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THE SPECIFIC NATURE OF THE CLERICAL DUTY OF LOYALTY

Abstract

Loyalty to their employer is one of the duties of civil servants, local government employees in clerical positions, and state officials. Officials owe loyalty to their employer, in this case an organisation without a legal personality under Art. 3 of the Labour Code and an office as defined by administrative sciences. The clerical duty of loyalty cannot be restricted to the other party to the employment relationship, however. Given the importance of the Polish nationality to the contracting and continuation of clerical employment relationships, officials must be assumed to owe loyalty to the state and public institutions. The clerical loyalty to the Republic of Poland should be seen as a materialisation of the constitutional duty of a citizen's allegiance to a state. Due to the importance of an act of will to the deprivation of Polish citizenship, the discontinuation of a clerical employment relationship is necessary.

Słowa kluczowe: obowiązek lojalności, urzędnicy, obywatelstwo

Keywords: duty of loyalty, officials, citizenship

ASJC: 3308, **JEL:** K31

1. Introduction

Labour law literature presumes as indisputable loyalty to employers is one of employee duties and part of their employment relationship. In terms of legal theory, this duty is implied by the statement work is not a commodity (Sobczyk 2015, p. 53), while basing the work relationship on employee loyalty and commitment and, for the other part, on the employer's care for their employee's needs make it unique.

The legal foundation of the duty is most commonly attributed to Art. 100 § 2 point 4 of the Labour Code (dated 26 June 1974, i.e. 1510 as amended; "the LC") and its explicit formulation of the employee's duty of care for the good of their workplace (Czerniak-Swędziol 2007, pp. 105 ff; Kosut 2018, pp. 107 ff). It is also pointed out that, since loyalty and trust

are linked indissolubly, the grounds for the employee's duty of loyalty can also be found in Art. 100 § 2 point 6 of the LC, that is, the employee's duty of observing the principles of social interaction (Świątkowski 2018, p. 245; Wiczorek 2018, pp. 308 ff).

The view the employment relationship comprises the employee's duty of loyalty is not doubted by judicial decisions either (cf. e.g., the Supreme Court judgment of 10 August 2022, III PSKP 80/21, LEX No. 3419125; the Supreme Court judgment of 14 April 2015, II PK 140/14, LEX No. 1811802).

In abstraction, a violation of the employee's duty of loyalty may become an action or omission, with a consequent termination of an employment contract by an employer, even at no notice in case of a gross violation. A failure of this duty can also have the features of a disciplinary offence leading to a disciplinary penalty. Finally, the employee's disloyalty to their employer in the term of employment may cause the court to find a claim for restoration to work contrary to the socio-economic purposes of law and to dismiss such a suit (the Supreme Court judgment of 10 August 2022, III PSKP 80/21, LEX No. 3419125).

This paper is intended to determine whether officials are bound by the duty of loyalty and in what regulations it is grounded. An affirmative answer will help to reach the basic goal of establishing if the duty of loyalty of employees not subject to labour regulations is different than the parallel duty included in the clerical relationships of employment and what is unique about it.

2. The legal foundations of the clerical duty of loyalty

Prima facie, the statement that loyalty to the employer is an employee's duty evidently implies the same duty is also incumbent on public employees in clerical positions. This applies in particular to the members of the civil service corps (the Civil Service Act of 21 November 2008, i.e., the OJ of 2022, item 1691, "the CSA"), local government employees in clerical and clerical management positions (the Local Government Employees Act of 21 November 2008, i.e., the OJ of 2022, item 530, "the LGE"), and state officials (the State Office Employees Act of 16 September 1982, the OJ, item 2290, "the SOEA"). It is beyond any doubt those in clerical positions are employees under Art. 2 of the Labour Code, hence subject to the subjective and objective scopes of the Labour Code. It should be remembered, though, the statutory employee status of officials is defined not only by the Labour Code but also by the provisions of other laws—labour regulations. The clerical regulations are thus special, since the Code's provisions apply to matters not governed by the former (Sanetra 2021, p. 67), while the relation between them and the Labour Code is determined by Art. 5 of the Labour Code. The specialist literature notes the employee regulations, that special labour legislation, formally play a double role. On the one hand, they substitute the relevant provisions of the universal labour law while supplementing the same, on the other hand (Florek 2016, pp. 18–19).

