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**COMMENTARY TO THE SUPREME COURT RESOLUTION
OF 20 SEPTEMBER 2018, I KZP 5/18**

Abstract

The Supreme Court, in the ruling which is subject to this commentary, addresses the notion of an employee referred to in Article 218 § 1a of the Criminal Code. The court discussed the issue of the designation and limits of the notion of “employee” and the subject-matter of protection of the provision referred to above along with its scope. The commentator – in this context – analyses the Supreme Court’s thinking.

The commentary’s author agrees in most part with the belief that “the scope of Article 218 § 1a CrC covers only persons who are employees within the meaning of Article 2 LC and Article 22 § 1 and § 1¹ LC”, though he deems it incomplete as one also needs to take into account Article 8(2a) of the act on social insurance, where – with regard to social insurance – the notion of an employee is slightly broader than the one included in the provisions of the Labour Code. The commentator believes it legitimate that the subject-matter of protection of Article 218 § 1a CrC includes all employee rights resulting from an employment or social insurance relationship. The commentator shares the *de lege ferenda* postulate for the “protection under Article 218 § 1a CrC to include also persons in employment relationships other than a contract of employment” and, which the Court did not address in the discussed resolution, the civil law relationship referred to in Article 8(2a) of the Social Insurance Act.

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Keywords: employee in criminal law, criminal and legal protection of employee rights, criminal law, employment relationship

The Supreme Court, in a ruling which is subject to this commentary, addresses the issue of an employee referred to in Article 218 § 1a CrC.¹ The court answers the following questions: what is the designation and what are the limits of the notion of “employee”? what is the subject-matter of protection of the provision referred to above and what is its scope? The commentator follows the Supreme Court’s thinking and analyses it.

In the Labour Code perspective, an employee is a person bound with the employer by the bond of an employment relationship. By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration (Article 22 § 1 LC).² The name of the contract concluded by the parties is entirely irrelevant here, since employment pursuant to Article 22 § 11 LC is employment under the employment relationship. Also, it is inadmissible to replace employment contracts with civil law contracts where the conditions of the performance of work specified in Article 22 § 1 LC remain intact (Article 22 § 12 LC). Also in the perspective of Article 218 § 1a CrC the notion of the employee mostly overlaps with the meaning attributed to in by the Labour Code.³ The legislator narrowed down in this notion the protected person (“employee”) in relation to the persons referred to in the title of the Chapter of the Criminal Code in which this phrase was placed (“people in paid work”). Nevertheless, one cannot forget the slightly broader

¹ Act of 6 June 1997 The Criminal Code, Dz. U. (Journal of Laws) of 2018, item 1600, consolidated text as amended (hereinafter referred to as: CrC).

² Act of 26 June 1974, The Labour Code, Dz. U. (Journal of Laws) of 2018, item 917, consolidated text as amended (hereinafter referred to as: LC).

³ See Daniluk, P., Witoszko, W., *Glosa do uchwały SN z dnia 15 grudnia 2005, I KZP 34/05*, “Orzecznictwo Sądów Polskich” 2006, No. 7–8, item 93, <https://sip.lex.pl/#/publication/385929524>, accessed on: 27.03.2019 and Siwik, Z., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, 5th edition, Warszawa 2016, <https://sip.lex.pl/#/commentary/587611208/503460>, accessed on: 28.03.2019, commentary to Article 218, thesis 4.

understanding of the terms “employee” against the Labour Code regulation – in reference to social insurance.⁴

