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The Right to Strike by Medical Practitioners

Prawo lekarzy do strajku

SUMMARY

The right to strike action is one of the fundamental human rights and trade union freedoms. Strike, as a form of protest against broadly understood injustice is one of the most important measures of trade union protection of workers' interests. However, the right to strike is not absolute and its legal use must often take into account the interests of the employer and third parties. The aim of the article is to assess – basing on a review of the literature and the case-law – the doctors' right to strike from a legal, ethical and moral perspective. The issue of medical practitioners' right to participate in a strike is ambiguous in view of the legislation currently in force, and two opposing positions have developed in the collective labour law literature. The problem of the legality of this form of protest of medical practitioners is nowadays left to the assessment of the parties to a collective bargaining dispute, carried out based on the general clause of a possible "threat to human life and health or national security", with the lack of appropriate judicial review in this regard. It is, therefore, undoubtedly necessary for the legislature to take appropriate *pro futuro* legislative action.

Keywords: doctor; strike; the right to strike action; the doctors' right to strike

INTRODUCTION

The right to strike action is one of the fundamental human rights and trade union freedoms. The adopted classification is the result of the location laid down in Article 59, in Chapter II of the Polish Constitution[1] entitled "The freedoms, rights and obligations of persons and citizens", in the section "Political freedoms

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483), hereinafter: the Polish Constitution. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.08.2020].

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and rights", and therefore concerning civil human rights – as well as due to the establishment in para. 4 of the aforementioned article of international guarantees of observance of that right as a trade union freedom[2].

A strike, as one form of protest against injustice in the broad sense of the word[3], is one of the most important measures of trade union protection of workers' interests and is undoubtedly the most effective way of influencing the employer, aimed at forcing the employer to implement the demands made by the strikers, primarily concerning wages and salaries. However, the right to strike is not absolute and its legal use must often take into account the interests of the employer and third parties. Strike is a measure that can have difficult-to-predict effects on parties to the dispute, society or the national economy.

Undoubtedly, strikes by doctors and nurses pose a significant social problem, and their consequences can be felt practically by each of us. In view of the conflict between the two constitutionally protected rights (interests): the right to strike (Article 59 para. 3 of the Polish Constitution) and the right to protect human life and health (Articles 38 and 68 of the Polish Constitution), the right of doctors to hold this form of protest is often analysed as confronted with ethical and moral principles attributed to or expected from this professional group, making up the so-called "ethos of the medical profession".

Moreover, we must still have in mind that the doctor, as a medical service provider on the medical market, is one of the participants in the labour market, and thus a holder of rights (freedoms) granted to persons employed under the law.

THE RIGHT TO STRIKE ACTION UNDER POLISH LAW AND INTERNATIONAL LAW

The detailed discussion on the legislative basis of the right to strike should be started by defining the very concept of strike, which is one of the oldest institutions of collective labour law. The first statutory definition of strike action was set out in Article 37 para. 1 of the Act of 8 October 1982 on Trade Unions[4], according to which the strike consisted in voluntary abstaining from working in order to defend the economic and social interests of the group of employees concerned.

[2] M. Kurzynoga, *Warunki legalności strajku*, Warszawa 2011, p. 32; judgement of the Supreme Court of 7 February 2007, I PK 209/06, LEX no. 280749.

[3] J. Żołyński, Strajk i inne rodzaje akcji protestacyjnych jako metody rozwiązywania sporów zbiorowych, Warszawa 2013, p. 180.

[4] Journal of Laws 1982, no. 32, item 216 as amended, hereinafter: ATU.

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Under the legislation currently in force, the legal definition of the concept in question is set out in the Act of 23 May 1991 on Collective Bargaining[5]. It has not changed substantially. In accordance with Article 17 para. 1 ACB, strike action means personnel collectively abstaining from working in order to resolve a dispute concerning working conditions, wages and salaries or social benefits and the rights and freedoms of workers or other groups who have the right of association by joining trade unions.

