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Employer's right to ban unvaccinated (COVID-19) employees from the workplace in Israel and Poland

Uprawnienie pracodawcy do niedopuszczenia do pracy pracownika niezaszczepionego przeciw COVID-19 w Izraelu i w Polsce

Abstract
The article deals with the problem of presence of employees unvaccinated against COVID-19 at the workplaces. Medical research conclusions show, that presence of unvaccinated person increase risk of infection also for vaccinated individuals. In debate on possibility of exclusion of unvaccinated workers from a workplaces the clash of values has to be considered. On the one hand there is a right to privacy, dignity and freedom of occupation, on the other hand right to life, right to safe working environment, protection from diseases and limitation of employer's economic risks. Israeli labour courts in described cases approved ban of workplace access for unvaccinated persons, in situations where it was the only way to protect other people from COVID-19 infection. Still if there were other sufficient measures, the ban of access was lifted. Article describes also legal situation in Poland, where employer's access to data on worker's vaccination is under discussion and relevant legal regulations should be amended. However there are no legal measures of banning employee access to the workplace, the dismissal based on lack of vaccination should be accepted, if any other measures of infection control are not accessible.

Keywords
COVID-19, vaccination, unvaccinated workers, prevention, workplace access ban

Streszczenie
Artykuł podejmuje problem obecności w zakładach pracy pracowników niezaszczepionych przeciw COVID-19. Wyniki badań z zakresu medycyny pokazują, że obecność niezaszczepionej osoby zwiększa ryzyko zakażenia COVID-19 także dla osób zaszczepionych. Dyskusja nad dopuszczalnością wyłączenia dostępu do zakładu pracy dla niezaszczepionej osoby opiera się na rozstrzygnięciu konfliktu podstawowych wartości: z jednej strony prawa do prywatności, godności i wolności pracy, a z drugiej prawa do życia, prawa do bezpiecznych i higienicznych warunków pracy i prawa pracodawcy do ograniczania ekonomicznych ryzyk prowadzonej działalności. Izraelskie sądy pracy w opisanych wyrokach potwierdziły legalny charakter zakazu wstępu niezaszczepionych pracowników do zakładu pracy, gdy nie istniały inne możliwości ograniczenia stwarzanego przez nich ryzyka epidemicznego dla innych pracowników i klientów zakładu. Artykuł podejmuje również analizę analogicznych problemów w polskim systemie prawnym. Pracodawca ma legalną możliwość przetwarzania danych osobowych o szczepieniu pracowników, jakkolwiek odnośne przepisy wymagałyby doprecyzowania. Brak szczepienia nie może być podstawą niedopuszczenia pracownika do pracy, ale stanowi wystarczające uzasadnienie wypowiedzenia w tych przypadkach, gdy nie ma możliwości odizolować niezaszczepionego pracownika od innych pracowników lub klientów.

Słowa kluczowe
COVID-19, szczepienie, niezaszczepieni pracownicy, profilaktyka, zakaz wstępu do zakładu pracy

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Introduction

The world has suffered from COVID-19 pandemic (also called Covid or Corona Virus) since the end of 2019 and up to this day of 2021. Vaccines for this disease have been developed and countries all over the world have been taking them. Israel was the first country in the world that vaccinated much of its population up to the coverage of over 60% of the population. Also, in Poland vaccination is developing, which currently makes jabs available in short term for all willing people. Population not vaccinated include children who do not have FDA confirmation to get vaccinated, people that cannot be vaccinated due to medical reasons and others that do not want to be vaccinated. But both in Israel and Poland there are some people, that avoid getting vaccines despite the fact, that on medical terms they qualify for it and vaccines are available for them.

The article discusses the legal question regarding employers that prohibit employees from entering the workplace if they are not vaccinated. The legal question involves employees right to privacy, dignity, and freedom of occupation from one side and from the opposite side the employers legal right to keep safe from disease and protect the workplace, other employees, and customers. What is the base of entitlement of employers to reject worker, that is not vaccinated? Can the employer base his right on a common rule of health and safety at work? These questions have emerged in Israel and discussed in the Regional Labor Court.[1]

The article compares the situation in Poland and Israel. Three cases discussed in the Israeli Labor Court are presented regarding employers banning unvaccinated employees that also refuse to do frequent covid tests (in two cases) from entering the workplace. The first case was an assistant teacher in a school. The second case, a few days later, was about a cashier at the supermarket. Both cases were determined on March 2021. The third case, determined in July 2021, was an administrative worker that refused to get vaccinated but consented to frequent covid tests.

