis, the narrowing of sales markets for products and services and, as a result, the reduction of business entities, the demand for the use of labour is rapidly decreasing. This means that the actual dependence of employees on employers is only increasing. Taking advantage of this dominant position, employers believe that they can use their power without any restrictions in organising and controlling the production process.

Employers apply the following control measures: recording employees' phone conversations with corporate phones; monitoring their email correspondence and communication in social networks, and collecting other personal data. Due to quarantine measures, when new types (forms) of hired labour are used and the possibility (necessity) of performing labour functions outside the "stationary" workplaces of employees, such control is becoming more and more relevant.

Disciplinary power of the employer, according to the definition of I.V. Lazor, provides for the organisation of hired labour and its management, the use of legal and organisational means to ensure compliance with the established order in production when employees perform the work assigned to them. Such powers of the employer are not only appropriate, but also necessary in the conditions of market relations [12]. During the implementation of such guiding functions of the disciplinary authorities, the employer will try to control employees as much as possible, using available technical capabilities, while not restricting their rights and freedoms.

The expansion of the scope of application of special means of control over employees is a global trend. For example, since January 2020, in accordance with the provisions of regulation 2016/679, amendments to

the Polish labour code, employers have received a legal mechanism with extensive opportunities for supervision of employees. In particular, employers can control their employees by monitoring their email, recording their phone calls, or tracking employees' corporate instant messaging directly at the workplace. The new corporate rules include provisions prohibiting the use, for example, of official mail for personal purposes or mandatory labelling of sent personal messages, etc. [13].

The author shares the position of I.M. Vaganova, who notes that the compulsory nature of the use of technical means of control is based on psychological influence, which is legitimate, since it implies a voluntary volitional perception of observation by an employee. The compulsoriness of these measures is manifested in the fact that with the help of special systems, a person is forced to voluntarily refuse to perform illegal actions against the employer's property, and the use of special control systems mobilises the employee during the performance of labour duties, encourages clearer compliance with internal labour regulations [14].

Although the latest technologies make it easier for the employer to exercise control over the employee, in particular, over their private life, but they make it more difficult for the employee to identify this control, to protect their right, and this problem is aggravated by objective inequality between the parties to the employment relationship. Therefore, the priority area for the development of modern labour legislation in Ukraine is the renewal of the national legal system, the creation of an effective mechanism for guaranteeing and ensuring the rights of employees during the implementation of the employer's control functions to determine the grounds, conditions, purpose, and limits of the use of such control, and therefore, the scope, features and grounds of existing restrictions on the rights and freedoms of employees guaranteed by law.

To determine the limits of such interference and, as a result, the restriction of the employee's rights, it is necessary to clarify the concept of "the right to privacy of the employee during the performance of their work functions", because only this is the line beyond which the employer's economic (disciplinary) power no longer operates.

Defining is the provisions of Articles 8-11 of the Convention for the protection of human rights and fundamental freedoms ratified by Ukraine on November 4, 1950, according to which the exercise of rights by a person is not subject to any restrictions other than those provided for by law and necessary in a democratic society in the interests of national security and public peace, in order to prevent crimes, protect health and morals, or protect the rights and freedoms of others [15]. According to Part 1 of Article 8 of the convention, everyone has the right to respect for their private and family life, their home and correspondence.

The right to this privacy is also provided for in Articles 28, 31, 32 of the Constitution of Ukraine, specified in the provisions of Article 270 (the right to inviolability of personal and family life, the right to respect for dignity and honour, the right to secrecy of correspondence, telephone conversations, telegraph and other correspondence), Article 301 (the right to privacy and its secrecy), Article 302 (the right to information) and Article 307 of the Civil Code of Ukraine. According to the rules of Article 271 of the Civil Code of Ukraine, the content of an employee's personal non-property right is their ability to freely, at their own discretion, determine their own behaviour in the sphere of private life [16].

In addition, Part 4 of Article 23 of the Law of Ukraine "On Information" prohibits the collection of information about a person without his/her prior consent, except in cases provided for by law [17]. According to the decision of the Constitutional Court of Ukraine No. 5-zp of October 30, 1997, it is prohibited not only to collect, but also to store, use, and distribute confidential information about a person without his/her prior consent [18].

At the same time, I.M. Vaganova, studying the issues of compliance with the rights of citizens to their privacy, shares the thesis of civil law specialists who consider "private life" a category that cannot exist within the framework of labour relations, because the main purpose of establishing control systems in places where the employer's property is concentrated is to record: the facts of theft both during working and non-working hours; actions that can further provide the owner with an evidence base in cases of disputes with counterparties or persons who have committed mercenary offences [14]. The study strongly disapproves this position, because, firstly, performing labour functions, the employee does not lose their human rights and freedoms, and therefore the right to their privacy, and secondly, considering the content of Part 2 of Article 9 of the Civil Code of Ukraine, according to which the provisions of this code apply to labour relations, if they are not regulated by other legislative acts (in particular labour). Due to the lack of regulatory regulation by labour legislation of the right of employees to their personal (private) life and its secrecy, in particular, the secrecy of correspondence, telephone conversations, telegraph and other correspondence, etc. during the performance of labour functions, it is considered quite reasonable and logical to apply the norms of civil legislation to these legal relations.

