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The preventive inspection of employees on the presence of alcohol in the light of the Act on Upbringing in Sobriety and Alcoholism Prevention

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For the last few years there has been a discussion in the society, including legal circles, on the admissibility of preventive inspection of employees for their sobriety in their workplace. Nowadays, no one questions the rights of an employer to order an employee who is rightfully suspected of consuming alcohol at his workplace to restrain from work¹. Moreover, according to the justification of the Supreme Court decision from 22nd September 2004², in case of the rightful suspicion of consuming alcohol by an employee, or his presence at the workplace in the state of intoxication, an employer, which also is not questioned, has the right to measure the concentration of alcohol in an employee's body, allowing him at the same time the verification of the conducted examination according to art. 17 of the Act from 26th October 1982 on Upbringing in Sobriety and Alcoholism Prevention (further on referred to as the Act

on Upbringing in Sobriety)³. The discussion on the admissibility of the preventive, frequently unjustified, inspection of employees on the presence of alcohol flared up after numerous fatal accidents that recently had place in Poland caused by intoxicated drivers of public transport vehicles⁴. Since then, both some transportation companies as well as many alike business entities in the whole country, have introduced internal regulations according to which tram and bus drivers undergo the preventive inspection on the presence of alcohol in their bodies before starting work.

Even though the majority of society comprehends the justification for this type of routine activities undertaken, e.g. by municipal transport companies, nevertheless taking into account the explicit meaning of art. 17 par. 1 of the Act on Upbringing in Sobriety, one

¹ The adjudication of the Supreme Court from 11th February 2000, II UKN 401/99, OSNP 2001/15/498

² The adjudication of the Supreme Court from 22nd September 2004, I PK 576/03, OSNP 2005/7/91

³ Dz.U.2016.487.

⁴ One of the most high-profile cases of causing a collision by a drive of public transport vehicle was an unfortunate incident which happened in January 2014 in Łódź, when an intoxicated driver of a city tram had fatally blindsided two people and rammed a car..

ought to consider seriously the legality of introduced regulations, which as it seems are *contra lege* towards the content of the above mentioned act of law. According to art. 17 par. 1 of the Act on Upbringing in Sobriety, the manager of a company or an individual authorized by him have the duty not to allow the work of an employee, if there is a rightful suspicion, that he arrived at work after consuming alcohol or has consumed alcohol while working. The core of the analyzed problem is in the statutory term „rightful suspicion”, which as it seems directly limits the preventive inspection action of employers. As Grażyna Zalas points out in the comments to the above mentioned act, „suspicion must be rightful, i.e. the behaviour of an employee must arise doubts concerning his soberness. These rightful suspicions may result from an employee’s behaviour, which commonly indicates the presence of alcohol in a man’s body. [...] Also the scent of alcohol may raise rightful suspicions that an employee is in the state after consuming alcohol”⁵. Analyzing judicial decisions of the Provincial Administrative Courts in Poznań and Krawków one comes to a rightful conclusion that the suspicion regarding the presence of an employee at his workplace after consuming alcohol may arise only as a result of the observation of a particular individual and identification in his behaviour external indicators, which combined with the life experience of an employer or manager will raise justified worries concerning the complete soberness of an employee⁶. In her monograph „Legal forms of controlling an employee at his workplace” Magdalena Kuba remarks that an employer, „must not base exclusively on his subjective conviction on an employee’s intoxication. It must stem from some objective premises, which would arise suspicions in any average individual. They might be, for instance: staggering, incoherent speech, or the scent of alcohol”⁷. From the above

mentioned monographs and adjudications one may conclude that the checking of an employee on the presumption of the presence of alcohol in his body ought to be preceded with the observation of his behaviour, and conducted only in case of revealing the characteristic typical for intoxicated individuals. In other words, preventive examination of soberness of all, or randomly selected employees in front of the proverbial gate, ought to be considered as the abuse by employers, in the light of the Act on Upbringing in Sobriety. The act, even though amended between 2012 and 2016, has not introduced any alterations in the referred to art. 17 par. 1. Therefore, if the legislator in his legislative work has omitted the demands of the group of employers propounding the change in the mentioned legal rule, his behaviour ought to be considered as expedient, aiming at the consolidating of the current legal state.