The notion of strike action is widely defined in the literature on collective labour law. According to J. Brol, a strike consists in a voluntary collective cessation of working by employees in order to resolve the collective bargaining dispute favourably for them[6]. W. Masewicz defines a strike as an instrument for fighting for rights or interests and a means of pressure on the employer by employees and organizations acting on their behalf. At the same time, he stresses that it is always a collective action and therefore actions of individuals pursuing their own interests cannot be deemed a strike[7]. According to A.M. Świątkowski, a strike is one of the forms of action used by employees to put pressure on the employer and it consists in a collective cessation of their work for a certain period of time. The author similarly accepts that the cessation of work by an individual cannot be regarded as a strike action[8].

A strike should be clearly distinguished from other industrial action which may also be used to defend the rights and economic interests of the employed persons (Article 25 ACB). According to the above-mentioned analysis of the term in question, the immanent feature of strike action is refraining from work and the lack of readiness to provide it. Any other form of collective protest which does not meet this condition should be classified as (other) industrial action. Thus, industrial action does not involve any interruption of work and entails the need to comply with the existing legal order to prevent endangering human life or health. Importantly, the right to such a form of protest can also be exercised by those workers who do not have the right to strike. Typical industrial action includes the work-to-rule action (so-called Italian strike), rule-book slowdown (obstructionism), posting flags and posters on employer's buildings, or holding demonstrations or pickets.

The right to strike is one of the civil rights guaranteed by the Polish Constitution, which in Article 59 para. 3 grants trade unions "the right to organize workers' strikes or other forms of protest subject to limitations specified by statute"[9]. In the same

[5] Journal of Laws 2020, item 123 as amended, hereinafter: ACB.

[6] J. Brol, *Rozwiązywanie sporów zbiorowych*, Warszawa 1983, p. 26.

[7] W. Masewicz, *Zatarg zbiorowy pracy*, Poznań 1994, pp. 103–105.

[8] A.M. Świątkowski, *Rozwiązywanie sporów zbiorowych pracy*, [in:] *Studia z zakresu prawa pracy i polityki społecznej*, ed. A.M. Świątkowski, Kraków 1994, p. 315.

[9] By contrast, the previously applicable Polish Constitution of 1952 did not contain any reference to strike.

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paragraph, however, the constitutional legislature reserves that "for protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields".

The foregoing entails the right of trade union organizations to initiate and conduct collective bargaining in the form of an employees' strike. In this context, however, attention should be paid to the different (broader) understanding of the concept of employee under the Polish Constitution, in relation to that used in ordinary legislation. According to the position of the Constitutional Tribunal, the status of employee should be assessed, on constitutional grounds, by reference to the criterion of gainful employment. The Tribunal pointed to three conditions setting out the legal framework for the constitutional understanding of the term "employee". It covers all persons who (1) provide certain work under gainful employment, (2) have a legal relationship with the entity for which they provide it, and (2) have professional interests relating to the performance of work which may be collectively protected[10]. Thus, the Polish Constitution does not deny the right to strike for those who are not employees within the meaning of the Labour Code. Moreover, the Constitutional Tribunal has considered Article 2 para. 1 of the Act of 23 May 1991 on Trade Unions in its wording before the amendment[11] as incompatible with Article 59 para. 1 in conjunction with Article 12 of the Polish Constitution, in so far as it restricted the freedom to establish and join trade unions for other persons engaged in gainful employment not mentioned in that provision. That provision indicated, due to the wording of Article 6 ACB, also designated a circle of persons having the right to participate in an employee strike organized by the trade union.

A consequence of the Constitutional Tribunal's judgement was the amendment of Article 2 para. 1 ATU and the granting of full association rights to all persons performing work under gainful employment within the meaning of Article 1^1 point 1 ATU, i.e. employees or persons performing paid work on a basis other than the employment relationship, if they do not employ other persons for such work, regardless of the legal basis of employment, and have such rights and interests related to the performance of work that can be represented and defended by a trade union[12]. Therefore, the right to join trade unions and to participate in labour strikes and other forms of protest organized by these unions is currently vested also in those who perform gainful employment on the basis of civil law contracts.

