**Right to privacy: in general and in the employment relationship**

*Outline for a guest lecture*

**Intro**

The right to privacy is acknowledged as a universal human right and therefore part of many human rights conventions. For instance, the United Nations' Universal Declaration of Human Rights, in particular article 12, which reads:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

This is repeated in article 17 of the International Convenant on Civil and Political Rights. A similar formulation is found in article 8 of the European Convention of Human Rights (ECHR).

Being an acknowledged universal human right, it seems inherent that the right to privacy applies always: in the vertical situation between the state and its citizens, in which situation the citizens are protected against infringement of their privacy by the state; and in the horizontal situation between two private persons, for instance between an employer and employee. In particular in the context of the ECHR private persons can file a complaint at the European Court of Human Rights (ECtHR) about alleged infringements of the right to privacy. Consequently, the right to privacy as regulated in the ECHR has a significant impact on the national legal orders of the states that ratified the convention, including the Netherlands and Russia.

Having established this, the lecture will focus on the different dimensions that can be found in the right to privacy as regulated by the ECHM. These include:

1. the classical protection of individuals against interference of the state in their private lives. Exceptions to this are allowed, based on paragraph 2 of article 8 ECHR, when this "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

2. the protection of the right between two private entities/individuals, in general and in the specific situation between employer and employee. The latter situation is in particular interesting since the right of the employer to run his business freely and to give instructions (as part of the element of subordination in the employment relationship) is inherently at odds with the right to privacy. Several situations can be distinguished in this respect and each of these situations will be illustrated with examples, either just of practice or in case law. Most case law will be based on Dutch cases and discussed in comparison with how it would work out in the Russian situation. Comparing in this way is interesting for at least two reasons: 1) it gives insight in the two different legal systems and 2) it will also illustrate, that although a universal right, it is also subject to cultural differences and habits making certain situations more or less acceptable in society and therefore by the law.

The situations that will be discussed are:

a. right to privacy at the workplace during working hours

e.g. registration of working hours by a 'check-in/out' system

e.g. supervising the activities

(illustration by a fragment of Charlie Chaplin's movie Modern Times: https://www.youtube.com/watch?v=DfGs2Y5WJ14)

e.g. checking private emails at the computer of the employer and the employer's right (end maybe also obligation) to monitor activities using the internet connection of the enterprise.

b. right to privacy at the workplace outside working hours

e.g. after work drinks at the workplace (Dutch case about a head of the department getting drunk and misbehaving which was cause for summary dismissal because his behaviour resulted in the loss of respect and authority. Legal question to be addressed when the dismissal was challenged as unfair is whether the behaviour outside working hours wasn't behaviour in private time and that the employer therefore could not rely on it)

c. right to privacy outside the workplace, during working hours

e.g. the right, or maybe even the obligation, of the employer to make sure you have a healthy and safe workplace. This could include the employer's right to give instructions about what sort of chair and desk you have to have at home when working from home (often the case in academia and increasingly the case as a consequence of the digitalised working place, increase in services rather than industry, and a better reconciliation of private and working life.

These forms of flexibilisation of the employment relation raises questions about 'workplace' and also 'working hours'. While the tendency is that these notions are getting wider, it implies that employees have to accept more interference of the employer in their private life.

d. right to privacy outside the workplace, outside working hours

e.g. a truck driver who went out with friends on a Saturday night. He gets drunk, gets into his own car and gets caught for drunk-driving. He is so drunk that the police officer decides to confiscate his driver's license for 6 months. At Monday he reports at work without a driver's license due to which he can't do his job. Since it will last for 6 month's he is fired instantly.

e.g. a prestigious hotel at the Caribbean island Aruba runs a strict policy on drugs. This is important for them, because the island has an issue with drugs control (being close to Latin America and under the influence of the Dutch relaxed legislation on drugs) and they host mainly rich Americans who want to stay in a drugs free place. Part of the policy is that no drugs are allowed in the hotel and that the staff will be tested on the use of drugs regularly. One of the chambermaids used some cocaine during her weekend off from work. She is totally sobered up when she has to go back to work, but when tested some residues of the cocaine were found. The employer put her on non-active and offered her to go to a rehab-programme. The employee refused, upon which she was dismissed instantly. In court she challenged that her right to privacy was infringed, because she used during her time off and never brought the drugs into the hotel or showed up for work under the influence of it.