In national legislation, the concept of "personal life" is mainly used as a synonym for the concept of "private life" or, along with family life, as part of private life (Article 15 of the Criminal Procedure Code of Ukraine), but there is no regulatory definition of it. According to the definition contained in the academic Explanatory Dictionary of the Ukrainian language, "personal" is one that directly concerns a person, is associated with them [19]. At the same time, according to the provisions of Article 9

of the Constitution of Ukraine, Article 19 of the law of Ukraine "On International Treaties of Ukraine" of June 29, 2004 No. 1906-IV [20], Article 17 of the law of Ukraine "On the Execution of Decisions and Application of the Practice of the European Court of Human Rights" of February 23, 2006 No. 3477-IV, the norms of international law are part of the national legislation, they are applied in accordance with the procedure provided for the norms of national legislation, and the courts apply when considering cases the convention and the practice of the court as a source of law. However, there is no definition of "private life" in European legislation, which also applies to the decision of the European Court of Human Rights (ECHR). In particular, the ECHR decision in "Peck v the United Kingdom" states that the convention does not cover the content of the term "private life", since it describes it as "a term with a broad meaning that cannot be defined" [21]. According to D. Vitkauskas, a lawyer for the ECHR Secretariat, the European Court of Justice does not give a clear definition of the concept of private life, because the court quite deliberately avoids such attempts and prefers to focus mainly on a specific issue, considering it necessary to note that "private life" is a broad concept that is not subject to an exhaustive definition [22].

An example is the ECHR's decision in "Nimit v Germany", which states that it would be too strict to limit privacy to an intimate circle where everyone can live their personal life as they prefer, rather than completely exclude the outside world from this circle. At the same time, the concept of "private life" cannot be interpreted in a restrictive sense; respect for personal life should also partially cover the right to establish and develop relationships with other people; it is not always possible to clearly distinguish between these concepts and because you can also carry out activities that relate to both professional and business, and, conversely, it is possible to do things that do not belong to the professional sphere in the office or commercial office premises [23].

Based on the study of judicial precedents of the ECHR regarding the rights of employees in the performance of their duties, it can be stated that the concept of private life belongs to the sphere of direct personal autonomy, which includes aspects of moral integrity, goes beyond the narrow limits of guarantees of life free from unwanted publicity. Given this concept, the ECHR considers that the right to respect for "private" life also implies psychological integrity of a person, and the use of technical means of control is precisely coercive in nature and is based on psychological influence, which can be legitimate, because it implies a voluntary volitional perception of observation by an employee.

It is seen that the personal (private) life of an employee is a special part of the private sphere of their life (private zone), covering the time of performance of his labour functions and consists in various relations, phenomena, events, behaviour, etc., that do not have public significance, including the sphere of their work, defined and regulated by a person. Considering the fact that employers naturally seek to protect their business, their confidential information, the practice of the ECHR confirms the legality of monitoring employees during the performance of their work functions and prior warning about such surveillance, in particular, reading their work correspondence, listening to conversations, etc. And although actions regarding supervision on the part of the employer can be recognised as legal and keep the entire labour collective in "good shape", however, this is not unlimited. The employer's economic right ends where such actions begin to affect the rights and freedoms of employees, that is, there must be boundaries. Although for whatever purpose it would not justify what methods and means of surveillance the employer would not use (records of telephone conversations with corporate phones; control over electronic correspondence and communication in social networks, etc.), in fact, this is access, collection, processing, accumulation and storage, use, deletion or destruction, transfer of personal (personal) data of the employee in the meaning of the Law of Ukraine "On personal data protection" of June 1, 2010 No. 2297-VI [24]. In addition, the employee's personal data obtained as part of such surveillance is confidential information, since it is information about them as an individual, and its processing without the consent of this person, according to the law, is unacceptable, except in cases clearly defined by law.

Considering personal conversations, communication using messaging programmes (Viber, WhatsApp, Skype, etc.) and in social media, checking their own email distracts employees from performing work functions (although a well-known researcher on the organisation of management D. Meister defends a different opinion) [25], as well as the ability to transfer trade secrets to unauthorised persons, employers try to control employees by tapping corporate phones, perlustration of correspondence (secret printing and viewing of private letters), etc. Admittedly, it is not a fact that the disclosure of corporate information can occur exclusively with the use of corporate means of communication, it is possible mainly by negligence. Although for the most part, such disclosure occurs outside the employer's control, there is a question of access to and use of corporate (confidential) information, and this is the exclusive competence of the employer. An interesting practice of the ECHR has developed in this regard.