Background: COVID-19 and vaccination in Israel

In Israel, responsiveness to vaccination was extremely positive. Reasons for the success and quick participation of the Israeli population in the vaccination effort are explained by Rosen et al. (2021). They claim several factors contributed to the success of the initial phase of vaccination rollout in Israel. Among these factors are: Israel is a small size country; with a relatively young population; the centralized national system of government; the experience in quick response to large scale emergencies and cooperation between government, healthcare, and hospitals; the community-based healthcare and well trained committed nurses; IT and logistic capacities in Israel; rapid transfer of funds and purchase of a large amount of vaccine; well-tailored efforts to reach population and encourage to get vaccinated and more.(Rosen at al., 2021).

The Covid vaccination certificate in Israel is called the Green Pass — it is given to any person who has been vaccinated for COVID-19 or recovered from COVID-19. It served as a mandatory entry permit to certain places according to guidance. On June 1st. 2021 this restriction was lifted due to low infection rates and a downward trend of infection in Israel. The vaccination certificate is given to any person who has received a second vaccine dose, and it takes effect one week after the administration of the second dose. A certificate of recovery is given to any person who has recovered from COVID-19 and consequently is not eligible to get the vaccine, although there is a recommendation to get vaccinated.[2]

Siegal Avishay case regarding employer forbidding the entrance of unvaccinated employee

The question in the Siegal Avishay case[3] was: can an employer prevent an employee who has not been vaccinated against the coronavirus and refuses to present a negative corona test result regularly from reporting to work? Avishay, the applicant, was an assistant teacher in the local school in a class of special needs students. We must mention that many municipalities awaited the Labor Court decision on this matter for it was an urgent question at the return in a class of schools and kindergartens to operate after Covid lockdown in Israel. The judgment of the court is in preliminary proceedings for temporary remedy and the main proceedings have not yet occurred. However, it demonstrates the attitude of the court in the matter.[4]

As schools were gradually opening in Israel, the local Council ordered that school staff returning to work should provide vaccination certificates or high frequent negative tests for Covid. Avishay claimed this order was illegal and not legitimate, she cannot be compelled to provide personal medical information regarding vaccination or compelled to be tested once a week without legal authority. She claimed prohibiting her entrance to the workplace injures her freedom of occupation and her human dignity and that only primary legislation can harm legal rights.

Further, Avishay claimed there is a law regulating the issue of dealing with the Covid virus as well as specific regulations enacted under it regarding the restriction of activity in educational institutions, in which it was not decided to require employees to be vaccinated or present negative Covid tests. Also, she claims the Local Council decision was made without authority and that the managerial prerogative given to the employer cannot allow an injury to the employee's body.

The Council, the respondent, contended that its actions were taken to protect the safety and health of the public and that the applicant's refusal to present a negative Covid test constitutes a breach of employment

contract in bad faith. The employee voluntarily provided extensive and detailed medical information every day for many weeks (in health declaration) and the Council's demand did not include physical coercion to be vaccinated but a moderate demand that balances the interests of safeguarding public health and on the other hand safeguarding the applicant's right to privacy. The Council stressed the enormous damage it will cause to special needs education students, to their parents and family members, should it become clear that the applicant is ill with Corona and an obligation of isolation will apply to all special education students. No law prevents an employer from making entry into the workplace conditional on 'medical fitness'. The employer has a duty to provide its employees with a safe and secure work environment. Additionally, the Covid test (provided free of charge in Israel) is not particularly pleasant, but it is tolerable and worth the value of protecting human life.

From December 2020 vaccination commenced in Israel and had become available to all in Israel over 16 years old.[5] It was found to be useful against the pandemic.[6]

In this context, the legal question discussed by the Court was whether it should intervene and overturn an employer's decision and was there a flaw in the decision of the employer restricting the applicant from entering the school.

