

Chapter 2. Basic Principles of Individual Labour Law

2.1. The principle of the right to work

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The first of the fundamental principles of labour law laid down in the Polish Labour Code¹ is a right to work. According to article 10 of the Labour Code, everyone shall have the right to work freely chosen. Except in the cases prescribed by law, no one can be forbidden to practice his profession. In its original version, article 10 of the Labour Code explicitly expressed the principle of the right to work² which was also highlighted in the Constitution of 1952³. The current wording of article 10 of the Labour Code refers to a regulation included in article 65 (1) of the Constitution of the Republic of Poland of 1997⁴, which provides that every person shall be guaranteed a freedom to choose and to pursue profession and to choose a place of work, unless law provides otherwise. The literal wording of ar-

¹ Act of 26 June 1974 – Labour Code – Journal of Laws [Dz.U.] of 1998, No. 21, item 94, as amended.

² Article 10 § 1 of the Labour Code: “Citizens of the Polish People’s Republic shall have guaranteed work through continuous and comprehensive development of the national economy and rational employment policy. § 2. The right to work is subject to protection in accordance with the rules set out in the Labour Code and in specific laws. § 3. Competent public authorities shall provide citizens with assistance in obtaining employment corresponding to their qualifications, in a manner specified under separate laws”. (Journal of Laws [Dz.U.] of 1974, No. 24, item 141).

³ Article 68 (1) of the Constitution of 1952 explicitly provided that “Citizens of the Polish People’s Republic shall have the right to work which means the right to employment against remuneration corresponding to the quantity and quality of work”. Moreover, article 19 of the Constitution of 1952 emphasized the meaning of work and underlined that “Work is a right, obligation and a matter of honour of every citizen. Through their work, compliance with the work discipline, work competition and improvement of working methods, the working people of towns and villages build the strength and power of their homeland, increase the welfare of the nation and accelerate complete implementation of the socialist system”. (Journal of Laws [Dz.U.] 1976, No. 5, item 29, as amended).

⁴ The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws [Dz.U.] No. 78, item 483, as amended) eliminated the *expressis verbis* principle of the right to work.

title 10 of the Labour Code is different; however it falls within the scope of article 65 of the Constitution⁵. Because of the fact that neither the Constitution nor the Labour Code mentions explicitly the principle of the right to work, in the legal writings this principle is sometimes referred to as the principle of the freedom of labour,⁶ the principle of the freedom of employment⁷ or the principle of the freedom of choice of work and prohibition of forced labour⁸. The Constitution guarantees to the citizens the freedom of labour⁹. It should also be noted that in Europe the expression the “right to work” is considered one of the constitutional issues which has not been expressed explicitly but as the liberty¹⁰.

The expression “the right to work” is used also in international documents. First to mention is the United Nations Universal Declaration on Human Rights of 1948. According to its article 23 (1): “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”. Another act is the International Covenant on Economic, Social and Cultural Rights of 1966 which provides that the right to work includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right (article 6). As regards the European laws, a reference should be made to the Charter of Fundamental Rights of the European Union¹¹. According to its article 15 (1)(2): “Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”. The European Social Charter of 1961 provides in article 1 titled “The right to work” that: “with a view to ensuring the effective exercise of the right to work, the Parties undertake to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable

⁵ A. Sobczyk, *Prawo pracy w świetle Konstytucji RP [Labour Law in the Light of the Constitution of the Republic of Poland]*, Volume II, [in:] *Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka [Selected Problems and Labour Law Constructs and the Constitutional Human Rights and Freedoms]*, p. 11.

⁶ G. Goździewicz, [in:] *Kodeks pracy. Komentarz [The Labour Code. A Commentary]*, precisely, commentary on article 10 of the Labour Code, argument 1; see: A. Sobczyk, *Wolność pracy i władza [Freedom of Work and Authority]*, Warsaw 2015, pp. 31, 153 ff.

⁷ K. Rączka, [in:] M. Gersdorf, M. Rączkowski, K. Rączka (eds.), *Kodeks pracy. Komentarz [The Labour Code. A Commentary]*, precisely commentary on article 10, argument 3.

⁸ See W. Perdeus, [in:] K.W. Baran (ed.), *Kodeks pracy. Komentarz [The Labour Code. A Commentary]*, precisely commentary on article 10, argument 1.

⁹ L. Florek, *Konstytucyjne gwarancje uprawnień pracowniczych [Constitutional Guarantees of Workers' Rights]*, Państwo i Prawo 1997, vol. 11–12, p. 207.

¹⁰ H. Zięba-Zalucka, *Prawo do pracy jako przedmiot regulacji konstytucyjnych [The Right to Work According to the Constitution]*, *Praca i Zabezpieczenie Społeczne* 2006, No. 2, p. 7.

¹¹ Official Journal of the EU C 2007, No. 303, p. 1.

a level of employment as possible, with a view to the attainment of full employment; to protect effectively the right of the worker to earn his living in an occupation freely entered upon; to establish or maintain free employment services for all workers, to provide or promote appropriate vocational guidance, training and rehabilitation”.

Neither the Labour Code nor the Constitution of the Republic of Poland guarantees that every citizen will find employment in his acquired profession. The right to work freely chosen should be understood as access to such work by persons who meet certain requirements¹². This right does not involve a claim but it only creates an opportunity to freely choose the work that the person concerned wishes to perform¹³. However, the possibility to perform a specific work is conditional upon holding appropriate qualifications and for certain professions – also upon meeting statutory requirements such as absence of criminal record, Polish citizenship. The legislature may set out conditions which must be met in order to be able to pursue certain work or profession, however they cannot be discretionary. The provisions of article 31 (1) of the Constitution of the Republic of Poland will apply¹⁴. According to this article, any restrictions upon the exercise of constitutional freedoms and rights may be imposed only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. The Supreme Administrative Court (*Naczelny Sąd Administracyjny*)¹⁵ held that the fundamental principles of labour law imply that the principle of the freedom of labour applies not only to the moment of hiring an employee but also to the circumstances when the employee remains in the employment relationship. Consequently, an employee cannot be forced to remain in employment against his will – the employee’s right to terminate an employment relationship cannot be effectively restricted.