The ECHR judgment of 25 June 1997 in "Alison Halford V. the United Kingdom of Great Britain and Northern Ireland" on the protection of private life while using the office telephone states that the ECHR case-law certifies that telephone conversations from office premises and from home fall within the meaning of Article 8 of Section 1 of the Convention, and therefore, Article 8 is applicable to this part of the complaint. In addition, the court noted that it was reasonable that

the applicant's calls from her office were tapped by the police with the primary aim of collecting materials that would help them defend themselves in the gender discrimination proceedings brought against them [26].

The decision of the ECHR in the case "Uzun v. Germany" is relevant from the standpoint of protecting the personal data of employees regarding tracking the movement of a person using GPS tools. The court found that monitoring the applicant through a global system of positioning and processing and using the information obtained in this way was an interference with the exercise of his right to privacy, protected by Article 8 of Section 1 of the Convention [27].

Important is the decision of the Grand Chamber of the ECHR of September 5, 2017, in the case "B. Mihai Bărbulescu v. Romania" regarding the protection of privacy when using a company phone and correspondence using the Yahoo Messenger online chat service via the internet, sent from the workplace. The court noted that Article 8 of the Convention guarantees the right to "private life" in a broad sense, covering the right to lead a "private social life", that is, the ability of an individual to develop their social identity, and this right establishes the ability to get closer to others to establish and develop relations with them. The court considers that the concept of "private life" may include professional activities or activities taking place in a public context. Restrictions in a person's professional life may fall under Article 8 if they affect the way they build their own social identity by developing relationships with others, because it is in the process of working life that most people have almost the highest opportunity to develop interaction with the outside world, and for the legality of verification, the employee must be warned about all the features before starting it.

The ECHR has defined the criteria for assessing the proportionality of the measures used to control the correspondence of employees, the purpose of whether employees are sufficiently protected from the possible arbitrariness of employers, namely: (1) whether the employee was warned in advance and clearly about the nature of the inspection; (2) the scope of such inspection and the degree of interference in the privacy of the employee (the content of the correspondence is checked; the whole or only part of the correspondence, or the check is limited in time and by the number of persons involved in the check); (3) whether the employer has legal grounds for justifying the need to check the content of the correspondence, because since the check of the content of the correspondence involves a more significant "interference", it should have a weightier justification; (4) whether a less intrusive control system than direct access to the content of the employee's correspondence could have been implemented; (5) whether the employee had adequate guarantees, especially in cases where the inspection by the employer was of the nature of "intervention", and in the absence of a warning, the inspection is impossible; (6) the employee's unconditional opportunity to challenge in court actions regarding the employer's inspection of such correspondence [28].

Consequently, telephone calls and personal correspondence from premises where economic activities are carried out probably fall under the concepts of "private life" and "correspondence" under Article 8 of the Convention. It is logical to conclude that electronic messages sent from work should also be protected under Article 8 of the Convention, and information obtained as a result of monitoring a person's use of the Internet ("Copland v. the United Kingdom") [29]. This approach of the ECHR corresponds to Parts 1 and 2 of Article 306 of the Civil Code of Ukraine [16]. It is seen that such "surveillance" within the enterprise, organisation, institution of employees can also be prevented by prescribing an appropriate provision in the internal labour regulations, which are developed and approved by the employer not alone, but only in agreement with representatives of the labour collective, which should indicate the purpose of recording telephone conversations, monitoring electronic correspondence and visiting social networks, etc., with restrictions provided for by the established norms. If the information collected in this way is considered "risky" (it poses a particular risk to the rights and freedoms of personal data subjects, contains, in particular, information about the location, state of health, political views, etc.), its processing should be notified within thirty working days from the date of the beginning of such processing in accordance with the established procedure to the Commissioner for the processing of personal data (Part 1 of Article 9 of Law No. 2297-VI).

National judicial practice is also being formed regarding the violation of the right to privacy of telephone conversations, which causes mental suffering and is a presumption of causing moral harm to a person, if the offender does not prove the absence of their guilt. The content of the decision of the Supreme Court of Ukraine dated September 27, 2017 in case No. 6-1435cs17, according to which a telephone conversation involving the use of obscene language took place between the plaintiff and an employee of a car service, is indicative. The plaintiff was warned that the conversation would be recorded, and he agreed. After some time, the recording of the conversation was posted on the YouTube video hosting site without the plaintiff's consent. The Supreme Court of Ukraine, guided by the presumption of guilt of the offender (defendant) in this type of tort, noted that it is the defendant (the employer of the rude person) who must prove the absence of their guilt in the fact that as a result of their violation of the right to secrecy of telephone conversations, the plaintiff experienced emotional unrest, because only then there are no grounds for collecting moral damage from the offender. The APU also noted that the plaintiff's proof of

mental suffering is unacceptable, given the legal essence of the constitutional right to secrecy of telephone conversations. The court showed the need to take into account Article 276 of the Civil Code of Ukraine, according to which the violated personal non-property right must be restored by the court with compensation for moral damage caused by its violation. In this case, the restoration of the plaintiff's personal non-property right to the secrecy of the telephone conversation would be the removal of its recording from free access on the network, that is, from YouTube, and the defendant would have to provide relevant evidence to the court in this regard [30].

