



Gaabriel Tavits

*Docent of Labour and Social Welfare Law,
University of Tartu*

Development of Contemporary Means of Communication and Their Efficiency of Use in Labour Relations

The development of means of communications, in general, has created a situation where interpersonal communication has become easier and faster. E-mails, different messengers, mobile phones and other such means are used more and more often in everyday communication.

With such a development there is no call to send different bureaucratic documents by regular mail any more. It is now sufficient if the necessary documents are only sent electronically or with a digital signature.

The development of means of communication and the consequent changes in interpersonal relations also effect changes in labour relations. Labour relations have become more flexible. Employees can decide on their actual working time; working at home is also made possible through the use of contemporary means of communication.

Modern society is significantly influenced by the development of different means of communication and their new areas of use. Therefore, developments over the last decade have significantly changed people's needs for, and the possibilities of, communication. Interpersonal relations have become faster and more versatile. There are more and more colleagues who are known only by a messenger emotion sign or a nickname, or as a small green icon in the lower right hand corner of the computer screen.

Sending necessary documents by different electronic means of communication has taken international and intercontinental communication to such a level that making decisions is now only a question of a matter of minutes or seconds.

All such developments in interpersonal communication are a challenge to the legal regulation of interpersonal relations, especially because the communication environment itself has changed significantly. This development also concerns labour relations and the legal regulation thereof. Although the legal regulation of labour relations is essentially a product of the 19th century industrial revolution, real life has now forced some corrections to be made. For example, people's understanding of what an employment contract relationship is, needs to be significantly corrected — is it still a master and a subordinate relationship or can parties agree on flexible work conditions?

The development of communication also significantly influences understanding of employees' representation in companies and the rights of the employees' representatives to use the employer's electronic means of communication for their representative duties.

Although this topic has enjoyed much attention in literature^{*1}, in the Estonian legal order, the influence of modern means of communication on labour relations has not been paid sufficient attention. This article studies general changes in labour relations with regard to the development of means of communication, and analyses the possibilities in that development and influence on collective employment relationships in the Estonian legal context.

1. Typical and atypical labour relations

1.1. Individual employment relationships

Modern means of communication influence the development of labour relations. Labour relations in general become more flexible. This means that an employee no longer needs to perform work on company premises, there are also possibilities outside.^{*2} This in turn makes the so-called traditional "Ford production process type employment relationship" history. If today we still have people who are used to personal communication or land line phones, then the younger generation prefers to use mobile phones and Internet communication sites.^{*3} Since the exchange of communication has become faster, then the employee, as well as the employer, must be able to work through an increased amount of information. It is thus possible to argue that economic development in general, as well as the development of means of communication, has created something we can call atypical labour relations.

What is a typical labour relation? Typical labour relations are mostly considered to be labour relations with the following attributes: (a) an employee is employed full-time (b) on the basis of an employment contract concluded for an unspecified amount of time; (c) the employee's position is stable; (d) he or she need not worry about his or her social protection after the end of the labour relation; and (e) there is a clear subordination relationship with regard to orders given by the employer about the content, the location as well as the manner of the work performed.^{*4}

Such traditional labour relations are starting to retreat and the so-called project-based jobs are becoming more frequent; instead of stable labour relations we find more temporary jobs. Neither is an employee subordinated to the employer's will any longer, with some forms of work such control is no longer even possible (e.g., employees who are teleworking and working mostly from home). Similarly, in the case of part-time jobs, such organisation of work time gives employees a chance to better combine their work and family life and thus flexibly decide on how they do their job.

Atypical labour relations are usually such labour relations where an employee needs not work at the location and in the manner designated by the employer. This in turn means that the traditional dependency relations, as we know them from the 19th century, no longer work, and new labour protection regulations are needed. Such atypical labour relations are emerging mostly because the available means of communication facilitate interpersonal relations and also job-related communications. Employees can thus perform their jobs by using different forms of teleworking. Different mobile options and electronic communication channels enable an employee to work from another country or continent and still be available to colleagues and the employer.