According to the Court, when an employee is obligated to perform a medical examination against his will this infringes on his fundamental right to autonomy over his body. This right has been recognized in the case law as a derivative of the right to human dignity. It is defined as the right of every individual to decide on his actions and desires by his choices. This right implies that every person is free from interference with his body without his consent.

An employee obligated to provide the test results or details about his immunization to the employer may also have his right to privacy infringed, which is also a constitutional right explicitly enshrined in the *Basic Law: Human Dignity and Liberty*.[7] Also, may be infringed the applicant's right to freedom of occupation enshrined in the *Basic Law: Freedom of Occupation*.[8] The Basic Laws are on the level of constitutional laws in Israel.[9]

In the face of the applicant's rights, the Court places the first and foremost right to life and health of the students, their parents, and the rest of the school staff, who are also paramount rights, whose superiority and importance are undisputed. The Court looks for legal sources supporting this notion because no explicit law or regulation permits the employer to forbid the employee from entering without a vaccine or corona test. The court finds that the "mirror image" of these rights is the duty imposed on the Council under the employment relationship to ensure the safety of the other employees in the workplace, which stems from the increased duty of care imposed on an employer towards his employees and from the overriding principle of good faith that is a source of the employer's contractual obligation to ensure safety and hygiene conditions in the workplace.

The Court states that the Council, as the owner of the school's property, has a conceptual duty of care due to the possession of real estate. The holder of real estate has the best ability to anticipate risks inherent in real estate and to act to prevent them. The duty of the Council to take care of the health of its residents and those at its gates is also learned from the Local Councils Order:[10] "*…ensure public health, order and security, prevent the appearance and spread of diseases and lesions…*".

The conclusion is therefore that there is legal source regulating the Council's duty to look after the interests of students, parents and the educational-administrative staff, on whom it is responsible. The court acknowledges the applicant's right to dignity and privacy but it is not a right that stands alone in a vacuum. On the other side, stands a fundamental right on the same normative — constitutional level of the students, parents, and the rest of the school staff: the right to life, on which all rights are based. The Court refers to the property right of the employer in the workplace, which is also enshrined in the Basic Law: Human Dignity and Liberty.[11] According to the Supreme Court ruling, the employer's management prerogative, which derives from this fundamental right, gives him freedom of action in the management of his business and in the performance of various actions concerning him, including actions that have an impact on the rights and obligations of employees.

In Israeli legal system, the right given to an individual is not an absolute right but a relative right, which sometimes withdraws from other rights and values. When it comes to an "internal" conflict between human rights themselves, a "horizontal" balance must be struck between them. A balance must be struck between two rights of equal status while reciprocating and striving to reduce the violation of rights on either side of the barricade.

The National Labor Court ruled that the right balance between the increased duty of disclosure applied to an employee in an employment relationship on the one hand and his right to privacy on the other is found in the relevancy of the information in question.[12] Is this information relevant? The Court believes that at the current point in time, when the Israeli economy is trying to return to routine, including the education system with it and when many workers are required to return to work — the information about immunization of workers is relevant information to the employer. It helps to determine the manner of work and to maintain the security and health of all employees (including the applicant herself) and the students and their parents.

Regarding forcing the applicant to submit up to date Covid test results, the Court determines it is up to the legislator to decide or up to collective agreements. Meanwhile, it is up to the Court to perform the balance. The Court focuses on the "balance of convenience" according to the formula of "parallel forces". Who will be harmed more? The applicant or the respondent. The Court determines the general conclusion that the balance of convenience is inclined in the direction of the respondent — the employer.

Currently, the prevailing opinion is that the effectiveness of the vaccine in preventing infection is high and when presenting a negative Corona test, the person is not sick and therefore does not pose a danger to another. The Council's requirement that whoever 'comes in its gates' be vaccinated or at least present a negative Corona test is not an unreasonable, irrelevant requirement.

Opposite the right of the applicant to continue attending her workplace are the right of students to life, education and health, the right of other school employees to a healthy and enabling work environment and the right of students' parents to life and employment. The students with whom the applicant works are young children with special needs who cannot get vaccinated themselves at this stage therefore, the danger to them if they get ill is high and so is the potential harm to them and their families.