Undoubtedly, it seems that art. 11 of the Labour Code, obliging an employer to respect the dignity and other personal rights of an employee, is the largest obstacle in allowing the application of preventive inspection of employees, which is significant from the legislator’s perspective. This article is tightly associated with art. 23 of the Civil Code, and both articles take their legitimacy directly from art. 30 of the Constitution. A man’s dignity in constitutional meaning is a matter of exceptional complexity, the Constitutional Tribunal stated in its decision from 4th April 2001, „The constitutional legislator granted the man’s dignity constitutional meaning, making it the point of reference for the system of values, around which the Constitution has been constructed, and at the same time the foundations of the whole legal order in the State [...]”⁸. Analyzing art. 30 of the Constitution in Comments to the Constitution Krystian Complak remarks that due to the unique nature of features of a human being it is immensely difficult to violate the dignity of a human being. „The act of such a kind should touch not merely a particular individual, but simultaneously all people as representatives of the mankind”⁹. Thus, by a behaviour violating the dignity of a man as an individual one will understand such an activity or failure which will not be understood and approved of by the society, and will be treated as reprehensible. The dignity according to art.

⁵ Zalas Grażyna, Skrzydło-Niznik Iwona, The Act on Upbringing in Sobriety and Alcoholism Prevention. The Comments, Zakamycze 2002, art. 17.

⁶ The adjudication of the Provincial Administrative Court in Krakowie from 22nd March 2016, III SA/Kr 1290/15, Lex no 2034167; the adjudication of the Provincial Administrative Court in Poznań from 23rd July 2014, SA/Po 296/14, Lex no 1493550. These adjudications regard the assessment of breaching the prohibition selling alcohol to intoxicated individuals, however their justifications seem to be adequate in the context of the analysis of art. 17 par. 1 of the act on upbringing in sobriety.

⁷ Kuba Magdalena, The Legal Forms of Inspection towards Employees at the workplace. Lex 2014, chapter 4.2.1. The Inspection of Employee’s Sobriety in Polish Legal System.

⁸ The adjudication of the Constitutional Tribunal from 4th April 2001, K 11/00, Lex no 46869

⁹ Complak Krystian, Balicki Ryszard, Bartoszewicz Michał, Haczowska Monika (ed.), Masternak-Kibiak Małgorzata, Ławniczak Artur, The Constitution of the Polish Republic. The Comments, Lexis Nexis 2014, art. 30.

11 KP is an objective value of each man, not depending on its secondary features as well as the sense of this value by himself¹⁰. In other words, by the dignity of an employee one should comprehend the respect he deserves due to his personality, individuality, gender, civil and social attitude, or professed system of values¹¹. The duty to respect dignity and other personal DOBRO of an employee resulting from art. 11 k, similarly to dignity in its constitutional meaning, is not however an issue unconditionally unilaterally directed at a particular individual-an employee. Taking into account the decision of the Supreme Court from 2nd February 2001, one ought to point that employer's duty to respect personal rights of an employee comprises the prevention and counteracting violation against them by other employees subordinate to him. Hence, tolerating such violations means the contribution of an employer to any harm resulting from them, justifying his responsibility for the harm caused on behalf of his organ on the basis of art. 416 of the Civil Code¹². The above decision proves explicitly that the respect of dignity and other personal rights of a particular employee may remain coherent with an identical claim of other employees towards the mentioned individual, whose execution is also the responsibility of an employer. It ought to be assumed then that within multilateral employee relations in a workplace may be the cases of not only violating dignity and personal rights of subjects present in them, but also expressing objective, social, beyond juridical judgements whether the violation of these right has actually taken place. The assessment of the fact of violating personal rights may not be performed according to an individual sensitivity of an involved party, but must be based on objective criteria. The feelings of a wider circle of participants need to be taken into consideration as well as commonly accepted, deserving approval, rules of behaviour (custom, tradition). The motivation of the perpetrator of violation are not without significance either¹³.