The essence of the freedom to pursue a profession is to create such legal situation in which everyone will have access to such a profession, conditional only upon talent and qualifications¹⁶. Under some acts the opportunity to pursue

¹² K. Walczak, Komentarz do kodeksu pracy [*Commentary to Labour Code*] (available at Legalis Database), precisely a commentary on article 10, argument 4; Z. Góral, Prawo do pracy [*The Right to Work*], [in:] K.W. Baran (ed.), Zarys Systemu Prawa Pracy [*Outline of Polish Labour Law System*], vol. I, Warsaw 2010, p. 551, see: Z. Góral, Prawo do pracy. Studium prawa polskiego w świetle porównawczym [*The Right to Work. A Comparative Study*], Łódź 1994, p. 5 ff.

¹³ See A. Śledzińska-Simon, Wolność pracy [*The Freedom of Labour*], [in:] M. Jabłoński (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym [*Exercising and Protection of Individual Rights and Freedoms under the Polish Legal System*], Wrocław 2014, p. 573.

¹⁴ Judgment of the Constitutional Tribunal of 24 January 2001, SK 30/99, OTK 2001, No. 1, p. 3.

¹⁵ Judgment of 28 March 2005, II FSK 450/2005, not published.

¹⁶ Judgment of the Constitutional Tribunal of 19 October 1999, SK 4/99, OTK 1999, No. 6, p. 119.

a specific profession is conditional upon meeting certain requirements regarding qualifications, for example in the case of lawyers. Such requirements are justified by the public interest, provided that the scope of the requirements set out by the legislature is not arbitrary¹⁷. There are arguments raised in the labour law literature that the right to work may to some extent be considered claimable, by establishing appropriate protective measures, if we refer to the prohibition of discrimination in employment¹⁸.

The legislature has also introduced restrictions on the performance of specific work by certain categories of persons. First to mention are restrictions on the performance of certain work by pregnant and breastfeeding women (strenuous work, dangerous work or work harmful to health, work which may have a negative impact on their health, course of pregnancy or breastfeeding) (article 176 of the Labour Code) and restrictions on the performance of certain work by minors as specified by law¹⁹ (work which may pose risk to their health (article 204 of the Labour Code)). Moreover, the restrictions on the exercise of the freedom of labour apply also to the age of the employees. Article 7 of the European Social Charter²⁰ defines the minimum age of admission to employment which shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education. Also, the ILO Convention No. 138 concerning Minimum Age for Admission to Employment adopted in Geneva on 26 June 1973²¹ provides that in general the minimum age is 15 years²². Other ILO's document relating to the restriction and prevention of child labour is Convention No. 182, concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted on 17 June 1999 in Geneva²³. As regards EU laws, the fundamental principles regarding child labour were laid down in the Council Directive 94/33/EC of 22 June 1994 on the protec-

¹⁷ M. Bartoszewicz, [in:], M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. A Commentary]*, precisely, commentary on article 65, argument 4. See judgment of the Constitutional Tribunal of 18 February 2004, P 21/2002, OTK-A 2004, No. 2, item 9.

¹⁸ W. Pedrus, [in:] K.W. Baran (ed.), *Komentarz do prawa pracy. [Labour Law. A Commentary]*, precisely, a commentary on article 10, argument 2.

¹⁹ Regulation of the Council of Ministers on the list of jobs prohibited to young people and the terms and conditions of employment in some of these jobs [*Rozporządzenie Rady Ministrów w sprawie wykazu prac wzbronionych młodocianym i warunków ich zatrudniania przy niektórych z tych prac*] (Journal of Laws [Dz.U.] of 2016, item 1509).

²⁰ Journal of Laws [Dz.U.] of 1999, No. 8, item 67.

²¹ Journal of Laws [Dz.U.] of 1978, No. 12, item 53.

²² A Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years (article 2(4) of the ILO Convention No. 138).

²³ Journal of Laws [Dz.U.] of 2004, No. 139, item 1474.

tion of young people at work²⁴. Under the Polish laws, in principle, employment of a person below the age of 16 is prohibited²⁵. All the above mentioned restrictions are aimed at protection of the employed persons and cannot be classified as discrimination.

The constitutional principle of the freedom of labour in a positive sense covers both an opportunity to choose a type of work (qualificative aspect), to choose an employer (personal aspect) and to decide on the place of employment (spatial aspect)²⁶. In the literature it has been rightly pointed out that the freedom to choose an employer means not only the possibility to change employment but also to remain in another employment relationship, which means to take up additional employment²⁷. However, as regards certain groups of employees, there exist statutory restrictions on the right to take up additional employment. In the case of the majority of officers of uniformed services²⁸ these restrictions usually mean prohibition on taking up other paid activity outside the service. In such case the purpose of these restrictions is to ensure impartiality of the officers in the performance of their duties as well as to prevent the situations in which taking up additional activity would be in conflict with the principle of “dedication” to the service²⁹. On the other hand, as regards separate laws governing employment of specific categories of public sector employees (so called *pragmatyki*), the restrictions involve usually a prohibition of additional employment³⁰. Such pro-

²⁴ Official Journal of the EU L of 28 August 2014, p. 12, as amended.

²⁵ Under article 191 § 5 of the Labour Code, the Minister of Labour and Social Policy, in agreement with the Minister of Education, may specify in a regulation the situations where the following is exceptionally permissible: employment of young people who have not completed the 8-year primary school; exemption of young people without professional qualifications from the obligation to undergo a vocational training; employment of persons below the age of 16, who completed the 8-year primary school; employment of persons below the age of 16, who have not completed the 8-year primary school.

²⁶ Judgment of the Constitutional Tribunal of 23 June 1999, K 30/98, OTK 1999, No. 5, p. 101.

²⁷ See Z. Góral, Swoboda doboru pracowników i wolność pracy. Polskie prawo pracy w okresie transformacji w oświetleniu prawa wspólnotowego [*Freedom of Selection of Employees and the Freedom of Labour. Polish Labour Law in the Period of Transformation in the Light of the Community Law*], Warsaw 1997, p. 37.

²⁸ Internal Security Agency [*Agencja Bezpieczeństwa Wewnętrznego*] and Intelligence Agency [*Agencja Wywiadu*], Government Protection Bureau [*Biuro Ochrony Rządu*], Border Guard [*Straż Graniczna*], Customs Service [*Śłużba Celna*], the Military Counterintelligence Service [*Śłużba Kontrwywiadu Wojskowego*], the Military Intelligence Service [*Śłużba Wywiadu Wojskowego*], the Prison Service [*Śłużba Więzienna*].

²⁹ T. Kuczyński, [in:] R. Hauser, A. Wróbel, Z. Niewiadomski (eds.), Stosunek służbowy. System Prawa Administracyjnego [*An Official Relationship. A System of Administrative Law*], vol. 11, Warsaw 2011, p. 422.