The public interest is in restoring the economy to normal activity and depends also on returning to the normal routine of the education system. In the absence of a normative or collective regulation on the issue of the duty of immunization and the presentation of negative Corona tests in the workplace, employers should not be presented with a stalemate and should be given proportionate and reasonable tools to deal with the situation created, together with minimizing damage to workers' rights.

The potential for violation of the right to life resulting from an employee who has not been vaccinated or has not presented a negative test is clear and immediate, while the violation of the employee's privacy as a result from providing the information about the vaccine is ostensibly 'on the low side'. The Court does not take lightly the right of an employee to dignity and privacy and the need to protect them, especially concerning medical matters about the privacy of the individual. However, providing information of a binary nature (vaccinated/not vaccinated) without detailing the reasons for the non-vaccination — whether lack of will or lack of medical ability to do so, does not infringe on the core right to privacy. The same applies to the test result — negative/positive.

Regarding the Corona test, the Court is aware that this is an invasive and unpleasant test that involves discomfort for the subject. However, if one compares this to the obligation to get vaccinated, there is no doubt that this is a lesser violation of the employee's autonomy. Also, when the Corona Powers Act was enacted and the regulations of educational institutions were enacted, the issue of vaccines was not on the agenda at all.[13] Given the "new player" in the form of the Corona vaccine, it can be said that a change of circumstances occurred which raises the threshold of life protection potential, when in the absence of option or desire to be vaccinated the "next best option" should be presented.

Avishay, the applicant, was not suspended or dismissed from her job, her position at the school was maintained and she continued receiving her salary. We note that this is a temporary solution. Eventually the employer will have to decide whether to terminate this employee and the question is whether the dismissal will be deemed lawful dismissal.

The Court concludes that the applicant's apparent rights do not outweigh the respondent's right and duty to care for the welfare of her students, the educational staff, and the students' parents. The balance of comfort is clearly in the favor of the respondent that is responsible for the welfare of her employees, children and adults that come in her gates. Therefore, the opinion of the Court was that the application should be rejected.[14]

The Shufersal case

The second case given a few days after the case of Avishay was about a private company, Shufersal Ltd. This is a big supermarket and pharma retail with about 18,000 employees. Shufersal announced that only employees who display a green pass indicating that they have been vaccinated or a negative Corona test every 72 hours will be allowed to come to work. The applicant Pickstein, a cashier in the supermarket, petitioned the Court to prevent the employer from sending her on forced leave or initiating dismissal proceedings against her in the face of her refusal to be vaccinated or produce a negative Corona test.

The Regional Labor Court ruled that the applicant did not prove an apparent right to cancel the respondent's decision to require her, as well as other employees, to present a green pass or a negative Corona test every 72 hours as a condition for reporting to the workplace and actual work to such an extent as to justify temporary remedy.[15]

The Court determined that the respondent, Shufersal has an obligation as well as a responsibility to maintain a safe and health-safe work environment for its vaccinated employees, the customers, suppliers and all who enter its premises under the Labor Inspection Organization Law[16]. Although the issue of the entry of workers who have not been vaccinated into workplaces has not yet been regulated by legislation, it cannot be said that the respondent is not allowed to set a policy to make decisions regarding the entry or non-entry of workers who are not vaccinated into the workplace. Given that the respondent has legal authority to decide on this issue, the question is whether her decision was reasonable and proportionate and was made for a proper purpose and under substantive considerations. Contrary to the applicant's contention, the respondent's decision does not compel her to be vaccinated or perform a Corona test, but rather that this refusal has consequences in the context of continuing to report for work. In addition, even if there are differing medical opinions regarding the degree of risk of a vaccinated person from an unvaccinated person, this does not negate the respondent's reliance on the opinions and recommendations of its physicians, who maintain an ongoing dialogue with the Ministry of Health.