[10] Judgement of the Constitutional Tribunal of 2 June 2015, K 1/13, LEX no. 1730123.

[11] Under Article 2 para. 1 ATU, in its wording prior to the amendment, employees had the right to establish and join trade unions regardless of the basis of the employment relationship, members of agricultural production cooperatives and persons performing work under an agency contract if they were not employers (Journal of Laws 2014, item 167).

[12] Act of 5 July 2018 on the Amendment to the Trade Union Act and Certain Other Acts (Journal of Laws 2018, item 1608).

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At the statutory level, the right to strike is guaranteed by Article 17 para. 1 ACB, which grants the right to organize it only to trade unions, with a clear reservation of the goal that can be pursued in this way, i.e. exclusively to defend the economic and social interests of employees and trade union rights and freedoms. However, a strike to pursue demands of a political nature is unacceptable[13].

It follows from the further wording of this provision that a strike is considered to be the ultimate measure and, as a rule, cannot be declared without first using other possibilities of dispute resolution (negotiation and mediation), and when deciding to declare a strike, the entity representing the interests of employees should take into account the proportionality of the demands to the losses related to the strike (Article 17 para. 2–3 ACB). It is usually assumed in the literature that observing the principle of social adequacy is one of the prerequisites for the legality of a strike[14].

In most international acts, the right to strike is considered to be one of the human rights of an economic nature, which may be subject to the statutory limitations of a given country[15]. The right to strike is not expressly regulated by any international acts of the International Labour Organization. However, the Committee of Experts on the Application of Conventions and Recommendations and the Trade Union Freedom Committee take the view that strike is a legitimate means of defending workers' interests and that the right to strike results indirectly from Article 3 of ILO Convention no. 87 of 9 July 1948 Concerning Freedom of Association and Protection of the Right to Organize[16] as part of the right of trade unions to organize their activities[17]. According to the ILO's Trade Union Freedom Committee, the right to strike should be vested in a wide range of workers, but it is acceptable to restrict or waive this right, e.g. for workers employed to provide essential services, such as the hospital services sector[18].

[13] T. Liszcz, *Prawo pracy*, Warszawa 2019, p. 680.

[14] B. Cudowski, *Spory zbiorowe w polskim prawie pracy*, Białystok 1998, pp. 129–130.

[15] As set out by, i.a., International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (UNTS 993/3); European Social Charter, signed in Turin on 18 October 1961 (ETS, no. 35); European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ETS no. 005 as amended) – although the Convention does not expressly state the right to strike, it is assumed that it implicitly results from Article 11, which grants everyone the right to free and peaceful assembly and association, including the right to establish and join trade unions to defend their rights.

[16] Journal of Laws 1958, no. 29, item 125.

[17] M. Kurzynoga, *Warunki legalności…*, pp. 26–27.

[18] Eadem, *Kwestia prawa lekarzy do strajku*, „Praca i Zabezpieczenie Społeczne" 2012, no. 5, p. 18.

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LEGALITY OF STRIKE ACTION BY MEDICAL PRACTITIONERS

Of the key significance, from the point of view of the doctor's right to participate in a strike, are two acts – the Act of 23 May 1991 on Collective Bargaining and the Act of 5 December 1996 on the Professions of Medical Practitioner and Dentist[19]. It should be reminded that as of 1 January 2019, this problem concerns not only doctors performing their profession under an employment relationship, but also those providing health services under civil law contracts (contracts for medical services).

The analysis of the provisions of the Act on Collective Bargaining shows that the right to strike is not absolute in nature and is vested as determined by the legislature, which explicitly waives this right in relation to certain groups of employees[20] (subjective restriction) or indicates in which organizational units or positions[21] the cessation of work as a result of strike action is inadmissible (subjective restriction). While in the case of subjective restrictions, the prohibition of strike applies to entire workplaces, the subjective restrictions apply, as a rule, only to the employees of a given entity, employed in certain positions which involve special responsibility for human life and health or national security. On the other hand, workers employed in the same workplace, but in other positions, are entitled to cease working as part of strike action[22].