Thus, new types of subordination relations appear as well as a new understanding of job organisation options. One such flexible job possibility is set forth in the Estonian Working and Rest Time Act, which attempts to define a person with independent decision-making powers, who is not subordinated to employer's orders and has the right to decide when to perform his or her duties.^{*5} The definition in § 1 (3) 1) of the Working and Rest Time Act is not the best possible, as it does not provide clearly to what extent and under which conditions employees can determine their working time.

¹ See, e.g., W. Däubler. *Internet und Arbeitsrecht*. 2. Aufl. 2002; M. Colucci, R. Blanpain. *The Impact of the Internet and New Technologies on the Workplace: A Legal Analysis from a Comparative Point of View*. Kluwer 2002.

² Especially, e.g., working from home or teleworking see, e.g., G. Schaub. *Arbeitsrechts-Handbuch*. 9. Aufl., pp. 1612–1629.

³ In Estonia such a communication portal is, e.g., www.rate.ee.

⁴ See A. Junker. *Grundkurs Arbeitsrecht*. 3. Aufl. Beck 2004, p. 71 et seq.

⁵ Töö- ja puhkeaja seadus (The Working and Rest Time Act) § 1 (3) 1). – Riigi Teataja (State Gazette) I 2001, 17, 78; 2006, 14, 112 (in Estonian). Pursuant to the named definition implementation of work-time related limitations (e.g., overtime) are not mandatory with regard to employees who have independent decision-making powers and determine their working time themselves pursuant to their employment contracts or the statutes of the administrative agency, and their working time is not directly or indirectly determined by a unilateral decision of the employers or agreement between the parties.

Flexible jobs are most used in the tertiary sector where development of such labour relations is inevitable. It is nevertheless understandable that flexible jobs do not have a place in the processing industry, since line workers cannot realistically demand flexible organisation of work, it is simply not plausible and cannot be accomplished.

Such flexible jobs or atypical labour relations also bring new aspects to collective employment relationships, which have thus far not been known or demanded.

1.2. Collective employment relationships

All of the above-described also concerns collective employment relationships. One of the main aims of collective employment relationships is to develop social dialogue between the employees and the employer on the company level. Social dialogue has only one aim — to achieve as flexible as possible work conditions, which on the one hand considers the employer's as well as the contractor's interests and on the other hand offers sufficient protection to employees. The development of modern means of communication poses several new questions to the parties of collective employment relationships, which thus far have been irrelevant. Suddenly the problem of how to organise collective negotiations in a company where 70% of employees are teleworkers or how to solve collective labour disputes in a so-called virtual company have become important. Problems of how to inform and consult employees arise also in traditional (non-virtual) companies, since the current regulation does not, as a rule, provide how the informing and consulting be carried out — should it be done orally or in writing, if it is done in writing, then do the internal e-mails and the Intranet count?

The development of modern means of communication significantly influences the balance of rights and responsibilities between employers and employees. A question that needs to be answered is whether and to what extent can a trade union use the employer's server for posting its website and whether the employer can check the trade unions' correspondence to make sure that mails are clean of viruses. All such problems are still without a clear legal solution in Estonia, since the development of relations in society has been faster than the development of legislation.

2. Employees' representatives and their competency in Estonian companies

2.1. Employees' representatives

A dual system on employee representation is used in Estonian collective employment relationships (the so-called dual channel system).⁶ On the one hand, the employees can elect an employees' representative, on the other hand the employees are also represented by a trade union. The Employees' Representatives Act⁷ (ERA) in force in Estonia provides for two types of representatives. The first type of employee representative is elected by the general meeting. The opportunity to elect is given to employees who have not joined a trade union. Whereas the procedure for their authorization, as well as the conditions for their recalling, remain unspecified. This should be decided by the general meeting of employees, who has elected the employee representative.

The second type of a representative is elected by employees who are trade union members. The procedure of their election is prescribed in the union's articles of association.

