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# The Scope of the Employee's Right to Allowed Public Criticism of the Supervisor. Gloss to the Judgment of the Supreme Court of August 28, 2013, I PK 48/13. Critical Voice

Łucja Kobroń-Gąsiorowska
Dr., Institute of Law and Economics, Pedagogical University of Krakow, correspondence address: ul. Podchorążych 2, 30-084 Kraków, Poland, email: l.kobron@nckg.pl
https://orcid.org/0000-0002-8669-452X

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**Abstract:** This gloss discusses the position of the Supreme Court adopted in the judgment of August 28, 2013, I PK 48/13. The main thesis of the Court concerned the employee's possibility of allowed public criticism of the supervisor, i.e. the right to whistleblowing, which is the disclosure of irregularities in the functioning of the workplace consisting in various types of acts of dishonesty, unfairness involving the employer or its representatives, when this does not lead to a breach of the employee's duties consisting, in particular, in caring for the interests of the workplace and maintaining the confidentiality of information, the disclosure of which could cause damage to the employer (duty of loyalty; not to infringe the employer's interests – Article 100 § 2 (4) of the Polish Labor Code. The Supreme Court's lack of consistency in its ruling between informing the public about irregularities in the workplace and the employee's duty of loyalty provides for even more doubts on the part of employees wishing to report irregularities. In the author's opinion, the position taken in the case does not explain when loyalty is binding on the employee. The Supreme Court duplicated the lack of consistency in subsequent rulings, e.g. of May 10, 2018.


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## 1. Thesis

[…] the employee has the possibility of allowed public criticism of the supervisor (the right to whistleblowing, i.e. disclosing irregularities in the functioning of the workplace consisting in various types of acts of dishonesty, unfairness involving the employer or its representatives), when this does not lead to a breach of the employee's duties, in particular duty to care for the interests of the workplace and maintain the secrecy of information, the disclosure of which could cause damage to the employer (duty of loyalty; not violating the interests of the employer – Article 100 § 2 (4) of the Polish Labor Code), as well as to observe the principles of social coexistence in the workplace (Article 100 § 2 (6) of the Polish Labor Code; an employee may not rashly, in a manner justified only by subjective reasons, formulate negative opinions against the employer or its representatives).

## 2. Factual and Legal Background

The glossed ruling was issued as a result of a cassation appeal against the judgment of the District Court – Labor and Social Insurance Court of July 4, 2012, dismissing the cassation appeal of the defendant employer. The facts of the proceedings conducted in subsequent instances concerned an employee[1] who was employed at the Museum for an indefinite period from January 3, 2005 to March 31, 2011 as the head of the department. The director of the Museum was the immediate supervisor of the employee. In November 2010, the term of the city councilor exercised by the employee expired. The situation that gave rise to a direct conflict between the employee and the employer was related to an interview on television given by the employee in which the employee criticized the mayor's actions in the field of culture. The employee used the term "liquidation" during the interview and criticized the director of the Museum and called him "culturally illiterate." He stated that the mayor of the city "hired" the director of the Museum in order to "liquidate culture." The defendant also accused his immediate supervisor of terminating employment contracts with employees, including pregnant women, and of harassing employees. The employee emphasized that as an employee of the Museum, he declares total official

[1] For the purposes of the gloss, the entity concerned by the facts discussed herein will be alternately referred to as the "employee" or a "whistleblower."

loyalty to the director, but on the other hand, being a councilor, he is obliged to speak out in the interest of other employees of the Museum. The employee did not limit himself to indicating these allegations only in the interview he gave. He posted the allegations on the internet forum and website, although it should be pointed out that the main charge was the dismissal of the "female employee who is undergoing oncological treatment," who was reinstated by the Court in the defendant Museum. When the employee was dismissed from work, the director of the Museum was not aware that she had received oncological treatment.

Nevertheless, the termination of an employment contract with a pregnant employee occurred when the employer intended to submit her a notice of termination. On December 10, 2010, the employer terminated the employment contract with the plaintiff by three months' notice. The reasons for the dismissal were a prolonged conflict between the employee and the director, manifested in the dissemination of false information by the plaintiff and discrediting the director's good name, offensive, public reference to the director, undermining the legality and criticizing the director's actions in a way that exceeds the principles of allowed criticism, refusal to comply with the employer's orders, public questioning of the professional competences of the director of the Museum and accusing that the director is acting to the detriment of the institution he manages. In the opinion of the employer, the above behavior resulted in a loss of trust in the employee. In addition, the employer accused the plaintiff of failing to comply with the official order regarding the return of the company mobile phone while taking the annual leave.