In view of the above, in the resolution commented on, the quoted content of the resolution of the Supreme Court of 15 December 2005, I KZP 34/05,⁵ saying that offences specified in Article 220 CrC and Article 218 § 1a CrC are placed in the same chapter of the Criminal Code, entitled “Offences against the rights of people in paid work”, whereas the term “employee” (also mentioned in the provisions typifying these offences) “has not been legally defined for the needs of the Criminal Code in its Article 115, but the legislator left it, which is rational and purposeful in all measures, to norms of labour law”. The Supreme Court pointed out that in accordance with Article 2 LC an employee means a person employed on the basis of an employment contract, an appointment, an election, a nomination or a co-operative employment contract, and also that the status of an employee is acquired by forming an employment relationship, by which – in line with Article 22 § 1 LC – an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer while the employer undertakes to employ the employee in return for remuneration. The law study assumes that definitions established under other branches of law should not be as a rule modified in the process of decoding attributes of crimes (see Wiatrowski, P., *Dyrektywy wykładni prawa materialnego w judykaturze Sądu Najwyższego*, Warszawa 2013, pp. 123–134).⁶ Therefore, the Supreme Court continues, “the significance of the terms in question, employed in Article 218 § 1a CrC, should be established by means of norms and definitions deriving from the labour law.

Differentiation of protection of employees *sensu stricto* (Article 218 and 220 CrC) and of other persons in paid work (Article 219 and 221 CrC) is strongly

⁴ More on this subject, see judgment of the Administrative Court in Białystok of 24 September 2013, III AUa 304/13, LEX No. 1369209 and Konarska-Wrzosek, V., et al., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, 2nd edition, Warszawa 2018, <https://sip.lex.pl/#/commentary/587715878/571138>, accessed on: 26.03.2019, commentary to Article 218, thesis 5.

⁵ LEX No. 164200.

⁶ Cf. Wiatrowski, P., *Dyrektywy systemowy interpretacyjnej wykładni przepisów prawa karnego w orzecznictwie Sądu Najwyższego*, “Czasopismo Prawa Karnego i Nauk Penalnych” 2009, No. 2, pp. 179–181.

supported in the systemic argumentation, since only in Article 218 and 220 CrC did the legislator use the term »employee« within the meaning of Article 2 LC. Chapter XXVIII CrC also includes Article 218a CrC, added by Article 13 of the act of 10 January 2018 on restricting trade on Sundays and holidays and certain other days (Dz. U. (Journal of Laws) of 2018 item 305) which, by its use of the expressions »employee or an employed person« differentiates clearly between these two terms, which means that it gives than a different meaning (prohibition of applying synonymous interpretation)”.⁷

The confirmations cited above, as mentioned before, may be approved, though it needs to be emphasized that in the context of “social insurance” the notion of an employee becomes slightly broader.⁸ *In genere* it needs to be stated that an employee means a person specified in the regulation of the Labour Code (Article 2 LC, Article 22 § 1 and § 1¹ LC),⁹ and in the perspective of the act of 13 October 1998 on social insurance system¹⁰ an employee means, similarly, an individual under an employment contract (Article 8(1)), as well as an individual specified in Article 8(2a). This provision stipulates, that an employee also means a person who performs work on the basis of an agency agreement, a mandate contract and other another agreement for the provision of services, to which provisions on mandate apply under the Civil Code, or a specific work contract if the individual concluded such a contract with an employer with whom he is bound under an employment relationship, or if he carries out work under such a contract for the benefit of the employer with whom he is bound by an employment rela-

⁷ One can refer here to the content of Article 1¹ of the act of 23 May 1991 on trade unions (Dz. U. (Journal of Laws) of 2019 item 263 consolidated text), according to which a person delivering paid work means an employee or a person performing work in return for remuneration on a basis other than an employment relationship, unless they employ other persons for this type of works, regardless of the basis for employment, and has the same rights and interests related to the performance of work that can be represented and protected by a trade union. However, it needs to be pointed out that this provision came into force on 1 January 2019, that is after the issuance of the ruling subject to this commentary. See Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, (System Informacji Prawnej LEX, 2018), <https://sip.lex.pl/#/commentary/587737074/578912>, accessed on: 01.04.2019, commentary to Article 218, thesis 1.

⁸ Judgment of the Administrative Court in Białystok of 24 September 2013, op. cit. and Konarska-Wrzosek, V., op. cit., commentary to Article 218, thesis 5.

⁹ Which is also pointed to in the commented ruling.

