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*I. V. Lagutina***THE RIGHTS OF EMPLOYEE AS A SUBJECT OF PERSONAL DATA**

**Problem setting.** In contemporary socio-economic conditions, the role of the protection of employee's personal data is increased to a large extent. With the wide use of modern information technologies data about the citizen is increasingly used by both state and non-state actors.

**Analysis of recent researches and publications.** At the present time the protection of personal data as fundamental right is the subject of study of Ukrainian and foreign scientists, such as W. Berka, V. Brizhko, S. Bogatirenko, A. Dolgov, G. Chanyшева, R. Chanyшев, A. Chernobay, C. Grabenwarter, S. Gutwirth, A. Hamilton, D. Harris, P. De Hert, C. Kuner, A. Lushnikov, V. Luzhetsky, A. Markevich, A. Pazyuk, Y. Pouillet, A. Prosvetov, J. Rosemary, V. Sedov, M. Tinnefeld, etc.

The **purpose** of this article is to analyze approaches to the definition of personal data, the legal regulation of personal data protection. Personal data is defined as any information related to an identified or identifiable employee.

**Article's main body.** International and European institutions are paying increasing attention to the ratio between concepts "data protection", "communication technologies" and "privacy at work". Thus, in 1996 the ILO issued a code of practice on the protection of employees' personal data, covering general principles of protection of such data and specific provisions regarding their collection, security, storage, use and communication.

The ILO Code of Practice does not prohibit monitoring of employees, but it does restrict it in two ways. First, the employees must be informed in advance. Second, employers must take account of the consequences on employees' privacy, etc. in choosing their methods of monitoring. Furthermore, the Code very much limits the use of secret monitoring to cases where it is necessary for health and safety reasons or for the protection of property.

The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms states in Article 8 "Right to respect for private and family life".

This is especially true that information and communication technologies now play a significant role in enterprises, with growing use of computers in all aspects of operations and increasing communication and dissemination

of information through the internet, internal intranets and the use of e-mail. For both employers and employees, there are new dangers linked to the development of ICT. Notably, as far as employees and their representatives are concerned, the main danger lies in the new capacity that exists for monitoring and surveillance. New technology may allow employees' work and productivity to be monitored, and also aspects of their personal lives, while their use of the internet and e-mail can be subject to monitoring (not least because of the traces any such use leaves). This raises questions of both privacy and the relationship of control at the workplace. These dangers can be even greater, and the surveillance technology even more advanced, in situations where there is a physical distance between the employee and the employer [1].

A common data protection problem in today's typical working environment is the legitimate extent of monitoring employees' electronic communications within the workplace. It is often claimed that this problem can easily be solved by prohibiting private use of communication facilities at work. Such a general prohibition could, however, be disproportionate and unrealistic.

In the context there have also been relevant recent cases in the European Court of Human Rights.

For example, in *Libert v. France* no. 588/13 (application communicated to the French Government on 30 March 2015). The applicant complains in particular of a violation of his right to respect for his private life arising from the fact that his employer (The French national rail company, SNCF) opened files on his professional computer's hard drive named « D:/personal data » without him being present. He was later struck off because of the contents of the files in question. The Court gave notice of the application to the French Government and put questions to the parties under Article 8 (right to respect for private life) of the Convention.

The case *Bărbulescu v. Romania* concerns the applicant's dismissal by his employer, a private company, for having used the company's Internet for personal purposes during working hours in breach of internal regulations. The applicant complains in particular that his employer's decision to terminate his contract was based on a breach of his privacy. In its Chamber judgment of 12 January 2016 the Court held, by six votes to one, that there had been no violation of Article 8 (right to respect for private and family life, the home and correspondence) of the Convention, finding that the domestic courts had struck a fair balance between the applicant's right to respect for his private life and correspondence under Article 8 and the interests of his employer. The Chamber observed, in particular, that the applicant's private life and correspondence had been engaged. However his employer's monitoring of his communications had been reasonable in the context of disciplinary proceedings [2]. On 6 June 2016 the Grand Chamber Panel accepted the applicant's request that the case be referred to the Grand Chamber.

It is clear that trade unions in many countries are concerned that the current relationship between employees' privacy rights and employer monitoring rights is unbalanced, with the latter unfairly privileged. Trade un-

ions are calling for clearer rules in this area and restrictions on employer monitoring.

In labour law, the employer may lawfully store personal data about employees provided that it is necessary in order to achieve the purpose of the employment relationship. This is generally the case as regards data on the employee's age, training and performance.

