THE OFFENCE OF INFRINGING UPON THE EMPLOYEE'S RIGHTS – ART. 218 § 1 OF THE POLISH PENAL CODE[1] (SELECTED ISSUES)

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The present article focuses on the issue of mischievous or persistent infringing upon the employee's rights, resulting from labour relations or from the social insurance, on the ground of the Penal Code of 1997. As the range of the analyses conducted is limited, special attention was put to the subject – matters of protection and the subject of infringing upon the employee's rights offence from art. 218 § 1 of the Penal Code[2].

Introduction

The regulations in Chapter XXVIII of the Penal Code of 1997 establish criminal liability for "offences against rights of persons executing paid work". Although they are generally the continuation of regulations included in the art. 190–191 of the Penal Code of 1969[3], the range of punishable acts infringing employee's rights was widened considerably after the new Penal Code came into force on March 1, 1998. Taking into consideration the reasons for the project of the Penal Code[4], it is clear that the aim of extending Chapter XXVIII was to provide better protection for authorities of persons' executing paid work in

[1] Statute of June 6, 1997 The Penal Code (J. of L., No 88 item 553) [Ustawa z dnia 06.06.1997 r. Kodeks karny (Dz. U. 88 poz. 553)].

[2] Art. 218 § 1 of the Penal Code

The person who, executing the activities from the range of labour and social insurance law, maliciously or insistently infringe employee's rights resulting from the labour relation or from social insurance, involves fine, penalty of restricted liberty or penalty of deprivation of liberty up to 2 years.

Art. 218 § 1 k.k.

Kto, wykonując czynności w sprawach z zakresu prawa pracy ubezpieczeń społecznych, złośliwie lub uporczywie narusza prawa pracownika wynikające ze stosunku pracy lub ubezpieczenia społecznego, podlega grzywnie karze ograniczenia wolności albo pozbawienia wolności do lat 2.

[3] Statute of April 19, 1969 The Penal Code (J. of L., No 13, item 94) [Ustawa z dnia 19 kwietnia 1969 r. Kodeks karny (Dz. U. 13, poz. 94)].

[4] Lack of author, *New Penal Codes of 1997 with justification*, Warszawa 1997, p. 198, [Brak autora, *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Warszawa 1997, str. 198].

the free-market system (with the special consideration of allowance and pension authorities, which were not protected earlier by legal penal norms).

Binding regulations extended significantly the responsibility for offences, threatening persons' executing paid work rights through penalization of new kinds of this infringement. As the example, we can point: art. 218 § 2 establishing the criminal sanction for the refusal to engage someone to work again, whom the proper authority stated about, art. 219 introducing the punishability for failure to register social insurance data or also reporting of false data, and art. 221, which establish penalty for non-accomplishment of duties connected with the accident at work, or with the occupational disease, which are a significant novelty on the background of the former Penal Code regulations. It is worth mentioning, having in mind the regulations of the Labour Code dealing with offences against the employee's rights, that such offences were transformed into misdemeanors, [the refusal to execute the court judgement obliging to engage someone to work again (see: art. of 282 § 2 of the Labour Code[5])]. It is an obvious sign of enhancing the legal-penal protection.

I. Maliciousness or persistence in infringing the employee's rights as evidence pointing to the possibility of opening criminal proceedings

Currently binding art. 218 § 1 of the Penal Code maintained the responsibility of persons executing activities in matters of the labour and social insurance law, who infringe maliciously or insistently the employee's rights resulting from labour relation or social insurance. This regulation was also present in act of 1969. Presently, this offence has the formal character and so neither the occurrence of material or non material damage, nor causing "direct and concrete danger of damage"[6] is not necessary to commit the offence. It is a different solution than that established in art. 190 of the former Penal Code, where it was necessary to expose the employee to "serious damage" to fulfil the features of this offence. Accepting the formal character of the offence is in fact a considerable widening of protection range of the analysed regulation. This is in conformity with the legislator's intention. "Maliciousness" or "persistence" as a feature, remained a constant constructional element of this norm.