³⁰ *Ibidem*, p. 423. These include members of the civil service corps, public officers, court and public prosecution service officers, judges, trainee judges in administrative courts, public prosecu-

hibitions may be waived if the consent for the additional employment is granted by the superior. The superior's decisions in this regard are discretionary since this issue is not regulated in detail in the public sector employment regulations.

Sometimes employers include in the contracts of employment certain clauses concerning the requirement to previously inform the employer on the intention to take up additional gainful activity. There are arguments raised in the labour law literature that any restrictions on taking up additional or future employment, regardless of its form, are invalid if there is no reasonable, real and actual cause or if it causes significant life restrictions for the person (employee) concerned without a good reason or without compensation³¹. The limits on the employer's right to obtain information from an employee are specified by the norms establishing the prohibition of discrimination and violation of personal rights of an employee³². Taking up additional employment by employees is acceptable because of a separate calculation of working time by particular employers. However, there is a visible conflict between the protective function of the provisions governing the working time and the principle of the freedom of labour³³.

What limits the full freedom of choice of the employing entity are non-compete agreements during the term of employment relationship and following the end of employment (so called non-compete clause). To the extent specified in a separate agreement, an employee cannot carry out an activity which is competitive to the employer or perform work under an employment relationship or on other basis for an entity which is a competitor of the employer. In the event of a non-compete agreement following the end of an employment relationship, an employee cannot start employment with another employer who runs business competitive to that of the previous employer. The non-compete obligation after the end of an employment relationship which in fact limits the right to work must be very precisely and reasonably specified in an agreement. The principle of the freedom of labour is not violated only if the actual purpose of such clauses is protection against unjustified competition and if the restrictions agreed upon between the parties as regards employment are proportionate to the risk to the employer's interests³⁴. Such agreement may be concluded only with an employee

tors, court-appointed curators, and counsellors of the General Counsel to the Republic of Poland [*Prokuratoria Generalna*].

³¹ A. Sobczyk, *Kodeks pracy. Komentarz [The Labour Code. A Commentary]* (available at Legalis database) precisely, commentary on article 10, argument 3. See a judgment of the Supreme Court of 14 April 2009, III PK 60/08 with a commentary of J. Czerniak-Swędzioł, OSP 2011, No. 7–8, p. 593 ff.

³² Judgment of the Supreme Court of Poland of 19 January 2017, II PK 33/16, MPP 2017, No. 4, pp. 203–205.

³³ B. Cudowski, *Dodatkowe zatrudnienie [Additional Employment]*, Warsaw 2007, p. 148.

³⁴ Z. Góral, *O kodeksowym katalogu zasad indywidualnego prawa pracy [The Labour Code Catalogue of Principles of Individual Labour Law]*, Warsaw 2011, p. 96.

who had access to particularly important information, disclosure of which might cause damage to the employer. Moreover, such agreement is always a fixed-term agreement since the amount of the compensation payable to the former employee is dependent on the duration of such agreement.

A particular manifestation of the freedom of labour is a freedom to choose an employer with whom one wishes to work. However, in the case of a transfer of an undertaking or a part of an undertaking to another employer under article 23¹ of the Labour Code, the freedom to choose an employer is limited. In such situation the new employer who has taken over the entire undertaking or a part thereof becomes, by law, a party to the existing employment relationships. An exception applies to workers hired on a basis other than a contract of employment (article 23¹ § 5 of the Labour Code). However, in such case a manifestation of the freedom to choose an employer is the right of the acquired employee to terminate employment without notice, upon 7-days' notification, within 2 months from the transfer of the undertaking or a part of the undertaking to another employer.

A negative aspect of the constitutional principle of the freedom of labour includes the prohibition of slavery and forced or compulsory labour. The prohibition of (freedom from) slavery was one of the first human rights recognized internationally³⁵. There are arguments raised in the jurisprudence that forced labour occurs when there is an actual element of force. In the case of compulsory work, there is an obligation to perform such work set out in legal regulations³⁶. In the Labour Code the negative aspect is not taken into account. However, in the Polish legal system the mentioned prohibitions are undisputed and derive not only from the Constitution but also from international agreements ratified by Poland. A strong emphasis on the prohibition of forced labour in connection with the prohibition of slavery and servitude was put in the Convention for the Protection of Human Rights and Fundamental Freedoms³⁷. Similar provisions are laid down in the Charter of Fundamental Rights of the European Union³⁸. According to its article 5 (1) and (2) no one shall be held in slavery or servitude or be required to perform forced or compulsory labour. Moreover, article 15 (1) of the Charter provides that "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".

³⁵ K. Drzewicki, *Prawo do pracy jako normatywny agregat międzynarodowej ochrony praw człowieka [The Right to Work as a Normative Set of International Protection of Human Rights]*, [in:] M. Seweryński, J. Stelina (eds.), *Wolność i Sprawiedliwość w zatrudnieniu [Freedom and Justice in Employment]*, Gdańsk 2012, p. 77.

³⁶ See L. Garlicki, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności [Convention on the Protection of Human Rights and Fundamental Freedoms]*, vol. 1, Commentary on articles 1–18, Warsaw 2010, commentary on article 4, pp. 145–146.

³⁷ Article 4, *Journal of Laws [Dz.U.] of 1993*, No. 61, item 284.

³⁸ Official Journal of the EU C of 2007, No. 303, p. 1

In the labour law jurisprudence it has been rightly held that forced labour does not include contractual obligations specified in law such as non-compete agreements or so called loyalty agreements which are signed if an employer finances the costs of professional development of an employee, if an employee can be released from such obligation through payment of the amount proportionate to the costs incurred by the employer³⁹. The principle of the freedom of labour is linked to the prohibition of normative imposition of sanctions in the case of failure to take up employment. A person who does not work may usually face a negative moral judgment by other persons. In the teachings of the Catholic Church work is a fundamental dimension of human existence⁴⁰. Work is an obligation stemming from the nature of a human being as a rational being⁴¹.