Although, in this case, it was a violation of the private life of another person (client of the employer), when the employee himself could violate these rights of another person, it is important that the judicial practice regarding the secrecy of telephone conversations during work is formed primarily considering the requirements of Part 2 of Article 13 of the Law of Ukraine "On the Judicial System and Status of Judges" of June 2, 2016 No. 1402-VIII regarding the obligation to execute court decisions that have entered into legal force by everyone, as for individuals and legal entities throughout Ukraine [31].

Therefore, based on the analysis of judicial practice, the following conclusion is obtained: if before listening/recording/viewing, the employer receives consent from all participants in the conversation (in particular, the employee), then the ban on surveillance does not work, because if all persons have agreed to track their communication (that is, that it will not be secret), then the constitutional guarantee to ensure the employee's right to privacy is not applied. However, if such consent is not obtained, and surveillance is conducted, in particular hidden, then for violation of this right of the employee, the employer's officials face criminal punishment: under Article 163 (violation of the secrecy of correspondence, telephone conversations, telegraph or other correspondence transmitted by means of communication or through a computer); Article 182 (violation of privacy); for viewing in social networks – Article 361 (unauthorised interference in the operation of electronic computers (computers), automated systems, computer networks or telecommunication networks) of the Criminal Code of Ukraine of April 5, 2001 year No. 2341-III [32].

At the same time, the right to private life, the personal zone of the employee during the performance of their duties, along with determining the terms of the employment contract, are absolutely unchanged, even when the employee can give consent to interfere in such a private zone. An example is the current Swiss law, which provides for the establishment of mandatory norms aimed not only at protecting the fundamental rights of the employee as the weakest party to the contract, but also at developing the entrepreneurial autonomy of the employer and the state economy as a whole.

According to Article 319 of Title X of the Swiss law of obligations of March 30, 1911 (with subsequent amendments), the protection of an employee's identity means the protection of life, health, and respect for the personal moral rights of an employee, it is carried out imperatively. These mandatory legislative norms that restrict the autonomy of the will of the parties when concluding or changing an employment contract are aimed at protecting the social and personal rights of the employee. The content of these norms cannot be changed by the will of the parties to the employment contract either in the direction of deterioration of the situation of both parties, or in the direction of deterioration of the situation exclusively of the employee, primarily in the aspect of protecting their personality [33].

Therefore, even if the employer, using its dominant position, finds convincing words for the employee about the possibility of violating the boundaries of his private life, the latter, according to the requirements of the law, cannot grant such permission. If, without receiving the employee's alleged objection, the employer still violates such limits, this should be considered an offence.

Since the Verkhovna Rada of Ukraine is delaying the adoption of the Labour Code, the study suggests that the analysed practice of the ECHR gives grounds to regulate legal relations between employers and employees to ensure the right to privacy of the latter right now. At the same time, in order to prevent discrimination and violation of the right to privacy of an employee (personal data subject) in the draft Labour Code of Ukraine of December 27, 2014 No. 1658, prepared for the second reading, is provided for in Article 29 "Control over the performance of employees' labour duties" [34]. If there are no objections to Part 2 of this Article, even after taking into account the proposals to the content of this Article between readings from the standpoint of observing the rights of the employee, the proposed version of Part 1 of this norm is still not perfect. The legislators did not consider the fundamental and practical comments contained in the analytical note of the National Institute for Strategic Studies, either regarding the term "features of production", or regarding the ban on the collection and storage by the employer of information about the personal life of an employee (the need to determine the list of information that is considered confidential, the establishment of a ban or at least strict regulation of the possibility and procedure for its publication, except in cases defined by law), or regarding the restriction and regulation on the installation of such technical means [35]. Consequently, the adoption of Article 29 of this draft law, taking into account these comments, will be aimed at protecting the labour rights of employees and strengthening the guarantees of their rights to privacy when performing their labour functions.

The scientific originality of the study lies in the fact that the issue of the legality of the employer's control over an employee using technical means has been comprehensively investigated, considering their types, legal requirements, in particular, the practice of the ECHR and national judicial practice. This actualises the need for a thorough study of the regulatory regulation of technical control of employers over employees using the removal of information from transport telecommunications and electronic information networks, wiretapping, control over electronic correspondence and communication of persons in social networks. The study substantiates the expediency of normative consolidation in the legislation of Ukraine of the concept of private life of an employee during the performance of labour functions, defines possible limits for restricting the rights and freedoms of employees from interference by the employer's economic (disciplinary) authorities in the sphere of its private autonomy.

Conclusions

Ukraine, as a state governed by the rule of law, must ensure the fulfilment of its international obligations, in particular, in the field of human labour rights, and the protection of employees from the arbitrariness of employers when they exercise control over employees using technical means.

