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Information and Privacy in Dutch Labour Law

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1. Introduction

It is said that our society is changing from an industrial society into an information society. No longer, the production of goods is determining the organisation of our society, but the role of information has become crucial for influence and power. Information and Communication Technology (ICT) have a prominent place in the production of goods and services. Information can be more easily collected, stored and exchanged than it used to be. In reaction to this, the quest for secrecy and protection of privacy of citizens has become more urgent. Another aspect is the fact that big companies have a great influence in society and cannot always be controlled by governments. The role of employees in unveiling unlawful behaviour of companies is recognized in the person of the 'whistle blower'.

In Dutch Labour Law, these developments have led to a growing interest in privacy regulations and freedom of speech of the employee and to many disputes between employers and employees. Although this development is also happening in other European countries, this paper is restricted to the actual situation in the Netherlands.

2. Sources of privacy protection

Many sources of law are aiming to protect the privacy of citizens in general or the privacy of employees in particular.

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General protection of privacy of citizens

In general, in the Netherlands the most relevant sources of law in this field are:

- Article 8 of the European Convention for the protection of Human Rights and fundamental freedoms (ECHR) of the Council of Europe of 1950.
- Article 17 of the International Covenant on Civil and Political Rights (ICCPR) of the United Nations of 1966.
- Article 10 of the Dutch constitution as amended in 1983.
- The Treaty on Data Protection of the Council of Europe of 1988.
- Directive 95/46/EC of the European Union of 1995.¹
- The Act on Protection of Personal Data of 2001 (Data Protection Act).²
- Article 8 of the Charter on Fundamental Rights of the European Union of 2000.³

The first two provisions protect private life in general. The other, more recent, sources deal explicitly with the registration of personal data.

This reflects the development in practice. In the Netherlands, a public revolt against a census held by the Government in 1972, inflamed the discussion on the protection of privacy of citizens. It was a reaction to the growing use of computers in collecting data of citizens by the government and other institutions. A State Enquiry Committee, presided by the famous Dutch Lawyer Koopmans, reported in 1976 and promoted legislation in this field. It lasted until 1989 before the first Act on Personal

¹ Directive 95/46/EC of the European Parliament and the Council of 24 October 1995, *Official Journal* (1995) L 281/31.

² Act of 6 July 2000 concerning rules regarding the protection of personal data (*Wet bescherming persoonsgegevens*), *Staatsblad* (2000) 302, entered into force on 1 September 2001.

³ This Charter is not a binding set of rules yet. It has been incorporated in the Constitutional Treaty of the European Union that was accepted by the Governments of the Member States earlier this year, but this Treaty has still to be ratified by all 25 EU-Members. The Charter is primarily serving to protect human rights within the EU-institutions. But it will probably have a wider influence.

Data Registration was enacted. This act was replaced by the actual Data Protection Act of 2001, that transposed the EU-Directive of 1995.

With regard to case-law, so far the most important lines are drawn by the European Court of Human Rights in Strasbourg, on the basis of the European Convention on Human Rights (both are abbreviated ECHR). The basic line of reasoning of the ECHR with respect to article 8 ECHR is that interference by a public authority in the private life of persons is only allowed in case this is foreseen by law and necessary in a democratic society for a pressing social need. The purpose of the interference may not be attainable through less drastic methods and the interference must be appropriate in relation to its purpose.⁴

Protection of employees and employers

Specific sources of privacy protection of employees and protection of information of employers are less extensive. Partly, this protection is included in the abovementioned general sources. The European Court of Human Rights decided that the privacy protection of article 8 ECHR also covers the working area.⁵ The Dutch Supreme Court has also accepted the right to privacy on the work floor, and applies article 8 ECHR directly.⁶

The good employers article 7:611 in the Civil Code is sometimes invoked, but it is discussed whether this is necessary, since article 8 ECHR has direct horizontal effect. Employers' and Consumers' organisations opposed the Data Protection Act. As for the employers, the reason was a feared administrative burden that the Act would impose on employers. The protest had little result. The enforcement of the privacy standards of the European Data Protection Directive is mandatory. By the way, the EU-Directive was in itself a compromise as a result of successful attempts of lobby groups to influence the decision-making process.

⁴ Verheij 1992.

⁵ ECHR 16 December 1992, *Nederlandse Jurisprudentie* 1993, 400 (Niemitz); ECHR 25 June 1997, *Nederlandse Jurisprudentie* (1998) 506 (Halford).

⁶ Dutch Supreme Court 27 April 2001, *Jurisprudentie Arbeidsrecht* 2001/95 (Wennekes).

3. Protection of company information

The interest of the employer to protect secret company information is protected by Dutch Labour Law. It has two aspects: the prohibition to work for a competitor and the duty of confidentiality.