Article 19 para. 1 ACB states that "it is inadmissible to cease working as a result of strike action at workplaces, equipment and installations where the abandonment of work threatens human life and health or national security". Unfortunately, neither the aforementioned provision nor other provisions of the Act on Collective Bargaining specify the positions, equipment, installations and workplaces in which work must be continued as stipulated by the legislature, and the only guideline for examining the admissibility and legality of a strike in such cases is a fairly generalised condition of posing a threat to human life and health or national security. At this point, it is worth noting that the previously binding Trade Union Act of 1982[23] provided expressly – originally in Article 40 para. 1, and then in Article 47 para. 1

[19] Journal of Laws 2020, item 514 as amended, hereinafter: APMPD.

[20] Employees hired in state authorities, central and local government administration, courts and the prosecutor's offices are not entitled to strike (Article 19 para. 2 ACB).

[21] It is unacceptable to organize a strike at the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the State Protection Service, in the units of the Police and Armed Forces of the Republic of Poland, Prison Service, Border Guard, Marshal's Guard of the Sejm, National Revenue Administration in which officers of the Customs and Tax Service serve, and fire protection organizational units (Article 19 para. 3 ACB).

[22] M. Kurzynoga, *Kwestia prawa lekarzy…*, p. 20.

[23] Journal of Laws 1985, no. 54, item 277.

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– that the right to strike is not granted to employees employed in healthcare and social care institutions, as well as in pharmacies.

The Act on the Professions of Medical Practitioner and Dentist does not contain a clear prohibition on the organization of strike action either. However, attention should be paid to Article 30 APMPD, which is crucial from the point of view of the essence of the profession, according to which the medical practitioner is required to provide medical assistance whenever a delay in its provision could result in a danger of loss of life, serious injury or severe derangement of health, and in other cases of urgency. Therefore, this regulation entails the doctor's obligation to take action in all cases where a delay in the provision of medical assistance could, even indirectly, contribute to the risk of loss of life or serious injury or serious health derangement. The absolute obligation to provide assistance has also been extended to "other cases of urgency" not expressly mentioned in Article 30 APMPD, i.e. those in which inaction will cause a threat of adverse effects on the patient's health, but not serious enough to be classified as serious injury or severe derangement. These will, therefore, require assistance due to the danger of deterioration of health, obstruction of the diagnostic process or complexity of the therapeutic process[24].

Such statutory duties of a medical practitioner are complemented by the rules of medical deontology included in the Hippocratic Oath, in which the doctor undertakes to serve the health and human life and to provide assistance to the ill and detailed in the Code of Medical Ethics. Moreover, this regulation is reinforced by the content of Article 15 of the Act of 15 April 2011 on Medical Activities[25], according to which a healthcare entity may not refuse to provide health care to a person who needs it immediately due to one's endangered life or health.

In view of the unclear legal situation, two opposing positions on the legality of the doctors' strike have been developed by scholars in the field. The representatives of the first of them are in favour of a total ban on strike action by this professional group[26]. According to A. Zoll, the strike action by medical practitioners combined with the failure to provide medical services (the so-called departure from patients' beds) is, in the light of Article 19 para. 1 ACB, always unlawful conduct[27]. According to the second and prevailing view, the legislature does not impose a general ban on the strike action by medical practitioners, but excludes the right to strike in certain places or in certain positions. According to M. Kurzynoga, depriving all health professionals to strike would be too far-fetched. The author points out that the

[24] T. Dukiet-Nagórska, *O potrzebie nowelizacji prawa medycznego*, „Prawo i Medycyna" 2002, no. 11, pp. 11–12.

[25] Journal of Laws 2020, item 295 as amended.

[26] As maintained by, i.a., B. Cudowski, *op. cit.*, p. 134.

[27] A. Zoll, *Obowiązek udzielenia pomocy lekarskiej a prawo lekarza do strajku*, „Prawo i Medycyna" 2008, no. 1, pp. 11–12.