The powers of the employees' representative in the representation of employees are quite modest. Pursuant to § 6 of the ERA, a representative can mainly be the mediator in disputes arising between the parties and he or she has the right to make proposals to the employer to end the violations of requirements provided by law, should such a need arise. Yet, representatives have no real power to force employers to comply with their requests/demands. Proposals made by the representative to disputing parties are not binding, and the parties may use their legal right to turn to either a court or a labour dispute committee. Although the ERA might leave an impression that employees' representatives do not have much real power, they do have additional powers arising from other labour laws. Employees' representatives negotiate collective agreements⁸ and

⁶ Although from the legal perspective Estonia uses the dual system of representation of employees, in fact the representation of employees has concentrated to trade unions.

⁷ Section 3 of the Employees' Representatives Act (Töötajate usaldusisiku seadus). – Riigi Teataja (State Gazette) I 1993, 40, 595; 2002, 111, 663 (in Estonian).

⁸ Section 3 of the Collective Agreements Act (Kollektiivlepingu seadus). – Riigi Teataja (State Gazette) I 1993, 20, 353; 2002, 61, 375 (in Estonian).

they have a right to organise strikes.⁹ Since the organisation of strikes and the conclusion of collective agreements is not an exclusive right of trade unions, then employees' representatives can also assume the functions of employee representation. In addition to the above, the representative also has additional representation functions pursuant to the Republic of Estonia Employment Contracts Act (ECA). An employees' representative must be notified in case of a transfer of the company^{*10}, as well as of part-time and full-time vacancies and vacancies for contracts with an indefinite term.^{*11} Hence, although the Employees' Representatives Act does not give many powers to represent employees, then other laws do provide for the obligation of informing and consulting the representative. Yet, such an obligation of informing and consulting is not universal, it only guarantees the rights of representatives in specific employment contract related issues.

2.2. Trade unions

Employees are also represented by trade unions, in addition to employees' representatives. Activities of trade unions are based on § 29 (5) of the Constitution. Pursuant to § 29 (5) of the Constitution, employees may unite in unions and federations to uphold their interests. Pursuant to § 29 (5) of the Constitution, the conditions and procedure for the exercise of the right to strike are provided by law. That right, stipulated by the Constitution, is expressed in the Trade Unions Act^{*12} (TUA), which establishes specific guarantees for activities of trade unions in companies and for representation of employees in labour relations.

Pursuant to § 2 of the Trade Unions Act, a trade union is an independent and voluntary association of persons, which is founded on the initiative of the persons and the objective of which is to represent and protect the employment, service-related, professional, economic and social rights and interests of employees. In the Estonian system of labour relations, trade unions may operate at the company, industry or state level. Formation of trade unions at the company level has been made as easy as possible for employees. In order to form a trade union, a company must have at least five employees. If employees decide to form a trade union then the union must be registered in the register of trade unions. Trade unions are by nature non-profit organisations. If a company has a trade union, then, pursuant to the TUA, it gives the trade union a universal competence to represent all employees of that company in collective employment relationships. Trade unions do not have such powers in individual employment relationships. Here, a separate authorisation is needed for a trade union to represent an employee. An important right given to trade unions in current Estonian law is the universal right of being informed and consulted.^{*13} That right belongs without exception to trade unions, and any non-compliance or partial compliance with the obligation to inform and consult results in the violation of trade unions' rights, and the payment of the fine prescribed by public law. Compliance with the obligation to inform and consult requires a clear and unambiguously understandable agreement on which channels should be used for informing and which channels are at all possible for forwarding the necessary information to employees. If there is no such agreement, then misunderstandings between parties are bound to occur and disputes arising from non-performance of the obligation to inform and consult are quick to take place.^{*14}

An important aspect in the obligation to inform and consult, placed on trade unions, is the fact that, above all else, the consulting obligation covers all major changes in the company, which may affect all employees' labour relations. The difference between informing and consulting lies in the fact that upon informing, a trade union merely acknowledges certain information presented to it by the employer. Consulting, on the other hand, means a situation where the employer, before making any decisions, is obliged to hear the trade union's position and only then can implement its decision. Therefore, the employer is not obliged to take the opinion of the trade union representatives into account. An object of consulting may also be an employer's decision to use, for example, the Intranet to better inform employees, change the current electronic mail rules, impose rules on Internet use for private purposes, etc. Although the TUA does not specifically prescribe that trade unions should be consulted in such matters, such a conclusion may be drawn from § 22 of the TUA, since such rules or changes may affect a large number of employees working in that company.