Competition clause

In practice, most important is the possibility of a competition clause in the employment contract. It prohibits the employee to work in a competing company after leaving his job. If an employer wants to keep his company information restricted, he can use this clause to prevent an employee to use his insight information for a direct competitor. In the clause, he can imply penalties on the employee to pay a sum of money in case of breaking the competition clause. However, the competition clause is statutory restricted (Article 7:653 Dutch Civil Code). The clause is only valid, when it is concluded in writing with an adult employee. Its scope as well as its penalties can be moderated by the court. The competition clause can be easily in contradiction with the freedom of the employee to choose his work, which is protected by international treaties and the Dutch Constitution.⁷ When the freedom of work became part of the Dutch Constitution in 1983, the Home minister gave his view on its implications. He suggested that it was up to the courts to protect this right in the case of competition clauses and to weigh the interests of employers and employees in concrete cases. However, it is quite complicated that the employee has no certainty about the validity of the clause once he has to decide on accepting a job offer. It is possible to ask a provisional court decision, but principally that gives no guarantee.⁸ Therefore, some Labour Law authors oppose the competition clause as such and the largest National Union FNV promotes the abolishment of the clause.

⁷ Article 19, section 3 of the Dutch constitution; Article 1 of the European Social Charter of the Council of Europe (1961); Article 6 of the International Covenant on Economic, Social and Cultural Rights of the United Nations (1966).

⁸ See Grapperhaus 1995.

In the 1990s, the Competition Clause came under discussion again. In practice, it was an impediment for employees to change jobs and therefore it was supposed to be contrary to the proper functioning of the labour market. A Committee advised the Government to restrict it much more. At this moment, a Bill is pending in Parliament to follow this advice partly. It is intended that the Competition Clause will be only valid during the first year after the employee has left. The clause will have to describe its scope specifically and will only be applicable to the job the employee conducted. Following the German example, the employer will have to pay compensation for the lack of freedom of the employee to choose his job. It is because of this last element that it is far from certain that the Bill will be accepted in the end.

Besides the competition clause, the so-called 'Relation Clause' recently became popular. According to such a clause, the employee is not allowed to continue relations with former customers of the employer. According to case-law the restrictions on the Competition Clause are likewise applicable to the Relation Clause. But this might change in the future, since Parliament has excluded the Relation Clause from the new article on the competition clause in the pending Bill.

Tort Action

In case the employer has no competition clause he can also fight the employee's working for a competitor with a general tort-procedure. However, in that case he will have the burden of proof that he is damaged by the work of the employee and he also has to prove the causal relationship between his damage and the behaviour of the employee. It is for this heavy burden of proof that many employers use a Competition Clause rather than rely on a tort action.

Duty of confidentiality

The civil legislation does not directly require the employee to protect company secrets during his employment contract. Under criminal law, the

disclosure of professional secrets can be punished with a maximum of one year imprisonment or a fine. The disclosure of specific information of the company for which secrecy was imposed on an employee is punished with a maximum imprisonment of six months or a fine (articles 272 and 273 Dutch Criminal Code). Under civil law, one of the grounds for a summary dismissal of an employee is 'the publication of specific information regarding the household or the business of the employer' (art. 7:678, 2 sub i° Dutch Civil Code).

Members of a works council have an explicit duty to respect business secrets that they get to know in their capacity as member of the council, as well as with respect to all matters which the employer has declared confidential (article 20 Dutch Works Council Act).

Besides these explicit statutory rules, the general duty exists to act as a good employee (article 7:611 Dutch Civil Code). In some cases, a duty of the employee to respect secrets was based on this article.⁹

It may also be noted that many employment contracts know a secrecy clause in which the duty to keep information secret is stipulated.¹⁰

Freedom of speech

Freedom of speech is in the Netherlands recognised as a fundamental right.¹¹ There is no specific labour legislation with regard to the subject. It is not clear whether the freedom of speech has horizontal effect in employment relationships. There are indications that the Supreme Court recognises this horizontal effect, but this is not explicitly mentioned in its decisions.¹²

An actual discussion regards the so-called whistle-blower: the employee who reports violations of the law or dangerous situations caused by the employer.¹³ The importance of this phenomenon for society is in-

⁹ See with regard to company espionage Cantonal Judge Rotterdam 27 augustus 1984, *Praktijkids* 1984, no. 2184.

¹⁰ Cantonal Judge Wageningen 10 april 2002, *Praktijkids* 2002, no. 5885.

¹¹ Articles 7 Dutch Constitution, 10 ECHR and 19 ICCPR.

¹² Verhulp (1999) 114.