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threat to the life or health of the patient, which excludes this right, occurs wherever the patient requires immediate assistance or permanent care (such as emergency service, on-call wards, intensive care units). In those hospital wards where patients do not need permanent care and in other healthcare entities, it is sufficient to provide patients with access to the medical practitioner and obtain immediate assistance if the delay with it would put one's life or health at risk. However, it considers it illegal to strike, where only on-call doctors work, who provide assistance only in emergency situations and all scheduled procedures are cancelled and a situation where no new patients are admitted to hospital and staff are limited to treating those already in wards[28].

According to A.M. Świątkowski's view, the strike ban applies only to those employees who, during the strike action, prove necessary for the operation of the hospital, since their absence due to participation in the strike may endanger the fundamental values protected by the law, i.e. human health and life. It is the responsibility of the organizer of the strike to assess a possible threat to these interests. The author himself pointed to a significant problem that may arise in the event of divergences in the positions of the parties to the conflict (employers and trade unions) regarding the legality of participation in the strike of individual medical staff members. It should be noted that no judicial authority has been authorised by the legislature to settle disputes of this kind[29].

K.W. Baran also does not derive a general ban on the strike of doctors from Article 19 para. 1 APMPD, but considers unlawful a strike in those of medical facilities – regardless of the form of organization or ownership – which carry out "direct" medical care for patients, i.e. hospitals and "on-call" units, emergency medical departments, intensive care units[30].

Concerning the issue of medical practitioners' right to strike, I share the second of the presented positions. In my view, it is impossible to infer a general ban on the strike of this professional group. In practice, however, this right will be considerably limited, given the content of Article 30 APMPD, but also Article 73 of the Code of Medical Ethics, according to which a medical practitioner who decides to participate in an organized form of protest is not exempt from the obligation to provide medical assistance if failure to provide that assistance may expose the patient to loss of life or deterioration of his or her health[31]. So, undoubtedly these are cases in which the result of a doctor's inactivity may result in death, serious

[28] M. Kurzynoga, *Warunki legalności…*, pp. 95–96.

[29] A.M. Świątkowski, *Kontrolowany model gwarancji prawa do strajku w służbie zdrowia*, „Prawo i Medycyna" 2017, no. 2, pp. 12–13.

[30] K.W. Baran, D. Książek, *Art. 19. Komentarz do ustawy o rozwiązywaniu sporów zbiorowych,* [in:] *Zbiorowe prawo zatrudnienia. Komentarz*, LEX/el.

[31] It is worth noting that the Code of Medical Ethics uses the term "protest", not "strike" which is a form of protest.

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injury or severe derangement of the patient's health, but also urgent cases (cases of emergency) requiring immediate action due to the possibility of deterioration of health, not strictly related to life-threatening conditions, or situations where delay in aid can simply harm the patient[32]. It must be considered that this threat should be actual and imminent[33]. Such a threat occurs wherever the patient requires constant care or immediate provision of the service. This undoubtedly applies to such hospital wards as ICU, EW or EMS. I also consider unlawful a strike in those of medical institutions that provide "direct" medical care for the patient, i.e. in hospitals and the case of general practitioners. Similarly, it is necessary to consider unlawful the postponement of scheduled medical procedures not only those life-saving and health-saving, but also those whose delay can significantly negatively affect their health and hinder the therapeutic process in the future[34].

A controversial manifestation of doctors' strike action is the abandonment of patients' beds or the adoption of "the E.R. system of work" – only doctors on duty on given day work, no scheduled procedures are performed, and doctors provide assistance only in case of endangered life. It should be noted that a hospital is a specialist healthcare entity where people requiring constant and direct medical care are treated. In such entities, the risk to life or health of patients due to the abandonment of health services is usually greater. Resorting by medical practitioners to the argument of abandoning patients' beds is in clear contradiction with the essence of their profession. Due to the type of goods which are the subject of medical services provided by medical practitioners: human life and health, it cannot be assumed that they are entitled to fight for their rights using freely chosen means of pressure. Therefore, such action, which actually constitutes a refusal to provide medical care to patients, must be considered contrary to the law and medical ethics.

