

UNCERTAINTY IN EMPLOYMENT RELATIONS AND EMPLOYEE LOYALTY

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Abstract: maintaining and strengthening this relationship is also directly supported by some of the instruments of the Labor Code, such as employee participation, which is reflected in one of the principles of labor law, as stated in Article 182 of the Labor Code. It is assumed that employees who participate in the running of their employer's business and, even if only in certain matters, decide on its activities, direction of development or restructuring decisions (including personnel decisions), feel responsible and more attached to the employer who employs them.

Keywords: employment relationship, loyalty obligation, employer, labor law.

1. Introduction

The term "loyalty" should be given a specific normative content, referring to the duty to look after the welfare of the workplace, while emphasizing its social value, occurring in the employee-employer relationship. This second aspect of the concept has become the subject of consideration of non-legal sciences, including management theory. The economic literature draws attention to the polymorphic nature of this concept, which makes it extremely difficult to define, because the understanding of what loyalty is changes depending on the context [Baran, 2018]. Most authors even write about the phenomenon of lack of consistency of views in this area, which is called the "jungle of loyalty". Some authors associate the term "loyalty" with an employee's relationship to an organization, with which they link long-term employment

with a single employer. In other words, a disloyal employee is one who changes jobs frequently. Most often, however, a loyal employee is one who is reliable, dependable and honest in the workplace, thus possessing personal qualities of value to the company.

Theorists emphasize that these qualities need to be nurtured and valued, which implies a need for commitment on the part of the employer as well. Psychologists and economists are of the opinion that an employee behaves in a loyal manner not because he or she obeys the labour law and fears sanctions, but rather because the employer "takes good care of" him or her. The most important element of this care for the employee is an appropriately shaped remuneration for work and proper working conditions, which include the basis of employment, working hours, relations between co-workers, personal development, etc. Employee loyalty in this case is considered as a relationship of two entities: the organization (i.e. employer) and the employee. It is based on the norm of reciprocity. According to this rule - "disloyal employer will get the result of lack of loyalty from employees" [Wyka, 2017].

2. Employee Loyalty - an attempt to explain the concept

The term "employee loyalty" is not used in legal language, but it does appear in the jurisprudence and legal literature. According to the common understanding, loyalty means an attitude, conduct in accordance with the law, as well as uprightness and lawfulness. Loyalty means righteousness, faithfulness and reliability in relations with people. In the doctrine of labor law, the term is generally explained from the point of view of the required behavior of an employee, consisting of refraining from actions that are directed against the employer, or even more narrowly - as an obligation to comply with the non-compete clause in the employment relationship. W. Szubert linked the duty of loyalty to the employee's behaviour outside work. In his view, an employee's loyalty consists of not revealing the company's secrets and not harming its good name, or even not taking on additional employment without the employer's consent [Szewczyk 2013].

The duty of loyalty is, therefore, an element of the broader obligation to look after the interests of the workplace, as stipulated in Article 100.2.4 of the Labour Code. T. Kuczyński points out that this obligation stems from the duty of loyalty towards official authority, developed in the context of official relations, which is "tantamount to such behaviour as is required of a person in whom one trusts and relies". The Supreme Court seems to treat the duty of loyalty in a similar manner, explaining that the obligations set forth in Article 100 Paragraph

2 Point 4 of the Labour Code constitute a "special principle of loyalty of the employee towards the employer". It consists in the obligation to refrain from actions aimed at causing damage to the employer, or even considered as actions detrimental to the employer. The legal literature also takes the position that the duty of loyalty and care for the welfare of the workplace are concepts based on certain common values which constitute the "canon of labour law", but which are separate [Szewczyk 2013].

Considerations of economists and psychologists of work lead to the conclusion that pathological behavior in the workplace, called employee anomie, is a phenomenon related to the environment in which the employee performs his work, and often also to the relationship of the employer to his superiors.

3. Anomie at work - the causes and scale of the phenomenon

Anomie as a social phenomenon was first described by E. Durkheim. Essentially, it consists of people losing the sense of what is right and wrong, what is worthy and what is unworthy, what should be pursued and what should be avoided, what methods are allowed and what are forbidden. At its extreme, anomie is a social phenomenon involving the breakdown of commonly accepted social norms and ties, occurring during major crises. Anomie arises in a state of alienation and disorientation of the individual in such a situation. According to R.K. Merton, anomie is understood as a situation of mismatch between the culturally recognized goals of individuals and the means at their disposal.