While making an attempt to answer the question appearing here of whether the preventive inspection of an employee on the presence of alcohol in his body by

an employer violates the dignity or other personal rights of an examined individual, one needs to reach for the decision of the Supreme Court from 13th April 1972, which is of significance for the further analysis. In the quoted adjudication the highest resort stated that, „the common application, within regulations of work or set customs of searched members of staff in order to prevent carrying away possessions of a company is in accordance with the law and does not violate personal rights of employees (art. 23 and 24 of the Civil Code) only when employees have been informed on the possibility of applying this kind of inspection to protect common property and when the inspection is performed, as agreed with representatives of staff and in a manner that is not contrary with its socio-economic purpose or the rules of social existence in the People's Republic of Poland [...]”¹⁴. In the content of the justification of the above quoted decision the Supreme Court mentioned a number of circumstances justifying the admission U of preventive measures of an employer towards subordinated employees. Firstly, the Supreme Court emphasised that the order of the manager of an organizational unit referred to all employees of the workplace, hence it was of general and not individual character. Secondly, the order resulted from socially justified motifs and, „was intending at providing more efficient protection of common property of the company endangered with loss on the part of the staff members, having access to this property within the range of their employment functions. [...] seemingly tiny harms would combine due to their frequency into a significant loss in common property, therefore they ought not to be neglected, especially when they undermine the sense of honesty and dignity of work [...]”. Finally, the Supreme Court pointed, that inspection activities of an employer did not cause any threat towards the life or health of the plaintiff employee, as well as other employed individuals who underwent the search. While continuing its ponderings the supreme judicial organ drew the attention to the role of a representative organ of employees, which ought to participate in establishing the rules of a preventive inspection of employees in a workplace, and the inspection itself ought not to be contrary with its socio-economic purpose or the rules of social existence. In the justification of the decision the standpoint of the Supreme Court was that conducting the preventive inspection of employees exclusively on the basis of an

¹⁰ Liszcz Teresa, *The Labour Law*, Warszawa 2011, p. 80. w Baranaaaaa.

¹¹ The adjudication of the Supreme Court from 2nd February 2011, II PK 189/10, Lex no 811844.

¹² The adjudication of the Supreme Court from 2nd February 2011, II PK 189/10, Lex no 811844.

¹³ Romer Maria, *The Labour Law. The Comments*, edition. V, LexisNexis 2012, art. 11¹; Sanetra Walerian, *The Labour Code. The Comments*, Edition. III LexisNexis 2013 art. 11¹.

¹⁴ The adjudication of the Supreme Court from 13th April 1972, I PR 153/72, OSNC 1972/10/184.

order of the managing crew launched *ad hoc* without legitimization in work regulations or even the custom of a workplace (despite launching this order in the rightful aim) is groundless.

Summarizing the ponderings of the Supreme Court one comes to conclusion that preventive searching of an employee may not be considered groundless and violating his dignity or personal rights provided it is performed in order to protect supreme rights (as common property was in the People's Republic of Poland), conducted after the agreement of a representative organ of staff, in manner that is not contrary to its socio-economic purpose, having general character towards all employees, not posing any threat towards life or health of inspected individuals, as well as based in work regulations or workplace customs. Additionally, as it is shown in jurisprudence of the labour law, all activities of such a kind performed by an employer ought to be organized in the manner guaranteeing a searched individual maximal level of comfort of privacy and intimacy possible at that moment.

On 26th April 2016 the district court in Gdańsk-Południe in Gdańsk in the legal action of an employee on annulling the penalty for breaching the order associated with his refusal to subdue random inspection of the presence of alcohol in his body, while dismissing the claim unintentionally copied the arguments, which in decision I PR 153/72 had been spotted by the Supreme Court. What is of significance, the case at the court in Gdańsk concerned a bus driver, who was struggling against his employer- the public transportation company. The court established that since in the past there had been cases of driving vehicles of city transportations by intoxicated individuals, the company had introduced a number of internal regulations binding employees, which were to prevent such incidents in the future. The basis of preventive inspection of the staff was constructed from rules in the work regulations and instructions issued for the Road Traffic Inspection, which he was familiar with and had actually been obeying for years. The aim of introducing the above mentioned internal rules lied in the employer's duty to guarantee his employees the protection against the threat towards their lives or health, as well as, „the character of service provided associated with the transportation of people in city transportation. An employer [...] is entitled, or even obliged, to undertake such activities so as to provide full security of passengers, as well as other users of roads. In this respect, he is doubtlessly obliged to minimalise the

risk of driving vehicles by individuals in the state after consuming alcohol or in the state of intoxication. In the light of the above, internal regulations introduced by the defendant unquestionably served the mentioned aim”¹⁵.

