

Original Paper

Criminal Liability of Persons Responsible for Occupational Health and Safety in Poland

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Abstract

This paper focuses on the interpretation of the concept of a “person responsible for occupational health and safety”. Only such a person can be an offender under Article 220 of the Polish Criminal Code. Following an analysis of the legal situation and the rights and obligations of the various entities capable of becoming offenders under said article, the author concludes that the category of persons responsible for occupational health and safety includes only the following: the employer, the person managing employees, members of the occupational health and safety service, OH&S coordinators.

Keywords

occupational health and safety, criminal liability in relation to occupational health and safety, OH&S service, national labour inspector

1. Introduction

The Polish Criminal Code foresees a specific type of offence that can only be committed by a person who is responsible for occupational health and safety. Article 220 of the Criminal Code provides as follows: “§ 1) Anyone who fails to perform their duties concerning occupational health and safety and thereby exposes an employee to an immediate danger of loss of life or a serious injury, shall be liable to imprisonment for up to 3 years. § 2) If the offender acts unintentionally, they are liable to a fine, restriction of liberty or imprisonment for up to 1 year. § 3) An offender who voluntarily prevented an impending danger shall not be liable to a penalty”. Clarification of the concept of a “person responsible for occupational health and safety” is not only key in establishing the subject of the offence (the offender) but has a much broader significance in the field of labour law. From a practical point of view,

it's also important for employers who should know who—in the context of their own work establishment—is responsible for occupational health and safety. The purpose of this paper is to interpret the criterion given in Article 220 of the Criminal Code, which defines the offender, and to draw up a catalogue of persons responsible for occupational health and safety.

To begin with, it needs to be stressed that the right to healthy and safe working conditions is one of the fundamental rights of every employee. The Constitution of the Republic of Poland stipulates that “everyone shall have the right to safe and healthy conditions of work” (Article 66(1)). The concept of a person responsible for occupational health and safety has not been defined and its scope has been a controversial issue. We do not have a statutory catalogue of such persons. The Polish doctrine offers no uniform position as to who should be viewed as responsible for occupational health and safety and, as a result, who is capable of becoming an offender under Article 220 of the Criminal Code. The literature usually lists the following entities: the employer, the person managing employees, members of the occupational health and safety service, social labour inspector, national labour inspector, national sanitary inspector, a person occupying an independent position in the organisational structure of a work establishment, OH&S coordinator, and regular employee. Occasionally, other persons are mentioned, including members of the occupational medical service, members of the occupational health and safety commission, persons conducting OH&S training.

2. Discussion

The provision in Article 220 of the Criminal Code is a blanket provision and as such requires a reference to provisions of the labour law as it is broadly defined. The concept of occupational health and safety is a characteristic element of the labour law rather than that of criminal law. Article 15 of the Labour Code states explicitly that the employer is obliged to ensure healthy and safe working conditions for their employees. Moreover, Article 94(4) of the Labour Code, defining the employer's duties, provides for the employer's obligation to ensure safe and healthy conditions at work and to provide systematic OH&S training to employees. Indisputably, the employer is one of the persons responsible for occupational health and safety. According to Article 3 of the Labour Code, an employer is an organisational unit even if it has no legal personality, and an individual that employs employees. Article 3 of the Labour Code provides as follows: “§ 1) In the case of an employer being an organisational unit, any acts concerning labour law are performed by the person or authority managing that unit, or by another person assigned to carry out these acts. § 2) The provision in § 1 applies accordingly to an employer being an individual if the employer does not personally perform the acts referred to in that provision”. The above clarification is also relevant in the context of criminal law since criminal liability is only applicable to individuals. Criminal liability is individual and personal and attributable to a specific individual (a person). Thus, in the case of an employer not being an

individual, a managing person or another appointed person will be responsible for occupational health and safety. In the case of an employer who is an individual, it is obvious that they are the person responsible for occupational health and safety. Pursuant to Article 207 of the Labour Code, the employer is responsible for occupational health and safety in their establishment and must protect employees' health and life by providing safe and healthy working conditions, appropriately implementing the achievements of science and technology in this field. In particular, the employer must:

- 1) organise work in a manner ensuring safe and healthy working conditions;
- 2) ensure that occupational health and safety regulations and rules are complied with in the work establishment, issue instructions to correct any breaches in this respect, and control the implementation of those instructions;
- 3) react to needs in relation to ensuring health and safety at work, as well as adopt measures to improve the existing level of protection of health and life of employees, given the changing conditions of work;
- 4) ensure the development of a coherent policy preventing accidents at work and occupational diseases; the policy should consider technical problems, work organisation, condition of work, social relations as well as the effect of factors of the work environment;
- 5) consider the protection of health of juveniles, pregnant or breastfeeding employees, as well as disabled employees within the preventive measures undertaken;
- 6) ensure the implementation of all announcements, decisions and orders given by regulatory authorities competent for working conditions;
- 7) ensure the implementation of the social labour inspector's recommendations.