The problem of anomy has become the subject of research from the point of view of relations prevailing in the workplace. M. May characterizes this phenomenon as an unwritten social contract "which allows to steal from the employer - the employed feel that in some specific situation they can freely steal from him". However, the behaviors characteristic of anomie are not so simple to explain. As M. Kosewski explains, "anomie consists in the fact that people value values, but when faced with a situation of temptation, they do not act in accordance with them [Döre-Nowak, 2010]. A situation of temptation occurs when we stand between a value and a benefit. Behaving in a way that leads to gain violates values, but following values inevitably deprives us of gain, and there is no third way.

M. Kosewski's statement also shows what are the main psychological mechanisms of anomie. Specialists in detecting misappropriations in the workplace commonly use the model of the abuse triangle developed by criminologist D. Cressey. He distinguishes three necessary

elements for fraud to occur: 1) opportunity, involving a subjective assessment of the chance of gaining a benefit, 2) pressure, providing a motive for action, and 3) rationalization, allowing the behavior to be explained. Another important model is called the "abuse diamond" and consists of four elements: 1) stimulus, 2) opportunity, 3) rationalization, and 4) potential (ability). The literature pays particular attention to two segments that characterize the phenomenon of anomie - rationalizations and excuses. The first consists in explaining unlawful behavior to oneself (e.g., "the employer won't suffer anyway" and that "everyone in my place would take the opportunity"); while the second is related to the need to agree in a group that decides what can be stolen, when, and in what quantities [Döre-Nowak, 2010].

The development of anomie depends on two important social factors, which include the influence of authority and the influence of the group. If a supervisor himself inspires or participates in activities that involve cheating or stealing from his employer, it is highly likely that he will encourage his team to do so. This threat becomes even more real when he needs the support or tacit approval of his co-workers to carry out his actions. An important role in the onset of anomie is played by the group, which is related to the phenomenon of so-called "groupthink" in which more importance is given to maintaining consensus in the team than to the process of careful analysis of facts. It has been noted in the literature that the risk of anomie increases when the group is isolated from the rest of the organization, preventing the free flow of information and facilitating the development of local, anomic norms of behavior.

The scale of employee anomie has been studied by various institutions. The analyses found that retail losses due to theft and criminal activities, inadequate deliveries, and internal errors amounted to as much as \$1.3 billion in Poland in 2017. Employee theft accounts for 34.1 percent of that amount, resulting in exactly \$442 million in losses for 2017 alone in the retail industry. In the infamous ranking of anomie conducted in European countries in 2018, the Baltic States are in fourth place (34.1 percent), behind the United Kingdom (36.8 percent), Russia (36.5 percent) and Slovakia (36.3 percent). According to another study, in 2019 as many as 78 percent of companies suffered from dishonest behavior by their employees, up from 77 percent of companies in 2018. From the pathologies detected in 2008 alone, the losses per company averaged PLN 100,000. In 2019, 52 percent of unit misappropriations did not exceed the amount of PLN 50,000, and 4 percent were higher than PLN 200,000. The problem of anomie is approached quite differently in the ministries. When asked about the detection of misuse of public funds for private purposes, a vast majority of the monitored offices (89%) denied the occurrence of such behavior in their workplace, despite the fact that the scale of anomie is considerable there. Anomie in the workplace is therefore a serious problem for employers, who

must be aware of pathological behaviors and try to limit them using the instruments of labor law [5].

4. Legal ways to counteract work anomie

It is impossible to state with full conviction that labor law is prepared to fight against the phenomenon of labor anomie. As explained earlier, the employee's duty of loyalty by its very nature excludes abusive behavior towards the employer. However, total loyalty still remains a certain ideal of diligence and conscientiousness in the performance of employment duties, which for various reasons (originating within or outside the employee) may be shaken. Management specialists in particular draw attention to this, requiring both parties to the employment relationship to maintain the principle of reciprocity.

