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THE ISSUE OF THE SUBJECTIVITY OF ARTIFICIAL INTELLIGENCE ACTING FOR AN EMPLOYER

Abstract

The rapid development of artificial intelligence and large-scale application of algorithmic management has led to significant changes in the work environment. These primarily concern the ways in which work is provided and the conditions under which it is carried out, but they should be viewed much more broadly. Already today, most of the employer's tasks in relation to individual employment relationships can be performed by artificial intelligence. In the near future, this trend will become even more noticeable. Since AI manages employees and de facto exercises control over them in the work process, it seems worthwhile to start a discussion on the subjectivity of AI as an employer. This is all the more important because other branches of law already discuss the subjectivity of AI, while the doctrine of labour law does not address this topic, although it is in the work environment that the impact of AI is most visible.

Słowa kluczowe: sztuczna inteligencja, prawo pracy, zarządzanie algorytmiczne, podmiotowość prawna, pracodawca, podporządkowanie, technologia

Keywords: artificial intelligence, employment law, algorithmic management, legal subjectivity, employer, subordination, technology

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Introductory remarks

Recent developments in modern technologies, particularly those that affect the manner and conditions of providing employment, cannot be left unreflected in the doctrine of labour law. This is especially true for such technologies that can trigger changes across a very broad spectrum—not just in terms of the performance of work, but also affecting the labour market or modes of employment. Artificial Intelligence (AI) is certainly one example of such technology. Predictions concerning its evolution, and especially its future impact on labour relations, are varied, yet this influence cannot be underestimated. For it may turn out that not only will there appear extensive modifications relating to the

labour market, the provision of employment, but also to the entities participating in employment relations. Against this background, now is the right time to consider the issue of the possible subjectivity of artificial intelligence on the part of the employing entity.

Legal and functional concept of an employer

The Polish Labour Code provides a definition of an employer in Art. 3. Pursuant to this provision, an employer is an organisational unit, even if it has no legal personality, or an individual, provided it employs employees. Despite the literal wording of the said provision, given the fact that the employment relationship is an individual legal relationship, it is evident that in order for there to be an employer, it is sufficient for such an entity to employ at least one employee.

Article 3 of the Labour Code is definitely the key norm that defines the entity we call the employer, however, it does not extend beyond organisational issues, most notably it does not indicate a functional definition of the employer. It becomes necessary in order to make further analyses in terms of the possible subjectivity of AI.¹ In order to formulate it, one should refer to a number of provisions of the Labour Code referring to the rights and obligations of the employing party. Article 22 § 1 of the Labour Code, which indicates the basic rights and obligations of the parties while defining the employment relationship, is of crucial importance in this context. First of all, the content of this provision indicates the employer's right to benefit from the employee's work, as well as to manage the employee during the work process.² This seems to be the way to decode the phrase "for the benefit of an employer and under his supervision". The employer's main obligations arising from this provision are to employ the worker and to pay the worker's remuneration (Maniewska 2021, p. 259).

Developing a functional definition of an employer would not be possible without referring to other normative provisions of the Code, especially to the regulations pertaining to the rights and obligations of the parties to the employment relationship. They determine the legal framework of the employer's actions. It should be noted, however, that the actions of this entity are determined by the need to pursue its interests, irrespective of their indisputable necessity to comply with the law. For the most part, these interests will be of an economic nature, although not always and not entirely so. Therefore, it is worth considering not so much the rights and obligations of an employer as its tasks.

¹ It is worth noting that given the subject matter of this paper, the functional definition of the employer is going to be limited to only those aspects that are necessary to outline the role of artificial intelligence. Accordingly, by its very nature, this definition cannot be considered complete or comprehensive.

² The scope and meaning of these powers and especially the employer's management have been discussed in many publications, both of dogmatic and axiological nature. First see Świącicki 1957, pp. 75–76; Szubert 1980, p. 90; Kubot 2002, pp. 234 ff; Liszcz 2009, p. 147; Sobczyk 2017, pp. 265 ff.

When addressing the issue of employer's tasks, it is possible to resort to various ways of classification. One of the most transparent ways is to divide them according to the key oriented towards stages of the employment relationship.