⁹ Section 3 of the Collective Labour Dispute Resolution Act (Kollektiivse töötüli lahendamise seadus). – Riigi Teataja (State Gazette) I 1993, 26, 442; 2002, 63, 387 (in Estonian).

¹⁰ Section 6 of the Republic of Estonia Employment Contracts Act (Eesti Vabariigi töölepingu seadus). – Riigi Teataja (State Gazette) 1992, 15/16, 241; 2006, 10, 64 (in Estonian).

¹¹ Sections 13¹ and 13² of the ECA.

¹² Ametiühingute seadus. – Riigi Teataja (State Gazette) I 2000, 57, 372; 2002, 63, 387 (in Estonian).

¹³ Section 22 of the TUA.

¹⁴ It has to be noted here that there have been no significant disputes with regard to non-compliance of that obligation.

3. Problems in the use of modern means of communication

3.1. How to choose the employees' representative?

Participation of employees in decision-making in the company has been and will continue to be a very difficult and somewhat political issue. Employees always retain the right to choose their representatives. Although Estonian law prescribes that employees' representatives are elected by employees who are trade union members as well as those who are not, the question remains how can, for example, those employees who have decided to work part time or full time from home participate in the election of the representative. And there is still the question of whether an employees' representative can be elected electronically.

It is possible to organise on-line voting and elect an employees' representative that way, but the formalisation of the results of that on-line voting, and the legality thereof, would be an issue. Elections can be electronic, since the ERA does not prescribe the type of election procedure. The ERA makes no restrictions in that regard. Such elections are more an issue of technical means or lack thereof.

Pursuant to the Employees' Representatives Act, the employer has the right to know who the elected representative with the company is, and the employer also has the right to control whether voting (or the election of an employees' representative) was carried out pursuant to the agreed upon procedure. Control of the named procedure is necessary for the employer, in order to make sure that the position of an employees' representative is created. If minutes are usually taken at an employees meeting then, in the case of on-line voting, taking minutes is more complicated and additional legal regulation is needed regarding how to prepare on-line minutes, which rules must be complied with and how should such on-line minutes be signed. It can be complicated to determine the procedure of elections and powers of the representative, even based on the ERA, and organising on-line voting is as complicated, and from the legal point of view, yet unregulated.*¹⁵ The need for an electronic voting system is emerging also in labour relations.

3.2. Trade union's right to use employer's electronic channels

Regardless of who the elected employees' representatives are and whether they belong to a trade union or not, the employer is obligated to allow the trade union or the employees' representative to use its means of communication and premises for the performance of their duties. Pursuant to § 6 (1) 5) and 6) of the ERA, the employees' representative has the right to disseminate information to employees and use the employer's telecommunications systems for the performance of the representative's duties. Since the ERA was adopted in 1993, changes in the means of communication have created new problems: (1) can the employees' representative use the employer's websites, network and servers for dissemination of its corresponding information? (2) If so, can it be done without limits or only to a certain extent?

To answer the first question, it must be ascertained whether it is an employer's obligation to make contemporary means of communication available or not, and whether such right to use the employer's e-mails, servers, and the Intranet is covered by the constitutional right to unite in unions and federations to uphold one's interests, as well as the function of employee representation in general. The opinion has been published in professional literature that the right to unite is connected with the right to disseminate trade-union related information among union members and thus the employer must allow, for that purpose, the use of all necessary communication channels which it allows other employees to use.*¹⁶

It cannot be univocally concluded from the Estonian ERA or the TUA, though, that a trade union or a representative has the right to demand that the employer allow the use of its e-mails, servers etc. for the promotion of trade union work. The listed possibilities are primarily possible through a mutual agreement between the trade union and the employer. Today, the labour law in force does not guarantee the actual right to use the employer's electronic means of communication, which could be enforced in court.