¹³ Verhulp 1997; 1999.

creasingly recognised in recent years. In particular two cases have raised the Dutch people's consciousness in this respect:

- The case of Paul Van Buitenen, a civil servant of the European Union who reported fraud within the European Commission to members of the European Parliament, which scandal led to the fall of the European Commission, but also to the demotion of Van Buitenen.¹⁴
- The case of Ad Bos, a former board member of a construction company who reported massive fraud in the construction sector, which led to a Parliamentary Inquiry.¹⁵

On the other hand, some employees today claim to be a whistle-blower solely because they do not agree with the policy of their boss. In 1990, the Supreme Court seemed to be restrictive in accepting the whistle blower.

In the *Meijers/De Schelde* case, the Works Council Member Meijers claimed that his employer, shipbuilder De Schelde, did not correctly use government subsidies. He wrote this in a letter to the Government, that he also send to the press. He was dismissed at once. When the case came before the Supreme Court, Meijers claimed that he was entitled to publish the information on the basis of freedom of speech. He stipulated that this freedom was only restricted by his duty to protect company secrets. The Supreme Court followed the decision of lower courts that Meijers had breached his duty to protect company secrets, without weighing the conflicting interests of company secrecy versus freedom of speech.¹⁶

In line with the development of the discussion in society, recent lower court decisions show more respect for whistle blowing.

¹⁴ In the elections for European Parliament, Van Buitenen acquired two seats thanks to his reputation in this respect.

¹⁵ Bos was denied financial compensation by the Government and was also prosecuted for his part in the fraud, although his penalty was moderated because of his part in its discovery.

¹⁶ Dutch Supreme Court 20 April 1990, *Nederlandse Jurisprudentie* (1990) 702 (Meijers/De Schelde).

The Amsterdam District Court decided in a case where the employee was engaged in research for a new medication for heart patients. The employee reported his worries with regard to a lowering of the measurement of quantity to the medical-ethical committees that supervised the research project. Therefore, the project was suspended in two countries. The employer claimed damages because of breach of the duty of confidentiality. The court judged that the employee was in a conflict of duties, because his duty of secrecy and his obligation to act as good employee clashed with his duty as physician and as clinical expert to protect patients against unnecessary risks. Since he first had tried to get his view internally discussed and brought his objections in a confidential way to the committees, he had acted in proportionality.¹⁷

The Foundation of Labour (a national body of organisations of management and labour) has published recommendations with regard to the treatment of whistle blowers. Government has given rules for whistle blowing civil servants and installed a permanent body to deal with their actions.

4. Providing the employees with information

Since information is so essential in today's society it also is within a company. Dutch labour law knows two kinds of rules regarding the obligation of employers to provide employees with sufficient information about the company: individually and collectively by works councils or unions.

Information concerning the labour relationship

With regard to individual employees, employers have the duty to provide them with the essential information regarding their relationship. This was regulated in the Civil Code (article 7:655) as a result of a European Directive of 1991.¹⁸ The reason for this directive was the more fre-

¹⁷ District Court Amsterdam 9 July 2003, *Jurisprudentie Arbeidsrecht* 2003/191 (Stiekema/Organon).

¹⁸ Directive 91/533/EC of the Council of 14 October 1991 concerning the duty of the employer to inform the employee on the conditions that are applicable on his employment contract or relationship, *Official Journal* L 288 of 18 October 1991, p. 32.

quent use of so-called 'a-typical labour relationships'. In order to make the production process more flexible, employers made less use of the typical employment contract for an indefinite term on a full-time basis, but used other, more flexible labour relations like part-time contracts, contracts with a fixed term, temporary work and on-call contracts. For this reason, the Directive and the national law protect the worker in at least providing for sufficient information about his position.

Information and consultation

On a collective basis, the Works Council Act foresees in the providing of company information to Works Councils in companies with at least 50 employees. In companies with less employees a lighter body, called the Employees' Representation, may be installed for this purpose. If not, the employer has to inform all employees with regard to important changes in the company. The rules for providing information to Works Councils are most detailed.

The European Community has given several Directives with regard to Information and Consultation of Employees Representatives. This regards the European Company (SE), the European Works Councils in Companies on a European scale and also the information and consultation within the Member-States. Besides that, several Directives on specific subjects, like Health and Safety, Collective Redundancies and Transfer of Undertakings, also foresee in providing information to Employee Representatives. All these directives are transposed into national law.

Besides this, the Netherlands also know a Merger Code, which provides for information to unions with regard to mergers of Companies. Many collective agreements also foresee in information of unions with regard to changes in the workforce.

5. Duty of employer to respect privacy

The Data Protection Act gives several rules for the use of personal data. Personal data are any data that concern an identified or identifiable per-

son. It includes pictures, voice recordings, data on the use of telephones, the amount of sickness, the use of petrol, production numbers, registrations of the use of computers, trainings that are followed and so forth. The registration of data (either automatically or not) is governed by the following principles:

- Data may only be collected for a specified purpose.
- The purposes that are allowed are given by the law.
- The use of data may not be incompatible with the purpose for which they are collected.
- The data must be appropriate and correct.
- The data must be protected against loss or illegal use.