The initial stage involves the creation of the employment relationship. In other words, it includes the formation of this relationship, as well as activities preceding it. The employer's tasks at this stage include above all carrying out recruitment in compliance with the provisions of law and at the same time allowing for the selection of the most suitable candidates for employees, which helps to reduce personal risk on the part of the employer. Moreover, another important task is to select the grounds for employment, determine its terms and conditions of employment and properly structure the agreement. It should be emphasised that these activities are carried out by the employer in consultation with the employee, but it is undeniable that in practice the employer usually plays the dominant role.

The next stage concerns the performance of the employment relationship. The employer's tasks are extremely diverse here and refer to the whole process of work. Among others, it includes organising the process, assigning tasks to be performed by employees, determining the manner of performance of work, controlling the way employees perform their work, as well as making employees accountable for their work, including the use of the system of awards, and if necessary, disciplinary actions.

The final stage focuses on the termination of the employment relationship. It covers various tasks of the employer, the nature of which varies depending mainly on the manner of termination of the employment relationship and, in the case of its termination, on the party that gave grounds for it, as well as the manner in which this legal act is to be performed. These tasks include, among others, the selection of employees for dismissal (e.g. in the case of collective redundancies), determining the circumstances which constitute the grounds for termination of the employment relationship, drawing up an appropriate declaration of intent, and finally the activities related to the termination of employment (drawing up an employment certificate, settling accounts with the former employee, etc.).

Tasks of the employer performed by artificial intelligence

All of the aforementioned tasks of the employer, as stipulated by both the law and the employer's interests, determine its functional role in the employment relationship.³ Having said that, it is worthwhile to examine which of these tasks can be performed or will soon be performed by artificial intelligence.

³ Naturally, the indicated tasks do not exhaust the rights and obligations of an employer—be it in relation to collective labour relations or issues related to labour protection, as well as obligations resulting from social insurance law or tax law.

At the initial stage, even before the employment relationship is established, the most fundamental task of the employer is certainly the recruitment process, which is largely performed by artificial intelligence algorithms. Not only does the Applicant Tracking System allow the recruitment process to be automated, but also it largely relieves the employer of the workload (or, more precisely, the staff of HR departments) (Tyagi 2016, pp. 28 ff). Having entered data such as job position and employer expectations, these systems are capable of designing the entire process of sourcing personnel, using appropriate tools to select the right candidates (including advertisements, use of social media, database searches, etc.), conducting comprehensive communication with candidates, constructing and analysing recruitment forms and tests, and even conducting interviews using bots (Woźniak 2020, p. 183). This kind of recruitment is much more focused, faster and with a lower risk of errors, which undoubtedly contributes to reducing the employer's personal risk. Such systems are now used universally. They are commonplace in large corporations—of the 500 largest Fortune 500 companies, 494 (98.9%) employ such systems.⁴ Due to the fact that cost of using such software is becoming lower and lower, it is being applied with growing frequency, also in medium and small enterprises. It is worth noting that the use of AI does not end with the recruitment process. In fact, algorithms are already capable of constructing a typical employment agreement, specifying the terms and conditions of work on a given position, including the proposed salary, adjusted to the employer's remuneration policy. It appears that conducting effective negotiations with candidates to reach an agreement on working conditions and pay will soon no longer be beyond the capabilities of AI. Similarly, there is no doubt that artificial intelligence can train a hired employee in occupational health and safety and check the results of such training, for example.

The performance of the employment relationship is certainly a pivotal stage in the employer-employee relationship. During this stage, artificial intelligence is able to perform a number of tasks traditionally assigned to the employer. In terms of work organisation, algorithms can select employees for appropriate tasks or arrange them into teams that will cooperate optimally. In doing so, AI is able to analyse multiple data regarding individual employees—their character traits, productivity, chronotype, or even views expressed on social media. Furthermore, AI can assign work to be performed by employees (e.g. specific transportation requests to taxi drivers or couriers) and determine the manner in which the work is to be carried out (e.g. the route to be taken, the location of goods in the warehouse, etc.). It seems extremely important for artificial intelligence to fulfil tasks related to the supervision of an employee's work performance. Such control can assume different forms—from simple counting of mouse clicks or marking relevant fields in the mobile application related to the successive stages of the performed task (e.g. by delivery drivers), checking and analysing the driving behaviour of drivers using GPS devices, to far more complex ones such as analysing text documents prepared by

⁴ Based on data for 2019–L. Qu, *99% of Fortune 500 Companies use Applicant Tracking Systems*, <https://www.jobscan.co/blog/99-percent-fortune-500-ats/> (access: 5 January 2022).

the employee, controlling the work efficiency of warehouse personnel (by measuring their hand movements with the use of an electronic armband) (Ozkiziltan, Hassel 2021), or checking an employee's facial expression in the course of work (e.g. smiling when serving a customer) (Jurczak 2020). The results of such monitoring can have significant implications. AI algorithms determine work standards, the amount of awards or bonuses to which employees are entitled for their efforts, but can also lead to disciplinary actions against them.