The answer to the second question above assumes that the parties have concluded an agreement on the trade union's guaranteed right to use the employer's electronic means of communication for the promotion of union work and the informing of employees. That agreement must determine not only the right to use the employer's electronic means of communication, but also the procedure of control of server work and to what extent can the employer control the correspondence between trade unions, as well as between the board of a trade union and its members. These issues require a detailed agreement, because two principles collide here:

¹⁵ It has to be admitted, though, that e-voting has already been tried in political elections, but not in labour relations yet.

¹⁶ W. Däubler. *Internet und Arbeitsrecht*. 2. Auf. 2002, p. 212 et seq.

the employer's right to inviolable property, guaranteed by the Constitution^{*17}, and the opportunity guaranteed to trade unions to unite and uphold the interests of their members with means that are not against the law.^{*18}

This also raises issues related to data protection. The question to what extent an employer may control the movement of an employee's e-mails is not clearly resolved in Estonian legislation today. Thus far, the theoretical approach in Estonia has reached the conclusion that an employer cannot control those electronic letters which concern the employee's private life, but the employer has the right to control work-related letters.^{*19} Yet, the question of how to determine whether an electronic letter is work-related remains. In order for an employer to determine that a letter is not personal, the letter has to be opened and the confidentiality of messages, established in the Constitution, thus remains unguaranteed.

Since the employees' representative has been given the authority to transfer information in connection with the representation of the employees to the employees who have elected him or her, then this raises an issue of whether such information can be transferred over the employer's Intranet, or is it possible that an employees' representative or even a trade union posts a web site on the employer's server. Since relevant Estonian legislation dates back to a period when such questions were not as important, they need to be resolved today. The easiest way to solve that issue is by an agreement or by the employer's internal rules.^{*20} The problem that will thus arise concerns the limitation of the trade union's or the employees' representative's rights. If the ERA provides for the possibility to transfer information over the employer's communication channels, then this also gives the right to use all of the employer's electronic channels, which are necessary for the performance of the representation job. If the employees' correspondence, and the information sent by employees, can in certain instances be controlled, then messages sent by trade unions are covered by double protection — on the one hand, the confidentiality of messages provided for in the Constitution, and on the other hand the right which forbids the employer to interfere with trade unions' freedom of activity. Current legislation in Estonia does not clearly regulate how and to what extent trade unions can the employer's electronic means for better organisation of their work. A basis for disagreements thus exists.

An important issue to be discussed here concerns the employer's right to control the correctness and regularity of the use of different communication channels. There is a quite serious collision of two sets of interests here: on one hand the employer's, as the owner of the work equipment, and on the other hand the interests of the trade unions, as the representative of employees.

With regard to regular mail sent to the company, the confidentiality of a personal message is guaranteed when the letter is addressed to the employee personally. If the letter is addressed impersonally, for example to a head of a department or a director, then opening the letter by third persons cannot be considered invasion of confidentiality of a personal message, as it was not clearly stated to be a personal message and employees who are responsible for checking mail must have the right to check mail.^{*21}

With regard to letters sent to a representative — an employees' representative or a trade union — the opening issue of those letters has not been legally solved. The position should nevertheless be taken here that those letters may only be opened by an employees' representative or a representative of a trade union, since an employer might otherwise be accused of excessive invasion with the employees' representative's work. The situation is different when the employer and the employees' representatives have agreed that those letters may be opened.

The same principle must be applied to facsimile messages. If the personal nature of the fax is evident, then that fax is subordinate to the protection of transfer of personal messages and any control activities by the employer may lead to the violation of the confidentiality of messages.