However, we must notice that the representatives of the doctrine were firmly claiming, on the ground of art. 190 of the former Penal Code, that it is possible to speak of "persistence" of the perpetrator only in the face of the repeated and contrary to complaints "disobedience of regulations connected with working time, leaves or social insurance"[7], while presently the

[5] Statute of November 14, 2003 Labour Code (J. of L., No 213, Item 2081) [Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy –odeks pracy oraz o zmianie niektórych innych ustaw (Dz.U. Nr 213 poz. 2081)].

[6] J. Wojciechowski, *The Penal Code*, *Commentary*, *Jurisdiction*, Warszawa 2000, p. 483 [J. Wojciechowski, *Kodeks karny*, *Komentarz*, *Orzecznictwo*, Warszawa 2000, str. 483].

[7] M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Penal Code*, *Commentary*, Warszawa 1977, p. 487 [M. Siewierski, [w:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny*, *Komentarz*, Warszawa 1977, str. 487].

employee's objection is not the *sine qua non* condition to find persistence as a feature determining the causative activity. Yet, the long-lasting character of the subject's executing the activities in the scope of labour or social insurance law behaviours, is not necessary to assume the "malicious" character of the employee's rights breach. The "maliciousness" describing the aspect of the offence of art. 218 § 1 as to the doer, is directing our attention to the perpetrator's motivation, which is directly referring to the employee whose rights were infringed (this is so called *dollus coloratus* – special deliberate intent)[8].

Referring to above-mentioned remarks, we have to add that describing the aspect of the offence of art. 218 § 1 as to the deed, is presently debatable in literature. The most universally accepted seems to be the opinion that this offence can be only committed willfully, with direct intent[9]. A different opinion is presented by Andrzej Marek[10], who shows that using by the legislator the feature "maliciousness", indeed "requires the direct intent, but the persistence of infringing the employee's rights is not excluding conceivable intent". It is worth remembering that in many cases we can have a concurrence of offence of art. 218 § 1 of the penal code with scopes of misdemeanors of art. 281 and 282 of Chapter XII of the Labour Code. In such case, the feature of persistent or malicious character of behaviours will determine whether it is a offence or not.

2. The range of notions indispensable for executing general regulations

Considering the general character of the analysed art. 218 § 1 of the Penal Code, both, as for the objective features and for the subject of a offence, we have to make the decodification of the norm's content with reference to the labour law and social insurance law. It will be necessary to determine such terms as: "employee", "labour relation", "social insurance relation" as well as to determine the objective feature of the term "activities from the scope of the labour and social insurance law".

Art. of 22 § 1 of the Penal Code defines labour relation as such legal relationship whose establishing by a employee makes him "obliged to execute work of the determined kind for the employer, under his management and in the place and time determined by the employer, where the employer is obliged to employ the employee for remuneration". In art. 2 of the Labour Code we will find the in-depth catalogue of legal actions creating labour relation, which are: contract of employment, call, election, appointment and cooperative

[8] M. Flasiński, *Crimes against rights of persons executing paid work in the new Penal Code*, Work and Social Security 4/98, p. 32 [M. Flasiński, *Przestępstwa przeciwko prawom osób wykonujących pracę zarobkową w nowym kodeksie karnym* PiZS 4/98, p. 32].

[9] See: *ibidem*, p. 32 and O. Górniok [in:] O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Penal Code*, *Commentary*, Volume II, Gdańsk 2005, p. 251 [O. Górnok, [w:] O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny*, *Komentarz*, Tom II, Gdańsk 2005, str. 251] and R. Góral, *Penal Code*, *Practical commentary with jurisdiction*, Warszawa 2005, p. 345 [R. Góral, *Kodeks karny*, *Praktyczny komentarz z orzecznictwem*, Warszawa 2005, str. 345].