The employee is entitled to see the data that are registered about him and to correct them if they are incorrect. There is a Data Protection Board¹⁹ where complaints can be filed. The board is authorised to impose administrative sanctions, like fines, on the employer who violates the Act. Appeal against the decision is possible at the Administrative Sector of the District Court.

6. Monitoring of the employee by technical means

Telephone use

The recording and registration of telephone calls by employees are falling under the scope of the Data Protection Act. Modern telephone systems can give plenty of information to a company on the use of telephones by employees. The Data Protection Act is then applicable. Some employers use 'call monitoring' as means to control the employee. According to the Works Council Act, the Works Council has to give consent to such a measure (art. 27, paragraph 1 sub 1).

In one case, the employer PTT Telecom wanted to use a computer to measure the time that employees of the call centre needed for each call. This was contrary to an agreement with the company's Works Council. The court consid-

¹⁹ College Bescherming persoonsgegevens.

ered this behaviour not in accordance with good employership until a new agreement was made about the way and intensity of the measuring. The court ordered to destroy the already collected data.²⁰

The Data Registration Board has published 'thumb rules' with regard to registering, overhearing and recording telephone calls of employees. These rules are based on legislation and case-law. Although not legally binding, they can be used by companies and courts as 'good practice.' According to these rules, overhearing and recording of telephone calls should be restricted to employees for whom calling is such an important part of their task that without examination of their conversations no insight can be acquired of their functioning. The overhearing should be restricted to the professional content, the possibility should be offered to have personal conversations without overhearing, and the overhearing should be on an incidental base. Employees have to be informed in advance and at the moment of effective overhearing, the overheard conversations have to be evaluated instantly and the information may only be filed in a personnel register after the person has got the opportunity to react.

Secretly overhearing of telephone calls is only acceptable with consent of the employee or in the case of a threat with criminal behaviour, like the publication of company secrets. It must not be possible to prevent the threat with other measures. This method can be used in case the offender cannot be discovered by other means or the gravity of the threat cannot be examined. Tapes have to be carefully treated. Others may not have access to the tapes, and the data should be destroyed afterwards.

Camera watching

More and more, cameras are used to protect citizens against crime. Employers use cameras to protect employees and customers, for example, in banks and petrol stations. But they also use cameras to check employees. The use of cameras to follow the actions of employees falls under the scope of the Data Protection Act. With respect to cameras, the Works

²⁰ President District Court Amsterdam 14 November 1989, *Kort Geding* 1990, 33.

Council have to consent in advance to such a measure (art. 27, paragraph 1 sub 1 Works Council Act).

The use of cameras to watch personnel permanently was — except for cases of clear necessity — judged by a court “beyond what is acceptable from a viewpoint of normal human treatment.”²¹

Courts used to struggle with the question how to deal with cameras that are placed to betray employees who are under suspicion of committing crimes. Some lower courts argued that

- “the stockroom of a company does not belong to the private life of the employee”²² and
- “against the violation of the privacy of employees stands the weighty interest of the employer to protect his property.”²³

A principal judgment was delivered by the Dutch Supreme Court in 2001.

The employee was working as a saleswoman for Wennekes Leatherware in the Hague as from 1978. Since Wennekes held a suspicion against the manager of the employee, he installed a hidden camera. The pictures that were made on 2 October 1995, were viewed by Wennekes only on February 24 and 25, 1996. There was no reason to watch the tapes earlier, since the manager had not worked on October 2nd. The video tape showed that the employee on that day had sold a purse, that she did not register this in the cash desk and that she put the received money in her bag. On February 26, Wennekes summarily dismissed her for this reason. The employee claimed that the dismissal was null and void. With regard to the time delay, the Supreme Court considered the time when the video was recorded not decisive, but the time that it was watched and thus the employer got to know the incident.

The employee claimed that the making of videotapes during her work violated her private life, contrary to articles 17 ICCPR, 8 ECHR, 10 Dutch

²¹ Court of Appeal 's-Hertogenbosch 2 July 1986, *Nederlandse Jurisprudentie* 1987, 451 (Koma).

²² Cantonal Judge Utrecht 20 August 1997, *Jurisprudentie Arbeidsrecht* 1997/294 (Boering). This view is not necessarily in line with privacy protection law.

²³ Cantonal Judge Schiedam 8 July 1997, *Jurisprudentie Arbeidsrecht* 1997/189 (Romi).