The public aspect of the freedom of choice of employment consists in an obligation of a state to determine the minimum amount of remuneration for work and to implement a policy aimed at full and productive employment⁴². The provisions of article 10 §§ 2 and 3 of the Labour Code are a reflection of article 65 of the Constitution of the Republic of Poland⁴³. Remuneration for work is one of the characteristics of an employment relationship and stems directly from article 22 of the Labour Code. An employee cannot waive the right to remuneration or transfer this right to another person. Article 65 (4) of the Constitution of the Republic of Poland imposes on the legislature an obligation to set out the minimum remuneration for work or the method for determining its amount. However, it does not provide for any guidelines as to the method of determination of such minimum remuneration, leaving to the legislature the full freedom to choose the rules under which the remuneration should be calculated and criteria for calculation of the amount of such remuneration. According to article 10 § 2 of the Labour Code, the state shall determine the minimum wage. Professor Sobczyk pointed out that the guarantee of the minimum wage means interference by the legislature in the rights and freedoms of an employer in the name of protection of an employee against social exclusion⁴⁴. The minimum remuneration is the minimum amount of remuneration of an employee who is employed on a full-time basis in a month. If an employee is not employed on a full-time monthly

³⁹ See Z. Góral, *Podstawowe zasady indywidualnego prawa pracy [The Fundamental Principles of Individual Labour Law]*, [in:] K.W. Baran (ed.), *System prawa pracy, Część ogólna, Tom 1 [The System of Labour Law. General Part. Volume 1]*, Warsaw 2017, p. 1022.

⁴⁰ See *John Paul II, Laborem exercens* encyclical, Katowice 1981.

⁴¹ J. Majka, *Rozważania o etyce pracy [Deliberations on the Work Ethics]*, Wrocław 1986, p. 81.

⁴² M. Gersdorf, K. Rączka, *Prawo pracy. Podręcznik w pytaniach i odpowiedziach [Labour Law. Questions & Answers Handbook]*, Warsaw 2013, p. 96.

⁴³ A. Sobczyk, *Komentarz do prawa pracy [Labour Law Commentary]* (available at Legalis Database), a commentary on article 10, argument 7.

⁴⁴ A. Sobczyk, *Prawo pracy w świetle... [Labour Law in the Light...]*, p. 35.

basis, then the minimum remuneration should be determined in an amount proportionate to the number of hours worked by the employee in the month concerned, based on the amount of the minimum remuneration determined on the basis of the Act of 10 October 2002 on the Minimum Remuneration for Work⁴⁵. The mentioned Act further provides that the remuneration must be determined taking into account the minimum hourly rate in relation to the so-called self-employed⁴⁶ as well as natural persons who do not conduct business activity, who accept commissioned work or provide services under separate contracts to which laws on provision of services apply, to an entrepreneur⁴⁷ or to other organisational unit within their business operations⁴⁸. A contractor or a service provider cannot waive the right to remuneration at the amount stemming from the amount of the minimum hourly rate or transfer the right to such remuneration to another person. The amount corresponding to the minimum rate should be paid at least once a month in the case of contracts concluded for longer periods (article 8a (6) of the Act on the Minimum Remuneration). It is also necessary to determine the method how the number of hours worked under the contract will be confirmed (article 8b of the Act on the Minimum Remuneration). In some cases the hourly rate will not apply (article 8d (1) of the Act on the Minimum Remuneration). First to mention are contracts under which the place and time of performance of work or provision of services is determined by the contractor or the service provider and they are only entitled to a commission-based remuneration. Other contracts which were excluded are those governing provision, for a period exceeding 24 hours, of care, educational and welfare services specified in detail in article 8d (1) (2–5) of the Act on the Minimum Remuneration. The amount of the minimum remuneration as well as the amount of the minimum hourly rate is published in the Official Gazette of the Republic of Poland – *Monitor Polski* – in the form of an announcement of the Prime Minister, by 15 September each year. This amount is subject to annual negotiations within the Council of Social Dialogue (*Rada Dialogu Społecznego*)⁴⁹. The remuneration above the minimum level should be determined taking into account the type, quantity and quality of work, that is in accordance with the guidelines laid down in article 78 § 1 of the Labour Code.

⁴⁵ Journal of Laws [Dz.U.] of 2017, item 847.

⁴⁶ A natural person running business registered in the territory of Poland or in a non-EU Member State or non-EEA Member State, who does not employ workers or does not conclude contracts with contractors.

⁴⁷ Within the meaning of the Act of 2 July 2004 on the Freedom of Establishment (*ustawa o swobodzie działalności gospodarczej*) (Journal of Laws [Dz.U.] of 2016, item 1829).

⁴⁸ Since 1 January 2018 the minimum hourly rate is 13.70 PLN gross.

⁴⁹ Since 1 January 2018 the minimum remuneration for work is 2,100 PLN gross.

Article 10 § 3 of the Labour Code addresses another aspect of the right to work, that is an obligation of the state to implement a policy aimed at full and productive employment. On the other hand, article 65 (5) of the Constitution lists specific actions to be undertaken by public authorities, designed to comply with the right to work such as implementation of programmes to combat unemployment, including organisation of and support for vocational guidance and training, as well as public works and intervention works⁵⁰. The functions of the state in the field of promotion of employment, mitigating effects of unemployment and professional activation of unemployed persons and persons seeking work are laid down in the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions (*ustawa o promocji zatrudnienia i instytucjach rynku pracy*)⁵⁰. Moreover, regulations concerning employment support measures are included in the Act of 27 August 1997 on the Professional and Social Rehabilitation and on Employment of Persons with Disabilities (*ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*)⁵¹ and in the Act of 13 March 2003 on the Specific Rules of Termination of Employment for Reasons not Attributable to Employees (*ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników*)⁵².

The essence of the right to work, both in the constitutional sense and under article 10 of the Labour Code, is that the public authorities are obligated to act in order to create jobs⁵³. This does not mean that the policy should guarantee employment to all citizens seeking work. Recently, there has been a visible decrease in unemployment rates on the Polish labour market. However, there has long been a problem with the lack of work in prisons. It has been emphasized that even if prisoners cannot demand employment, still the state should ensure the possibility for the prisoners to exercise the right to work by implementation of an appropriate penitentiary policy. However, because the society has put pressure on severe punishment of offenders, it often overshadows the need for vocational re-adaptation of prisoners which is necessary for their adaptation to normal professional life out of prison after serving their sentence⁵⁴.

⁵⁰ Journal of Laws [Dz.U.] of 2017, item 1065.

⁵¹ Journal of Laws [Dz.U.] of 2016, item 2046.

⁵² Journal of Laws [Dz.U.] of 2016, item 1474.

⁵³ A. Sobczyk, Kodeks pracy... [The Labour Code...], commentary on article 10 of the Labour Code, argument 1.