It can be noted, by the way, beside Art. 5 of the Labour Code, two of the three clerical regulations cited above contain conflict of law rules between them and the Labour Code. Article 9 sec. 1 of the CSA stipulates the Labour Code and other labour law provisions apply to the civil service relationships of employment not governed by the Act. In turn, Art. 43

sec. 1 of the LGE states the provisions of the Labour Code apply to matters not governed by the Act as appropriate. It is not doubted, therefore, the provisions of the Labour Code apply directly, without modifying the contents of the Code, to civil servants' relationships of employment insofar as they are not governed by the CSA, however, in the case of local government employees, it cannot be ruled out in advance the Labour Code provisions could apply as modified or possibly would not apply at all (cf. Nowacki, pp. 320–372). It should be assumed, therefore, the CSA does not modify the directive of applying the Labour Code provisions to the process of determining civil servants' rights and duties as implied by Art. 5 of the Labour Code. The legal position of state officials seems identical as the SOEA fails to specify how the conflicts should be resolved that arise from state officials being subject to employee regulations and to the Labour Code.

The search for the legal grounds of the clerical duty of loyalty should begin by saying duties in employee regulations are expressed in a way that is substantially similar to the formula of employee duties in the key Art. 100 of the Labour Code. This is not only because the employee regulations institute the duty of following the employer's instructions, but also because the relevant employee regulations present an open-ended catalogue of other duties. The similarities do not mean there are no differences, however. The way an official is to carry out their superiors' instructions is crucial and unique to the clerical legislation. In light of Art. 18 of the SOEA, Art. 78 of the CSA, and Art. 25 of the LGE, the duty of remonstrance appears to bind state officials, the members of the civil service corps, and local government officials, respectively. That duty consists in raising objections to defective instructions or, in the case of their disqualifying defects, even in a refusal to carry them out. Thereby, the provisions of clerical regulations, insofar as they concern the duty of fulfilling superiors' instructions, are a *lex specialis* in relation to Art. 100 § 1 of the Labour Code, while reformulating it and making it more specific. *In concreto*, not Art. 100 § 1 of the Labour Code, but the relevant provisions of an appropriate clerical regulation need to be cited in the process of applying law to a case whose facts can be reduced to an official refusing to carry out their superior's instructions. In other words, Art. 100 § 1 of the Labour Code and the relevant provisions of employee regulations are part of the provision of an abstract and general legal norm whose contents are identical, namely, the employee's duty of carrying out their employer's lawful instructions.

It has already been mentioned the crucial duties of officials are defined in regulations forming an open-ended catalogue, in the same manner as Art. 100 § 2 of the Labour Code. Article 17 sec. 1 and 2 of the SOEA, Art. 76 sec. 1 of the CSA, and Art. 24 of the LGE, respectively, designate the basic or core duties of state officials, civil servants, and local government officials. The question needs to be asked whether these provisions constitute a *lex specialis* in relation to Art. 100 § 2 of the Labour Code and thus whether the duty of loyalty, the principal object of this discussion, arising from Art. 100 § 2 points 4 and 6 of the Labour Code, binds upon officials as well, since the regulations do not formulate the clerical duty of care for the office or of following the principles of social interaction. A reservation is in order here that even if this was found to be the case, this would not substantiate a conclusion the relevant provisions of clerical regulations are a *lex specialis* to Art. 100 § 2 of the Labour Code and would not

automatically lead one to decide officials are not bound by loyalty. Such a conclusion would only be reasonable if the regulations prevented a reconstruction of the norm according to which officials are obliged to be loyal to their employers.