Constitution and the obligation to act as good employer (article 7:611 Dutch Civil Code). The Supreme Court based its decision on — ‘among others’ — article 8 ECHR, with which sentence the court implicitly recognises the direct effect of this article. The Supreme Court considers that it is important whether there was a concrete suspicion of penal offences. It is not of interest that this suspicion was not directed to the employee but to her manager. It is also of importance that this suspicion could only be affirmed by camera monitoring. Under these circumstances, the employer had a justified interest to take pictures without warning in advance. Although the monitoring only concerned the behaviour of the employees at the cash desk, this does not mean that the tapes could not be used in a procedure like this.²⁴

The Supreme Court-rule is basically in line with the state of the art of the Dutch privacy legislation. It also is in conformity with the guidelines of the Data Protection Board. However, these guidelines are stricter with regard to the keeping of videotapes. They say that videotapes may only be kept for one day, or two weeks at most, when nobody is available to watch the tapes. Although this period seems too restrictive in practice, one can ask the question whether there should not be a time limit in the use of tapes as evidence.

Recently, the government introduced a new criminal sanction on the use of cameras in places that are open for the public (Article 441b Criminal Code) as well as in houses and places that are not open for the public without notification in advance (Article 139f, sub 1° Dutch Criminal Code).²⁵ These provisions underline that employers are not allowed to use cameras to control their employees secretly. However, in some cases it is clear that the secret use of cameras is the only way for the employer to detect criminal behaviour. Although in civil law this principle is accepted, it seems that this would be a violation of the Criminal Code. According to the Explanatory Memorandum of the Act, the secret use of

²⁴ Dutch Supreme Court 27 April 2001, *Jurisprudentie Arbeidsrecht* 2001/95 (Wennekes).

²⁵ Act of 8 May 2003, *Staatsblad* 2003, 198 (Uitbreiding strafbaarstelling heimelijk cameratoezicht).

cameras for the prosecution of criminal facts (like theft or fraud) is basically restricted to the police.²⁶

Use of e-mail and Internet

The use of e-mail and internet by employees is protected by the Data Protection Act. When an employer controls the employees' use of e-mail and internet by technical means, this measure needs the consent of the Works Council (article 27 Works Council Act).

Another reasonable ground can be the verification of the compliance of employees with guidelines for the use of e-mail. More incidental grounds can be the check of incoming e-mail during sickness or the check in case of a justified suspicion of violation of the guidelines (like sending company secrets, pornographic, racist or other untasteful e-mails, or just too many private e-mails).

It is important that within the company it is known if and if so, on which scale and with which intensity, e-mail and internet use is being checked.

In 2001, the Data Protection Board published a report on the checking of e-mail and the use of internet in the workplace.²⁷ This report consists of a series of rules of thumb, based on the legislation. The most important general rules of thumb are:

- To treat matters 'on line' as much as possible the same way as 'off line'.
- To draw up clear rules, with the consent of the Works Council.
- To publish the rules in an accessible way for employees.
- The employer should indicate to which extent private use of facilities is allowed and which software may be used for that purpose. Usually a limited use for private purposes shall be allowed. A total prohibition of private use is principally allowed, but does not justify a continuous control of the use of e-mail and internet by the employees.

²⁶ *Kamerstukken II* 2000/01, 27 732, no. 3, p. 14. Ostendorf 2003 and Roelofs 2003.

²⁷ Registratiekamer 2001.

Specific rules of thumb for the use of e-mail and internet are such as the following:

- Make a division between professional and private use.
- Restrict control measures to purposes formulated in advance.
- Restrict the control on compliance as much as possible.
- Respect privileged information of works council members and company doctors in e-mails.

The Supreme Court did not yet decide in cases about these matters. However, there is a substantial number of lower court decisions in this respect:

- Sending e-mails of erotic nature can lead to dissolution of the employment contract, but whether a summary dismissal is justified depends on the record of the employee. Relevant factors are also
 - While the employee was not warned in advance, he should have known that this was not allowed.²⁸
 - There had been general²⁹ or specific³⁰ warnings in advance.
- Visiting pornographic websites may lead to dissolution of the contract, depending on the length of service, the record and the age of the employee.³¹ It may be relevant if it happens during working hours, with the computer of the company, if the company has a concrete policy regarding this matter³² and whether a warning has been given in

²⁸ Cantonal Judge Haarlem 16 June 2000, *Jurisprudentie Arbeidsrecht* 2000/170 (Royal Dutch Airlines KLM).

²⁹ Cantonal Judge Apeldoorn 6 September 2000, *Jurisprudentie Arbeidsrecht* 2000/212 (Achmea Insurance Company); Cantonal Judge Delft 4 September 2003, *Jurisprudentie Arbeidsrecht* 2003/231 (Sportfondsen Naaldwijk).

³⁰ Cantonal Judge Utrecht 31 oktober 2002, *Jurisprudentie Arbeidsrecht* 2002/289 (Fortis Bank).

