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Serious Violation of Workers' Rights in a Situation when Employees Refrain from Work due to Employer's Failure to Provide Safe and Hygienic Working Conditions

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***Abstract*— The paper examines a situation in which an employee is entitled to terminate the contract of employment without prior notice. The case under examination occurs when the employer commits a serious violation of workers' rights by failing to provide safe and hygienic working conditions. The paper also presents topic related controversies that have arisen in the doctrine and judicature and tries to establish at which point one may speak of a breach of fundamental labour rights and on the basis of which regulations the employer may be held liable. The authors also try to determine whether certain situations could constitute a basis for termination of the employment contract by the employee, at the same time giving rise to the right to claim damages from the employer. Other issues touched upon in the paper include the absence of a catalogue of infringements in the Polish Labour Code and the way of assessing the weight of various infringements.**

Index Terms— labour law, the Labour Code, workers' rights, health and safety at work.

I. INTRODUCTION

It can be said without any doubt that labour law includes a number of solutions aimed at protecting the weaker party in the employment contract i.e. the employee. Each time, the assessment of the weight of infringements of the employer's duties is conducted through the analysis of specific circumstances in which the employer has failed to fulfill his or her obligations with respect to the employee. A serious violation of workers' rights, may, in certain cases, constitute a basis for termination of the employment contract by the employee without the necessity to file a prior notice, it may also give rise to the valid claim for damages from the employer. It is difficult, however, to provide an answer to the question when exactly the violation of fundamental employee rights occurs, as the Labour Code does not feature a direct catalogue of infringements. Another problematic issue is how to assess the weight of infringements when they occur, according to which criteria and upon which premises. Another dilemma concerns the subject of assessment – is it the possibility of occurrence of certain effects (the risk) or only the consequences of what actually occurred? The paper attempts to determine the practical significance of risk in terms of the employer's liability regarding the issues being the subject matter of the present paper.

II. EMPLOYEE'S ENTITLEMENTS IN CASE OF A SERIOUS VIOLATION OF WORKERS' RIGHTS

Pursuant to Article 55 of the Labour Code, an employee may terminate the employment contract without notice in two cases. According to § 1 of this article, the employee is entitled to such termination of employment if a medical certificate has been issued stating a harmful effect of the work performed on the health of the employee, and the employer, within the period of time determined in the medical certificate, fails to transfer the employee to another position appropriate for his health condition and corresponding to his professional qualifications. The literature on the subject treats such a situation as a form of termination of the employment contract without notice by the employee for reasons not attributable to the employer (Dorre-Kolasa, Baran 2010).

In contrast, however, § 1^1 of the analysed article allows for

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termination of the employment contract without notice by the employee for reasons attributable to the employer. Pursuant to the wording of this paragraph, the entitlement arises when the employer committed grave violations of his basic duties towards the employee; in such a case, the employee is entitled to compensation in the amount due for the notice period.

The termination of the employment contract with immediate effect in the case referred to in § 1, does not itself entail the liability of the employing entity. Nevertheless, it validates the thesis that putting such a valuable asset as human health at risk, in principle, constitutes a violation of the basic duty to protect the health of the employee. As a consequence of this violation, the employee acquires the right for compensation in accordance to § 1^1 of the Labour Code (Jaśkowski, Maniewska, 2006).

III.PREMISES FOR EMPLOYER'S LIABILITY IN AN EVENT OF A SERIOUS VIOLATION OF WORKERS' RIGHTS

Speaking of the employer's liability in the event of termination of the employment contract by the employee due to a serious breach of the basic duties of the employer with respect to the employee, it is clear that this liability depends on the fulfilment of two premises. The first being the violation of fundamental workers' rights; the second referring to the nature of the violation. An important factor here is the severity of the infringement or the threat of infringement of workers' rights (Rycak, Stelina, 2011). Only the combined occurrence of these two elements makes the termination of the employment contract by the employee pursuant to Article 55 §1^1 of the Labour Code justified and entitles the employee to seek appropriate compensation from the employing entity.