The situation with regard to the use of electronic means of communication is somewhat more complicated, since the employer's possibility and need to control is much more intensive, and thus the employee's and employers' rights to control electronic correspondence must be regulated more precisely and correctly. With regard to electronic letters, three different types of situations exist: 1) the company uses one address, e.g., `university@ab.ee`, and it has not been determined who reads and forwards those letters. In such a case, a quite view has been expressed in professional literature that these letters can be viewed as the company's letters and the employer has the right to check them even if they are private in nature.^{*22} The second option

¹⁷ Section 32 of the Constitution of the Republic of Estonia.

¹⁸ See also W. Däubler (Note 16), p. 216 et seq.

¹⁹ A. Henberg. Isikuandmete töötlemine töösuhetes (Personal Data Processing in Labour Relations). – *Juridica* 2005/8, pp. 566–568 (in Estonian). It is important to note here that the checking of employees' personal letters concerns not only privacy of an employee's confidential messages, but also the protection of e-mail sender's privacy. See, e.g., S. Ernst. Der Arbeitgeber, die E-Mail und das Internet. – *Neue Zeitschrift für Arbeitsrecht* 2002/11, p. 589.

²⁰ It has to be taken into account that laying down such rules may require asking an opinion from the trade union.

²¹ See S. Ernst (Note 19), pp. 588–590.

²² *Ibid.*

is that the electronic address specifies the person's position, e.g., a secretary's address secretary@ab.ee. Since this address does not specify the employee personally, then letters also received at this address are the company's letters, and the employer or its authorised representative has the right to check them.^{*23}

More complicated is the situation where the employee's e-mail address is denoted by the person's first and last name, e.g., peter.pan@ab.ee. In such a case it is difficult for the employer to differentiate between work related and personal letters. This puts the employer in the position where it is forced to invade the employee's right of confidentiality of messages in order to check the security and working-order of the electronic systems given to their use.

3.3. Right to strike and striking in the virtual world

The issue of representation of employees and participation of employees in decision-making entails one important question, namely how their demands can be enforced? The problem is not so much legal but economic. The main means for employees to impose their demands is a strike. Different kinds of strikes exist, but developments in the means of communication offer new possibilities, which might not fall under the traditional definition of a strike.^{*24}

Today, a situation where employees prevent the use of the employer's Internet resources or jam the employer's servers with so-called junk mail and meaningless letters to overload the existing channels of electronic communication, can be treated as a strike. In both cases the main aim of the employees is achieved — work has been interrupted, the employer's subscribers or customers are affected by such an action, and it is now up to the employer to decide how and in what manner it will meet the employees' demands. The situation is in essence similar to a regular strike, where employees disrupt their work to gain concessions from the employer in their work related demands. At the same time organisation of such a strike falls under the scope of penal law, under which such employee activities might not only be their lawful activity in realisation of their rights, but may also entail computer crime concerning damage to the employer's electronic networks.^{*25} Thus, a clear line is needed between allowed types of strike by the use of electronic channels and computer crimes punishable pursuant to criminal procedure.

4. Conclusions

The development of new means of communication is bound to involve changes in interpersonal relations. Labour relations are no exception. Several new problems arise, which have not been paid attention to and need legal regulation. Especially in collective employment relationships, contemporary means of communication offer new possibilities for employee involvement, but also entail new problems, and are as yet unhandled by legislation in different countries. In order to avoid possible deeper problems, the legislator must preemptively regulate the right of use of new means of communication both in individual and collective employment relationships.

²³ *Ibid.*, pp. 588–590 et seq.

²⁴ Pursuant to § 2 of the Collective Labour Dispute Resolution Act, a strike is an interruption of work on the initiative of employees or a union or federation of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.

²⁵ Pursuant to the Estonian Penal Code damaging or obstructing a connection to a computer network or computer system is punishable by a pecuniary punishment. See §§ 206, 207, 208, 217 of the Penal Code (Karistusseadustik). – Riigi Teataja (State Gazette) I 2001, 61, 364; 2006, 31, 234 (in Estonian).