AI is also widely used during the stage related to the termination of the employment relationship. This is particularly evident when it comes to collective redundancies, where AI algorithms are used to select employees for release by analysing their performance, commitment, competence or suitability for further operations. Thanks to quick assessment of a large amount of data, artificial intelligence can make such a selection much more effectively than a human. As regards individual redundancies, the role of AI is related to the supervisory processes mentioned above. When verified by AI as insufficient, the employee's performance results can be used to make a decision regarding the termination of employment. It should be added that it is not beyond the capabilities of AI to create a document containing a declaration of intent to terminate an employment contract. Signing such a document with an electronic signature and sending it by e-mail has already been rather straightforward. Moreover, the algorithm can disable the redundant employee's access to the employer's electronic system, invalidate the office access card and make it difficult for such an employee to contact the employer.

Not only does the performance of the aforementioned employer's tasks by artificial intelligence raise many controversies of an ethical nature, but also considerable dilemmas related to their legality. Relevant literature points to a number of legal problems concerning many aspects of algorithmic management. These include algorithmic discrimination resulting from inappropriate design of algorithms by developers who implement their personal beliefs and stereotypes into the algorithms they create (De Stefano 2018; Otto 2022), or from inappropriate perception of initial data (Dastin 2018). Another sensitive issue is the violation of an employee's right to privacy, e.g. through the collection of a large amount of data on the employee and the use thereof in making an employment-related decision,⁵ as well as the extension of employer surveillance into the domestic sphere of employees, e.g. during remote working (Ajunwa, Crawford, Schultz 2017, p. 772).

Another vital issue concerns the so-called blackbox—i.e. insufficient transparency of both the algorithmic data processing and decision making. An employee whose data, e.g. on work performance, has been processed and as a result a decision to terminate the employment relationship has been taken, for instance, has little chance of obtaining information on the structure of the algorithm or the manner in which the decision has

⁵ Article 29 Data Protection Working Party. Opinion 2/2017 on Data Processing at Work. Adopted on 8 June 2017, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169 (access: 5 January 2022), see also: Aloisi, Gramano 2019, pp. 101–127.

been taken, not to mention the reasons behind it. It is worth adding that this problem has already been noticed by the European Parliament⁶ and some domestic legislators.⁷

Decision-making entity

When considering the possible subjectivity of artificial intelligence, it is of utmost importance to resolve the question of decision-making regarding the employee-employer relationship. This constitutes a certain determinant as to the entity that in fact employs workers, manages their work and decides on their redundancy. To put it another way, we need to consider whether individual decisions are made automatically without human involvement or whether AI is merely a tool that allows the situation to be assessed and possibly suggests the most appropriate solution, but the decisions are made by humans. The first scenario can already be observed in many situations. Although in axiological terms it may be difficult to accept, the employee is *de facto* subordinated in the work process not to a human being but to artificial intelligence. This aspect of technological development was rightly pointed out in the literature over 40 years ago (Masewicz 1981, p. 45).

Nevertheless, even if we accept the second approach, it does not resolve further dilemmas—since managers find themselves under pressure to follow the decisions suggested by AI, e.g. due to the amount of data to be analysed and the optimal nature of the decisions suggested (Sienkiewicz 2021). Hence, the person making the decision (e.g. for fear of being held accountable for making wrong decisions) becomes merely a person announcing the decision previously made by AI. Furthermore, advancements in the field of artificial intelligence and its application in making crucial decisions, e.g. in business—for example in algorithmic trading of shares and other financial instruments—indicate that human participation in such situations is becoming increasingly reduced. Decisions are usually made without or with very limited human involvement. It is difficult to conclude that in the case of algorithmic management in the workplace this tendency is going to be reversed.

⁶ European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies “stresses that applicants and workers should be duly informed in writing when AI is used in the course of recruitment procedures and other human resource decisions and how in this case a human review can be requested in order to have an automated decision reversed” (2020/2012, INL).