Collection of employees' personal data takes place even before the beginning of the employment relationship, during recruitment. It continues throughout employment and may extend even after its termination. Specific justifications may include compliance with the law; health, safety and security; assisting selection, training and promotion. The subject of personal data has the right to limit the right to process their personal data when granting consent.

Created in most developed countries the personal data protection mechanism provides the subject opportunity to control treatment with personal data during any operations. This opportunity is based on the rights of subject of personal data:

- a) the right to know the purpose and legitimate reason to collect information, future recipients;
- b) obtain a copy of the data collected, including information on their use;
- c) make adjustments to destroy or block (prohibit the use) personal data, which processed with violation of the law, and require to inform the party to whom the data have been disclosed.

There is no specific legal framework in the EU governing data processing in the context of employment. In the Data Protection Directive, employment relations are specifically referred to only in Article 8 (2) of the directive, which concerns the processing of sensitive data.

A survey of the most common data protection problems specific to the employment context can be found in a working document of the Article 29 Working Party [3, p.171]. The working party analyzed the significance of consent as a legal basis for processing employment data. The working party found that the economic imbalance between the employer asking for consent and the employee giving consent will often raise doubts about whether consent was given freely or not. The circumstances under which consent is requested should, therefore, be carefully considered when assessing the validity of consent in the employment context.

Sensitive personal data collected for employment purposes may only be processed in particular cases and according to the safeguards laid down by domestic law. Employers may ask employees or job applicants about their state of health or may examine them medically only if necessary to: determine their suitability for the employment; fulfill the requirements of preventative medicine; or allow social benefits to be granted. Health data may not be collected from sources other than the employee concerned except when express and informed consent was obtained or when national law provides for it.

Important to note that employee must have the following rights:

- to be regularly notified of the personal data held about them and the processing of that personal data;
- to have access to all their personal data, irrespective of whether the personal data are processed by automated systems or are kept in a particular manual file regarding the individual employee or in any other file which includes employees' personal data;
- to know about the processing of their personal data should include the right to examine and obtain a copy of any records to the extent that the data contained in the record includes that employee's personal data;
- to have access to medical data concerning them through a medical professional of their choice;
- to demand that incorrect or incomplete personal data, and personal data processed inconsistently with the provisions of this code, be deleted or rectified [4, p. 6].

In case of a deletion or rectification of personal data, employers should inform all parties who have been previously provided with the inaccurate or incomplete personal data of the corrections made, unless the employee agrees that this is not necessary. If the employer refuses to correct the personal data, the employee should be entitled to place a statement on or with the record setting out the reasons for that employee's disagreement. Any subsequent use of the personal data should include the information that the personal data are disputed, and the employee's statement.

The purpose for processing of personal data must be formulated in laws, other normative-legal acts, provisions, statutory and conform to the legislation in the field of personal data protection.

"The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article ... The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored ... [It] must also afford adequate guarantees that retained personal data were efficiently protected from misuse and abuse" (S. and Marper v. the United Kingdom, judgment (Grand Chamber) of 4 December 2008, § 103) [5].

On 30 September 2010 Ukraine ratified the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981. The Convention is aimed at the extension of the safeguards for human rights and fundamental freedoms, and in particular the right to the respect for privacy. It became a major step in realization of the

article 8 of the Convention for the protection of human rights and fundamental freedoms of 1950.

The legislation on the protection of personal data is relatively new for all European countries. The Commissioner for Human Rights is convinced that it is extremely important for Ukraine to study and take into account the world's experience in order to create an effective mechanism that would ensure the observance of the constitutional right to the respect for privacy in the country.

An important role in the field of personal data protection belongs to the institution of the Ombudsman (the Ukrainian Parliament Commissioner for Human Rights), which is characterized by democratic features such as independence from public authorities, the openness, the lack of formalized procedures for consideration of appeals, the free provision of assistance to citizens.

It should be emphasized that the right to the respect for privacy is guaranteed by the article 32 of the Constitution of Ukraine; the Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" [6]; the Law of Ukraine "On the protection of personal data" [7], that came into force on 1 January 2011. The Ukrainian Parliament Commissioner for Human Rights exercises parliamentary control over the observance of human rights to protection of personal data in accordance with the law. According to the article 14 of the Law of Ukraine "On the Ukrainian Parliament Commissioner for Human Rights" the Commissioner is governed in his or her activities by the Constitution of Ukraine, the laws of Ukraine and other legal acts, observes the human and citizen's rights and interests protected by law, preserves confidential information and has no right to disclose any information concerning the privacy of the applicant and others affected by this application without their consent. This obligation shall remain effective after the end of tenure in the Office of the Commissioner.