The employee disagreed with such argumentation, which was expressed in the appeal against the statement concerning the employment brought to the District Court. With such findings, the District Court found that the claim did not deserve to be upheld. The Court of First Instance indicated that the employee, while performing the mandate of the councilor, had the right to speak about the director of the Museum "in a deeply critical manner," taking advantage of the protection of the freedom of speech and not being subject to verification in court proceedings. The District Court verified the grounds for termination of the employment contract with notice. The Court analyzed the testimonies concerning the facts: the dismissal by the director of the Museum of a pregnant woman, who

allegedly lost her child , the dismissal of a woman undergoing oncological treatment, or the "terror" prevailing in the Museum. In the opinion of the Court, the employee's allegations of "firing a pregnant woman from work" have not been confirmed, while the fact that the second of the dismissed employees was not supposed to inform the employer about her oncological treatment was significant. According to the Court, the allegations against the director of the Museum did not result from reliable information, duly verified by the plaintiff, which he could quickly obtain. In these circumstances, the District Court found that the plaintiff had slandered his supervisor and had not acted as a councilor (in the public interest), but as an employee of the Museum abusing the right to criticize the employer. When making statements about the supervisor's behavior, the plaintiff was not guided by the interests of the people allegedly aggrieved by the director or the general interest of all employees of the Museum, but he expressed a personal aversion to the supervisor, not being able to accept the fact that he was the director of the Museum.

The employee disagreed with such a ruling, arguing in the appeal that the District Court did not consider that, while uttering certain words, he acted as a councilor. The Court of Appeal – taking into account the facts – pointed out that in the termination of the employment contract, the defendant employer referred to events that occurred when the plaintiff was serving as a councilor. According to the Court, the termination with the plaintiff of the employment relationship violated the protection of the durability of the employment relationship of the councilor as provided for in the Act of March 8, 1990 on the commune self-government. The Regional Court disagreed with the defendant that the termination of the employment relationship took place after the plaintiff lost his mandate, i.e., in the period when he did not have the status of a particularly protected employee. Assuming that the protection of the employment relationship of a councilor ends with the loss of his mandate would make the protection "illusory," as guaranteed under Article 25 sec. 2 of the Act on commune self-government. The purpose of protection against termination of the employment relationship of a councilor is to guarantee the freedom and security of the councilor employee during the term of office. The protection in question enables the councilor to take actions (including formulating

statements) in the public interest. Thus, the Court of Second Instance reinstated the employee to work for the previously held position.

The employer filed the cassation appeal. The employer complained that the Court of Second Instance had misinterpreted Article 8 of the Polish Labor Code and Article 45 § 2 of the Polish Labor Code. Considering the facts of the case, the decision to reinstate the plaintiff to work is not pointless, and the employee has committed negative behavior towards the supervisor, the claim for reinstatement of the plaintiff should be dismissed due to the plaintiff's abuse of legal protection. The Supreme Court indicated that the jurisprudence emphasized various aspects of the employee's right to the so-called "allowed criticism" and referred to the judgment of the Supreme Court of November 16, 2006, II PK 76/06. The employee has the right to allowed public criticism of the supervisor (the right to whistleblowing, i.e. disclosure of irregularities in the functioning of the workplace consisting in various types of acts of dishonesty, unfairness involving the employer or its representatives), when this does not lead to a breach of the employee's duties, in particular duty to care for the interests of the workplace and maintain the secrecy of information, the disclosure of which could cause damage to the employer (duty of loyalty; not violating the interests of the employer – Article 100 § 2 (4) of the Polish Labor Code), as well as to observe the principles of social coexistence in the workplace (Article 100 § 2 (6) of the Polish Labor Code; an employee may not rashly, in a manner justified only by subjective reasons, formulate negative opinions against the employer or its representatives).

## 3. Comment

It should be considered correct to refer to the ruling of the Supreme Court of November 16, 2006, II PK 76/06, LEX/el 2008[2] in which the Court ruled that it did not constitute a severe breach of the employee's basic duties (Article 52 § 1 (1) of the Polish Labor Code) giving a press interview by an employee, in which such employee critically assessed the behavior of a member of the employer's body, if the employee maintained the appropriate form of expression, and his behavior cannot be attributed to a significant level of

[2] Polish Supreme Court, Judgment of 16 November 2006, Ref. No. II PK 76/06, https://sip.lex.pl/#/jurisprudence/520414333.

bad will and deliberate action threatening the interests of the employer or putting the employer at risk to harm. It seems essential for the subject matter of the discussed case to narrow down or even avoid the arguments of the Supreme Court made in the commented judicature on the essence of the institution of reporting irregularities in the aspect of violation of the employee's basic duties by the employee. In order to correctly place whistleblowing in the context of the breach of the principle of loyalty in the applicable labor law system, it is necessary to at least briefly define it.