⁷ According to the solutions adopted in Spain in 2021, “the Workers’ Council [of the company], respecting an appropriate interval, is to be informed by the company of the parameters, rules and instructions underpinning the algorithms or artificial intelligence systems involved in any decision-making that may affect working conditions, access to employment and its maintenance, including profiling.” Cf. Villarroel Luque 2021.

AI subjectivity and the legal model of the employer

The Polish legislator has adopted the so-called managerial model of employer (Hajn 1997, p. 30). According to this model, the employer is an organisational unit whose executives have the authority to manage it and its employees. Under this model, it is irrelevant whether the unit has legal personality; moreover, it is possible for a separate part of a legal person to act as the employer. This is an important distinction from the concept of ownership, which prevails in the legislation of Western European countries. According to this approach, as a rule, natural persons and legal persons under civil law (e.g. a joint-stock company) and public law (e.g. communes) are entitled to the status of an employer. Other independent entities without legal personality—such as associations—are also allowed to act as an employer (Hajn 1994, p. 49). We should reflect on whether the employer model adopted in the Polish Labour Code may affect the possibility of accepting AI's subjectivity as that party to the employment relationship. It seems that it is not without its significance. In order to speak of an employer under the ownership model, artificial intelligence would have to be granted legal personality beforehand, or at least one would have to accept the idea that it could own property or dispose of it based on another legal title (e.g. lease). This would be challenging for a number of reasons. In the managerial model, it is not the ownership of assets by the employer that matters, but the management of the workplace. Although such a solution has to be regarded as imperfect and fully deserving the criticism formulated in the doctrine (Hajn 1997, pp. 31 ff), it causes the subjectivity of artificial intelligence to be perceived independently of the possible possession of property by it. Taking into account the preceding remarks, it must be admitted that AI can very much manage the employment establishment, although it currently does so in another entity's name. Therefore, it seems that under the managerial model, the recognition of AI's employment subjectivity could be more easily accepted. It is worth remembering that there had already been entities recognised as imperfect legal persons, which were granted certain specific legal capacities—such as arbitration capacity (Hajn 1995, pp. 3 ff). While I do not think it will be necessary to refer to these models in the future, it is worth noting that scope-based attribution of subjectivity is nothing new.

Conclusions

Bearing in mind that artificial intelligence can take over a considerable portion of the employer's tasks, it seems inappropriate to avoid discussing the subjectivity of AI as that party to the employment relationship. There is no doubt *de lege lata* that artificial intelligence cannot be considered an employer. This is supported by the fact that under Art. 3 of the Labour Code, the employer must be an organisational unit,⁸ the requirement

⁸ Or an individual, but this thread is being skipped for obvious reasons.

which AI clearly does not meet.⁹ However, the development of technology has been the major influence on changes in the law for many years. It is impossible to ignore the fact that most of the tasks of the entity we call the employer can be carried out by artificial intelligence. If this is truly the case, perhaps we should start having conversations about the subjectification of the force that manages such an entity and makes all the relevant decisions? It is worth pointing out that conferring full subjectivity on artificial intelligence with regard to employment relations and granting it the right to employ workers is not only premature, but even seems to fall under the category of futurology. However, it is worth reflecting on the possible episodic or partial subjectification of AI. I fully agree that “endowing AI with some kind of subjectivity is inescapable and the earlier we start to think about it, the more ideas are possible. The process of changing the law does not have to be very fast, but should accompany technological and social change. But legal science should work on proposals as soon as possible, and not fall into ideological boost or simply guarding tradition” (Wojtczak 2021).

What is noteworthy is that the debate on the legal subjectivity of artificial intelligence has also been undertaken in other disciplines of law. This can be seen, for example, in the field of copyright law (Wojtczak, Książak 2021) or civil law (Bertolini 2020). What is noteworthy is that the debate on the legal subjectivity of artificial intelligence has also been undertaken in other disciplines of law. This can be seen, for example, in the field of copyright law or civil law. In my opinion, there are no substantial reasons that would stand in the way of such a discussion in the doctrine of labour law.

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⁹ Nevertheless, it is notable that the idea has emerged in the doctrine that an organisational unit is created whenever even one employee is employed for commercial purposes, in which case there appears the phenomenon of joint work (employer and employee), which gives rise to a partnership relationship and consequently a micro-community, cf. Sobczyk 2017, p. 74.

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