The provision in Article 207 § 2(1) of the Labour Code provides that the costs of activities undertaken by the employer to ensure health and safety at work must not be borne by employees in any way. The employer must know, within the scope necessary to perform their duties, the labour protection laws, including occupational health and safety regulations and rules (Article 207 § 3 of the Labour Code).

In light of Article 207 § 3 and 212 of the Labour Code, it should not be open to question that a person managing employees who is not the employer is also responsible for occupational health and safety. They could be a member of the management board managing the whole work establishment or a team manager (e.g., a shift manager at a plant). Pursuant to Article 207 § 3 of the Labour Code, a person managing employees must know, within the scope necessary to perform their duties, the labour protection laws, including occupational health and safety regulations and rules as well as fire protection provisions. Article 212 of the Labour Code provides that a person managing employees must:

- 1) organise job positions in accordance with occupational health and safety regulations and principles;
- 2) care for the efficiency of personal protection measures and their application in accordance with their intended use;
- 3) organise, prepare and perform work in such a way as to protect employees against accidents at work, occupational diseases and other diseases related to the conditions of the work environment;
- 4) care for healthy and safe conditions of the work premises and of technical equipment, as well as for the efficiency of measures of group protection and their application in accordance with

their use; 5) enforce the observance of occupational health and safety provisions and principles by employees; 6) ensure the enforcement of medical recommendations issued by a doctor entrusted with health care over employees.

It's not entirely clear whether a member of the occupational health and safety service is a person responsible for occupational health and safety within the meaning of Article 220 of the Criminal Code. The appointment of an occupational health and safety service was envisaged in Article 237 of the Labour Code. An employer with more than 100 employees must create an occupational health and safety service to perform advisory and control functions concerning health and safety at work; an employer who employs up to 100 employees assigns the tasks of occupational health and safety service to an employee performing other work. If there are no competent employees, the employer may assign the performance of occupational health and safety tasks to specialists from outside the work establishment. The question posed at the beginning also applies to employees generally employed to perform other work and assigned health and safety service tasks and to specialists from outside the work establishment. To answer this question, we first need to analyse the rights and obligations of the occupational health and safety service which—in accordance with the Labour Code—performs advisory and control functions. Activities of the occupational health and safety service were defined in more detail in the Regulation of the Council of Ministers of 2 September 1997 concerning the occupational health and safety service. According to Section 2 of the Regulation, the OH&S service is tasked with, *inter alia*, control over the working conditions and the observance of health and safety regulations and principles; notifying the employer, on an ongoing basis, about any identified occupational risks and issuing recommendations as to their removal; developing periodic (at least yearly) analyses of the state of health and safety at work with suggestions for technical and organisational activities to eliminate employee safety and health risks and to improve working conditions, and then submitting them to the employer. Members of the occupational health and safety service have, *inter alia*, the following rights: controlling the state of health and safety at work and the observance of OH&S regulations and principles at the work establishment and at any other place where work is performed; requesting that persons managing employees remove identified accident risks, harmful conditions and OH&S negligence; immediately stopping a machine or other technical equipment in case of situations posing immediate danger to life and the health of employees or other people; immediately removing an employee doing forbidden work; immediately removing an employee whose conduct or manner of work poses an immediate danger to their own or other people's health or life (Section 3 of the Regulation). The offence defined in Article 220 of the Criminal Code can only be committed by failing to fulfil the duties concerning occupational health and safety. Thus, a person who has not been assigned these kinds of duties cannot be an offender in this context. The above-mentioned Regulation does not expressly define the duties of the occupational health and safety service, but it