Legal regulation of the protection of personal data of employees obtained, in particular, during the recording of their telephone conversations on corporate phones agreed with them; control over their electronic correspondence and communication in social networks, etc., needs to be developed based on the experience of the countries of the European Union, which have gone through the process of developing an effective mechanism for ensuring the right of employees to a personal zone during the performance of their duties. The studied practice of the ECHR allows regulating these relations between employers and employees in Ukraine to ensure the latter's right to privacy. At the same time, without a high-quality settlement of such legal relations at the state level, there are risks of a significant number of disputes (conflicts) regarding the violation of employees' rights, in particular, the protection of their personal data, which requires resolution at the legislative and local levels.

Therefore, it seems appropriate to define the concepts of "private life" and "personal zone of the employee at the time of performing work duties" at the legislative level. Article 2 of the Labour Code of Ukraine "Basic labour rights of employees" should be supplemented with Part 3, which provides for additional guarantees for protecting the right of employees to respect for their private life and the secrecy of personal correspondence, communication in electronic information networks, telephone conversations, electronic and other correspondence.

Supplement Article 2 (Basic principles of legal regulation of labour relations) of the draft Labour Code of Ukraine of December 27, 2014 No. 1658 with subparagraph 6-1, stating it in the following wording: "6-1) ensuring the right to the private life of an employee during the performance of their labour functions, including the right to a personal zone at the time of performance of such duties by an employee".

The last sentence of Part 1 of Article 29 of the draft should read as follows: "During the exercise of control, including video, audio, etc., actions that degrade the honour and dignity or violate other rights of employees, including their right to privacy, the secrecy of personal correspondence, communication in electronic information networks, telephone conversations, electronic and other correspondence, in particular, using telephones and other technical means of the employer are not allowed".

Part 1 of Article 29 of the draft should be supplemented with paragraph 2, stating it in the following wording: "During the exercise of control, it is not allowed to collect, store and disclose information about the personal (private) life of employees without their written consent. The list of such confidential information is established by law".

References

[1] Resolution of the Cabinet of Ministers of Ukraine No. 1236 "On Establishment of Quarantine and Introduction of Restrictive Disease Measures with the Purpose of Prevention of Distribution on Territory of Ukraine of Sharp Respirator Illness of COVID-19, Caused Koronavirusom Sars-Cov-2". (2020, December). Retrieved from https://www.kmu.gov.ua/npas/-1236-091220.

[2] Kravchenko, I. (2021). Problems of normative determination of concept "private life", taking into account admission of limits of limitation of rights for workers during realization of control measures an employer after them with application of hardwares and methods. *Scientific Bulletin of the National Academy of Internal Affairs*, 1(118), 82-93. doi: 10.33270/01211181.82.

[3] Decision of ECHR in business No. 59320/00 "Hannover v. Germany". (2004, June). Retrieved from https://zakon.rada.gov.ua/laws/show/980_324#Text.

[4] Nesterovych, V.F. (2020). Prohibition of discrimination as an important international and constitutional principle in the field of human rights. *Expert: Paradigms of Legal Sciences and Public Administration*, 5, 86-122. doi: 10.32689/2617-9660-2020-5(11)-86-122.