In the Polish labor law system, as Antoni Dral points out, there is no definition of the concept of protection of the durability of an employment relationship.[3] For Czesław Jackowiak, protection of the durability of the employment relationship consists in preventing unjustified termination of an ongoing employment relationship and ensuring continuity of work if termination of the employment relationship proves necessary. Tadeusz Zieliński understands the protection of the durability of the employment relationship as limiting the admissibility of terminating the employment contract by the employer in some instances under the provisions of the Polish Labor Code or separate provisions.[4] Artur Rycak distinguished the components of universal protection of the durability of the employment relationship, such as: "guarantees," "legal instruments" or "elements" (legal structure).[5] The boundary of protection of the durability of the employment

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3 Antoni Dral, *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian* (Warsaw: Wolters Kluwer, 2009), 250 et seq.

4 Ibid., 26 and the literature referred therein; e.g. Helena Szewczyk, "Ochrona trwałości zatrudnienia w gospodarce rynkowej (wybrane zagadnienia)," in *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, ed. Zbigniew Góral (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2007), 245; Maria Matey, "Prawo do pracy," in *Prawa człowieka. Model prawny*, ed. Roman Wieruszewski (Wrocław-Kraków-Warsaw: Ossolineum, 1991), 769; Andrzej Walas, "Prawna ochrona trwałości stosunku pracy," *Państwo i Prawo*, no. 5–6 (1961): 248; Walas, "Prawo wypowiedzenia umowy o pracę," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia* 42, (1961): 94; Monika Latos-Miłkowska, "Kształt powszechnej ochrony przed wypowiedzeniem we współczesnym prawie pracy," *Praca i Zabezpieczenie Społeczne*, no. 10 (2008): 11 et seq.; Ludwik Florek, "Ochrona przed wypowiedzeniem w prawie pracy Republiki Federalnej Niemiec," in *Prawo pracy państw obcych*, ed. Maria Matey, vol. II, (Wrocław: Ossolineum, 1985), 148 et seq.

5 Artur Rycak, *Powszechna ochrona trwałości stosunku pracy* (Warsaw: Wolters Kluwer Polska, 2013), 313.

relationship has its source in two basic duties of the employee indicated by the Supreme Court in the cited judgment, i.e. the obligation of loyalty and not infringing the employer's interests – Article 100 § 2 (4) of the Polish Labor Code and compliance with the principles of social coexistence at the workplace, Article 100 § 2 (6) of the Polish Labor Code: every employer, both in the public and private sector, requires loyalty from their employees. This loyalty is a vague concept and requires special attention in the aspect raised by the Supreme Court in the cited judgment.[6] Under the Polish labor law, loyalty is somewhat inconsistent with "reporting irregularities," and may justify the termination of an employment contract without notice. Loyalty in labor relations is a complex topic that still causes much controversy in the Polish labor law doctrine. The Supreme Court quite inconsistently defined the boundaries of the so-called unlawful criticism of work that may violate the principle of the employee's loyalty. Firstly, the Court incorrectly pointed out that employee duties are the employer's primacy, not the natural persons representing the employer. Later, however, the Court emphasized that the essential feature of allowed criticism is the employee's "good faith," i.e. the employee's subjective belief that such employee bases the criticism on truthful facts (with due diligence in checking them) and acts in the legitimate interest of the employer. In this case, one can only agree with the statement that the employer's rights are respected during the statement that evaluates his actions. In the context of whistleblowing, the Supreme Court incorrectly defined it, because the Supreme Court identified whistleblowing with the employee's possibility of criticizing the employer. In addition, we cannot miss the fact that we were dealing with a former employee who, within the meaning of Article 25 sec. 2 of the act on commune self-government, did not enjoy the mandate of a councilor,[7] and therefore the legal protection provided for public officials. The Court was faced with the problem of assessing whether and how an employee may publicly criticize the supervisor, without violating the employee's duty of loyalty to the employer and without violating the employer's interests.

6 Article 100 of the Act of 26 June 1974, the Polish Labor Code, Journal of Laws 1974 No. 24, item 141.

7 Act on the Commune Self-Government of 8 March 1990, Journal of Laws 1990 No. 16, item 95, as amended.

The main problem in the glossed judgment, which the Supreme Court omitted, was the re-conceptualization of the principle of loyalty in the context of the wrongly established whistleblowing. The Court should have determined whether the loyalty is binding in each case and who is the object of the loyalty: the employer or the organization's rules.