does so indirectly, by defining its tasks. If the OH&S service has tasks, it means it is obliged to fulfil them. It should be stressed that the OH&S service is appointed to take care of occupational health and safety matters, as its name indicates. The service is appointed by the employer and operates within their work establishment, or the employer's organisational structure. Moreover, it is entrusted with a control function with respect to occupational health and safety and was provided with the necessary authorities and competences by the legislator. Some commentators oppose the idea of considering OH&S members as persons responsible for occupational health and safety due to the advisory and controlling nature of their work; it was indicated that controlling authorities assigned to entities operating within a work establishment are not sufficient to deem these persons as criminally liable under Article 220 of the Criminal Code. It was noted that a person needs to have supervisory powers to directly impact the state of occupational health and safety and the obligation to take appropriate actions in this respect (Hryniewicz, 2013). I cannot agree with this position when it comes to the occupational health and safety service. It should be noted that the OH&S service has supervisory powers, for example, the power to immediately stop a machine in case of situations posing immediate danger to life and health of employees. Without doubt, this decision has a direct impact on the state of occupational health and safety of employees. The above arguments support the classification of members of the occupational health and safety service into the category of persons responsible for occupational health and safety.

Article 18 of the Labour Code stipulates that the social control over the observance of labour law, including the provisions and principles of health and safety at work, is exercised by the social labour inspectorate. The organisation, tasks and rights of the social labour inspectorate were defined in the Social Labour Inspectorate Act of 24 June 1983. Pursuant to Article 1 of the Act, the social labour inspectorate is a social service performed by employees whose purpose it is to make sure that the work establishment provides safe and healthy working conditions and that employee rights defined in the labour law are respected. The social labour inspectorate represents the interests of all employees at work establishments and is managed by labour unions operating in those establishments (Article 2 of the Act). Pursuant to Article 4 of the Act, social labour inspectors have the right to, *inter alia*, control the condition of buildings, machinery, technical and sanitation equipment, as well as technological processes with respect to health and safety; they also have the right to control the observance of labour law, in particular, provisions relating to occupational health and safety. Thus, they have control competences. In order to perform their tasks, they can access, at any time, premises and facilities within a work establishment, as well as demand that the manager of the establishment provides them with information and documents relevant to the activities performed by the social labour inspectorate (Article 8 of the Act). Article 11 stipulates that the social labour inspector issues the manager of a work establishment with written instructions and recommendations to remove any identified issues within a defined period of time. In case of immediate danger which could result in an accident at work, the

social labour inspector requests that the manager of the work establishment immediately removes the danger and if the latter fails to do so, they issue written instructions to stop the operation of a given piece of technical equipment or discontinue a specific type of work, at the same time informing the labour union operating in the establishment about this. The manager of the work establishment may submit an appeal against the instructions issued by the social labour inspector to the competent national labour inspector of the National Labour Inspectorate. In the event of an appeal, the national labour inspector issues a decision or takes other legal measures envisaged in the National Labour Inspectorate regulations. If the employer refuses to follow instructions issued by the social labour inspector, they are deemed to have committed a petty offence and are liable to a fine of up to PLN 2,500 (Article 22 of the Act). The above provisions could be deemed as pointing to the social labour inspector's responsibility for occupational health and safety. Indeed, the inspector has control and supervisory powers to issue instructions which are binding on the employer. It should be, however, noted that the social labour inspector is not appointed by the employer. They are a representative of employees and represent their interests. They are appointed and dismissed by employees working in a given work establishment (Article 6 of the Act). They should perform their tasks outside normal working hours and generally without receiving additional remuneration although in certain cases they may be entitled to some monthly lump sum remuneration (Article 15 of the Act). They have the right to control the observance of occupational health and safety regulations and principles in a work establishment but the employer remains responsible for ensuring the adequate state of health and safety at work. The social labour inspector is tasked with enforcing the fulfilment of this obligation by the employer. The above arguments speak against the classification of the social labour inspector into the category of persons responsible for occupational health and safety.

Among the persons responsible for occupational health and safety and potential offenders under Article 220 of the Criminal Code, the literature often mentions inspectors of the National Labour Inspectorate, or national labour inspectors. The National Labour Inspectorate is a body appointed to supervise and control the observance of labour law, in particular occupational health and safety regulations and principles (Article 1 of the National Labour Inspectorate Act). The Inspectorate's tasks include: supervision and control of the observance of labour law, in particular occupational health and safety regulations and principles, as well as control over marketed or commissioned products in terms of their compliance with the basic and other occupational health and safety requirements specified in separate provisions of law (Article 10(1) of the Act). Moreover, the National Labour Inspectorate supervises and controls the assurance of safe and healthy working conditions: 1) to individuals performing work on a different basis than under an employment contract and to self-employed individuals performing work at a location indicated by the employer of an entrepreneur not being an employer on behalf of whom the work is performed; 2) by entities organising work performed by individuals on a different basis than