Labour law literature doesn't question the view, established in judicial decisions, that employee duties laid down by Art. 100 § 2 of the Labour Code are fundamental to employment (see e.g., the Supreme Court judgment of 5 August 2002, I PK 271/14, LEX No. 2026881) regardless of the basis of employment relationship and type of work (Dzienisiuk, Skoczyński 2017, thesis 3). A contrary interpretation, based on the formal argument the legislator has placed a catalogue of the employee's basic duties in the Labour Code and the provisions of instituting regulations would imply an illogical conclusion an official would not be bound to follow work by-laws, order prevailing in the workplace or fire safety regulations. It cannot be decided, therefore, the regulations defining the duties are a *lex specialis* relative to Art. 100 § 2 points 4 and 6 of the Labour Code or preclude the duty of care for the employer's good or of abiding by the principles of social interaction arising from the Labour Code. An official is obliged both to care for the good of their workplace and to obey the principles of social interaction, hence they are bound by the duty of loyalty to their employer. It must be concluded, therefore, the provisions setting out clerical duties not specified by the Labour Code extend or supplement the contents of clerical relationships of employment.

It has been suggested above the legal grounds for the duty of loyalty can be sought in Art. 100 § 2 point 6 of the Labour Code, which lays down the employee's duty of following the principles of social interaction in their workplace. The principles of social interaction are non-legal standards of conduct, with ethical principles important among them. Officials form a professional group bound not only to abide by generally acknowledged ethical standards, like other employees are, but also by ethical standards proper to their category of employees. Although regulations do not express explicitly any grounds for the duty of employee loyalty, and the appropriate provisions of the Labour Code must be relied on, it is not to be doubted the loyalty is of special importance in this professional group as an ethical standard. This is demonstrated by its raising to the status of the civil service's ethical principle by force of the President of the Council of Ministers' Ruling 70 of 6 October 2011 concerning guidelines on the obedience to the civil service principles and on the principles of the civil service ethics (Polish Monitor No. 93, item 953, "the PCM's ruling No. 70"), issued pursuant to the authorisation incorporated in Art. 15 sec. 10 of the CSA. Due to the legal nature of the ruling, an implementing source of labour legislation under Art. 9 § 1 of the Labour Code, it can be said to effectively determine the normative dimension of the duty of civil servants' loyalty. The ruling meets the conditions of an act of internal legislation as envisaged by Art. 93 of the Polish Constitution. Its provisions cannot be doubted to have an immediate impact on the employee status of civil service members (cf. Baran 2022, thesis 3.3). The codes of ethics should be seen differently, introduced as they are by a variety of public administrative authorities to build the moral order, but "cannot be treated as perfect measures (*lex perfecta*). They are very often ineffective and virtually unenforceable and are commonly regarded as instances of wishful thinking" (Dobkowski 2007, p. 171).

§ 16 of the PCM's ruling No. 70 states the principle denotes in particular loyalty to the Republic of Poland, a loyal and thorough realisation of the programme of the Polish government regardless of one's own political views or convictions, loyalty to the office and superiors, colleagues and subordinates, readiness to carry out instructions with due care to obey the law and avoid mistakes. The principle of loyalty also comprises the duty of providing superiors with objective advice and opinions to the best of one's will and knowledge while preparing proposals for the actions of government administration and showing restraint in the public expressions of opinions about the work of one's office and other offices, especially if such opinions could undermine public trust in these institutions.

Although the legislator has not decided to specify the understanding of the loyalty principle with reference to local government and state officials, it is beyond any doubt that, *mutatis mutandis*, their loyalty in its objective and subjective scopes as set out in the PCM's ruling No. 70 can be required. Any differences from the foregoing model would be connected to the kind of tasks undertaken by local government employees and state officials. As far as the subjective dimension of loyalty is concerned, a local official would therefore be assumed to owe loyalty not only to their employing office but also to other offices supporting not only local government but also other public administration authorities. Officials should show restraint in public pronouncements about the work of their or of other offices regardless of their position in the public administration, especially if their opinions could undermine public trust in these institutions.

3. The target of the clerical duty of loyalty

The duty of employee loyalty is addressed to the employer, that is, the entity defined by Art. 2 of the Labour Code. It can be both a natural person, a legal entity, and an organisation without a legal personality, including the so-called internal organisational units (Lewandowicz-Machnikowska 2019, p. 193). It should be pointed out the latter is a particularly interesting case of "double" loyalty, namely, to the employer—an internal organisational unit—and to the entity such a unit is part of.