¹⁰ Dz. U. (Journal of Laws) of 2019, item 300, consolidated text as amended.

tionship.¹¹ Thus, the scope of Article 218 § 1a CrC also refers to these persons, since in light of the subject matter of Social Insurance Act they are considered employees. This is why, in the context of Article 218 § 1a CrC these persons may be injured by this offence if their rights under a social insurance relationship are maliciously or persistently infringed by an offender performing actions in term of social insurance matters. The Supreme Court rejects the thought that the interpretation of the term “employee” under Article 218 § 1a CrC should be “grossly non-guarantee” in nature, indicating that “it needs to be emphasised that the presented interpretation of the term »employee«, referred to in Article 218 § 1a CrC, cannot be considered as grossly non-guarantee in nature, since the system of law features both criminal and civil measures to protect the contractual relationship. The former involves offender’s liability under Article 160 CrC, which criminalises exposing anyone, not only an employee or another person in paid work, to an immediate danger of loss of life or a serious impairment of health”. It needs to be reminded that Article 160 § 1 CrC is *lex generalis* in relation to the regulation of Article 220 § 1 CrC, similar to Article 160 § 3 CrC in relation to Article 220 § 2 CrC. Also in the perspective of occupational health and safety (referred to in Article 207 § 2 LC) the employer is obliged to ensure such conditions to individuals performing work on a basis other than an employment contract in a work establishment or in a place designated by the employer, as well as to anyone conducting business activity on their own account in the work establishment or in a place designated by the employer (Article 304 § 1 LC); also, anyone who, while responsible for health and safety at work, or otherwise managing employees or other individuals, does not observe the provisions or principles of health and safety at work, is liable to a legal and offence-related sanction (Article 283 § 1 LC).¹² Nevertheless, it seems legitimate to state that the perspective

¹¹ Moreover, the legislator specified in the regulation of the Social Insurance System Act that, as long as an employee meets the criteria for co-operating individuals, described in subsection 11, for the purposes of social insurance they shall be treated as a co-operating individual (Article 8(2)); an individual co-operating with individuals engaged in non-agricultural business activities, contractors and natural persons referred to in Article 18(1) of the act of 6 March 2018 – Entrepreneurs Law, referred to in Article 6(1)(4) and (5), shall mean the spouse, children, the spouse’s children and adopted children, parents, stepmother and stepfather, and adopted parents of the individuals, as long as they share a joint household and co-operate in their business activities or in the execution of an agency agreement or a mandate contract; except for individuals who have concluded an employment contract with a view to preparing for a profession (section 11).

¹² More on the subject Wróbel, A., *Odpowiedzialność karna za niedopełnienie obowiązków z zakresu bezpieczeństwa i higieny pracy*, “Państwo i Prawo” 2012, No. 12, pp. 72–81.

of Article 218 § 1a CrC protects – narrowly – only the right of a person who is an “employee”, but not – broadly – the right of a person “performing work”, which in a perspective postulates for an extending amendment.¹³

The Supreme Court rightly points out in the discussed resolution that the subject of protection of Article 218 § 1a CrC includes all rights of an employee resulting from an employment or social insurance relationship. “All rights of an employee under an employment or social insurance relationship”, that is those whose source in an employment or social insurance relationship. It involves rights afforded to an employee: a) in the course of an employment relationship (for employees and situations specified in Article 8(2a) of the Social Insurance Act – in the course of a civil law relationship) and b) after termination of the employment relationship (for employees and situations specified in Article 8(2a) of the Social Insurance Act – after termination of a civil law relationship), not the rights of persons who are not and have not been the “weaker” party (employee) of a given employment relationship, or a party – in the perspective