Under the article 24 of the present Law of Ukraine "On Protection of Personal Data", the state guarantees protection of personal data. Subjects of relations related to personal data are obliged to ensure protection of such data against unlawful processing and unauthorized access.

In 2015, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights received 638 complaints from citizens and legal persons concerning the implementation of the human right to protection of personal data. Half of these complaints contained request for clarification on the practical application of the provisions of the Law of Ukraine "On Protection of Personal Data". Another part of the appeals – complaints about the violations of law by owners of personal data. They apply to access to own personal data, transfer of personal data to third parties, the grounds for processing personal data, mismatch of volume of personal data to certain goals of processing.

The processing of health data is in principle prohibited in view of the risk for the privacy of the individuals concerned. Nevertheless, taking into account the fact that the processing of health data is a necessary practice in the employment context, which may often be justified by various legitimate reasons

for the benefit of both employers and employees, there are a number of general exceptions to this principle.

Also, employees should be informed about the purpose of the processing of their personal data, the type of personal data stored, the entities to which the data are regularly communicated and the purpose and legal basis of such communications.

Employers should also inform their employees in advance about the introduction or adaptation of automated systems for the processing of personal data of employees or for monitoring the movements or the productivity of employees.

Personal data on employees are processed for purposes directly relevant and necessary to the employment of the employee.

Furthermore, personal data on employees collected are used in principle only for the purpose for which they were originally collected. Personal data must be processed fairly and lawfully.

Conclusions. In that regard, the protection of employees' personal data is an increasingly debated issue. In its various aspects, it is currently the subject of active discussions, negotiations, regulations and research at international, European and national levels. This is notably due to the specific nature of the employment relationship as well as to recent socio-economic, organizational and technological changes.

In this context, it is important to strike a balance between the employees' fundamental rights, in particular that to privacy, and the employers' legitimate interests. Whilst this appreciation is carried out on a case by case basis, the question is raised whether it is advisable to have a framework of guidelines and rules regulating in a specific way processing of personal data in the employment field.

It is necessary to develop mechanism to protect employee's personal data. Such data must be considered with the awareness of specific, objectives and tasks of labour law and labour legislation.

Personal data of employees are regarded as information about the facts, events and circumstances of employee's life, which provided to employer to ensure compliance with laws and other normative legal acts.

Currently, article 2 of the current Labour Code of Ukraine among the basic labour rights of employees the right to protection of personal data is not fixed.

In article 21 of the draft Labour Code of Ukraine in the list of the fundamental rights of employees this right also is not included. It is proposed to the Labour Code of Ukraine to include a special chapter devoted to right to protection of employee's personal data, which define the concept of personal data, general and special requirements for the processing of employee's personal data and ensure their protection, use requirement, collection, saving and storage, dissemination, destruction of personal data, the order of data transmission, responsibility for violation of legislation.

A range of information that compose the personal employee's data should be determined in local normative legal act, but within the limits set forth by laws of Ukraine.

### Literature

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### Summary

#### **Lagutina I. V. The rights of employee as a subject of personal data.** – Article.

The article examines the main approaches to the definition of personal data of employees, the role of protection which in modern socio-economic environment significantly increases. Defines the general requirements for the processing and protection of personal data.

Emphasized the need for consolidation in the national legislation the right of employees to protection of personal data and guarantee its implementation.

*Key words:* human rights, personal data of employees, processing of personal data of employees, use of personal data of employees.

### А н о т а ц і я

#### **Лагутіна І. В. Права працівника як суб'єкта персональних даних.** – Стаття.

У статті аналізуються основні підходи до визначення персональних даних працівників, роль захисту яких у сучасних соціально-економічних умовах значно зростає. Визначаються загальні вимоги до оброблення та захисту персональних даних працівників.

Підкреслюється необхідність закріплення в національному законодавстві права працівників на захист персональних даних і гарантій його реалізації.

*Ключові слова:* права людини, персональні дані працівників, оброблення персональних даних працівників, використання персональних даних працівників.

### А н н о т а ц и я

#### **Лагутіна И. В. Права работника как субъекта персональных данных.** – Статья.

В статье анализируются основные подходы к определению персональных данных работников, роль защиты которых в современных социально-экономических условиях значительно возрастает. Определяются общие требования к обработке и защите персональных данных работников.

Подчеркивается необходимость закрепления в национальном законодательстве права работников на защиту персональных данных и гарантий его реализации.

*Ключевые слова:* права человека, персональные данные работниками, обработка персональных данных работников, использование персональных данных работников.