In light of employee regulations, however, the duty of clerical loyalty cannot be restricted to the employer, i.e., the other party to the relationship as part of which work is performed. The importance the legislator attaches to an official's nationality is the key argument for this idea. Polish citizenship is among the so-called core (selection) criteria pre-requisite to forming a relationship of clerical employment. The legal doctrine defines citizenship as a legal institution whose essence is a relatively permanent legal bond between an individual and a state that determines the former's membership of the latter and provides the foundation for an array of mutual rights and obligations between the two (Jagielski 1998, p. 20). Citizenship is seen as a legal relation expressing an individual's membership of a state, which can be treated as a status or a legal relationship (cf. Bodnar 2008, pp. 32–33; Kubuj 2016, p. 867; see also the Constitutional Court judgment of 18 January 2012, Kp 5/09, OTK-A 2012, No. 1, item 5). Citizenship has its associated rights and obligations, including the duty of

faithfulness, expressed in Art. 82 of the Polish Constitution and originating in feudal times, when subjects owed their faith to their feudal lord, one of the obligations forming the bond of citizenship (Pudzianowska 2015, p. 33). At the same time, specialist literature questions the legal dimension of the constitutional duty of faithfulness (loyalty) and reduces it to solely moral and political aspects (Pudzianowska 2015, p. 33).

The assumption citizenship has no legally defined meaning must be rejected, for instance, because the Polish citizenship is pre-requisite to employment in clerical positions, which should be interpreted as the legislator's presumption that the nature of citizenship incorporates the primary duty of faithfulness (loyalty) to the state. That duty materialises especially in connection with the clerical relationship of employment. An official's loss of citizenship causes the relationship of a civil servant's employment to expire (Art. 70 sec. 2 of the CSA) and a state official's relationship of employment to dissolve by force of law (Art. 14 sec. 2 of the SOEA). It can be noted Art. 55 sec. 6 of the LGE envisages a relationship of employment with an appointed local government employee to terminate at no notice by force of law in case of a loss of Polish citizenship. The provision is not applied due to the temporal scope of the legal norm it expresses and since appointment is eliminated as the basis for employing local government staff, yet it provides a major interpretative argument. It belongs among the directives of the historical methods of law interpretation and proves useful if the legal effects of local officials losing their Polish citizenship need to be determined. It can apply to civil service employees and state officials in parallel. It should be assumed, therefore, that where legal regulations fail to explicitly define the consequences of an official losing their Polish citizenship, an employer should terminate a contract of employment at no notice. Given that, *de lege lata*, the loss of Polish citizenship is caused by a sequence of actions, including a declaration of resignation, it must be assumed a loss of citizenship makes it necessary for the employer to terminate the contract of employment without notice by the employee's fault. This conclusion is not sufficient, though, since the Labour Code provides for the termination of an employment contract at no notice by default or for no fault of the employee. Article 52 § 1 and Art. 53 § 1–2 of the Labour Code imply Art. 52 § 1 point 1 or Art. 52 § 1 point 3 of the Labour Code, or circumstances where fault must be ascribed to the employee, are the only theoretically admissible legal grounds for terminating the clerical relationships of employment. The close-ended catalogue of circumstances stipulated by Art. 53 of the Labour Code, their nature and function precludes the conclusion a loss of citizenship, in the light of regulations for this institution, is independent from the employee or, to be more accurate, occurs through no fault of the employee. A renunciation of citizenship is a declaration of will that includes the statement someone is not ready to fulfill the constitutional duty of loyalty (faithfulness) to the state.

Citizenship cannot be qualified as a "competence" under Art. 52 § 1 point 3 of the Labour Code. The doctrine defines competences necessary for a job as public, corporate and even private (cf. Baran 2022, point 5.2). It should be added the "professional competences" should be seen as a special type of professional qualifications, one of the autonomous conditions of qualification. Citizenship is a self-contained condition of qualification, thus it obviously cannot be a competence for a given position under Art. 52 § 1 point 3 of the Labour Code. Its loss cannot be therefore qualified as a reason for terminating a contract of employment by

force of this regulation. By way of elimination, it should be assumed the loss of citizenship by officials whose relationships of employment are not terminated or dissolved *ex lege* then should cause such relationships to terminate pursuant to Art. 52 § 1 point 1 of the Labour Code. Given the significance of the clerical duty of loyalty, it seems the very submission of an application for the removal of citizenship should be qualified as allowing for the termination of a contract of employment according to Art. 52 § 1 point 1 of the Labour Code, thus as a gross violation of a basic employee duty.