¹³ The Supreme Court stresses that “attributing, on the ground of Article 218(1a) CrC, the term »employee« with a meaning that is broader than the one functioning in the labour law would constitute an unlawful interpretation to the detriment of the accused, in collision with the *nullum crimen sine lege* principle. A significant share of commentators opted for a homogenous, that is compliant with the definition under Article 2 CrC in connection with Article 22 CrC, understanding of the word »employee« throughout Chapter XXVIII CrC, pointing out that it is inadmissible to apply an extending interpretation here (see Unterschütz, J., *Glosa do postanowienia SN z 13 kwietnia 2005, III KK 23/05*, “Gdańskie Studia Prawnicze – Przegląd Orzecznictwa” 2006, No.1, pp. 123–134; article in “Gdańskie Studia Prawnicze – Przegląd Orzecznictwa” 2015, No. 4, pp. 164–172). As far as critical opinions on the resolution deciding the sense of Article 220 CrC (see Musiała, A., Jankowiak, J., *Glosa do uchwały SN z 15 grudnia 2005*, “Prokuratura i Prawo” 2007, No.2, pp. 163–167) may raise some doubts among the commentators or those applying the law as regards the existing understanding of the word »employee« used in this provision (the current composition of the Supreme Court does not have such doubts), these critical stands may in no way refer to the content of Article 218 § 1a CrC”. In this case it involves the fact – as pointed out by the Court – “that the aim of protection under Article 220 CrC is the employee’s right to safe and healthy conditions of work and only in this context did the opponents attempt to negate the result of the interpretation done by the ruling of 15 December 2005, by reference to Article 66(2) of the Constitution of the Republic of Poland, Article 3(a) of Directive 89/391/EEC or Article 29(3) of the Atomic Law, which (those regulations) all are solely devoted to the value of health and safety at work. The arguments directed at this issue could not have obvious reasons for application when deciphering the sense of Article 218 § 1a CrC, because the subject of protection of this provision, contrary to Article 220 CrC, does not involve rights to healthy and safe conditions at work, but all rights of an employee resulting from the employment or social insurance relationship”. Cf. Wróbel, A., *Glosa do postanowienia SN z dnia 13 kwietnia 2005, III KK 23/05*, *Studia Iuridica Toruniensia* 2013, No. 1, pp. 265–267. DOI: <http://dx.doi.org/10.12775/SIT.2013.013>, accessed on: 28.03.2019.

of Article 8(2a) of the Social Insurance Act to a civil law relationship.¹⁴ Thus, when an employment relationship (or respectively a civil law relationship) has not been formed yet, the rights resulting from social insurance have not occurred yet, then such a situation is not in any way reflected – in terms of the subject of protection – in the regulation of Article 218 § 1a CrC. The catalogue of employee rights includes: the right to respect for dignity, the right to receive remuneration or their benefits, the right to rest, the right to obtain a certificate of employment, the right to confirm the terms of the employment contract in writing, the right to protect the permanence of the employment relationship, the right to special protection of work in the case of women and youth, the right to safe and healthy conditions of work, the right to be re-admitted to work which was ruled by a competent authority, the rights arising from the social insurance relationship.¹⁵ The Supreme Court rightly points out that there is an indirect legal construct between: a) “a person employed on the basis of an employment contract, an election, a nomination or a co-operative employment contract”, and b) “a person performing work under civil law agreements”. Thus, it does not cover “persons who under the disguise of a civil law agreement in fact perform work under an employment contract”. Such a reasoning of the Court is also supported by Article 22 § 12 LC which specifies that it is inadmissible to replace employment contracts with a civil law contract where the conditions of the performance of work specified in Article 22 § 1 LC remain intact.

This is why it is validly noted in the resolution in question that the motivational part of the resolution of the Supreme Court of 15 December 2005, I KZP 34/05 does not make a direct mention of Article 22 § 11 LC, which specifies that employment under the conditions stipulated for in Article 22 § 1 LC constitutes employment on the basis of an employment contract regardless of the name of the contract concluded by the parties, “though it was expressly highlighted in its reasoning, that the term »employee« can also include a person with whom a civil law agreement, not an employment contract, was formally executed. This entails the need to treat such a defectively named contract as an employment contract,

¹⁴ Cf. Samol, S., *Prawnikarna ochrona praw pracownika w nowym kodeksie karnym*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1998, No. 3–4, p. 77 and Budyn-Kulik, M., op. cit., commentary to Article 218, thesis 1.