The judicature has expressed a view that in order to assess the legitimacy of the employee's termination of the employment contract in this mode, it is necessary to consider whether the employer violated the basic obligation(s) towards the employee, and only a positive answer to this question triggers the necessity to consider whether this action is of a qualified nature (the Supreme Court, 2010). After a thorough analysis, the above thesis may be approved, at least from the perspective of economics of trials. Efforts to find out whether a given instance of workers' rights infringement was serious seem futile, when the circumstances show *prima facie* that the employer could, as a matter of fact, have committed an offence of infringing or actually threatening a given duty (or duties) with respect to the employee, but this duty (duties) was not of primary character.

During the analysis of the first premise, it was observed that the legislator did not specify any basic obligations towards the employee and did not create a catalogue of such obligations. With certainty, such obligations include all obligations resulting directly from the Act, especially from section 9 *Health and safety at work*. The legislator explicitly defined the duties presented there as 'basic'. The term 'duties of the employer' also appears in Article 94 of the Labour Code. Nevertheless, in this case the legislator did not decide to add the adjective 'basic' (A. Sobczyk, 2009). In the literature on the subject, however, there is an opinion that the very presence of these duties in the Act enhances their significance. It is emphasized that in practice it is possible to qualify these duties as basic obligations. The doctrine of labour law also counts as obligations such duties whose violation constitutes an offense against the workers' rights punishable by a fine (Patulski, Muszalski, Nałęcz, Małęcz, Orłowski et al., 2003).

Within this regard, the responsibilities of the employing entity that arise from the basic principles of labour law, cannot be omitted. In particular, the obligation to respect the dignity and other personal rights of employees (Article 11^1 of the Labour Code), the principle of equal rights for the same duties (Article 11^2), prohibition of discrimination in employment (Article 11^3), the right to rest (Article 14) and improvement of professional qualifications (Article 17) (Mitrus, Sobczyk, 2015). The practice also counts as basic duties those that result from the nature of a given obligation, even if the provisions of the labour law or the employment contract directly would not give them such a rank, as well as those which under the employment contract have been raised to the rank of basic obligations (Sobczyk, Wagner, 2009).

In accordance with the doctrine of labour law, the literal wording of provisions lets to assume a thesis that, in the substantive dimension, the provision applies not only to obligations arising from the employment contract, but to all basic obligations towards the employee (Baran, 2014). The catalogue of duties of this type includes e.g. payment of social security contributions (the Supreme Court, 2014). Nevertheless, the content of Article 55 § 1^1 of the Labour Code should not be extended on situations in which the employer fails to meet his obligations towards the employee's family, even if it indirectly affects the employee's status (Baran, 2014). It is clear from the above, that it is impossible to indicate all possible breaches of basic obligations towards the employee. Whether or not a particular obligation can be assigned the value of a basic obligation, is the subject to assessment in each individual case.

When it comes to the second premise i.e. the qualified form of violation of basic obligations towards the employee, it should be observed that in practice, in order to classify a given violation as serious, the violation must pose a real threat to the employee's essential interests or cause some damage to that sphere (the Supreme Court, 2012). In other words, the employer's misconduct must cause serious harm to the interests of the employee (Baran, 2014). Each time, the severity of the breach of the employer's obligations is assessed by the analysis of specific circumstances in which the employer failed to fulfil his obligations (Budka, 2008) (the Supreme Court, 2012). Therefore, the assessment in question is of individual nature.