[10] A. Marek, *Commentary to the Penal Code*, *Specific part*, Warszawa 2005, p. 485 [*Komentarz do kodeksu karnego*, *Część szczególna*, Warszawa 2005, str. 485].

contract of employment. *A contrario* to the quoted regulation, persons executing work on the basis of a freelance contract, contract for a specific task, agency agreement as well as contract for outwork, are not treated as "employees".

What is essential from the point of view of our reflections, is the fact that protection of employee's rights, resulting from labour relation or from social insurance, is also referring to persons who, despite executing work formally on the basis of the civil agreement, are actually the parties of the labour relation[11]. Art. 22 § 1^1 states unambiguously that establishing legal relationship which contains basic elements of labour relation, such as: employee's obligation to execute work under the direction of employer, in exchange for payment, results in finding it necessary to determine such a bond between subjects as labour relation, regardless of the contract's name. The jurisdiction and doctrine of labour law was emphasizing the fact[12] that the abovementioned regulation does not introduce the presumption of concluding a contract of employment, but causes the necessity to recognize such employment as the contract of employment.

The appropriate determining the legal relationship, which actually links the subjects, will be the most significant for determining the range of subjects, whose rights are protected by the regulation of art. 218 § 1 of the Penal Code. If, using only formal criterion, we find that a employee is only a person employed on the basis of a contract of employment, call, election, appointment or cooperative contract of employment, then we will erroneously limit the range of subjects whose rights are protected by the analysed regulation. Assuming that for creating the labour relation, not creating the relation of employment basing on art. 2 of the Labour Code is essential, but a real legal relationship linking the determined subjects, we have to state that employment on the ground of art. 2 of the Labour Code is only producing the presumption that the person is a employee. It is possible to abolish this presumption in exceptional circumstances.

The subjects not protected by the analysed art. 218 § 1 of the Penal Code are persons in the administrative law official relation. The Supreme Court repeatedly declared[13] that this relation cannot be recognised as labour relation. That is why, currently among others, the Police Officers, Prison Service Officers, Officers of State Protection Office or professional soldiers official relations are not labour relations in the meaning of art. 2 of the Labour Code, even if they were created by appointment.

Analysing the subject-matter of protection in the art. 218 § 1, it is necessary to refer to the theory known by criminal

[11] See: A. Tomporek, *Subject – matter of protection and subject of infringing worker's rights crime (art. 218 of the Penal Code)* Work and Social Security 7/2002, p. 14 [A. Tomporek, *Przedmiot ochrony i podmiot przestepstwa naruszenia praw pracownika*, PiZS 7/2007, str. 14].

[12] See: Supreme Court judgement of September 23, 1998 r. (II UKN 229/98, OSNAPiUS 1999, No 19, Item 627) [Wyrok SN z dnia 23 września 1998 r. (II UKN 229/98, OSNAPiUS 1999, Nr 19, poz. 627) and A. Świątkowski, *Labour Code*, *Comenntary*, Warszawa 2004, p. 139 [A. Świątkowski, *Kodeks pracy*, *Komentarz*, Tom I, Warszawa 2004, str. 139].

[13] See: General Administrative Court judgement of June 5, 1991, II SA 35/91, OSNA 1991, No 3-4, Item 64 [Wyrok NSA z dnia 05.02.1991 r. (II SA 35/91, OSNA 1991, nr 3–4, poz. 64)].

law[14], which in the change of the title of Chapter XXVII – replacing the term "employee's rights" by the term "rights of persons executing paid work" perceive the basis for providing persons who executing paid work while not being employees, with legal-penal protection. Accepting this theory may lead to a false assumption that the subject-matter of protection for all regulations in the current Chapter XXVI-II of the Penal Code is identical and was determined in the title of the Chapter. The title cannot have superior for precise establishment of the subject-matter of protection and as a consequence, it cannot lead to skipping terms used in art. 218 § 1, which describe the features of the prohibited act.

