The Right to Privacy in Employment

A Comparative Analysis

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OXFORD AND PORTLAND, OREGON
2016

Hart Publishing
An imprint of Bloomsbury Publishing plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2016

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50990-611-6
ePDF: 978-1-50990-613-0
ePub: 978-1-50990-612-3

Library of Congress Cataloging-in-Publication Data

Names: Otto, Marta, author.

Title: The right to privacy in employment : a comparative analysis / Marta Otto.

Description: Oxford ; Portland, Oregon : Hart Publishing, 2016. | Includes bibliographical references and index.

Identifiers: LCCN 2016024675 (print) | LCCN 2016025227 (ebook) | ISBN 9781509906116 (hardback : alk. paper) | ISBN 9781509906123 (Epub)

Subjects: LCSH: Employee rights. | Privacy, Right of.

Classification: LCC K1763 .O88 2016 (print) | LCC K1763 (ebook) | DDC 342.08/58—dc23

LC record available at https://lccn.loc.gov/2016024675

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
TJ International, Padstow, Cornwall

Introduction

AT THE BEGINNING of the twenty-first century, the term 'privacy' gained new prominence around the world, but in the legal arena it is still a concept in 'disarray'. Enclosing it within legal frameworks seems to be a particularly difficult task in the employment context, where the Information Revolution,[1] by altering the nature of work and, as a consequence, the character and reach of the traditional instruments of employer supervision, has considerably challenged long-held assumptions concerning the employees' expectations of privacy.

Nowadays, more than ever before, the work of individuals is reliant upon knowledge, technology and communication rather than material production per se. An integral companion to this 'new' dynamic is a new style of management of work relationships, ie human resources management,[2] which not only visibly transcends the limits of the traditional instruments of employer supervision but, first and foremost, reinforces the inherent asymmetry between the parties in the employment relationship by equipping employers with a rejuvenated source of power over employees, namely that of information. In practice, due to widely accessible and relatively affordable technology, almost every action of an employee can be tracked by a camera, computer, cell phone, GPS or RFiD, and his every personal characteristic or competence detected by personality or vocational testing. This unprecedented access to employees' personal spheres undeniably adds a new dimension to the fundamental problem of reasonable accommodation of apparently contradictory interests, namely employers' powers of command (control, supervision) and employees' privacy. One of the key questions that needs to be asked nowadays is therefore: how much intrusion into employee privacy is justifiable?

In the author's opinion, providing adequate answers to the question posed requires us to overcome first the conceptual impasse over employees' right to privacy. Despite indeed voluminous literature on right to privacy,

[1] The term refers to current economic, social and technological trends beyond the Industrial Revolution.

[2] See eg M Freedland, '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' (Oxford, 1999) 27; G Trudeau, 'En conclusion … Vie professionnelle et vie personelle, ou les manifestations d'un nouveau droit du travail' (2010) 1 *Droit Social* 77 (describing the influence of new social and economic context on the work and labour law paradigms).

thus far, the employment-specific doctrine focused mainly on analysis of the divergent forms of privacy intrusion in the employment context (such as monitoring, drug testing or personal data collection) and identification of the new legal challenges raised by the advancement of new technologies in chosen countries.[3] While, considered cumulatively, it provides an illuminating picture of the relevant regulatory framework, its main shortcoming is its *sui generis* compartmentalization and the resultant lack of more comprehensive theoretical analysis on the specificity of right to privacy in employment (its definition, meaning, and value).

The book attempts to fill the mentioned gap to some extent by distinguishing conceptual and normative foundations of the contemporary, employment-specific paradigm of right to privacy. These demands were decisive in framing the analysis within the comparative method of research, and they determined its final 'horizontal' dimension. Accordingly, the proposed study is centered around comparative examination of three dominant (American, European, Canadian) models of privacy protection, each of which employs specific vocabulary to express the concept of right to privacy and uses different regulatory techniques of approaching the given issue. Ultimately, however, the 'functional' analysis[4] of models at macro (ie mostly federal) level is treated by the author only as an instrument enabling more deeper-reaching reflection on the *sui generis* culmination of norms and legal institutions of given *ordo iuris*, namely the scope of coverage (conceptual boundaries) and actual scope of protection of right to privacy. In the author's view, contrary to the existing works on the same topic,[5]

[3] See eg F Hendrickx, *Employment Privacy Law in the European Union: Human Resources and Sensitive Data* (Intersentia, 2003); F Hendrickx, *Employment Privacy Law in the European Union: Surveillance and Monitoring*, (Intersentia, 2002); S Nouwt, B de Vries, C Prins, *Reasonable Expectations of Privacy? Eleven country reports on camera surveillance and workplace privacy* (Springer, 2005); K Klein and V Gates, *Privacy in Employment: Control of Personal Information in the Workplace* (Thomson Canada Limited, 2005). See also following works which provide some limited theoretical account of the specificity of right to privacy in employment: JD Craig *Privacy and Employment Law* (Hart Publishing, 1999) and 'Information technology and workers' privacy' *23 Comparative Labour Law and Policy Journal* (both covering the issue of desirable legal principles governing the protection of privacy in employment); M Freedland, 'Data Protection and Employment' (Oxford, 1999) (analysing the complex relationship between the labour law and data protection in the EU).

[4] Analysis of the different legal systems (rules, concepts, regulatory and institutional arrnagements) through the prism of the function they perform in a given *ordo iuris*. See generally K Zweigert, H Kötz, T Weir, *Introduction to Comparative Law* (Clarendon Press, 1998) 11.

[5] See eg A Levin and MJ Nicholson, 'Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground' (2005) *University of Ottawa Law & Technology Journal* 357; A O'Rourke, A Pyman, J Teicher, 'The Right to Privacy and the Conceptualisation of the Person in the Workplace: A Comparative Examination of EU, US and Australian Approaches' (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 161; JF DeBeer, 'Employee Privacy: The Need for Comprehensive Protection' (2003) 66 *Saskatchewan Law Review* 383, all of which portray the relevant legal frameworks as constituting different models.

these are the conceptual and normative perimeters that are the veritable determinants of distinctiveness of particular models and at the same time invaluable signposts towards discernment of the contemporary paradigm of right to privacy in employment.

The book consists of four chapters. The first three chapters will provide a formal, dogmatic analysis of the building blocks of the relevant (American, European, Canadian) privacy protection architecture. Given, on the one hand, their predominantly general (ie non-employment specific) character and, on the other, the existence of comprehensive studies on the national privacy protection instruments,[6] the relevant chapters of the book are not intended to provide all-inclusive descriptions or examinations of either the privacy or labour law regulation in the given *ordo iuris*. The analysis rather goes as far as to enable a deeper-reaching reflection on the specificity of the given framework and the need and possible forms of its further particularization and complementarity with regard to the employment context. Notably, the chronological order of the relevant parts as well as their rigid structure are not accidental but rather reflect a methodologically conscious approach, adopted by the author to facilitate the observation of the *sui generis* migration of privacy norms and institutions between the legal systems presented.

The fourth chapter of the book draws on the conceptual, regulatory and institutional convergences and divergences between European, American and Canadian models of privacy protection as well as the rudimentary reconstruction of prevailing theoretical accounts of privacy to re-examine the foundations of the contemporary paradigm of employees' privacy and to elucidate the pillars of a holistic approach to the protection of right to privacy in employment ie an approach that attempts to provide a more effective and sustainable framework of privacy protection in employment by addressing the issue not only of contemporary regulation but also the conceptualization, adjudication, and common (public) perception of employees' privacy.

[6] See n 3 above.