under an employment contract, as part of socially beneficial work; 3) to individuals in prisons and juvenile detention centres performing work as well as to soldiers in active service performing work, as instructed (Article 10(2) of the Act). The National Labour Inspectorate also supervises and controls the employer's assurance of safe and healthy conditions for onsite activities realised by students and pupils who are not employees (Article 10(3) of the Act). Labour inspectors are entitled to conduct control, without notice and at any time of day or night, of, *inter alia*, the observance of labour law and in particular the state of health and safety at work (Article 11(1) of the Act). The National Labour Inspectorate has a number of supervisory powers. After establishing that labour law provisions concerning occupational health and safety have been violated, the inspectorate may, for example, order that the identified issues are removed within a defined time period. The Inspectorate may also ban work or activities at locations where the state of occupational health and safety poses immediate danger to human life and health, with such instructions being immediately enforceable (Article 11 of the Act). Pursuant to Article 17(2) of the Petty Offences Procedure Code, in the case of petty offences against employee rights, the national labour inspector acts as a public prosecutor. The national labour inspector may also impose a fine on the perpetrator of a petty offence through a penalty notice (Article 95 § 3 of the Petty Offences Procedure Code). Thus, the National Labour Inspectorate has supervisory and control competences for occupational health and safety purposes. This does not, however, entail that national labour inspectors are persons responsible for occupational health and safety. Let's not forget that the issue at hand concerns occupational health and safety at a work establishment. A national labour inspector who is staying at a work establishment to perform control activities should also be provided with safe and healthy working conditions. It should be stressed that the National Labour Inspectorate is an external entity and not a part of a work establishment's structure. The National Labour Inspectorate is an entity established to provide supervision and control over the observance of occupational health and safety regulations and principles rather than to ensure safe and healthy working conditions.

Among the persons responsible for occupational health and safety and potential offenders under Article 220 of the Criminal Code, the literature also mentions inspectors of the National Sanitary Inspectorate, or national sanitary inspectors. Pursuant to Article 1 of the National Sanitary Inspectorate Act, the National Sanitary Inspectorate is a body established to perform public health tasks by, *inter alia*, supervising the state of hygiene at work establishments. These tasks include provision of preventive and ongoing sanitary supervision (Article 2 of the Act). The tasks of ongoing sanitary supervision involve control over observance of provisions which define the requirements concerning health and hygiene, including provisions concerning the maintenance of hygiene at work establishments and health conditions of the work environment and, in particular, prevention of occupational diseases and other diseases related to working conditions (Article 4 of the Act). Pursuant to Article 27 of the Act, if

it is established that the requirements concerning health and hygiene have been violated, the national sanitary inspector issues a decision to order removal of any identified issues. If a violation of the requirements concerning health and hygiene has resulted in an immediate danger to human life or health, the national sanitary inspector orders that the work establishment is closed, wholly or partly (workstations, machines or other equipment). The above provisions indicate that the National Sanitary Inspectorate has an oversight and control function with respect to healthy working conditions and that it has certain supervisory powers. This does not imply, however, that national sanitary inspectors are potential offenders under Article 220 of the Criminal Code. The National Sanitary Inspectorate is an external entity with respect to a work establishment. It has no organizational links to the employer, nor is it controlled by them. It is not appointed to ensure healthy working conditions at work establishments but rather to control that such conditions are ensured by employers.

According to Article 208 § 1 of the Labour Code, if employees employed by various employers work at the same time at the same place, their employers are obliged to appoint a coordinator to supervise the occupational health and safety of all such employees. Neither the Labour Code nor other legal acts specify the authorities of such a coordinator. It could be claimed that the detailed scope of their rights and obligations would be specified each time by employers appointing the coordinator. It has been rightly noticed in the literature that in practice such coordinators are very rarely appointed (Widzisz, 2005). *In abstracto*, it could be said that the coordinator is a person responsible for occupational health and safety for two basic reasons: because they perform a supervisory function and they are appointed by employers.