¹⁵ More on the subject: Unterschütz, J., *Karnoprawna ochrona praw osób wykonujących pracę zarobkową*, Warszawa 2010, pp. 76–110.

and the person performing work – as a person under an employment contract”. Nonetheless, it should be added, that the regulation of Article 22 § 11 and Article 22 § 12 LC does not entail a prohibition of employing on the basis of a relationship other than an employment relationship.¹⁶ However, if the work met the *de facto* premises specified in Article 22 § 1 LC, then *de iure* it would be work performed under an employment contract;¹⁷ also, irrespective of the name and type of contract executed by the parties, irrespective of whether it would be one of the contracts under civil law (mandate, specific work, agency, “innominate”),¹⁸ “self-employment” (e.g. in the case of the so-called “ostensible entrepreneurs”)¹⁹ or “a management contract”,²⁰ etc.

The scope of Article 218 § 1a CrC, the Supreme Court points out (though, not mentioning the regulation of Article 8 (2a) of the Social Insurance Act), “covers only persons who are employees within the meaning of Article 2 LC and Article 22 § 1 and § 11 LC, thus persons employed on conditions characteristic to the employment relationship, irrespective of the name of the contract concluded by the parties; findings in this regard are determined in a criminal case by the court, according to the principle of jurisdictional independence expressed

¹⁶ As aptly pointed out by Radecki “where a civil law contract was not concluded only to conceal the true employment relationship, that is, it truly is a civil law contract (mandate contract, agency agreement, another service contract), which the parties may indeed execute, then the rights of e.g. the mandatary are not protected under Article 218 § 1 CrC”; Radecki, W., *Przestępstwa przeciwko prawom osób wykonujących pracę zarobkową. Rozdział XXVIII Kodeksu karnego. Komentarz*, Warszawa 2001, p. 30.

¹⁷ Cf. Kowalski, S., *Ochrona praw pracownika w kodeksie karnym. Zagadnienia teoretyczne i praktyczne*, Toruń 2014, p. 40.

¹⁸ Daniluk and Witoszko point out – analysing views expressed by legal scholars – that one should favour the stand that the term “employee” (even though in the context of Article 220 CrC, but also referring to Article 218 § 1a CrC) also refers to “persons which are not formally employed on the basis on an employment contact, an appointment, an election, a nomination or a cooperative employment contract (Article 2 LC), but in fact – performing acts under various, mostly ostensible, civil law agreements (e.g. mandate contract, contract for specific work) – they perform work under an employment contract”; Daniluk, P., Witoszko, W., *op. cit.*

¹⁹ Chobot, A., *Nowe formy zatrudnienia. Kierunki rozwoju i nowelizacji*, Warszawa 1997, pp. 168–169.

²⁰ Unterschütz, J., *Karnoprawna...*, pp. 69–71.

in Article 8 § 1 of the Code of Criminal Procedure”.²¹ This provisions stipulates *expressis verbis*, that the criminal court determines, at its own discretion, the factual and legal matters and is not bound by the determinations of another court or authority. In this context it is rightly taken up in the judicature that the principle of independence of jurisdiction of the adjudicating court specified in Article 8 § 1 CCP is one of the prime principles of criminal procedure; it is a consequence of application on the ground of the Code of Criminal Procedure of the principle of free appraisal of evidence under Article 7 CCP. “It means that for a ruling in a court’s criminal procedure, rulings of other courts or authorities are irrelevant even in factually similar cases. The only exception to this rule is introduced in Article 8 § 2 CCP in reference to valid determinations establishing rights or legal relationships”.²² One needs to agree with the thought expressed in the literature, that court determinations referred to in Article 8 § 1 CCP are “particularly important from the point of view of the notion of employing employees on the basis