The extended interpretation of "labour relations", demanded by some, has to be recognized as abortive, although corresponding with social needs. It rejects the reception of terms such as "employee", which has a determined and established meaning in the system of law. The range of this term is undoubtedly narrower and, as the result, determining broader limits of the subject-matter of protection of art. 218 § 1 of the Penal Code, leads to endanger the followers of such theory with accusation of breaching the guarantee rule.

3. Employee's rights resulting from labour relation and from social insurance, being subject to protection according to art. 218 § 1

The term: "employee's rights resulting from labour relation and from social insurance", determining the range of the subject-matter of protection of art. 218 § 1, includes a broad range of employees entitlements, resulting from both code and non – code regulations. Among the Labour Code ones, we can point out above all: the right to just payment for work (art. 13 of the Labour Code), the right to rest (art. 14 of the Labour Code), right to safe and sanitary working conditions (art. 15 of the Labour Code), right to equal treatment of men and women in the employment relation (art. 11^1 of the Labour Code). Certainly, these rights are directly referring to constitutional principles, as for example a principle of the equality towards the law, expressed in art. 33 of the Constitution[15]. This rule has its continuation in the art. 33 of the fundamental statute. These rights are also referring to the principles formulated in international agreements which became, through validation, a part of the binding law (e.g. Convention of the International Labour Organization, No 87 of July 9, 1948 establishing the right of employees and employers to create union organisations[16]).

What was emphasized under the former Penal Code of 1969 is the fact that employee's rights legal-penal protection includes the rights which exist during the labour relation but also the ones lasting or created after its expiration (e.g. the right

[14] W. Wróbel, [in:] A. Zoll (red.), *The Penal Code*, *Specific part*, *Commentary*, Volume II, Kraków 2006, p. 856. [W. Wróbel, [w:] A. Zoll (red.), *Kodeks karny*, *Część szczególna*, *Komentarz*, Tom II, Kraków 2006, str. 856].

[15] The Constitution of the Republic of Poland of April 4, 1997 (J. of L., No. 78, Item 483) [Konstytucja Rzeczypospolitej Polskiej z dnia 02 kwietnia1997 (Dz. U. Nr 78 poz. 483)].

[16] Convention of the International Labour Organization, No 87 of July 9, 1948 (J. of L., No 29 Item 125) [Konwencja dotycząca wolności związkowej i ochrony praw związkowych (Dz. U. Nr 29 poz. 125)].

to immediate obtaining the employment certificate in case of labour relation dissolution or expiration – art. 97 § 1 of the Labour Code). It is also worth mentioning that employee's right to safe and hygienic working conditions is subject to legal-penal protection, according to art. 220, not 218, § 1.

If we want to show the employee's rights resulting from the social insurance relation which are protected by art. 218 § 1 of the penal code, we have to refer to the act of social insurances[17], the act of cash benefits from the social insurance in the event of the disease and maternity[18], as well as to the act of the social insurance in the event of industrial accidents and occupational diseases[19].

The attempt to point out all or the majority of employee's rights, resulting from the social insurance, whose malicious or persistent infringing would be an offence, is impossible because of the extent of the present study. That is why, I would like to mention that in currently binding law order there are four kinds of social insurances which (among others) are the source of employee's rights. These four kinds are: pension insurance, annuity insurance, medical insurance and accident insurance[20]. However we can easily point out the rights which do not have "employee's character" and are not covered by the legal-penal protection, even though they have their source in social insurance relation. Here we have to mention the groups of rights which "war and military disabled persons and theirs families as well as combatants and repressed or deported persons" are entitled to on the ground of specific rules[21].