3. challenges to the right to privacy in a digital era, in particular in the context of the employment relationship.

Whereas most individuals are very aware of their right to privacy, for instance that letters cannot just be read by public authorities, their houses cannot just be entered by the police or strangers, or that phone calls cannot just be tapped. Of course infringements can be made, but based on paragraph 2 of article 8 ECHR there needs to be a good reason for it. Which these reasons are, are mentioned explicitly in this paragraph and even when such justified reason is present, this is subjected to a test on necessity, proportionality and subsidiarity of the exemption creating the infringement. In general people are aware of this as well.

With the rise of the digital area new issues have come up with respect to the right to privacy. In particular when it comes to the use of internet and social media. In general people are hardly aware of their privacy on internet. It is clear that when expressing an opinion on a open discussion forum it is there for the whole world to see. For instance this blog: http://blogs.cfr.org/cyber/2015/03/05/the-right-to-privacy-in-the-digital-age-where-do-things-stand/ It is not only freely accessible at the internet, others have promoted the post through facebook (10 times) and twitter (54 times). Maybe the author is fine with it, but what if it is tweeted by someone you don't want to be associated with? Can you claim that it was your private post and that it is an infringement of your privacy? In this situation it may be clear that you cannot expect this kind of privacy.

But what about facebook or instagram? These are presented as closed groups where you only share information with those persons you permitted access to "your" page by accepting them as friends. However, for each post you can select whether you share it with your friends only, or that it will be public, or with just one person only. This blurs the boarder of privacy. It becomes more vague when a friend has opened her/his page for friends of friends as well. When that friend is tagged in a message, the friends of that friends will also see it, and maybe their friends also when they like the message. How private is your page now? An example of how open a social medium like facebook can be is a party that got out of hand because the announcement of the party - which was intended to be a party of a girl and some of her friends - reached not a limited group of persons, but thousands. Even though people knew in advance that it was a mistake, many went to the place and a group of them started a riot (http://www.nrc.nl/inbeeld/2012/09/21/uit-de-hand-gelopen-facebookfeest-in-haren-loopt-ook-echt-uit-de-hand/).

The digital era causes also new challenges for the right to privacy at the work place. This includes not only the monitoring of the use of internet and email, but posts on social media seem to enter the employment relationship more often as well. In the Dutch situation many examples can be found of employees being dismissed because the posted something negative about their employer on facebook. Sometimes the employer found out because she/he was friends on facebook, other times it was indirectly because she/he was informed by a common friend or another employee who didn't share this negative opinion. In this case law issues have been raised about when and how the statement was made: at work? during working time? at a device of the employer or provided by the employer? But more decisive in these cases seems to be the question to which extend the reputation of the employer is damaged? The court is then asked to balance two rights: the fundamental right of privacy against the right of the employer to run a business, which is infringed when the reputation is damaged.

A case for discussion would be the following.

At the island Aruba a customer orders a burger with extra pickles. When receiving the burger he finds out that instead of extra pickles he got extra bacon. He goes back to the counter to ask for a burger with extra pickles. Something makes the serving employee snap and he grasps a full jar of pickles and empties this on the customer's burger. Not amused by how he is treated he makes a picture of his pickled burger and posts it on facebook, including a picture of the serving employee and a full account of the happening. Being a small island soon everyone knows about the incident, including the employer. For the employer this is reason for summary dismissal of the employee. The employee fights the dismissal. Several issues can be discussed here. First of all, was this behaviour reason enough for the dismissal? Why not first giving a warning? Secondly, the way how the employer learned about the incident. Before the digital era this might not have come to his knowledge, or at best in a letter holding a complaint which probably may not have lead to a summary dismissal, but more likely to a warning. Thirdly, the effect of the post on facebook. Maybe the behaviour itself was not reason enough for a summary dismissal, but the fact that everyone at the island knows about it and the effect this has for the reputation of the fast food restaurant. Which leads to a much wider question: how can the right to privacy be protected in the era of digitalisation? Especially when there is less control about what is taken out of the privacy-sphere by others.