In legal practice there is a predominant conviction that the premise of a qualified violation of workers' rights is closely related to the premise of guilt, even though it was not *expressis verbis* indicated in this provision (Mitrus, Sobczy, 2015). Therefore, in the literature concerning labour law, prevails a thesis according to which quilt should be classified as one of the premises of the employer's liability in this regard (Sadlik, 2007) (Świątkowski, 2003) (Salwa, 2004). As pointed out by

the Supreme Court, 'the term *serious breach of basic duties* in Article 55 § 1^1 of the Labour Code, means intentional or caused by gross negligence violation of obligations towards the employee committed by the employer or a person for whom the employer is responsible, posing a real threat to the employee's essential interests or causing a real damage in this sphere' (the Supreme Court, 2010). Thus, in this context, the guilt in itself is not significant, what matters is its qualified form. As a consequence, in the literature devoted to labour law, the prevailing opinion rules out immediate termination of the employment contract by the employee in a situation where the employer's behaviour is characterized by a lower degree of guilt (Rycak, Stelin, 2011). In practice, this assumption inspired some representatives of science to express an opinion that protective character of Article 55 § 1^1 of the Labour Code, due to the necessity of occurrence of qualified guilt, is considerably limited (Sobczyk, 1999/2000).

Recently, in this rather firmly established position of the doctrine and jurisprudence, a serious breach could be observed. The Supreme Court in a judgment of 18 May 2017 (the Supreme Court, 2017) held that the designation *serious violation of basic obligations towards the employee* does not refer to the degree of the employer's guilt (as it is enough to indicate the violation of these obligations and lack of due diligence on the part of the employer), but to the degree of violation of the employee's interests. In the further part of this judicature, the court stated that the employee loses the right to terminate the employment contract without notice under Article 55 § 1^1 of the Labour Code, if the violation of basic obligations by the employer did not affect his situation negatively. This is certainly a new outlook on the issue of serious violation of workers' rights. However, there is a serious doubt regarding the fact that the result of the breach is a decisive factor whether a given breach of obligations towards the employee can be classified as serious. As a consequence, when employees undertake actions that prevent the violation of their rights, it must trigger a situation in which they are no longer able to exercise the entitlement under Article 55 § 1^1 of the Labour Code. In reality, however, actual violation of these obligations does entitle the employee to benefit from the right of immediate termination of employment under Article 55 § 1^1 of the Labour Code and to claim damages. Moreover, a real threat to these obligations, if the actual violation of the obligations would not occur thanks to the actions of the employee under threat, also gives rise to a valid claim for the employee.

The legislator, by Article 66 point 1 of the Constitution of the Republic of Poland, guarantees every citizen the right to safe and hygienic working conditions. The emanation of this premise is Article 15 of the Labour Code, according to which the employer is obliged to ensure safe and hygienic working conditions for the employees. The doctrine rightly points out that the protection of life and health of the employed person is a public law obligation, because it is impossible to distinguish between the health of workers and the health of non-workers (Sobczyk, 2013) (Sobczyk, Tomaszewska, Stelina, 2013) (Jończyk, 1992). Also in Article 94 point 4 of the Labour Code, the legislator emphasizes that one of the basic obligations of the employer is to ensure safe and healthy working conditions and to conduct systematic training of employees in the field of occupational health and safety. In practice, it should not raise a slightest doubt that the provision of safe and healthy working conditions is an absolute obligation of the employer (Mitrus, Baran, 2005) (the Provincial Administrative Court, 2010). In the literature regarding labour law, working conditions are understood as all factors affecting the working process both on the premises of the working establishment and outside, when the employer requires work to be done in other places (Tomaszewska, Stelina, 2013).

IV. VIOLATION OF WORKER'S RIGHTS WHEN EMPLOYEES REFRAIN FROM WORK BECAUSE THE EMPLOYER FAILS TO PROVIDE SAFE AND HEALTHY WORKING CONDITIONS

As already mentioned above, it goes without saying that the employer who does not provide safe and healthy working conditions is guilty of serious violation of workers' rights. So now, it is also noteworthy to look at this issue from the perspective of situations when employees refrain from providing work due to the employer's failure to provide legally prescribed working conditions.