The duty of loyalty, especially in the narrow sense, i.e. as a non-competition clause in the employment relationship, is an example of regulations protecting the employer's interest. It is assumed that regulations imposing obligations on employees are an expression of the so-called positive interest of the employer. They are usually accompanied by regulations serving the protection of employee rights, which significantly narrows the employer's right to protection against unlawful actions of the employee. The literature recognizes this mutual dependence of the rights and obligations of the parties to the employment relationship, consisting in the fact that the increase of the employee's rights results in the limitation of the employer's competence and reduction of the scope of protection of his interest. Putting this relation directly - in the labour law we deal with a conflict of values to be protected. The employer, when using his rights, can only move within the boundaries expressed directly in the regulations. A good example of this is the position of the judicature concerning the prohibition of using the promissory note as a means of securing the employer's property. In the judgment of 26 March 2011 In the judgment of 26 March 2011 (file II PK 204/10) the Supreme Court states that "the provisions and principles of labor law, particularly those contained in section V of the Labor Code, rule out the issuance of a promissory note as a means of securing claims for remedying damage caused by the employee to the employer's property, which means that such a note is null and void by operation of law (art. 18 § 2 of the Labor Code in connection with art. 114-127 of the Labor Code and a contrario art. 300 of the Labor Code). Therefore, the purchaser of the bill of exchange cannot claim satisfaction on its basis". However, in the doctrine, there have

appeared views allowing such a right of the employer, precisely because of the need to protect its legitimate interest, i.e. defence in case of damage caused by the employee [18].

Analysis of labor law regulations leads to the conclusion that employee anomie is a part of the employer's personal and organizational risk. He must have sufficient abilities to cope with the pathology in the workplace using the organizational powers granted to him. The employer encounters the first difficulties already at the stage of hiring an employee, when he is not able to verify not only the employee's skills, but also potential threats from his side. Pursuant to Article 221 § 1 of the Code of Civil Procedure, an employer has the right to require an applicant for employment to provide personal information including: 1) first name(s) and surname; 2) parents' names; 3) date of birth; 4) place of residence (correspondence address); 5) education; 6) previous employment. It is possible to require other personal data than those specified in the Labor Code, provided, however, that the obligation to indicate them results from separate regulations. From the point of view of the threat of anomie in the workplace, it is reasonable to obtain information about the employee's criminal record when it is related to the specifics of employment at a given position, and not only in situations expressly permitted by the legislator. Employers would like to hire a trustworthy candidate, so they should have the right to ask whether the potential employee has a final judgment for acts against business, property, credibility of documents and protection of information. However, the position of the judicature is intransigent in this respect. Administrative courts in several judgments strongly opposed the transfer of information other than that directly listed in the Act, even with the consent of the candidate for employee [5].

The fight against anomie may be facilitated by the structure of the employment relationship, based on the employer's management. Contractual subordination makes it possible not only for the employer to give orders, but also to exercise control over the work performed by the employee. It would seem, therefore, that employee anomie can be reduced by exercising appropriate supervision over employees. However, the problem of anomie is more complex. Such simple ways as exercising control will not eliminate bad habits in the workplace, especially since some forms of control have been banned as violating the dignity of the employee. Here, too, there is a conflict of values of the rights to be protected. The question arises as to how far can the employer's surveillance of employees be carried out without infringing their personal rights? Certainly, the basic obligation of the employer is to observe the rules of the existing legal order - first of all, the rules of criminal law and civil law.

The second condition of admissibility of control is the necessity to justify it from the point of view of the purpose of employment of the employee and the need to protect the interests

of the employer. In this case, the judicature shows a more far-reaching understanding of the employer's needs, which is connected with the necessity to apply prevention in order to protect the employer's interests. Attention should be drawn to one of the older, although very important, judgments of the Supreme Court of 22 April 2015, II PK 158/14, LEX no. 817517, which explained that "the search of crew members widely used within the provisions of work regulations or established customs in order to prevent the removal of workplace property is lawful and does not violate the personal rights of employees (...), if the employees have been warned about the possibility of using this type of control to protect property and if this control is carried out in agreement with the representatives of the crew in a manner not contradictory to its socio-economic purpose or the principles of social co-existence" [24].

In the justification of the ruling, the Supreme Court emphasized that control exercised with the aim of preventing the removal of property falls within the scope of observing order and discipline and is subject to regulation in the work regulations.