Members of the occupational health and safety commission cannot be deemed persons responsible for occupational health and safety because their function is purely advisory and consultative. Pursuant to Article 237 of the Labour Code, an employer who employs more than 250 employees appoints an occupational health and safety commission as their advisory and opinion-forming body. The commission is made up of an equal number of employer's representatives, including members of the OH&S service and a doctor entrusted with preventive health care over employees, and employees' representatives, including the social labour inspector. Article 237(13) § 1 of the Labour Code provides that the occupational health and safety commission is tasked with verifying the conditions at work, carrying out a periodic evaluation of the state of health and safety at work, giving opinions on the measures taken by the employer to prevent accidents at work and occupational diseases, making suggestions on improving the conditions of work, and working with the employer towards the execution of his occupational health and safety duties.

Undoubtedly, persons providing OH&S training to employees cannot be considered persons responsible for occupational health and safety. They do not perform any control or supervisory functions nor do they have the supervisory powers to make an impact on the state of health and safety

at a given work establishment. These are the same reasons for which members of the occupational medical service are not responsible for occupational health and safety. Pursuant to Article 1(1) of the Occupational Medical Service Act, an occupational medical service is established to protect employees from harmful factors arising from the work environment and the methods of work, and to provide preventive health care to employees, including checking their health. The tasks of the occupational medical services are performed by doctors, nurses, psychologists and other persons having the necessary qualifications to perform the multidisciplinary tasks entrusted to this service (Article 2(1) of the Act). It is worth mentioning that while engaged in their tasks, the persons involved in the occupational medical service are independent of employers pursuant to Article 3 of the Act.

Contrary to the view found in the literature (Widzisz, 2005; Budyn-Kulik, 2017), people with independent positions within an employer's organisation cannot be considered as persons responsible for occupational health and safety. These include such employees as the chief mechanical engineer, chief process engineer, chief electrical engineer, machine or equipment operator (for example construction crane operator) or the chief accountant. The authors claim that these persons could potentially be held responsible for occupational health and safety because, due to their role, they can have an impact on the working conditions of other employees. The above argument should be rejected because impacting the state of health and safety at work is not the essence of these people's work—they have other tasks and duties. The category of persons responsible for occupational health and safety may only include people who are directly responsible for health and safety at a given work establishment.

In the literature, a view has been expressed that persons responsible for occupational health and safety include regular employees, i.e., all employees not managing other employees. From this perspective, every employee, regardless of their job and position, could be an offender under Article 220 of the Criminal Code (Daniluk, 2015). To support this opinion, Article 211 of the Labour Code was quoted, which stipulates that the employee must observe occupational health and safety provisions and regulations. In particular, the employee must: 1) know OH&S regulations and rules, take part in training in this respect and take the required testing exams; 2) perform work in a manner compliant with the OH&S regulations and rules as well as comply with the guidelines and instructions given in this regard by his/her superiors; 3) care for the proper condition of machines, tools and equipment as well as for the order and tidiness in the place of work; 4) use group protection measures and any provided individual protection measures as well as work clothes and shoes in accordance with their intended use; 5) undergo preliminary, periodic and check-up medical examinations and other recommended medical tests and follow the doctor's instructions; 6) immediately notify the superior or relevant OH&S services about any accident or threat to human life or health observed in the place of work, and warn co-workers and other people in danger zone about the impending danger; 7) cooperate

with the employer and his/her superiors in the performance of OH&S duties. The above position should be rejected. Although the employee is obliged to observe occupational health and safety regulations and principles, this does not make him or her responsible for occupational health and safety. The employee has the right to safe and healthy working conditions and the employer must ensure such conditions. *Ergo*, the responsibility for safe and healthy working conditions rests with the other party to the work relationship. Health and safety regulations have been introduced for the sake of employees and their best interests, which is why regular employees cannot be held legally liable for not ensuring adequate health and safety conditions at a work establishment. Employees' liability for violating employee duties by not observing occupational health and safety regulations and principles is a different matter altogether. In this case, we can talk about employee liability under Articles 70, 71 and 74 of the Petty Offences Code as well as disciplinary liability.

3. Final Conclusions

To sum up, the right to healthy and safe working conditions is one of the fundamental rights of every employee. Persons responsible for occupational health and safety who fail to perform their duties concerning OH&S and thereby expose an employee to an immediate danger of loss of life or a serious injury are subjected to criminal liability. In light of the Polish law, the persons responsible for occupational health and safety who could become offenders under Article 220 of the Criminal Code include the employer, the person managing employees, members of the OH&S service and OH&S coordinators.

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