Pursuant to Article 210 § 1 of the Labour Code, in a situation when the working conditions do not meet the health and safety regulations and pose a direct threat to the health or life of the employee or when the work poses threat to other people, the employees have the right to refrain from carrying out their work and to notify their superior immediately. As a consequence, there is a question whether exercising this right by an employee and refraining from performing work in accordance with the legal norm contained in Article 210 § 1 of the Labour Code, is a step which renders impossible terminating the employment contract pursuant to Article 55 § 1^1 of the Labour Code (due to the failure of the employer to ensure safe and hygienic working conditions). This is a dilemma which the District Court in Bielsko-Biała has already faced. In one of the cases pending before this court, a female employee with medical contraindications to lift more than 5 kg, was sent to work which basically involved nothing more than carrying loads exceeding 5 kg. As a result, the employee did not take up this position and terminated the employment contract pursuant to Article 55 § 1^1 of the Labour Code and demanded appropriate compensation. In the case at hand, the District Court in Bielsko-Biała acknowledged that the employer did not breach any obligations towards the employee, as the employee refrained from doing the job (the District Court in Bielsko-Biała, 2015). According to the Court, the common sense behaviour of the employee, who refrained from performing work, resulted in a situation in which it was not possible to hold the employer guilty of violation of health and safety rules. As a consequence, this led to the dismissal of the employer from the allegation of a serious breach of workers' rights. In the case in question, the employee certainly did not have her fundamental workers' rights violated. However, it cannot be assumed that the qualified violation of

the workers' rights did not occur. In the opinion of the authors, the recognition that the right under Article 55 § 1^1 of the Labour Code arises only as a result of the actual violation of the workers' rights deserves criticism because such reasoning is in conflict both with Article 210 § 1 and § 2^1 of the Labour Code. Pursuant to Article 210 § 2^1 of the Labour Code, the employee's refusal to perform work in the circumstances referred to in § 1 of this article cannot result in any negative consequences for the employee. Therefore, it can be said that the inability of the female employee to exercise the right under Article 55 § 1^1 of the Labour Code in a situation when she refrained from performing work because she had not been provided with safe and healthy working conditions, brought about unfavourable consequences for her as stipulated in Article 210 § 2^1 of the Labour Code. It should also be emphasized that the Supreme Court did not agree with the ruling of the District Court in Bielsko-Biała. The Supreme Court rightly observed that the employer is obliged to ensure the actual safety of the employee on top of all the other obligations arising from generally applicable rules of health and safety with respect to working conditions. As a consequence, in the case at hand, the Supreme Court expressed the view that the employer seriously violated his basic obligations towards the female employee, despite the fact that she did not actually even commence to work.

V. DUALISTIC CONCEPT OF GUILT IN LABOUR LEGISLATION

Recognizing the validity of the statement of the Supreme Court which states that failing to ensure safe and hygienic working conditions in itself constitutes a serious violation of workers' rights, and sharing the view that intentional guilt or gross negligence is a prerequisite of liability in this regard, it seems justified to devote more attention to this prerequisite.

It is assumed that labour legislation is more complex than civil law. The starting point for further considerations is the recognition that there is a dualistic concept of guilt in labour legislation (Zieliński, 1986). Already in the previous century T. Zieliński pointed out that the ununiform concept of guilt has its justification in different assumptions of legal regulation of the employer's and employee's liability (more on this subject: Zieliński, 1986). Thus, although it is generally assumed that Article 55 § 11 of the Labour Code is a kind of a mirror image of Article 52 § 1 of the Labour Code (the Supreme Court, 2014), the guilt in these provisions should be defined differently. Speaking of employer's liability for damages, the guilt of this entity is determined only with objective factors taken into account (Jaśkowski, Maniewska, 2006). It should not be equated with intentional guilt or gross negligence within the meaning of Article 52 § 1 of the Labour Code, and thus, with a psychological attitude towards undertaken actions (Mitrus, Sobczyk, 2015) (Florek, 2009). The employer may fail to meet his basic obligations to the employee in a severe way, even if his actions are not characterized by malice or gross negligence (Florek, 2009). As noted by T. Zieliński, the attribution of guilt to the employer occurs in isolation from the specific circumstances indicating his carelessness (Zieliński, 1986). The failure to perform or improper performance of an obligation by the employer may in itself bear the mark of contractual guilt, amounting to a negative assessment of the debtor's unlawful conduct (Mitrus, Sobczyk, 2015). The above concept did not gain support of the entire scientific community. W. Ostaszewski criticizes this approach to the guilt of the employer. According to this author, in accordance with the civilian concept of contractual guilt, the employer's testimony that he performed due diligence in the implementation of the basic obligation towards the employee, would have to result in him being released from liability in this regard. In this case, the employee would not be entitled to exercise the rights under Article 55 § 1^1 of the Labour Code (Ostaszewski, 2015).