³¹ Cantonal Judge Utrecht 13 July 2000, *Jurisprudentie Arbeidsrecht* 2000/199 (Campina Dairy Company): no dissolution because of record of 25 year and age of 55.

³² Cantonal Judge The Hague 3 October 2002, *Jurisprudentie Arbeidsrecht* 2002/269 (De Swart); Cantonal Judge Tilburg 12 June 2003, *Jurisprudentie Arbeidsrecht* 2003/176 (De Runne); Cantonal Judge Haarlem 15 April 2004, *Jurisprudentie Arbeidsrecht* 2004/125.

advance.³³ The justification of a summary dismissal may depend on whether the sites were disseminated and other employees were confronted with them.³⁴ A human resources manager who was also a consultant for sexual harassment affairs was summarily dismissed after he had visited pornographic websites and had copied these on computers of colleagues.³⁵ Three employees who were surfing to (child) pornographic websites were not summarily dismissed, but their contract was dissolved without compensation.³⁶ In the case of an employee who had surfed to pornographic websites and forwarded pornographic e-mails to a selected group of others, the contract was dissolved and a small compensation was granted, because the employer could have used a less severe sanction.³⁷ However, the judge in Amsterdam seems to be more tolerant: neither summary dismissal, nor dissolution of the employment contract was accepted after the em-

³³ Cantonal Judge Amsterdam 19 April 2002, *Jurisprudentie Arbeidsrecht* 2002/107 (Zwaan/Nortel Networks): employee had sent e-mail with pornographic attachment by mistake to the Chief Executive Officer of the holding Company in Canada instead of to a colleague; Cantonal Judge Venlo June 27 2003, *Jurisprudentie Arbeidsrecht* 2003/217 (Flextronics International Europe): after 25 years of service summary dismissal not acceptable since this sanction was not explicitly communicated to employee; Cantonal Judge Haarlem 3 April 2003, *Jurisprudentie Arbeidsrecht* 2003/117: after 33 years of service no dissolution employment contract, no explicit rules on sanctions on unlawful internet use; Cantonal Judge 's-Hertogenbosch 16 December 2002, *Jurisprudentie Arbeidsrecht* 2003/28 (GGZ Oost-Brabant): Directives and protocol leave responsibility to individual employee, no previous action against such use of e-mail and internet and no addressee has been offended; Cantonal judge Eindhoven 17 September 2002, *Jurisprudentie Arbeidsrecht* 2003/77 (Daf Trucks): no clarity on the sanctions and restricted saving of pornographic files on computer.

³⁴ Cantonal Judge Rotterdam 10 April 2000, *Jurisprudentie Arbeidsrecht* 2000/109 (HMA Power Services).

³⁵ Cantonal Judge Emmen 23 January 2002, *Jurisprudentie Arbeidsrecht* 2002/73 (Penske Logistics).

³⁶ Cantonal Judge Sittard 21 December 2001, *Jurisprudentie Arbeidsrecht* 2001/28 (DSM); Cantonal Judge Haarlem, 15 February 2002, *Jurisprudentie Arbeidsrecht* 2002/55; Cantonal Judge Sittard 3 December 2001, *Jurisprudentie Arbeidsrecht* 2002/105.

³⁷ Cantonal Judge Alkmaar 27 June 2002, *Jurisprudentie Arbeidsrecht* 2002/171 (Broekkamp).

ployer discovered pornographic files on the computer of an employee after his computer had crashed.³⁸

- Dissolution of the employment contract without compensation also was applied in the case of an employee who caused very high costs of internet use. His claim that a hacker was responsible for the internet use was rejected because the use was only during working hours and it was not likely that burglars would stick so diligently to the working hours.³⁹ The same conclusion was reached in a case of a teaching assistant who used the telephone line and e-mail of the school intensively for the sex-shop he was running as a separate business.⁴⁰ In another case excessive internet use and private e-mails were not evident.⁴¹
- A ground for summary dismissal was accepted in the case of an employee who had sent an e-mail with 'tasteless pictures' also to persons within the company who did not like to receive this. A perfect track record of 14 years was not enough to compensate this.⁴² Dissolution without compensation was also given in the case of the employee who after the break-up of the relationship with her department head harassed him with dozens of e-mails.⁴³
- No dissolution was granted in the case of an employee who had sent sexually oriented e-mails to a colleague with whom he had a sexual

³⁸ Cantonal Judge Amsterdam 26 May 2003 & 26 June 2003, *Jurisprudentie Arbeidsrecht* 2003/201 (Dell Computer): "Pornography saved on the hard disk of one's own computer does not differ from pornography in the drawer of one's desk. In both cases have those who get to know this, violated the privacy of the employee concerned, which to a certain extent also exists at work."