[5] Beschastnyi, V.M. (2019). Ethnic behavior of the police: Europe and the United States. *Law Journal of Donbass*, 4(69), 176-182. doi: 10.32366/2523-4269-2019-69-4-176-182.
[6] Kaminska, N., & Dzhuska, A. (2020). Implementation of the constitutional human right to secrecy of telephone conversations in Ukraine. *Scientific Bulletin of the National Academy of Internal Affairs*, 114, 100-109. doi: 10.33270/01201141.100.
[7] Kortukova, T., Kaminska, N., Dei, M., & Blahodarnyi, A. (2020). COVID-19: Regulation of migration processes in the European legal area. *Cuestiones Políticas*, 38, 321-332. doi: 10.46398/cuestpol.38e.20.
[8] Manzhosova, O.V. (2019). Specific aspects of implementing the right to respect to honor and divine in social networks. *Journal of Civilization*, 32, 81-85. doi: 10.32837/chc.v0i32.24.
[9] Drozdov, O.M., & Drozdova, O.V. (2018). *Reference book from application of the article 8 of European convention on human rights. A right is on respect to private and domestic life, habitation and correspondence.* Retrieved from https://unba.org.ua/assets/uploads/1259d4263dac852ef056_file.pdf.
[10] Vietukhova, I., & Kaplina, V. (2019). Control of the personal correspondence of worker by an employer: A production necessity or violation of the article of 8 Convention is about defence of human rights and fundamental freedoms. *Enterprise, Economy and Right*, 3, 105-109.
[11] Fedorenko, V.L., & Nesterovych, V.F. (2019). Affirmation and constitutional consolidation of the right to information: From ancient times to the present. *Scientific Bulletin of the International Humanities University,* 41, 47-51. doi: 10.32841/2307-1745.2019.41-1.11.
[12] Lazor, I.V. (2011). Disciplinary power of employer: A concept and value is in the conditions of market relations. *State and Right,* 52, 315-321. Retrieved from http://dspace.nbuv.gov.ua/bitstream/handle/123456789/34040/52-Lazor.pdf?sequence=1.
[13] Gazeta Prawna. (n.d.). Retrieved from https://polskapraca.in.ua/articles/polshcha-robotodavtsi-zmozhut-kontrolyuvati-svoikh-pratsivnikiv-za-dopomogoyu-videokamer/.
[14] Vahanova, I.M. (2016). To the question about the use of hardwares of supervision in the labour right of Ukraine. In M.I. Inshyn, V.I. Scherbyna, & I.S. Sakharuk (Eds.), *Trends in the development of the science of labor law and social security law* (pp. 39-43). Kyiv: Print-Service.
[15] Convention is about Defence of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[16] Civil Code of Ukraine. (2003, January). Retrieved from https://cis-legislation.com/document.fwx?rgn=8896.
[17] Law of Ukraine No. 2657-XII "On Information". (1992, October). Retrieved from https://cis-legislation.com/document.fwx?rgn=12087.
[18] Decision of Constitutional Court of Ukraine in business in relation to official interpretation of the articles 3, 23, 31, 47, to a 48 Law of Ukraine "On information" and Article 12 of the Law of Ukraine "On the Prosecutor's Office" (the case of K. G. Ustimenko) No. 5-зп. (1997, October). Retrieved from https://zakon.rada.gov.ua/laws/show/v005p710-97#Text.
[19] Dictionary of Ukrainian: In 11 volumes. (1970-1980). In *Dictionary of Ukrainian* (Vol. 9), (p. 778). Kyiv: Naukova dumka.
[20] Law of Ukraine No. 1906-IV "On the International Treaties of Ukraine". (2004, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1906-15#Text.
[21] Decision of ECHR in business No. 44647/98 "Peck v. the United Kingdom". (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/980_165#Text.
[22] Vitkauskas, D. (2003). Right on respect to private life in accordance with the article 8 of European Convention of defence of human rights and basic freedoms. In *New aspects of right on a detail and improvement of the Ukrainian legislation*. Retrieved from https://khpg.org/1094815937.
[23] Decision of ECHR No. 13710/88 in business "Niemietz v. Germany". (1992, December). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/SO2132.html.
[24] Law of Ukraine No. 2297-VI "On the Protection of the Personal Data". (2010, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2297-17.
[25] Jeane Meister "Want to be a more productive employee? Get on social networks". (2013). Retrieved from https://www.forbes.com/sites/jeannemeister/2013/04/18/want-to-be-a-more-productive-employee-get-on-social-networks/?sh=7dd969a8753d.
[26] Judgment of the European Court of Human Rights by Ms. Alison Halford v. the United Kingdom of Great Britain and Northern Ireland (application No. 20605/92). (1997, June). Retrieved from https://ol.zt.court.gov.ua/sud0618/pres-centr/13/394562/.
[27] Decision of ECHR in business No. 35623/05 "Uzun v. Germany". (2010, September). Retrieved from https://www.slideshare.net/pravotv/8-20152019.
[28] Judgment of the European Court of Human Rights by Mr. Bohdan Mihai Barbulescu v. Romania "On the Protection of Privacy When Using a Business Telephone and Correspondence Via the Yahoo Messenger Online Chat Service Via the Internet, Sent from the Workplace" (application No. 61496/08). (2017, September) Retrieved from http://kmp.ua/uk/analytics/echr/employer-s-review-of-the-employee-scorrespondence/.

[29] Decision of ECHR No. 62617/00 in business "Copland v. the United Kingdo". (2007, April). Retrieved from http://www.nsj.gov.ua/files/1529653122.
[30] Supreme Court of Ukraine ruling in case No. 6-1435tss17. (2017, September). Retrieved from https://ukrainepravo.com/law-practice/.
[31] Law of Ukraine No. 2899-IV "On Sudoustriy and Status of Judges". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402-19#Text.
[32] Criminal code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[33] Frenkel, E.B. (2002). *Labour and social right for foreign countries: Basic institutes. Comparative-legal research.* Moscow: Iurist.
[34] Project of the Labour code of Ukraine No. 1658. (2014, December). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1? pf3511=53221.
[35] An analytical message is "In relation to the separate innovations of the Labour code of Ukraine". (n.d.). Retrieved from ttp://old2.niss.gov.ua/articles/2194/.