In relation to these remarks we have to consider a controversial matter whether or not the rights of the employee's family members can be the subject-matter of protection of the analysed regulation. This matter is especially important in case of the right to the posthumous benefit, as well as insurance rights of persons who are entitled to them, even if they do not have employee's status. The theory that violating these derivative rights can cause criminal responsibility for a criminal misdemeanor of art. 218 § 1 of the Penal Code, is worth sharing.

4. Subjective features

Currently, the legislator showed as the subject of the analysed offence not the person responsible for the matters of employment in the company (as it was before, according to art. 190) but the person who "executes activities from the scope of the labour and social insurance law".

To make it clear we have to refer to art. 3 and art. 3^1 of the Labour Code. The first

[17] Act of social insurance system of October 13, 1998 (J. of L., No 137, Item 887 as amended) [Ustawa z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych (Dz. U. Nr 137, poz. 887 z późn. zm.)].

[18] Act of cash benefits from the social insurance in the event of the disease and maternity of June 25, 1999 (J. of L., No 31, Item 267 as amended) [Ustawa z dnia 25 czerwca 1999 o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz. U. Nr 31 poz. 267 z późn. zm.)].

[19] Act of the social insurance in the event of industrial accidents and occupational diseases October 30, 2002 (J. of L., No 199, Item 1673 as amended) [Ustawa z dnia 30 października 2002 o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych (Dz. U. Nr 199 poz. 1673 z późn. zm.)].

[20] A. Tomporek, *Subject*... p. 16.

[21] W. Wróbel, [in:] A. Zoll (red.), *The Penal...*, p. 859.

of them introduces the uniform definition of "employer" which includes: "all employing subjects, irrespective of their legal-organisational form, whether they are organisational units or not, as well as irrespective of the purpose of workers' employment"[22]. That is why, we can recognise as "the employer" both commercial law companies, foundations, labour unions, state enterprises, organisational units (even if they do not have the legal personality), and individuals.

Each individual has the ability to be an employer, although in case of a person who does not have a legal capacity, legal transactions are performed by a statutory representative[23]. However, in case of a person with limited capacity to legal transactions all legal actions need confirmation by a statutory representative[24].

The employer's representation established in the general way in art. 3^1 of the Labour Code is also significant for our analyses. The activity from the range of work can be made for the employer, who is an organisational unit by both the individual managing the unit, and the managing authority, as well as other individual appointed. Furthermore, all the above-mentioned subjects can perform these activities for the employer who is an individual, provided that the employer does not perform these activities.

The determination of the activities performed in the scope of the labour law is simple, as these are "activities in abroad meaning, both legal actions, and other actions, causing legal consequences". On the other hand, it is not only the matter of the activities from the scope of the individual labour law (e.g. referring to establishing labour relation, changing its content or its dissolution), but also activities from the scope of the collective labour law (e.g. establishing the collective agreement)"[25]. It is necessary to recall that this provision abolished the principle of one-man management in the labour law matters, which was previously binding on the ground of art. 4 of the Labour Code. This abolishment had a considerable influence on the responsibility for infringing the employee's rights.

It has to be mentioned that the offence of art. 218 § 1 of the Penal Code involves fine, a penalty of restricted liberty or a penalty of deprivation of liberty up to 2 years. Unfortunately, in case of conviction for such offence, the obligation of compensation for damages (art. 46 § 1 of the Penal Code) cannot be decided. This provisions has to be evaluated critically.

Conclusions

Summing up all these reflections, we have to point out the need for statutory changes, referring to the range of protection of the analysed regulation. The present regulation has to be found as unsatisfactory. Legal-penal protection for subjects of various relations of employment is so diversified,

22 K. Rączka, [in:] Z. Salwa (red.), *The Labour Code*, *Commentary*, Warszawa 20007 p. 16 [K. Rączka [in:] red. Z. Salwa Kodeks pracy. Komentarz. Warszawa 2007, str. 16].

23 See: Art. 14 Statute of April 23, 1964 The Civil Code (J. of L., No 16, Item 93 as amended) [Ustawa z dnia 23 kwietnia 1964 r. (Dz. U. 16, poz. 93)].