The European Union legislation attaches a huge importance to citizenship in connection with clerical work. In light of Art. 45 of the Treaty on the Functioning of the European Union (“the TFEU”), the freedom of employee movement does not include work for public administration. The decisions of the Court of Justice of the European Union (CJEU) (“the EUCJ”) presume employment with public administration as defined by Art. 45 sec. 4 of the TFEU is determined by the real nature of work performed. Public administration from the perspective of the EU legislation is governed not by national laws but the type of duties discharged by employees in specific positions. If these duties involve a direct or indirect participation in public power functions designed to protect the general interests of a state or other public organisations, they become part of the concept of public administration as defined by Art. 45 sec. 4 of the TFEU (the Commission against Belgium, 149/70; <https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:61979CJ0149>). The CJEU believes employment with public administration requires a special sense of solidarity with a state, as well as the mutuality of rights and obligations that form the foundation of the civic bond.

The EU legislator notes the possible conflict of loyalty in connection with employment by the European Union institutions. In line with Art. 11 of the employment by-laws of the European Union officials (the EC OJ L 1968, No. 56/1 as amended, the consolidated text in LEX, access: 14 January 2023), an official must solely be guided by the EU’s interests in the discharge of their duties and in their conduct. They cannot request or receive instructions from any governments, authorities, organisations or persons from outside the institutions they work. Officials must fulfill their duties impartially, objectively and with respect to the duty of loyalty.

Loyalty to citizens must be regarded as another dimension or property of an official’s duty of loyalty under a democratic rule of law. Specialist literature is right to note an official should contribute to citizens’ trust in the state and its institutions, which is in fact the reverse of blind loyalty and statolatry. Citizens’ trust in the state is to a substantial degree formed in contacts between citizens and officials, the personal keystone of the state and the citizen. Officials do, or at least should, share their loyalty between the government and citizens (Kłos 2007, p. 66).

4. Conclusion

The duty of loyalty is a fundamental employee duty under the provisions of the Labour Code and a failure of to discharge it may lead to a breach of order and disciplinary penalties or even a dissolution of employment relationship. The clerical regulations of the employee status of workers they govern are unique and, like the model in the Labour Code, contain some

catalogues of clerical duties. This doesn't mean, however, officials are not bound by loyalty to their employers. The relevant clerical regulations, in connection with Art. 5 of the Labour Code, do not exclude Art. 100 § 2 of the Labour Code as a matter of principle but expand the contents of the clerical relationships of employment. This means Art. 100 § 2 points 4 and 6 of the Labour Code are the legal foundations of the clerical duty of loyalty. This applies to the members of the civil service corps, whose duty of loyalty rests on the President of the Council of Ministers' Ruling, where loyalty acquires the rank of a principle of the civil service ethics.

Article 82 of the Polish Constitution is another source of the duty of clerical loyalty, owing to the importance to the entering into and continuation of the clerical relationships of employment the legislator attaches to Polish citizenship. Its loss voids the legislator's *a priori* assumption the Polish citizenship held by an official determines they will be guided by the interest of the Republic of Poland in the fulfillment of their clerical duties.

The provisions of the clerical labour legislation are in compliance with the European Union law, according to which the citizenship of a state may provide grounds for a refusal to employ someone with public administration. It should be stressed the CSA and the LGE contain provisions that directly refer to the way public administration is understood in the established decisions of the CJUE. Some deviations from the requirement of holding Polish citizenship when hiring for positions whose duties do not involve a direct or indirect discharge of public power should be seen in this perspective.

The fact the clerical duty of loyalty is addressed not only to an official's employer but also to other state and local government institutions and, above all else, to the state itself is the unique characteristic of this duty.

This does not mean, however, a blind loyalty to the public power can be required of an official. Quite the contrary. The limits of loyalty are set by the prevailing law, first of all by the Polish Constitution. The order to refuse to carry out an employer's defective instruction, effective in certain circumstances, is a major factor affecting how the duty of loyalty is perceived.

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