In the same vein as the Supreme Court, Norman Bowie[8] maintains that whistleblowing is a *prima facie* violation of the duty of loyalty to the employer, which may be disregarded for reasons of higher duties in the name of the public good. The second significant issue that escaped the Court's attention is the acceptance that any criticism requires good faith, and vindictive criticism will negatively affect the employee. In the jurisprudence of the Supreme Court, one can notice unsuccessful attempts to conceptualize the principle of loyalty and care for the interests of the workplace in the face of criticism of the employer. Providing for the employee's duty to care for the interests of the workplace, the Supreme Court indicates that in Article 100 § 2 (4) of the Polish Labor Code:

> a special principle of the employee's loyalty to the employer has been established, which primarily implies the duty of the employee (regardless of the position held) to refrain from actions aimed at causing harm to the employer, or even assessed as actions to the detriment of the employer. This obligation applies to every employee in the performance of rights and obligations arising both from and outside the employment relationship. The question of whether the employee behaved disloyally to the employer in a specific case depends on the facts of each case; therefore it is not possible to define an abstract solution understood as a decision on an important legal issue.[9]

The Supreme Court clearly stated that the employee's care for the interests of the workplace means the care of the workplace understood as an organizational unit being the workplace, constituting a common value good not only of the employer but also of the employees.[10]

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8 Norman Bowie, *Business Ethics: A Kantian Perspective* (New York: Prentice-Hall, 1982), 140 et seq.

9 Polish Supreme Court, Judgement of 26 January 2011, Ref. No. II PK 236/10, LEX No. 1413531.

10 Polish Supreme Court, Judgment of 9 February 2006, Ref. No. II PK 160/05.

## 4. Conclusions

In the analyzed ruling, the Supreme Court considers the alternating interpenetration of concepts and principles that do not indicate what kind of loyalty and to whom it would be justified. Loyalty is also taking care of the interests of the workplace and may result from gratitude for employment (especially in an economy with high unemployment) and from "positive" concern for the enterprise, if not from complete identification with it. Loyalty does not always have to be binding. When a company or organization requires an employee to conceal the misconduct from the public, the role that underlies this obligation disappears.[11] The inconsistency of the Supreme Court was also reproduced in the judgment of May 10, 2018.[12]

In the cited judgment, the Supreme Court was once again taken from the consequences of determining whether there is a duty of loyalty to the employer in conflict with the disclosure of irregularities by an employee. The essence of the problem comes down to determining the actual relationship between the employer and employee, which is different from the relationship between individuals in private relations. Suppose that the relationship of the roles of employer and employee is more than economic, where the economic relationship is defined as the balance of competitive interest between the employer and the employee. In that case, reporting irregularities may be viewed as a breach of this obligation.[13]. According to Ronald Duska and Norman Bowie, being loyal does not require unlimited or even blind loyalty, e.g., as indicated by an employee/auditor, he may be asked to lie in terms of product quality, price, or quantity control.[14] As part of the broadly understood economic freedom and balance in labor relations, it indicates a purely economic justification for reporting irregularities. Company or corporation (private sector): produces a good or service that is intended to be profitable. However, generating profit is a fundamental function of an enterprise as a business because if it is not profitable to produce a good or service, the company will cease to exist. The employees,

11 Bowie, *Business Ethics*, p. 140 et seq.

12 Polish Supreme Court, Judgment of 10 May 2018, Ref. No. II PK 74/17.

13 Norman Bowie and Ronald Duska, *Business Ethics*, 2nd ed. (New York: Prentice-Hall, 1992), 16.

14 Idem.

in turn, are obliged to perform work and also seek to make a profit. In this regard, the Supreme Court had a difficult task, as the employee did not act as a councilor with the powers of a public official. The considerations of the Supreme Court in this and other judgments lead to even greater chaos in terminology.

## References

Bowie, Norman. *Business Ethics: A Kantian Perspective*. New York: Prentice-Hall, 1982.

Bowie, Norman, and Ronald Duska. *Business ethics*. 2nd ed. New York: Prentice-Hall, 1992.

Dral, Antoni. *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*. Warsaw: Wolters Kluwer Polska, 2009.

Florek, Ludwik. "Ochrona przed wypowiedzeniem w prawie pracy Republiki Federalnej Niemiec." In *Prawo pracy państw obcych*, edited by Maria Matey, vol. II (Wrocław: Ossolineum, 1985).

Latos-Miłkowska, Monika. "Kształt powszechnej ochrony przed wypowiedzeniem we współczesnym prawie pracy." *Praca i Zabezpieczenie Społeczne*, no. 10 (2008): 11 et seq.

Matey, Maria. "Prawo do pracy." In *Prawa człowieka. Model prawny*, edited by Roman Wieruszewski. Wrocław-Kraków-Warsaw: Ossolineum, 1991.

Rycak, Artur. *Powszechna ochrona trwałości stosunku pracy*. Warsaw: Wolters Kluwer Polska, 2013.

Szewczyk, Helena. "Ochrona trwałości zatrudnienia w gospodarce rynkowej (wybrane zagadnienia)." In *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, edited by Zbigniew Góral. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2007.

Walas, Antoni. "Prawna ochrona trwałości stosunku pracy." *Państwo i Prawo*, no. 5–6 (1961).

Walas, Antoni. "Prawo wypowiedzenia umowy o pracę." *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia* 42, (1961).