The above quoted decision of the Supreme Court from 13th April 1972 as well as the district court in Gdańsk-Południe in Gdańsk from 26th April 2016 recognized the admissibility of regulating the issue of preventive inspection of employees in work regulations agreed upon with trade organizations. After preliminary analyses, however, such solutions might seem contradictory with the content of art. 9 par. 2 of the Labour Code which implies that the regulations of collective bargaining agreement as well as regulations and statutes must not be less beneficial for employees than the rules of the Labour Code as well as other acts and executory regulations, among which the Act on Upbringing in Sobriety certainly should be included. The language content of art. 17 par. 1 of the mentioned act deprives an employer of the right to conduct routine inspection of his employees, hence the limitation of these rules through regulations ought to be forbidden. However, is it really so that the expression, „less beneficial or employees” included in the analyzed legal rule deprives the parties of the employment relationship of the right to make arrangements in this area? As far as I am concerned, in this place one may refer to language analysis interpretation of art. 9 par. 2 of the Labour Code, which points at the plural form „for employees”. The discussed benefit ought to be referred not merely to an individual case of a particular employee, but like in case of the assessment of violating his dignity, the feelings of a broader circle of participants (employees in general) ought to be taken into account, as well as commonly accepted, and deserving to be approved, rules of behaviour (custom, tradition). The motifs of a perpetrator of violence are of significance, too¹⁶. Analysing art. 9 par. 2 the Labour Code on the grounds of the connection between potential rules of work regulations contesting

¹⁵ The adjudication of the district court in Gdańsk-Południe in Gdańsk from 26th April 2016, IV P 1123/14, Lex no 2055664, a similar adjudication, with the routine inspection of employees resulting from the work regulations approved by the court was issued by the District Court in Sandomierz on 15th July 2016, IV P 32/15, Lex no 2245472.

¹⁶ Op.cit. Romer Maria, The Labour Law. The Comments, edition. V, LexisNexis 2012, art. 111; Sanetra Walerian, The Labour Code. The Comments, Edition. III LexisNexis 2013 art. 111.

the content of art. 17 par. 1 of the Act on Upbringing in Sobriety with the rule included in art. 11 of the Labour Code, is even more rightful since the core of the problem regards the very subjective right of each employee to have his dignity respected. Thus, while employer and representatives of the common interest of employees, in the manner agreeable with the Labour Code settle that in the view of all the employed the rules on preventive inspection, serving the purpose of improving their safety and the social safety, do not breach dignity or their persona rights, it seems that there are no rightful grounds to undermine this kind of inspection right of an employer determined in the work regulations. The agreed regulations allowing the application of routine examination by an employer on the presence of alcohol in bodies of employees, additionally ought to meet the criteria of commonness, purposefulness, safety and intimacy of examination. The work regulations established on the basis of the above will, in my view, be able to resist the rule in art. 17 par. 1 of the Act on Upbringing in Sobriety, and as an internal source of law ought to be respected not only by staff, an employer but also other institutions, including the Labour Inspection and courts.

Summarizing the pondering over the issue of employer's rights for the preventive inspection of employees on the presence of alcohol in their bodies, it should be pointed that the arguments mentioned in this article, which are also present in decisions of courts, is an attempt to justify the regulations introduced in workplaces in the whole country, especially in public transportation ones. However, I do presume that the indirect legislative function of courts and doctrine ought

not to replace the legislator, who having appropriate tools at his disposal is capable of conducting suitable amendments in the Act on Upbringing in Sobriety and introducing solutions that are commonly approved of and looked forward to by the society.

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