⁵⁴ T. Zieliński, Prawo do Pracy – problem konstytucyjny [The Right to Work – a Constitutional Problem], Państwo i Prawo 2003, vol. 12, p. 13.

2.2. The principle of protection of dignity and other rights of an employee

E. Kumor-Jeziarska

The concept of dignity has not been defined by the Polish legislature. The human dignity is treated as a foundation of human rights. It is considered a certain cultural category, a universal value that grew out of the classical streams of the European philosophy⁵⁵. In the tradition of the Polish language, human dignity is usually referred to as the “self-esteem” and “self-respect”⁵⁶. The inherent and inalienable human dignity is a source of freedoms and rights of persons and citizens. It is inviolable. The respect and protection thereof shall be the obligation of public authorities (article 30 of the Constitution of the Republic of Poland). Dignity is derived from the nature and essence of humanity and is therefore not given by law⁵⁷. The employer should respect dignity and other personality rights of an employee, and this obligation was elevated to the status of one of the fundamental principles of labour law (article 11¹ of the Labour Code). Employee’s dignity is an integral concept. It is not derived only from being an employee but from being a human in general. The meaning of article 11¹ of the Labour Code is that a person whose dignity is violated is granted additional protection under labour law if the violator is an employer⁵⁸. In the labour law literature and judicial decisions, there exists a concept of employee’s dignity, identified as self-esteem based on the opinion of a good professional and conscientious employee and on the recognition of the abilities, skills and contribution of an employee by his superiors⁵⁹. In addition, it is argued that the concept of dignity in relation to an employee should be seen as a manifestation of non-instrumental treatment of an employee, employee’s empowerment in the work process, which will allow the employee to create self-esteem, thereby increasing his personal commitment to work⁶⁰. The pro-

⁵⁵ See D. Dörre-Kolasa, *Ochrona godności i innych dóbr osobistych pracownika [Protection of Dignity and Other Personal Rights of an Employee]*, Warsaw 2005, p. 3 ff.

⁵⁶ M. Szymczak, *Słownik języka polskiego [Polish Language Dictionary]*, vol. 2, Warsaw 1982, p. 673.

⁵⁷ See A. Redelbach, *Prawa naturalne, prawa człowieka, wymiar sprawiedliwości. Polacy wobec Europejskiej Konwencji Praw Człowieka [Natural Law, Human Rights and Justice System. Poles and the European Convention of Human Rights]*, Toruń 2000, p. 96.

⁵⁸ Judgment of 10 May 2012, II PK 215/11.

⁵⁹ Judgment of the Court of Appeal in Katowice of 29 April 2013, III APa 52/12.

⁶⁰ See H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu [Protection of Personality Rights in Employment]*, Warsaw 2007, p. 274. see: J.A. Piszczek, *Cywilnoprawna ochrona godności pracowniczej*

visions of article 11¹ of the Labour Code stipulate that the employer must respect dignity and other personal rights of an employee, which means that a person applying for a job, and thus having the status of a candidate for employment, can only enjoy the protection of personal rights guaranteed by the Civil Code. The Labour Code does not contain a catalogue of employee's personality rights, and article 11¹ of the Labour Code does not provide for their distinctiveness, however, it obligates to their protection. In the Labour Code, among personality rights the legislature exposed only dignity. In the jurisprudence, a disputable issue is the relation between article 11¹ of the Labour Code and articles 23 and 24 of the Civil Code. It is possible to distinguish two main approaches. According to the first, more convincing view, the issue of protection of the employee's personality rights was not fully regulated in the labour law; hence the existing gap should be filled on the basis of article 300 of the Labour Code by application of articles 23 and 24 of the Civil Code respectively⁶¹. According to the second view, the provisions of the Civil Code guarantee protection to everyone, and therefore also an employee who suffered from an infringement committed by the employer. Consequently, it is argued that the provisions of articles 23 and 24 of the Civil Code should be applied without reference to article 300 of the Labour Code which orders that the Civil Code should be applied *mutatis mutandis* to the employment relationships. As a consequence, both article 11¹ of the Labour Code and the provisions of articles 23 and 24 of the Civil Code are applied cumulatively⁶². Regardless of the approach taken, when identifying other personality rights of an employee, it is necessary to point out the exemplary catalogue of personality rights protected by law, specified in the Civil Code. It includes: health, freedom, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, home inviolability, scientific, artistic, inventive and rationalizing work. Honour and reputation of a person are concepts which cover all areas of his/her personal, professional and social life. The violation of an honour of a person usually takes place through the dissemination of messages which formulate allegations or negative assessments pertaining to a specific person regarding his- behaviour in personal, family or professional life. It is usually about creating a negative image of such person, about attributing specific behaviour or characteristics to such

[A Civil-law Protection of Employee's Dignity], Toruń 1981, pp. 53–54; I. Boruta, Ochrona dóbr osobistych pracownika [Protection of Personal Rights of Employees], PiZS 1998, No. 2, p. 19.

⁶¹ D. Dörre-Nowak, Obowiązek pracodawcy szanowania godności i innych dóbr osobistych pracownika oraz konsekwencje jego naruszenia [Employer's Obligation to Respect Dignity and other Personal Rights of an Employee and Consequences of Their Violation] Studia z zakresu prawa pracy i polityki społecznej 1999–2000, p. 134; M. Dyczkowski, W sprawie ochrony dóbr osobistych pracowników [Protection of personality rights of employees], PiZS 2001, No. 5, p. 14–19.

⁶² I. Boruta, Ochrona dóbr osobistych... [Protection of Personal Rights...], p. 20.

person that may result in the loss of confidence needed to pursue a profession or other activity. The harm resulting from such a violation is the feeling of discomfort caused by the loss of respect of other people⁶³. The category of personal rights is dynamic and changes over time. Technological and civilization development, moral and legal principles adopted in the society, most certainly have an impact on the emergence of the new categories of personal rights which are accepted in the judicature. The Supreme Court pointed out to the possibility to recognize a (secondary) personal right, separate from life and health of an employee, that is the right to safe and healthy working conditions. The confirmation of this argument is, among others, that one of the basic duties of the employer is to provide employees with safe and healthy working conditions (article 94 (2a) and (4) of the Labour Code)⁶⁴. Moreover, the Supreme Court held that employee's right to rest can be considered a personality right, separate from health and the right to safe and healthy working conditions. The right to rest is the right by which an employee can reconcile his functioning in the employment sphere with other social roles⁶⁵. It is also legitimately argued in the literature on the subject that assignment of an employee to work in inappropriate conditions can be assessed as degrading his dignity, especially when this condition is permanent or long-lasting⁶⁶. In its judgment of 10 January 2017⁶⁷ the Supreme Court held that if an employee is entrusted with the performance of work in a mouldy and musty environment (room), it can be considered an infringement of the personality rights of the employee (academic teacher). The Supreme Court found that what can be considered a personal right of an employee is data concerning employee's remuneration. The Supreme Court held that the right to remuneration can be included in the sphere of employee's privacy only following the analysis of all social and economic relations, customs and rules of coexistence. However, it should be acknowledged that the employer should absolutely refrain from disclosing the amount of employee's earnings if the employee explicitly, for justified reasons, objects to revealing to third parties the amount of his remuneration for work or in a situation where such information would encroach on the "sphere of intimacy" of the employee. According to the Court, such a situation would occur if the in-

⁶³ Judgment of the Court of Appeal in Warsaw – I Civil Division of 28 January 2016, I ACa 215/15.