Список використаних джерел

[1] Про встановлення карантину та запровадження обмежувальних протиепідемічних заходів з метою запобігання поширенню на території України гострої респіраторної хвороби COVID-19, спричиненої коронавірусом SARS- CoV-2 : Постанова Кабінету Міністрів України від 09.12.2020 р. № 1236. URL : https://www.kmu.gov.ua/npas/pro-vstanovlennya-karantinu-ta-zaprovadzhennya-obmezhuvalnih-protiepidemichnih-zahodiv-1236-091220.
[2] Кравченко І. М. Проблеми нормативного визначення поняття «приватне життя» з огляду на допустимість меж обмеження прав працівників під час здійснення роботодавцем заходів контролю. *Науковий вісник Національної академії внутрішніх справ*. 2021. № 1(118). С. 82–93. doi : 10.33270/01211181.82.
[3] Рішення Палати ЄСПЛ у справі «Ганновер проти Німеччини» від 24.06.2004 р. Заява № 59320/00. URL : https://zakon.rada.gov.ua/laws/show/980_324#Text.
[4] Нестерович В. Ф. Заборона дискримінації як важливий міжнародний та конституційний принцип в галузі прав людини. *Експерт : парадигми юридичних наук і державного управління*. 2020. № 5. С. 86–122. doi : 10.32689/2617-9660-2020-5(11)-86-122.
[5] Бесчастний В. М. Етична поведінка поліцейських: європейський і вітчизняний досвід. *Правовий часопис Донбасу*. 2019. № 4(69). С. 176–182. doi : 10.32366/2523-4269-2019-69-4-176-182.
[6] Камінська Н., Джуська А. Реалізація конституційного права людини на таємницю телефонних розмов в Україні. *Науковий вісник Національної академії внутрішніх справ*. 2020. № 114. С. 100–109. doi : 10.33270/01201141.100.
[7] Kortukova T., Kaminska N., Dei M., Blahodarnyi A. COVID-19: Regulation of migration processes in the European legal area. *Cuestiones Políticas*. 2020. Vol. 38. P. 321–332. doi: 10.46398/cuestpol.38e.20.
[8] Манжосова О.В. Окремі аспекти реалізації права на повагу до честі та гідності в соціальних мережах. *Часопис цивілістики*. 2019. № 32. С. 81–85. doi : 10.32837/chc.v0i32.24
[9] Дроздов О. М., Дроздова О. В. Довідник із застосування статті 8 Європейської конвенції з прав людини. Право на повагу до приватного і сімейного життя, житла і кореспонденції. 2018. URL : https://unba.org.ua/assets/uploads/1259d4263dac852ef056_file.pdf.
[10] Вєтухова І., Капліна В. Контроль особистої кореспонденції працівника роботодавцем : виробнича необхідність чи порушення статті 8 Конвенції про захист прав людини і основоположних свобод. *Підприємництво, господарство і право*. 2019. № 3. С. 105–109.
[11] Федоренко В. Л., Нестерович В. Ф. Утвердження та конституційне закріплення права на інформацію : від найдавніших часів до сучасності. *Науковий вісник Міжнародного гуманітарного університету.* 2019. № 41. С. 47–51. doi : 10.32841/2307-1745.2019.41-1.11.
[12] Лазор І. В. Дисциплінарна влада роботодавця: поняття та значення в умовах ринкових відносин. *Держава і право. Серія «Юридичні і політичні науки»*. 2011. Т. 52. С. 315–321. URL : http://dspace.nbuv.gov.ua/bitstream/ handle/ 123456789/34040/52-Lazor.pdf?sequence=1.
[13] Gazeta Prawna. URL: https://polskapraca.in.ua/articles/polshcha-robotodavtsi-zmozhut-kontrolyuvati-svoikh-pratsivnikiv- za-dopomogoyu-videokamer/.
[14] Ваганова І. М. До питання про використання технічних засобів спостереження у трудовому праві України. *Тенденції розвитку науки трудового права та права соціального забезпечення*: тези доп. II Міжнар. наук.-практ. конф. (м. Київ, 21-22 квіт. 2016 р.). Київ, 2016. С. 39–43.
[15] Конвенція про захист прав людини і основоположних свобод: міжнар. док. від 04.11.1950 р. URL : https://zakon.rada.gov.ua/laws/show/995_004.
[16] Цивільний кодекс України : Закон України від 16.01.2003 р. № 435-IV. URL : https://cis-legislation.com/document.fwx?rgn=8896.