24 See: Art. 17 and 18 of the Civil Code.

25 K. Rączka, [in:] Z. Salwa (red.), *The Labour*... p. 21.

that it has to be found as discriminating[26]. It is necessary to make an attempt in determining the possible legislative actions providing a broad protection of rights for persons executing paid work, which in fact was declared by the legislator in the justification to the Penal Code.

It could be done by introducing separate definitions of "employee" and "labour relation" on the ground of the Penal Code or by using the standardized term of "persons executing paid work", applying penalization of art. 218 § 1 of the Penal Code, providing the simultaneous preservation of the offence defining principle.

We have to consider that the regulations of the Penal Code, being the subject of our analysis, should be perceived in the broader light, on the background of actions taken up by the legislator in order to create a more restrictive policy towards the subjects breaking employee's rights (here we have to mention the recently amended act of the state labour inspection[27]). Criminal law can surely play a significant role in the assurance of appropriate rights protection for employees and persons executing paid work, but we have to remember that it has only a supporting function in this matter. However, in my opinion, it has also a very important preventive character, becoming a part of the whole system of regulations, protecting employees as the weaker party of the labour relation.

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[26] A. Tomporek, *Subject*... page 15.

[27] Act of the state labour inspection of April 13, 2007 (J. of L., No 89, Item 589) [Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy (Dz. U. Nr 89 poz. 589).

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4. General Administrative Court judgement of June 5, 1991, (II SA 35/91, OSNA 1991, No 3-4, Item 64).

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6. Statute of June 6, 1997 The Penal Code (J. of L., No 88, Item 553).

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LENKIJOS BAUDŽIAMOJO KODEKSO 218 STRAIPSNIO 1 PARAGRAFAS – DARBUOTOJŲ TEISIŲ PAŽEIDIMAS KAIP NUSIKALSTAMA VEIKA (ATSKIRI ASPEKTAI)

Joanna Łuczak

Santrauka

Straipsnyje nurodomos išplėstinės teisinio reguliavimo, sietino su darbuotojų teisių pažeidimu, priėmus 1997 m. Lenkijos baudžiamąjį kodeksą, ribos. Analizuojama Lenkijos Respublikos baudžiamojo kodekso 218 straipsnio 1 paragrafe reglamentuotos nusikalstamos veikos sudėties subjekto problematika, darbuotojo teisės, kylančios iš darbo ir socialinės apsaugos teisinių santykių, kaip kodifikuoto ir nekodifikuoto teisinio reguliavimo išraiška. Straipsnyje nurodoma, kad dauguma Lenkijos Respublikos darbo kodekse įtvirtintų darbuotojų teisių – konstituciniai principai, taip pat principai, kylantys iš tarptautinių sutarčių; socialinės apsaugos teisės aktai yra nekodifikuoti. Taip pat analizuojama, ar darbuotojų šeimos nariai įgyja teisinę apsaugą, numatytą Lenkijos Respublikos baudžiamojo kodekso 218 straipsnio 1 paragrafe.

Lyginant ankstesnį ir dabartinį teisinį reguliavimą nurodoma, kad nusikalstamos veikos, reglamentuotos BK 218 straipsnio 1 paragrafe, subjektas yra nebe asmuo, atsakingas už įdarbinimą įmonėje, bet asmuo, kuris atlieka konkrečius darbo ir socialinės apsaugos teisės srities veiksmus; autorė straipsnyje neigiamai vertina Lenkijos baudžiamojo įstatymo numatytą darbuotojų teisinės apsaugos reguliavimą, nes jame nėra reglamentuota kompensacija už žalą, padarytą kaltais asmenų, padariusių Lenkijos Respublikos baudžiamojo įstatymo 218 straipsnio 1 paragrafo dispozicijoje nurodytą veiką, veiksmais.

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