⁶⁴ II PK 311/08, see: *M. Dyczkowski, W sprawie ochrony dóbr osobistych... [Protection of Personality Rights...]*, p. 9

⁶⁵ Judgment of the Supreme Court of Poland of 21 June 2011, III PK 96/10. Resolution of the Supreme Court of Poland of 13 March 2008, I PZP 11/07. Resolution of the Supreme Court of Poland of 3 June 2008, I PZP 10/07. Judgment of the Supreme Court of 23 July 2009, II PK 26/09.

⁶⁶ *H. Szewczyk, Ochrona dóbr osobistych pracownika uwagi de lege lata i de lege ferenda – cz. 1 [Protection of Personality Rights of an Employee – De Lege Lata and De Lege Ferenda – Part I]*, PiZS 2010, No. 1, p. 4.

⁶⁷ III PK 37/16.

formation on the amount of the employee's remuneration affected his private life, e.g. if it disclosed the maintenance payments deductions⁶⁸. The wage secrecy is binding upon the employer and the persons representing the employer who have access to remuneration data. This obligation applies to the provision of information to all entities, unless specific statutory provisions authorize the disclosure of remuneration. For example, in the judgment of 8 May 2002⁶⁹, the Supreme Court held that the employer did not violate the employee's personal rights by obliging the employee – in accordance with the provisions of the regulations on granting benefits from the company social benefits fund – to submit a certificate of earnings obtained from his other employer.

Article 11¹ of the Labour Code provides a legal basis for protection of the employee's sphere of privacy. The legal theorists and the courts adjudicating on the employees' privacy issues do not define the concept of "privacy", "private sphere" or "private life" but rather try to determine which matters, states or circumstances belong to the private sphere, and which of them, belong to the so-called sphere of universal accessibility⁷⁰. According to article 47 of the Polish Constitution "everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life". As regards international law, worth noting is article 12 of the Universal Declaration of Human Rights which provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". Also the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950⁷¹ refers to this fundamental right in its article 8 and underlines that "Everyone has the right to respect for his private and family life, his home and his correspondence". The right to privacy is strictly related to the issues of protection of personal data and the image of the employee. According to article 94 (9a) and (9b) of the Labour Code, each employer shall keep documentation in matters relating to employment relationship and personal files and shall store them in the conditions preventing their damage or destruction. The personal files are created and kept separately for each employee. It is a collection of various documents, such as contracts of employment, medical certificates, other certificates, employee requests or declarations made by the parties to an employment relationship. Paragraph 6 of the Regulation of the Minister of Labour and Social Policy of 28 May 1996 on

⁶⁸ Resolution of 7 judges of the Supreme Court of 16 July 1993, I PZP 28/93.

⁶⁹ Judgment of the Supreme Court of 8 May 2002, I PKN 267/01.

⁷⁰ T. Liszcz, *Ochrona prywatności pracownika w relacjach z pracodawcą [Protection of Employee's Privacy in Relations with an Employer]*, MPP 2007, No. 1, p. 9.

⁷¹ Journal of Laws [Dz.U.] of 1993, No. 61, item 284.

the Scope of Documentation Kept by Employers in Matters Relating to Employment Relationship and the Method for Keeping Personnel Files (*rozporządzenie Ministra Pracy i Polityki Socjalnej w sprawie zakresu prowadzenia przez pracodawców dokumentacji w sprawach związanych ze stosunkiem pracy oraz sposobu prowadzenia akt osobowych pracownika*)⁷² defines the documents which should be collected in the personnel files. However, Part B of the files may also contain documents other than those listed in the Regulation, if they are significantly related to the course of employment, and their storage is justified and in compliance with law⁷³. According to the Supreme Court, it is not a mistake to put in the personnel files the notes and memos regarding employee's behaviour, if the employee is aware of it. In its judgment of 10 October 2003⁷⁴ the Supreme Court explained that an employer has the right to document employee's failure to perform his duties. And the employee cannot demand that documentation concerning the course of his employment, be destructed or no longer collected. However, he may request the inclusion of this documentation in personnel files and order the employer to further collect it in such files⁷⁵. A memo concerning a behaviour that may be the reason for punishing an employee with a penalty for breach of workplace order, procedures or policies (*kara porządkowa*) stipulated in the Labour Code, should be limited only to the facts and be devoid of assessment elements⁷⁶. The subject of other memos should only be significant events concerning the course of employment, e.g. refusal to accept a statement of termination of a contract of employment. Personnel files cannot contain documents the scope of which goes beyond the data which can be processed by the employer. Personal data of employees collected and stored in personnel files are a form of personal data processing by the administrator. Every employer, when processing personal data of his employees, should exercise due diligence to protect the interests of employees and candidates for employment. The General Regulation (EU) of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data⁷⁷ does not

⁷² Journal of Laws [Dz.U.] of 2017, No. 894.

⁷³ Judgment of the Supreme Court of Poland of 4 June 2002, I PKN 249/01.

⁷⁴ I PK 295/02.

⁷⁵ A different view was presented by the Supreme Court in its judgment of 23 November 2010, I PK 105/10, in which the Court held that an employer may not use and attach to the files any warning letters or other indications of breach of duties in order to discipline an employee. Preparation of such letters or notes is considered unacceptable practice. It leads to the circumvention of regulations on the imposition of penalties for breach of order in the workplace, especially in the absence of the possibility to appeal.

⁷⁶ See M. Mędrala, Notatki służbowe w pracowniczych aktach osobowych [*Memos in Personnel Files*], PiZS 5/2017, p. 11.