The thesis expressed by W. Ostaszewski deserves some more attention. The Labour Code does not contain a definition of diligence regarding the parties to the employment relationship. The definition of this concept falls under Article 355 § 1 of the Civil Code. According to this article, the debtor is obliged to act diligently as generally required in a relationship of a given type. Nevertheless, § 2 of this article states that 'due diligence of the debtor in the scope of his business activity is determined by taking into account the professional nature of that activity'. Therefore, Article 355 § 2 of the Civil Code can be used to control the employer's behavior pattern in the above-mentioned scope. In the light of this provision, in the civil law doctrine it is generally accepted that in relation to 'professionals', and in the authors' view every employer can be considered a professional, the expectations of the environment are higher when it comes to skills, knowledge, meticulousness, reliability and foresight (Manichowski, Gniewek, 2011).

According to the standpoint expressed in the judicature, 'an employer who does not pay the employee remuneration in full, seriously violates his basic duty as an intentional guilt, even if he did not receive funds for remuneration for reasons which are not his fault' (the Supreme Court, 2000 and 2006). In the latest jurisprudence, the Supreme Court pointed out that 'compliance with professionalism obliges the employer to act in such a way that in the absence of real financial resources for remuneration, they can immediately be obtained from another source (for example, from an open credit facility). In this context, the premise of terminating a contract of employment without notice due to a serious breach of basic obligations to an employee and claiming compensation (Article 55 § 1^1 of the Civil Code), is the guilt of the employer in not exercising due diligence. This guilt does not refer to subjective but only to objective criteria. Difficult financial situation of the employer, resulting from the unreliability of contractors, does not negate the failure of the employer's to deliver due diligence, affecting the subsumption of Article 55 § 11 of the Labour Code. The lack of due diligence is the threshold, after which the employer exposes himself to an assumption of negligence and, consequently, to liability (the Supreme Court, 2017).

There is a controversy regarding contractual guilt. Some representatives of the labor legislation doctrine indicate that in the light of this concept, the employer should be freed from liability when he can show that he has delivered due diligence

(Ostaszewski, 2015). It should be noted, however, that this thesis is based on a uniform concept of guilt in labour legislation.

It should also be observed that placing the employer's responsibility in the above-mentioned scope on the concept of contractual guilt, is not the only solution recognized by the judicature. The Supreme Court's jurisprudence also holds the view that 'potential employer's negligence in relation to the obligation to provide employees with a safe workplace, justifies the employer being held liable for fault' (the Supreme Court 2017). Two important elements result from the above judicatures. First of all, a failure to provide employees with safe and hygienic working conditions includes an element of culpable action. Secondly, this obligation incumbent on the employer is a tortious obligation of result, not of a diligent act. Thus, the mere demonstration by the employer that he has exercised due diligence in providing employees with safe and hygienic working conditions, does not mean that he cannot be charged with serious violation of the basic duty towards the employee unless the result is actually obtained in the form of safe and hygienic working conditions.