³⁹ Cantonal Judge Hilversum 6 September 2000, *Jurisprudentie Arbeidsrecht* 2000/216 (Foundation Care Centres BEL).

⁴⁰ Cantonal Judge Emmen 29 November 2000, *Jurisprudentie Arbeidsrecht* 2000/41 (Foundation AOC Terra).

⁴¹ Cantonal Judge Rotterdam 7 June 2004, *Jurisprudentie Arbeidsrecht* 2004/156 (Huisman Beheer Twee/Smit).

⁴² Cantonal Judge Utrecht 20 November 2000, *Jurisprudentie Arbeidsrecht* 2001/7 (Detron Business Networks)

⁴³ Cantonal Judge Nijmegen 3 March 2005, *Jurisprudentie Arbeidsrecht* 2005/72 (University Nijmegen).

relationship, which e-mails he had shown to colleagues/group leaders. Had he showed them to personnel that he supervised, the judgment would have been different.⁴⁴

- An employee who had sent e-mails to competitors with secret company information was obliged to pay a contractual fine on the ground of violation of his duty to secrecy.⁴⁵

7. Checking of the employee in case of sickness

According to the Data Protection Act, health data may only be used by the employer in case this is necessary for

- a proper application of legislation and collective agreements, which foresee in rights that are dependent on the physical condition of the person and
- the re-integration and guidance of employees regarding sickness and disability.

Dutch employers are obliged to have a contract with a so-called Arbodienst (Health and Safety Service).⁴⁶ The Arbodienst usually employs physicians (company doctor) as well as other experts. The company doctor is according to this legislation as well as his own professional standards obliged to respect the private life of the employee, being his patient. This implies that the company doctor is not supposed to give substantial medical information about the employee to the employer. An employer may also not give medical information to an insurance company. For instance he

⁴⁴ Cantonal Judge Amsterdam 26 April 2001, *Jurisprudentie Arbeidsrecht* 2001/101 (United Flower Auctions Aalsmeer).

⁴⁵ Cantonal Judge Amsterdam 24 April 2002, *Jurisprudentie Arbeidsrecht* 2002/174 (CTI Trading).

⁴⁶ However, the Dutch Health and Safety Act will be changed in this respect. The Court of Justice of the European Communities has ruled that the Dutch system is contrary to a European Directive, because it should give preference to own employees to foresee in these services. It is expected that many employers will terminate the contract with the Arbodienst and organise this themselves.

may not give individual data on sickness leave when negotiating a collective sickness insurance.

During the first two years of sickness of the employee, the employer has to pay 70 per cent of his wages.⁴⁷

Medical tests during the job application process

Since the employer has to pay wages during sickness, the impression was that employers were trying to get too much medical information during the job application process and were afraid to hire employees with a medical record. Therefore the Act on Medical Examinations was enacted.⁴⁸ This Act restricts the use of medical examinations to those jobs where extraordinary requirements with regard to medical ability have to be met. No medical examination may be required for the entrance to a pension scheme. In case a test is allowed, it must be restricted in nature, content and scope to the purpose for which it is being held. The results of a test may only be used for the purpose for which they are collected. No questions may be asked or medical search being undertaken that form an inappropriate breach in the private life of the person being tested. No tests may be done on diseases that cannot be treated (read: HIV-tests) or that otherwise are causing an inappropriate heavy pressure. The person who is tested may claim a re-examination by an independent examiner in case of a negative result or conditional positive result.

Medical tests on alcohol and drugs

Tests on the use of alcohol and drugs became more popular in the Netherlands during the 1990s, especially in American companies as a result of the disaster with an Exxon-ship near Alaska. However, in the Nether-

⁴⁷ During the first year also at least the statutory minimum wage. Many individual and collective agreements foresee in the payment of full wages for a certain period of sickness (most often at least a year).

⁴⁸ Act on Medical Tests of 5 July 1997, *Staatsblad* 1997, 365 (Wet Medische Keuringen).

lands such tests are basically contrary to the Constitutional inviolability of the human body. An exception can be made with the consent of the employee, but the employee cannot sign a contract in which he gives consent to set aside his constitutional rights for any tests in the future. If the employee signs such a clause, he is nevertheless entitled to refuse a test in a concrete case. Since these tests are most effective when they are conducted on unexpected moments, it makes it very difficult to introduce these tests in Dutch companies. Besides, the consent of the Works Council with such a policy is necessary. And company doctors would violate their professional ethics if they would conduct an involuntarily medical examination. Therefore, this type of tests is not very common in the Netherlands.⁴⁹ In case an employee is suspected of alcohol or drugs abuse, it is up to the employer to suspend him or start a dismissal procedure and to prove the suspicion. The Supreme Court judged that even if an employee is suffering from an addiction, a summary dismissal on the ground of unlawful absence is allowed.⁵⁰ An employee was unlawfully dismissed after working on a ship under influence of alcohol. The employee claimed that he had only drunk two alcoholic drinks, which was within the limits set by the employer. The employer did not succeed in proving that the employee was not capable to exercise his function.⁵¹ In a specific case of an employer who was cooperating in programmes where participants were supposed to abstain from the use of drugs, checks were considered admissible.⁵² In one case an employment contracts was dissolved, because the employee had withheld information on an alcohol problem during his job application, though he should have understood that this would make him unfit for the job for which he applied.⁵³ In another case dissolu-