⁷⁷ Official Journal of the EU L, No. 119, p. 1. It applies as of 25 May 2018.

introduce specific rules for data processing in the labour relations⁷⁸. The regulation sets out the basic rules for the processing of data. The personal data must be:

- processed lawfully, fairly and in a transparent manner in relation to the data subject;
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed;
- accurate and, where necessary, kept up to date;
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed;
- processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

Article 22¹ of the Labour Code contains a detailed list of data that an employer may request from a candidate for employment or from an employee. The employer may request other information about the candidate only if the obligation to provide it follows from separate provisions. Such an obligation may be explicitly indicated in a legal provision. For example, according to article 4 (4) of the Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service (*ustawa o pracownikach sądów i prokuratury*)⁷⁹, the condition for applying for employment in a court or prosecutor's office is that the person applying for a clerk's training submits a statement that there are no proceedings pending against him, prosecuted by public prosecution or relating to fiscal offences. There are also provisions that do not formulate *expressis verbis* the requirement to submit a specific document, nevertheless the need to obtain information about the criminal record can be interpreted from the requirements

⁷⁸ Article 88 of the General Data Protection Regulation reserves that "Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship. 2. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place".

⁷⁹ Journal of Laws [Dz.U.] of 2017, item 246.

stipulated in such provision which should be met by a candidate for employment. For example, civil services may employ only persons who were not punished for an intentional crime or intentional fiscal offence⁸⁰. Such requirements are stipulated also in other separate laws governing employment of specific categories of public sector employees (so called *pragmatyki*). According to article 6 (1)(10) of the Act of 24 May 2000 on the National Criminal Register (*ustawa o Krajowym Rejestrze Karnym*)⁸¹, an employer has the right to obtain information about persons whose personal data were included in the register, to the extent necessary to hire an employee who is subject to the statutory obligation of having no criminal record and full public rights, as well as to determine his right to hold a particular position, pursue a particular profession or conduct a specific business activity⁸². An employer who requests a certificate of no criminal record (*zaświadczenie o niekaralności*) from a candidate for employment, and the obligation to present this document is not prescribed by law, or is seeking to obtain information from third parties regarding conviction of an employee, may be accused of violation of personal rights. An employer may demand from an employee, that is a person with whom an employment relationship has already been established, other personal data, as well as names and dates of birth of the employee's children, if such data is necessary in connection with the fact that the employee may exercise certain rights provided for in the labour law. For example, the other personal data, necessary in connection with the exercise by the employee of special rights provided for in the labour law, may be information about the employee's disability.

Persons who apply for a job often include their photographs in their CVs. An employer cannot demand submission by the candidate for employment of curriculum vitae with a photograph, because the demand to disclose the image does not fit into the catalogue of data mentioned in article 221 of the Labour Code. If a candidate voluntarily provides additional information about himself, such as a photo, then his informed and voluntary consent to use the image for the recruitment process will be an element that legalizes the processing of this data for the recruitment by the employer. After hiring an employee, the employer cannot freely use the employee's image, for example place photos from his CV on the company's website. According to article 81 of the Act on Copyright and Related Rights, the dissemination of the image requires the consent of the person shown

⁸⁰ Article 4 (3) of the Act of 21 November 2008 on the Civil Service (*ustawa o służbie cywilnej*) (Journal of Laws [Dz.U.] 2017, item 1889).

⁸¹ Journal of Laws [Dz.U.] of 2017, item 678.

⁸² For example, according to article 4 (5) of the Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service (*ustawa o pracownikach sądów i prokuratury*), prior to admitting a person to a clerical training, a director of a court or a prosecutor managing an organizational unit, should obtain information about such person from the National Criminal Register.

on it. Exceptionally, consent is not required if the person has received the agreed payment for posing or when he/she is a well-known person, and the image was made in connection with performing public functions, in particular political, social, professional or the image of the person is only a detail of a larger whole such as gathering, landscape, public event.

Sometimes, the internal company regulations provide for an obligation to wear a badge or a service card with the employee's image. In this situation, the employer may require a photo from the employee. Such standpoint was expressed by the Inspector General for the Protection of Personal Data (*GIODO*). However, if there is no such requirement in the internal regulations, the employer who wishes to legally obtain employee's photo to place it on a badge or service card, must – as a rule – obtain the employee's consent. However, there are professions or the nature of work, where the image of the employee is closely related to the duties he performs, e.g. a security officer. In such case, security considerations make it possible to use the image of the security worker for identification purposes⁸³.

For many years, the possibility to process biometric data in the labour relations has been a problematic issue. The General Data Protection Regulation (GDPR) contains a definition of biometric data. Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data (article 4 (14) of the GDPR regulation). The problem of the permissible use, including the processing, by the employer of employees' fingerprints to control the working time, has been examined in the case-law. Initially, a view was presented according to which an employer has such a right, but only upon prior employee's consent⁸⁴. The standpoints presented in the later case-law were different. For example, the Supreme Administrative Court, in its judgment of 1 December 2009⁸⁵, held that "(...) the lack of balance in the employee-employer relation puts into question the voluntary character of consent to the downloading and processing of data (...). For that reason, the legislator limited, under article 22¹ of the Labour Code, the catalogue of data which may be demanded by

⁸³ See E. *Kumor-Jeziarska*, Komentarz do rozporządzenia w sprawie zakresu prowadzenia przez pracodawców dokumentacji w sprawach związanych ze stosunkiem pracy oraz sposobu prowadzenia akt osobowych pracownika [*A Commentary on a Regulation on the Scope of Documentation Kept by Employers in Matters Relating to Employment Relationship and the Method for Keeping Personnel Files*], [in:] K. W. *Baran* (ed.), *Akty wykonawcze prawa pracy [Delegated Acts to Labour Law]*, Warsaw 2016, p. 780.

⁸⁴ Judgment of the Supreme Administrative Court of 27 November 2008, II SA/Wa 903/08.

