Fundamental rights protection in the age of big data

Marta Otto
“.... [the] general dynamic towards the broadening of the roles of personal information use from the relatively limited traditional roles of selection and discipline into a new set of functions which have to do with the motivation, incentivisation and acculturation of workers, and the control of their behaviour”

M. Freedland, 1999 r.
People/HR analytics (data-driven approach to managing people at work) enhances efficiency and security of business operations by optimizing i.a.:

- workforce productivity;
- consistency/fairness in the decision making process;
- the ability to detect the fraudulent behaviour;
- the ability to protect the rights and freedoms of others, including employee himself.

People analytics might considerably exacerbate the information assymetry, and as a result the inherent inequality of bargaining powers between the parties of the employment relationship.

People analytics poses considerable threats to human rights of workers, in particular:

- right to privacy and personal data protection;
- principle of equality and non-discrimination;
- social rights (the right to work, the right to protection against unjustifed dismissal, right to fair and just working conditions; i.e respecting workers’ health, safety and dignity).
European Multilevel System of Privacy and Data Protection

**International level**
- Art. 8 ECHR
- Convention no. 108+
- ECtHR

**Supranational level**
- Art. 7 and 8 of the Charter (/Art. 6 TEU)
- Article 16 TFEU
- Directive 95/46/EC
- GDPR
- CJEU

**National level**
- Constitutional provisions
- Data protection laws
- National Courts/Supervisory authorities
The European right to privacy, resting upon ‘the right to establish and develop relationships with human beings’ and ‘the right to development and fulfilment of one’s own personality’ is a right that is ‘complementary’ to freedom of expression, freedom from discrimination, as well as the individual’s right to ‘earn a living’, ‘in the sense that if not enjoyed freely there can be chilling effects to the exercise of [those] rights’.

The Scope of Protection of Right to Privacy and Related Interests in Employment

The protection afforded to the right to privacy, as both the ECtHR and CJEU case law clearly imply, is not absolute.

Its ultimate scope is derivative, on the one hand, of the ‘reasonable expectations of privacy’ concept and, on the other hand, the existence of potentially broad array of apparently ‘more relevant’ legitimate interests.

The principle of proportionality is in most cases limited to the analysis of suitability and necessity of privacy-invasive measures (weak/zero-sum balancing).
Challenges to the protection of human rights in employment under the GDPR

• potentially broad catalogue of employer’s interests legitimizing processing of employee’s data (art. 6f GDPR);

• effective execution of data subjects rights in a context predetermined by power and information disparities;

• recognizing infringements of other dimensions of privacy (eg. territorial and personal privacy) that might accompany processing of personal data;

• assigning accountability for privacy & data protection violations.
National employment regulations v. employment specific Directive

Art.88 GDPR Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular, for the purposes of:

- recruitment;
- performance of the employment contract (including discharge of obligations laid down by law or collective agreements);
- management, planning and organisation of work;
- equality and diversity in the workplace;
- health and safety at work;
- protection of an employer’s or customer’s property;
- exercise and enjoyment (on an individual basis) of rights and benefits related to employment; and
- termination of the employment relationship.

Recital 73: restrictions concerning specific principles and rights of data subjects, may be imposed by Union or Member State law, as far as they are in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.
motto@wpia.uni.lodz.pl

Department of Labour Law
Faculty of Law and Administration
University of Lodz
Kopcińskiego 8/12, 90-232 Lodz, room 3 71