In the judicial practice, there is yet another concept of defining guilt in the light of Article 55 § 1^1 of the Labour Code. According to the standpoint expressed by the Supreme Court in the justification of the judgment of 8 October 2009, the employer's guilt is a more complex category than the employee's guilt. When it comes to the employee, the attribution of the guilt to the offender requires the use of subjective criteria for assessing his behavior. On the other hand, the employer's guilt may depend on the type of the duty breached, it depends to a large extent on objective reprehensibility (unlawfulness) of conduct. As the Supreme Court stated, such a situation will take place in the event of a breach of duties, the implementation of which rests on the employer as an organization unit. Nevertheless, in certain situations it will be necessary to refer to subjective criteria e.g. when the execution of specific duties will depend on the actual behavior of specific persons representing the employer (Supreme Court, 2009).

In the light of the above, the authors of the paper have no doubt that the court in this judgment accepted the dualistic concept of guilt in labor legislation. The court also advocated a kind of a mixed form of the employer's responsibility. On one hand, for a serious violation of the basic duties towards the employee, the employer will be held liable on the principle of guilt understood as objective reprehensibility of conduct. As a consequence of the above, it should be recognized that it will be a kind of liability similar to civil liability for one's fault, including the understanding of the employer's guilt specific for the Labour Code (only an objective element). On the other hand, it also stipulates that in certain situations the employer's liability will depend on the occurrence of a subjective element meaning the attitude of a given person to an act. This will be the case when the perpetrator of the infringement is, for example, another employee of a given employer. In such a situation, it seems justified to claim that the guilt in this case should be understood in the same way as the guilt in Article 52 § 1 point 1 of the Labor Code. Therefore, the basis of the employer's responsibility will not be every degree of guilt, even the smallest one, but only qualified guilt. It should be noted that such an assumption is in a way identical to the civil concept of responsibility for the subordinate referred to in Article 430 of the Civil Code. In this case, the superior is responsible for the subordinate's actions due to the principle of risk, provided they are faulty. Labour law does not exclude the principle of risk as the basis for employer's liability for damage in this regard (Rycka, Stelina, 2011). In the light of the Supreme Court's standpoint mentioned above, the lack of subjective element on the part of the perpetrator of a violation of the basic duty towards an employee, would result in the employer being released from liability in accordance with Article 55 § 1^1 of the Labor Code due to the impossibility of attributing the guilt to the offender.

It should also be noted that a part of the doctrine postulates that guilt should not be considered as a premise of responsibility in this regard. According to the proponents of this thesis, the element of guilt only poses difficulties (Ostaszewski, 2015). As W. Ostaszewski emphasizes, the irrebuttable presumption, according to which an employer who does not pay the employee remuneration in full, seriously violates his basic duty due to intentional guilt, even if, for reasons which are not his fault, he did not obtain financial means for remuneration, sounds like rulemaking. According to the author, 'the construction of liability for a fault did not work when reality-checked, which resulted in the Supreme Court resorting to assigning intentional guilt to an event - even in non-culpable cases'. The authors of the paper do not approve of the above position as they believe it is a consequence of the negation of the dualistic concept of guilt in labour legislation.

VI. CONCLUSIONS

In conclusion, it should be noted that the Supreme Court in its judgment captured the essence of the legal problem arising in the matter regarding failure of the employer to ensure safe and hygienic working conditions, which was omitted in proceedings before previous instances. As the Supreme Court has rightly pointed out, the employee's right to safe and hygienic working conditions is a value protected by the Constitution, and the manner of exercising this right and employer's obligations are specified in the bill. The solution applied in the analyzed case which consists of refraining by the employee from providing work is a specific one, resulting from the nature of the obligation to ensure safe and hygienic working conditions by the employer. It is a solution that the legislator himself pointed out to an employee at risk in the relevant regulations. One should also be aware of the fact that it will not always be possible for the employee to take similar steps should violation of his rights occurs again. However, it is generally not possible to exclude such possibility on the part of the employee in other cases, just as one cannot indicate all possible violations of the basic obligations towards the employee. However, the key point in the legislation is to stress that the employer's

obligations regarding safe and hygienic working conditions are unconditional in the sense that they burden the employer regardless of the way the employee works, and therefore the employer cannot be released from liability for an employee and the employer is held accountable for a fault.

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