²¹ The Supreme Court preceded this conclusion with an analysis, that “judicial decisions in terms of labour law devoted a lot of attention to the analysed subject matter, presenting homogeneous and consistent understanding in this matter, which proved helpful in reading the meaning of terms under this branch of law used in the criminal statute, including the term “employee” under Article 218 § 1a CrC. It is assumed, that the principal importance in the process of judicial examination of whether a given legal relationship is an employment relationship, lies with establishing the facts whether the work performed under the evaluated legal relationship truly has attributes named in Article 22 § 1 LC; for this purposes the circumstances and conditions in which a given person performs acts for the benefit of another entity under the law are examined, and only in the result of such examination is it decided whether these performances are provided in conditions indicating an employment relationship (see judgment of the Supreme Court of 17 October 2017, II UK 451/16). If employee characteristics prevail in the contract, such as reporting to the employer or absence of real possibility of the performance of the agreement by a person other than the employed, then we are dealing with an employment contract even if it was the parties’ will to execute a civil law agreement (see judgment of the Supreme Court of 7 June 2017, I PK 176/16). The literature notes that the character of the relationship and the content of an executed contract, not its name, decide whether a given person stays in an employment relationship or in an obligation relationship with the employing party. The features of an employment relationship – resulting directly from Article 22 § 1 LC – include provision of work in return for remuneration by the employee for the employer and under the supervision of this employer. The views of labour law scholars and commentators add to it features such as personal provision of work by the employee, unsolicited nature of the obligation and charging the employer with an economic, production and personal risk. The legislator, in Article 22 § 1¹ LC, established a specific principle for employment under the employment relationship, which means that any employment bearing the features of an employment relationship is by operation of law treated as employment under an employment relationship, regardless of the name of the contract executed between the parties (see Daniluk, P., Witoszko, W., op. cit., p. 93; Unterschütz, J., *Karnoprawna...*; Rączka, K., *Komentarz do art. 2 Kodeksu pracy*, LEX OMEGA dla Sądów 32/2018)”.

²² Thesis to an order of the Administrative Court in Katowice of 15 March 2017, II AKz 138/17, Lex No. 2333415.

of civil law agreements, referred to as »junk contracts«, which only »conceal« the fact that the employed person performs work under conditions typical to an employment contract”.²³

The commentator shares the *de lege ferenda* postulate, “for the protection under Article 218 § 1a CrC to cover also persons in employment relationships other a contract of employment”²⁴ and – which the Court does not refer to in the resolution in question – other than those specified in Article 8(2a) of the Social Insurance Act. In this case, in the law-making perspective, one needs to take into account not only “persons performing paid work” but also persons “performing work of a non-paid character”, that is *in genere*: persons “performing work”. Such a change should ensure protection not only to an employee in the meaning of the provisions of the labour law and social security law, but also any other person performing work irrespective of the basis of this performance; irrespective of whether it was performed under an employment contract or a civil law relationship. Regardless of whether the person performing work carries it out under an employment contract, an appointment, a nomination, an election, a cooperative employment contract, a volunteering contract, a contract for practical vocation training, an apprenticeship contract, a mandate contract, etc. The reasons of equity and the reasons of fairness require for all these persons to be protected with the possibility of applying a criminal sanction where the illegal practice of violating their right associated with the work performed by them (right resulting from the legal relationship that is the basis of the performed work, regardless of its type) or social insurance, reached the size justifying the application of legal and criminal repression.

The commentary’s author agrees in most part with the belief that “the scope of Article 218 § 1a CrC covers only persons who are employees within the meaning of Article 2 LC and Article 22 § 1 and § 11 LC”, though he deems it incomplete as one also needs to take into account Article 8(2a) of the act on social insurance, where – with regard to social insurance – the notion of an employee is slightly broader than the one included in the provisions of the Labour Code.

²³ Siwik, Z., op. cit., commentary to Article 218, thesis 4.

²⁴ This postulate, which is rightly pointed to in the discussed resolution and reminded of in the legal and constitutional perspective – needs to be addressed to “the law-making authority, as under the Polish legal system only the Parliament, not any court of any type of instance by means of a precedence ruling, is authorised to extend the limits of criminal liability on the basis of a specific provision”.

The commentator believes it legitimate that the subject-matter of protection of Article 218 § 1a CrC includes all employee rights resulting from an employment or social insurance relationship.

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