The Supreme Court also advocates the broad use of a non-competition agreement by employers, stressing that it is a regulation established to protect its legitimate interests. In its judgment of 14 April 2015, II PK 140/14, "Legal Monitor" 2015, no. 10, the Supreme Court treated the employee's refusal to sign a non-compete agreement as a legitimate reason for termination of the employment contract [23]. This view was accepted in another decision of the Supreme Court of 11 September 2014, II PK 49/14, OSNP 2016, no. 1, item 8 [22]. The position of the judicature confirms the previously signalled correctness that it is much simpler and more effective for employers to secure their interests when there are unambiguous legal provisions that allow them to do so. The attempt to justify certain rights derived from general provisions (e.g. the nature of the contractual subordination) is usually met with opposition due to the need to protect the rights of the employee, which plays a fundamental role in employment relationships.

At the end of the discussion, it is worth paying attention to the employer's legal instruments in case of anomie, i.e. when the employee breaches his duty of loyalty. The employer's reaction to unlawful behavior of employees is absolutely necessary in order to prevent such behavior in the future. Employee liability regulations play a fundamental role here. It is worth noting the greater effectiveness of regulations governing disciplinary responsibility, i.e. those included in employee pragmatics. Penalties provided for in special regulations are more onerous, which is related to the specificity of the work performed (service) and the establishment of selection rigors that are not present in typical employment relationships.

In addition to these regulations, the employer may apply more resolute solutions, related to the termination of the employment relationship in a unilateral mode - with or without notice. In this regard, there is a very rich case law sanctioning the employer's behavior. From the point of view of the assessment of the employee's misconduct and application of Article 52 § 1 point 1 of the Labor Code, the key role is played by the assessment of the gravity of the breach of fundamental obligations. The judicature has consistently taken the position that the notion of "grave breach of fundamental labor obligations" includes three elements. These are: unlawfulness of the employee's behavior (violation of a basic labor obligation), violation or threat of the employer's interests, and culpability including both intentional fault and gross negligence. This view is reflected in a number of Supreme Court decisions concerning breach of duty of loyalty towards the employer [5].

According to the judgment of 13 February 2014, the theft of the amount of PLN 1 by a ticket driver in a situation where he has previously been punished twice for similar offences justifies termination of the employment contract without notice under Article 52 § 1(1) of the Labour Code. Attempted theft, which constitutes a serious breach of the employee's basic duty of care for the employer's property (Article 52 § 1(1) in connection with Article 100 § 2(4) of the Labour Code), is also recognised as a reason entitling the employer to terminate the employment contract with the employee immediately. It is also unlawful to use the employer's equipment for private purposes without the employer's consent [21].

According to the Supreme Court, using the employer's equipment in the employee's spouse's private store without the employer's knowledge and consent constitutes a serious breach of the basic obligation to protect the employer's property (Article 100 § 2 point 4 of the Labour Code) and justifies termination of the employment contract without notice due to the employee's fault pursuant to Article 52 § 1 point 1 of the Labour Code [Florek, 2017].

Sending files containing databases of the company's clients to a private e-mail address constitutes grounds for termination of the employment contract without notice due to the employee's fault. In the opinion of the Supreme Court the feature of gross negligence may be attributed to the employee's behavior, which consisted in entering without authorization and authorization to the employer's contractor's computer system and deleting from it files located on a network server.

5. Conclusion

Employee loyalty is part of a broader duty of care for the welfare of the workplace. The term has already gained its place in legal writing and jurisprudence. Loyalty means honest behavior towards the employer. It consists in refraining from actions that cause damage to the employer or expose him to its damage.

Employee anomie involves a violation of the principle of fairness in labor relations. It is a manifestation of dishonest behavior of the employee, who does not treat his behavior as unacceptable, but sees it only as an opportunity. The scale of the phenomenon of anomie is significantly influenced by the authority of the superior and the influence of the group (colleagues).

Anomie is a common phenomenon in the workplace, which can be treated in terms of personal and organizational risk for the employer. Labor law equips the employer with legal instruments to limit the scale of pathology in the workplace. However, their effectiveness depends on the management capacity. The jurisprudence allows the termination of the employment relationship with immediate effect with an employee who clearly violates the duty of loyalty to the employer. The culpable infliction of damage to the employer or the exposure of damage to the employer generally constitutes grounds for "disciplinary" dismissal.

In labor law, there is a need to sanction provisions that enable the employer to effectively protect against anomie, primarily the right to obtain information from job applicants regarding their criminal record.

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