This does not mean that a medical practitioner is not entitled to participate in any form of protest. A medical practitioner may refuse to perform medical activities which will not entail the effects specified in the aforementioned regulations. Therefore, it will be permissible to refrain from carrying out scheduled procedures – but only those which are only aimed at improving and not saving the patient's health[35] (e.g. some orthopaedic, dermatological ones), to refrain from giving medical advice (the doctor will not accept patients in hospital's specialist clinics), sick leaves, certificates. Such actions should, in my opinion, be considered as compliant with the law. However, the question arises as to whether they will also comply with the

[32] P. Konieczniak, *Udział w proteście zbiorowym jako przewinienie zawodowe lekarza*, „Prawo i Medycyna" 1999, no. 2, p. 89.

[33] S. Molęda, *Poradnik dla lekarza – uczestnika protestu*, 2006, https://pulsmedycyny.pl/poradnik-dla-lekarza-uczestnika-protestu-885706 [access: 9.12.2019].

[34] A. Daniluk-Jarmoniuk, *Odpowiedzialność zawodowa lekarza*, Lublin 2018, p. 122.

[35] See E. Zielińska, *Trzeba mieć poważne powody, aby odmówić leczenia*, „Gazeta Prawna" 2008, no. 18338.

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principles of ethics, which should be adhered to by a medical practitioner as a representative of the profession of public trust, especially if his actions are based on claims regarding salaries, i.e. when the good and health of a patient are contrasted with the economic interests of medical practitioners. This is particularly doubtful in the light of Article 2 of the Code of Medical Ethics, in which the welfare of the patient is considered to be the highest ethical directive for medical practitioners: *salus aegroti suprema lex esto*. Market mechanisms, social pressure and administrative requirements do not exempt them from this principle.

Another doubt concerns the forms of collective protest, e.g. collective use of holiday leave on demand (in literature it is called a "secret strike") or sick leaves. In such cases, as a rule, medical practitioners cannot be attributed with professional misconduct or breach of official (statutory) duties, as the medical obligation to provide assistance does not apply here. It should be noted that taking leave on demand by a doctor, as in the case of "ordinary" leave, requires the prior consent of the employer. As long as the employee does not receive such consent, he or she cannot start it. On the other hand, if a doctor is granted leave on demand, it will be the responsibility of managers to ensure the continuity of health services and they will become the guarantor of patients' safety. Therefore, if it is not possible to replace the doctor with another specialist, which may result in the need to postpone or abandon certain procedures, the doctor's request for on-demand leave should not be accepted[36].

It should also be emphasized that, in defending the rights and interests referred to in Article 1 ACB, medical practitioners may, virtually without restrictions, protest in forms not involving cessation or restriction of the provision of health services, e.g. participate in pickets, display posters or put on clothes certain symbols as a sign of protest[37].

LEGAL LIABILITY OF THE MEDICAL PRACTITIONER FOR PARTICIPATION IN AN ILLEGAL STRIKE

Due to the type of services provided, medical practitioners must correctly choose pressure measures. Exceeding the limits in the selection of these measures can have negative consequences. Doctors involved in an illegal strike, depending on the basis of employment, may be held liable in terms of employee's obligations (both disciplinary and financial liability), as well as professional, civil and criminal liability. It should be emphasized, however, that medical practitioners are not so much responsible for participating in an illegal strike themselves, but a condition

[36] A. Daniluk-Jarmoniuk, *op. cit.*, pp. 123–124.
[37] *Ibidem*, p. 123.

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for imputing such liability to them is a simultaneous breach of their duties, the rules of professional conduct or the principles of professional ethics.

The employee's participation in an unlawful strike action constitutes a breach of employee duties, such as the duty of diligent and careful work and care for the good of the workplace. It, therefore, justifies the healthcare entity imposing on the medical practitioner concerned any penalty provided for an offence against the order and discipline of employment, including the termination of employment. The condition that is necessary to be met to punish the employee, in accordance with the general principle of employee liability, is guilt[38]. Its type (gravity) determines the choice of the method of termination of the employment relationship. Termination of an employment contract without notice may be justified only if the employee's action can be classified as a serious breach of the essential employee duties, i.e. where the employee can be attributed wilful misconduct or gross negligence. The assessment must take into account all the circumstances relating to the employee's conduct and, therefore, in addition to the degree of his culpability, also the degree of risk or breach of the interests of the employer.