⁴⁹ However, the employers' side of the Foundation of Labour (Stichting van de Arbeid), a national society of central organisations of labour and industry), considered in 1993 alcohol tests in specific cases acceptable, Stichting van de Arbeid 1993, p. 33-34.

⁵⁰ Dutch Supreme Court 29 September 2000, *Nederlandse Jurisprudentie* 2001, 560; *Jurisprudentie Arbeidsrecht* 2000/223.

⁵¹ Cantonal Judge Breda 24 March 1995, *Jurisprudentie Arbeidsrecht* 1995/144.

⁵² Cantonal Judge Rotterdam 22 January 1993, *Jurisprudentie Arbeidsrecht* 1993/103.

⁵³ Cantonal Judge Zutphen 24 July 2001, *Jurisprudentie Arbeidsrecht* 2001/228.

tion was approved where the employee suffered from a continuous alcohol problem, while he had contacts with customers and was obliged to drive in his car afterwards.⁵⁴

8. The use of illegally acquired evidence

It is discussed among lawyers to what extent illegally acquired evidence may be used when taking disciplinary measures against an employee and in a civil court procedure.

During a period of three weeks telephone calls from a member of the executive board of a company were recorded by an industrial private detective company. The tapes showed that the board member was busy to establish his own consultancy firm and was in close contact with a competitor. The company confronted the board member with the tapes, but he refuses to listen to them. In the dismissal case, he claimed that the tapes should not be taken into consideration because they were illegally recorded. The court considered that secret taping of telephone conversations of employees is a very drastic measure, which can only be justified by very heavy suspicions. Now the company could not make plausible that such suspicions were existing before the recording started, the recording of the calls was unlawful. The court thought that it would have been more logical if the company had discussed its suspicions first with the board member, which could have been followed by a warning. The period of taping was disproportional, since after one week the most charging conversations were already taped. However, the court did not conclude that the tapes were not acceptable in the procedure. On the contrary, the transcripts of the tapes gave reason for the court to blame the board member severely. In the decision on the severance payment the disproportional use of call monitoring was taken into account.⁵⁵

In criminal law, a basic principle is that unlawfully gathered evidence is not admissible in the criminal procedure (although in practice the application of the rule is avoided by not using the unlawful acquired evidence in the court). However, in civil law, such a principle is not accepted. This leads to the construction that the evidence may be unlawfully collected,

⁵⁴ Cantonal Judge Gouda 2 October 1997, *Praktijkgids* 1997, no. 4856.

⁵⁵ District Court Utrecht 25 September 1996, *Jurisprudentie Arbeidsrecht* 1997/6.

but still may be used against the employee. This is not an incentive for employers to behave properly. On the other hand, in some cases the evidence is so clear and convincing, that it would make a strange impression if it could not lead to consequences. In my view, one has to choose. Either the way the evidence is collected is acceptable and then it may be used, or the evidence is unlawfully gathered and then it is not acceptable. This implies that if one is of the opinion that in certain cases the rules for acquiring evidence are too restricted, one should lift the restrictions rather than make a distinction between substantive and procedural law. In practice, most of the problems are playing in the context of suspicions against employees of criminal offences. In that respect, the Dutch Supreme Court has set a proper guideline: making secret video tapes is allowed, providing that this is the only way to discover the truth.

9. Conclusion

During the last decade, the Dutch labour law has undergone an enormous progression with respect to the protection of employees regarding the violation of their privacy. The reason for this development is mainly, that employers nowadays have many more possibilities that are seen as touching the private life of employees: they can watch them with cameras, overhear their telephones and follow their actions on the computer without them being aware of this. This technologic development asked for a new approach by the law. To a large extent answers to the new questions were found. The use of new technologies in the workplace to control employees is subjected to strict rules and criteria. However, it is not certain that employers are aware of the new rules and obey them. This should be subject to research and monitoring. The Data Protection Board as well as Works Councils can play an important role in this respect.

The protection of company secrets has already a long tradition. With regard to the balance between company secrets and freedom of speech, Dutch Labour Law did not reach a clear solution. Although lower courts

now recognise the whistle blower, there is neither a Supreme Court decision that recognises this modern phenomenon, nor legislation to protect whistle-blowing employees in private companies.

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