⁸⁵ Judgment of the Supreme Administrative Court of 1 December 2009, I OSK 249/09. Judgment of a Voivodeship Administrative Court in Warsaw of 18 June 2010, II SA/Wa 151/10.

the employer from the employee. If the consent under article 23 (1)(1) of the Act on the Protection of Personal Data was considered a circumstance legalizing the collection from an employee of data other than those indicated in article 22¹ of the Labour Code, it would constitute a circumvention of this provision. The use of biometric data to control the working time of employees is disproportionate to the intended purpose of their processing within the meaning of article 26 (1) (3) of the mentioned Act on the Protection of Personal Data. Moreover, the Inspector General for the Protection of Personal Data emphasized that in the case of obtaining employees' personal data, other than those indicated in article 22¹ of the Labour Code, the consent of a person, to be considered a legal basis, must be expressed in a voluntary manner. However, in the relationship between an employer and an employee, it is difficult to talk about such a voluntary nature of consent, because there is no subjective balance (there is a relationship of superiority and subordination between the parties), which can often be conducive to enforcing consent⁸⁶. Processing of biometric data is not necessary for the achievement of purpose which is the working time recording. The employee's working time may be controlled by the employer by other means that are less intrusive in the privacy of the employee⁸⁷.

The problem of respect for personal rights is connected with the problem of the limits of application of the contemporary methods of controlling employees such as video monitoring of the workplace, checking employees' activity on the Internet, controlling business e-mails, recording telephone conversations, using GPS recorders in employees' business cars, biometric data processing or using lie detectors. According to legal theorists, monitoring means "activities undertaken in order to collect information about employees through observation of the employees, either directly or with the use of electronic devices". There is a proactive monitoring, focusing on preventive actions and assessment of employee's performance and a reactive monitoring undertaken after receiving information about illegal behaviour⁸⁸. It may be either permanent or incidental, evident or secret. Under article 94 (2) of the Labour Code an employer must organise work in a manner which guarantees making full use of the working time as well as achievement by the employees, with the use of their skills and qualifications, of high performance and appropriate quality of work. Such obligation of the employer corresponds with the employee's obligation to perform work diligently and with due care and to observe the working time established in the workplace,

⁸⁶ See http://www.giodo.gov.pl/348/id_art/3358/j/pl/ (accessed on 21 December 2017).

⁸⁷ Decision of the Inspector General for the Protection of Personal Data of 15 December 2009, DIS/DEC-1261/46988/09.

⁸⁸ A. Lach, *Monitorowanie pracownika w miejscu pracy [Monitoring of an Employee at Work]*, MPP 2004, No. 10, p. 264.

the work rules and work order, the rules of social coexistence and the principles of occupational health and safety, as well as fire regulations. An employee must also have regard for the welfare of the establishment and protect its property (article 100 of the Labour Code). Therefore, the employer may control the process of work and its results and protect its property. Employers use various forms of control depending on the specifics of the company. In the commercial sector, e.g. in stores, warehouses, employers most often use CCTV cameras. In the transport and construction industry, GPS recorders are often used in company cars and sobriety control is carried out. As regards office and administration employees or those providing consultancy services, employers most often control the activities that they perform on computers.

The GDPR does not directly define the rules of monitoring in the workplace. The regulations related to monitoring were introduced into the Labour Code by the act of 10 May 2018 on the Protection of Personal Data⁸⁹, which entered into force on 25 May 2018. Article 22² of the Labour Code refers only to the control with the use of technical means for video recording. Pursuant to the said provision, the employer may introduce special supervision over the area of the work establishment or the area around the work establishment in the form of technical means enabling video recording (video surveillance), if it is necessary to ensure the safety of employees, property protection, control of production or to keep secret the information the disclosure of which might cause damage to the employer. The video surveillance may not cover sanitary facilities, cloakrooms, canteens and smoking rooms or premises made available to a trade union organization. However, this does not apply in the situations in which the use of video surveillance in these rooms is necessary to achieve the objectives mentioned before and where it does not violate the dignity and other personal rights of employees, as well as the principles of freedom and independence of trade unions, in particular through the use of techniques that prevent recognition of persons present in such rooms. The employer may process video recordings only for the purposes for which they have been collected and keep them for a period not exceeding 3 months from the date of recording. In the case in which the video recordings constitute evidence in legal proceedings or the employer has become aware that they can be evidence in the proceedings, the time-limit is extended until the final conclusion of the proceedings. After the indicated periods have elapsed, the video recordings containing personal data and obtained as a result of the video surveillance should be destructed, unless separate provisions provide otherwise. The purposes, scope and method of the monitoring are set out in the collective agreement or in the work regulations or in a notice, if the employer is not covered

⁸⁹ Journal of laws [Dz.U.] of 2018, item 1000.

by a collective agreement or is not obliged to set work regulations. The employer informs employees about the introduction of the video surveillance, in a procedure adopted by the given employer, no later than 2 weeks before it is launched. The employer is obliged to communicate in writing the information about the purpose, scope and method of video surveillance in the workplace before allowing an employee to work. In addition, the employer must mark the premises and the area monitored in a visible and legible manner, by means of appropriate signs or sound notices, no later than one day before the launch of the monitoring.

Another problem that should be noted is the acceptability of control by the employer of the correspondence sent to and received from the employee's e-mail. The secrecy of correspondence is one of the rights protected under articles 23 and 24 of the Civil Code. Moreover, article 49 of the Constitution of the Republic of Poland guarantees to the citizens the freedom and privacy of communication. The secrecy of correspondence is also connected with the right of every human being to respect for his private life and the right to keep secret the communications addressed to other persons and institutions. Both traditional letters and e-mails are subject to protection. In the case of correspondence exchanged with the use of a business e-mail box, where the e-mail address includes a name of the employer, there is a presumption that this correspondence is exchanged on behalf of the employer. The presumption that any and all correspondence exchanged by the employee is a business correspondence cannot be relied upon by the employer if the latter allows his employees to use business e-mail also for private purposes⁹⁰. New article 22³ § 1–3 of the Labour Code includes regulations regarding the monitoring of business e-mails. According to article 22³ § 1, if it is necessary to ensure the organization of work enabling the full use of working time and proper use of work tools made available to the employee, the employer may introduce control of employee's business e-mail. Importantly, the monitoring of e-mail cannot violate the secrecy of correspondence and other personal rights of the employee. Just as with video surveillance, the relevant provision on business e-mail monitoring should be included in the company's internal regulations or communicated in a notice. Employees should be informed about it and the use of such monitoring should be indicated (article 22³ § 3 of the Labour Code in connection with article 22² § 6–9 of the Labour Code). The presented rules apply, as appropriate, to other forms of monitoring, e.g. telephone calls, GPS, network activity, if it is necessary to achieve the objectives set out in article 22³ § 1 of the Labour Code.

⁹⁰ See D. Dörre-Nowak, [in:] *Kodeks pracy. Komentarz [The Labour Code. A commentary]*; A. Sobczyk (ed.), *Legalis/el/2017*, a commentary on article 11¹, argument 12.