However, the examination of guilt must not be made in isolation from the employee's awareness of the illegality of his or her conduct (participation in an illegal strike). It seems that the legislature introduces an exception to the rule of the distribution of the burden of proof expressed in Article 6 of the Civil Code[39] which results in the transfer of the burden of proof to the employee and the need to prove his innocence (exculpation)[40].

For the period of an illegal strike, a medical practitioner does not retain the right to social security benefits and employment rights. This period is also not included in the period of employment on which employee rights depend (Article 23 para. 1 and 2 ACB *a contrario*).

Violation of the obligation to provide assistance (Article 30 APMPD) by a medical practitioner on strike may also result in his or her liability for damages towards the patient for injuries suffered by the latter. This situation applies to doctors employed under civil law contracts for the provision of medical services. In this case, the service provider's liability will be joint and several with the healthcare entity.

Regardless of the basis of employment, a medical practitioner may also be accountable to professional self-government bodies under the professional liability regime. The condition for this type of legal liability is the committing by the medical practitioner of the professional misconduct, defined by Article 53 of the

[38] B. Wagner, *Odpowiedzialność za zorganizowanie i udział w nielegalnym strajku*, „Praca i Zabezpieczenie Społeczne" 1992, no. 1, pp. 46–47.

[39] Act of 23 April 1964 – Civil Code (Journal of Laws 2020, item 1740).

[40] B. Wagner, *op. cit.*, pp. 46–47.

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Act of 2 December 2009 on Medical Chambers[41] as "violation of the principles of medical ethics" or "violation of the provisions related to the exercise of the medical profession". The classification of an act as professional misconduct depends on the existence of a causal relationship between such misconduct (unlawful or contrary to professional ethics) of the medical practitioner (act, omission or neglect), and the negative effect or even a state of abstract threat to a third party.

Therefore, it should be assumed that a medical practitioner who fails to perform the obligation specified in Article 30 APMPD due to a strike, commits professional misconduct if the strike is unlawful in the light of Article 19 para. 1 ACB. The professional liability regime will also cover the case of failure to provide medical assistance to a patient in an emergency due to the medical partitioner's participation in a legal strike.

It should be noted that the obligation to provide assistance is universal – it is incumbent on anyone who finds himself in a situation where another person is in a situation of a direct threat to life or health. This statement is essential from the point of view of the possibility to hold a medical practitioner liable under Article 162 of the Criminal Code[42]. A medical practitioner whose behaviour, while in a healthcare entity during a strike, meets the criteria specified in this provision, i.e. he or she fails to assist a person in a situation of imminent danger of loss of life or serious injury, being able to provide it without exposing oneself or another person to the danger of loss of life or severe detriment to health, should be held criminally responsible. However, a medical practitioner who does not appear at work because of a strike, will not be held, as a rule, criminally responsible for failure to provide assistance. In such a case, the head of the healthcare entity obliged to appoint an appropriate substitute becomes the guarantor of health safety of patients. The medical practitioner will not, however, be exempt from liability if he or she has not provided substitutes with information relevant to ensuring patient safety[43].

Therefore, in principle, professional and criminal liability will be borne by the medical practitioner who had an actual (physical) opportunity to provide assistance, i.e. stayed in the premises of the healthcare entity and refrained from providing the health service in question, as an expression of participation in the strike[44]. This is so because failure to fulfil an obligation to work must not lead to a failure to perform a statutory obligation imposed on persons practising a particular profession.

[41] Journal of Laws 2019, item 965.
[42] Act of 6 June 1997 – Criminal Code (Journal of Laws 2020, item 1444 as amended).
[43] The same view in: E. Zatyka, *Lekarski obowiązek udzielenia pomocy*, Warszawa 2011, p. 124.
[44] P. Konieczniak, *op. cit.*, p. 90; E. Zatyka, *op.cit.*, p. 124.