[17] Про інформацію : Закон України від 02.10.1992 р. № 2657-XII. URL : https://cis-legislation.com/document.fwx?rgn=12087.
[18] Рішення Конституційного Суду України у справі щодо офіційного тлумачення статей 3, 23, 31, 47, 48: Закону України «Про інформацію» від 30.10.1997 р. № 5-зп. URL: https://zakon.rada.gov.ua/laws/ show/v005p710-97#Text.
[19] Словник української мови : в 11 т. Київ : Наук. думка, 1970–1980. Т. 9. С. 778.
[20] Про міжнародні договори України : Закон України від 29.06.2004 р. № 1906-IV. URL : https://zakon.rada.gov.ua/laws/show/1906-15#Text.
[21] Рішення ЄСПЛ по справі «Пек проти Сполученого Королівства» від 28.01.2003 р. № 44647/98. URL : https://zakon.rada.gov.ua/laws/show/980_165#Text.
[22] Віткаускас Д. Право на повагу до приватного життя відповідно до статті 8 Європейської Конвенції захисту прав людини та основних свобод. *Нові аспекти права на приватність та удосконалення українського законодавства*: виступ на Міжнар. просвіт. семінарі (м. Київ, 6-7 жовтня 2003 р.). URL : https://khpg.org/1094815937.
[23] Рішення ЄСПЛ у справі «Німіц проти Німеччини» від 16.12.1992 р. № 251-B заява № 13710/88. URL : http://search.ligazakon.ua/l_doc2.nsf/link1/SO2132.html.
[24] Про захист персональних даних : Закон України від 01.06.2010 р. № 2297-VI. URL : https://zakon.rada.gov.ua/laws/show/2297-17.
[25] Jeane Meister «Want to be a more productive employee? Get on social networks». URL: https://www.forbes.com/sites/jeannemeister/2013/04/18/want-to-be-a-more-productive-employee-get-on-social-networks/?sh=7dd969a8753d.
[26] Рішення ЄСПЛ громадянки Великобританії пані Елісон Хелфорд проти Сполученого Королівства Великобританії і Північної Ірландії «Про захист приватного життя при користуванні службовим телефоном» від 25.06.1997 р. Заява № 20605/92. URL : https://ol.zt.court.gov.ua/sud0618/pres-centr/13/394562/.
[27] Рішення ЄСПЛ у справі «Узун проти Німеччини» від 02.09.2010 р. Скарга № 35623/05. URL : https://www.slideshare.net/pravotv/8-20152019.
[28] Рішення ЄСПЛ п. Богданом Міхай Барбулеску проти Румунії «Щодо захисту приватного життя при користуванні службовим телефоном та листування за допомогою сервісу онлайн-чатів Yahoo Messenger через мережу Інтернет, надісланих з робочого місця» від 05.09.2017 р. Заява № 61496/08. URL : http://kmp.ua/uk/analytics/echr/employer-s-review-of-the-employee-scorrespondence/.
[29] Рішення ЄСПЛ у справі «Копланд проти Сполученого Королівства» від 03.04.2007 р. Скарга № 62617/00. URL : http://www.nsj.gov.ua/files/1529653122.
[30] Постанова Верховного Суду України від 27.09.2017 р. № 6-1435цс17. URL : https://ukrainepravo.com/law-practice/.
[31] Про судоустрій і статус суддів : Закон України від 02.06.2016 р. № 1402-VIII. URL : https://zakon.rada.gov.ua/laws/show/1402-19#Text.
[32] Кримінальний кодекс України: Закон України від 05.04.2001 р. № 2341-III. URL : https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[33] Френкель Э. Б. *Трудовое и социальное право зарубежных стран: основные институты. Сравнительно-правовое исследование*. Москва: Юристъ, 2002. 687 с.
[34] Проект Трудового кодексу України від 27.12.2014 р. № 1658. URL : https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.
[35] Аналітична записка «Щодо окремих новацій Трудового кодексу України». URL : http://old2.niss.gov.ua/articles/2194/.

Проблеми правового регулювання заходів контролю за найманими працівниками

Ігор Миколайович Кравченко

Луганський державний університет внутрішніх справ ім. Е. О. Дідоренка
93400, вул. Донецька, 1, м. Сєвєродонецьк, Україна

Анотація

У статті здійснено аналіз норм національного та європейського законодавства, практики Європейського суду з прав людини й національних судів щодо захисту права працівників на приватне життя під час виконання трудових функцій. Досліджено проблему збереження «приватної автономії» працівників під час здійснення роботодавцем контролю за виконанням таких функцій із застосуванням технічних засобів і способів. Аргументовано необхідність нормативного визначення меж обмеження прав і свобод працівників в умовах такого контролю. Метою дослідження є обґрунтування доцільності нормативного закріплення в національному законодавстві певних гарантій для працівників у разі втручання хазяйської (дисциплінарної) влади роботодавця у сферу їхньої приватної автономії під час використання технічних засобів. Наукова новизна дослідження полягає в тому, що питання правомірності прослуховування телефонних розмов, контролю за електронним листуванням і спілкуванням працівників у соціальних мережах під час виконання ними трудових функцій є частиною комплексу публікацій щодо меж втручання роботодавця з використанням технічних засобів у приватне життя працівників. Предмет дослідження засвідчує актуальність нормативного визначення національним законодавством приватної автономії працівників та її меж щодо правових гарантій від зазіхань роботодавця. Охорона та захист прав працівників під час виконання ними трудових функцій від втручання дисциплінарної влади роботодавця у сферу їхньої приватної автономії, стеження за спілкуванням в електронних інформаційних мережах, змістом телефонних розмов й електронної та іншої кореспонденції не можуть бути ефективними без нормативного визначення допустимих меж такого втручання в приватне життя працівників

Ключові слова:

роботодавець; найманий працівник; трудовий договір; робоче місце працівника; істотні умови праці; таємниця листування; таємниця телефонних розмов; таємниця електронної, телеграфної та іншої кореспонденції; аудіоспостереження (прослуховування) працівника; захист прав і свобод людини й громадянина; персональні дані