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CONCLUSION

As the presented analysis shows, the issue of medical practitioners' right to take part in a strike is ambiguous under the current legislation, and undoubtedly requires *pro futuro* legislative action. The consequences of a strike in the healthcare sector are too important for the society to leave the problem of the legality of this form of protest to the assessment of the parties to a collective dispute, carried out through the prism of the general clause "threat to human life and health or national security", with no proper judicial review in this respect.

Noteworthy is the proposal to regulate this issue presented in the Draft Collective Labour Code of 2008[45]. According to Article 161 of the Draft Code, strike action in positions where the cessation of work poses a threat to human life or health or national security, as well as preventing the satisfaction of the basic needs of the population, is deemed unlawful. Reference should be made here to the position of the ILO's Trade Union Freedom Committee, which classifies essential services (crucial for the needs of the population), including the hospital sector. However, the draft proponent is still using an undefined phrase, which in practice would again require an appropriate interpretation. As a side note, it should only be stated that the second Draft of the Collective Labour Law Code of 2018[46] does not provide for a ban on strike due to the need to meet the basic needs of the population, basically just repeating the content of Article 19 para. 1 ACB.

To sum up, it should be strongly emphasized that introducing a general ban on strikes by medical practitioners would be too far-reaching, or at least questionable in legal terms. However, it seems necessary and reasonable, in view of the significant discrepancies in this respect, to expressly introduce a ban on strikes by employees providing substantive services to patients (including doctors, nurses) in those healthcare entities which provide permanent and direct care for the patient (hospitals) and provide health services in emergency cases. It would, however, be appropriate to provide these groups with proper substitute legal instruments to defend their interests, e.g. the possibility of resolving a dispute in arbitration.

[45] Komisja Kodyfikacyjna Prawa Pracy, *Zbiorowy kodeks pracy – projekt z kwietnia 2008 r.*, https://archiwum.mpips.gov.pl/gfx/mpips/userfiles/File/Departament%20Prawa%20Pracy/kodeksy%20pracy/ZKP_04.08..pdf [access: 10.12.2020].

[46] Projekt Kodeksu Zbiorowego Prawa Pracy, 2018, https://archiwum.mpips.gov.pl/download/gfx/mpips/pl/defaultopisy/10948/1/1/Kodeks%20zbiorowego%20prawa%20pracy.pdf [access: 10.12.2020].

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STRESZCZENIE

Prawo do strajku należy do podstawowych praw człowieka oraz wolności związkowych. Strajk, jako jedna z form protestu przeciwko szeroko rozumianej niesprawiedliwości, należy do najistotniejszych środków związkowej ochrony interesów pracowniczych. Prawo do strajku jednak nie ma charakteru bezwzględnego, a korzystanie z niego w sposób legalny musi niejednokrotnie uwzględniać interes pracodawcy i osób trzecich. Celem artykułu jest ocena legalności strajku lekarzy z punktu widzenia regulacji ustawowych oraz zasad etycznych i moralnych, przy uwzględnieniu poglądów literatury i orzecznictwa. Kwestia prawa lekarzy do udziału w strajku jest na gruncie aktualnego stanu prawnego niejednoznaczna, a w literaturze zbiorowego prawa pracy wykształciły się dwa przeciwstawne stanowiska w tym zakresie. Problem legalności tej formy protestu lekarzy pozostawiony jest obecnie w zasadzie jedynie ocenie stron sporu zbiorowego, dokonywanej przez pryzmat ogólnej klauzuli ewentualnego „zagrożenia życia i zdrowia ludzkiego lub bezpieczeństwa państwa", przy jednoczesnym braku odpowiedniej kontroli sądowej w tym zakresie. Niewątpliwie zatem wymagane jest podjęcie przez ustawodawcę odpowiednich działań legislacyjnych *pro futuro*.

Słowa kluczowe: lekarz; strajk; prawo do strajku; prawo lekarzy do udziału w strajku