The Court emphasized that the right given to an individual is not an absolute right but a relative right, as determined in the Avishay case. In contrast to the applicant's rights to dignity, violation of the right to autonomy over the body and freedom of occupation,

other basic rights are opposed. The right to life and health of all employees, suppliers and customers in the respondent's premises and the respondent's property right, rights no less important than the applicant's rights. The alleged evidence shows that the violation of the applicant's basic rights was done for the proper purpose of maintaining the health of the employees and their families and the health of the customers and all subsequent factors in contact with the respondent's employees and in particular the branch employees who have many contacts with customers and suppliers. The court determined that there is no doubt that the applicant's work, which serves as a cashier at the branch, involves contact with many customers daily and with branch employees, some in risk or unvaccinated groups, so the requirement from her to meet the green pass conditions is relevant. It was not found that it is possible to place the applicant in an alternative position that does not involve contact with customers, employees, or suppliers. The respondent's decision, made with the consent of the workers' union representatives, was proportionate and reasonable.

The Court finds that at this point, the balance of convenience tends in favour of the respondent. According to currently accepted medical information, the effectiveness of the vaccine in preventing infection is high but not absolute, so there is still a risk that vaccinated people will be infected by unvaccinated people. Continuing the applicant's work as a cashier, without presenting an up-to-date Corona test every 72 hours exposes customers and employees to the risk of infection and disease. There is no impediment to the applicant presenting an up-to-date corona test every 72 hours. The inconvenience of doing so is not weighed against the Corona disease damage to workers, customers, and their families. The harm to the functioning of the branch may be extensive, because of illness and isolation, when employees are required to enter isolation, including the financial expenses involved. At that stage, the court explains, the applicant could receive unemployment benefits. The Court determined that if it becomes clear in the main proceedings that the respondent's decision was made unlawfully or that there was a defect of some kind, the plaintiff's damages can be compensated financially.

At this stage it seems that employers can terminate the employee and it will not be an unlawful dismissal. In Israeli legal system the employer does not need to justify dismissal, however there are reasons of dismissal that are deemed unlawful as determined by prohibition in legislation, collective agreement, or due process.

"Mifal Hapayis", Israel's state lottery case

In "Mifal Hapayis", Israel's state lottery[17] judgment (July 2021) given by the Regional Labor Court in Jerusalem, the ruling was different than in previous two cases and an employee was reinstated to her job. The employee refused to get a covid vaccine, but she agreed to frequent corona tests and agreed to work separately from all workers. Her job was an administrative one, and she would not have contact with other workers or clients. Despite that, the employer declared that workers that will not get vaccinated will be sent on vacation without pay and then dismissed. An option of frequent corona test will not be available. The Court determined that the employer acted unreasonably and unproportionate by banning entrance to the workplace for unvaccinated workers indefinitely. The employer should act in good faith and find ways to continuing employment also of unvaccinated workers. The balance of convenience is in favor of the employee — the employer should make adaptations of the workplace and return her to work.

In Israel, corona test is free from charge inside the country. Payment is due only for people traveling outside the borders of Israel. The court finds the alternative to vaccine in the frequent covid tests. It is a way for ensuring the safety in the workplace. This case involves different type of work. An administrative employee that is not in contact with other workers or clients. Also, she agreed to get frequent covid tests so a solution to continue her employment was possible. In the first two cases presented above, Avishay and Shufersal, the employee had multiple contacts with people that may be at risk due to her refusal to get vaccinated or tested. In the Avishay case it was students, parents, and other workers. In the Shufersal case it was clients, suppliers, and other workers.

Avishay appealed the preliminary ruling to the National Labor Court that rejected her appeal and did not intervene in the Regional Labor Court decision.[18] Additional employee claims in the same matter were submitted to the Regional Labor Courts in Israel and appealed to the National Labor Court however, the attitude of the court was as presented above[19] (see about the Israeli legal system: Rivlin, 2012).The judgement of the Regional Labor Court was consistent and depending on the medical opinion of the Ministry of Health. The interest of the employer and the public was favored over the interest of the individual employee. The legal right of the employee for privacy, dignity and freedom of occupation retreated in face of the employers right to provide a safe and healthy workplace for other employees, users, and customers. In Mifal Hapais case the court favored the employees' rights due to the possibility to provide negative corona test and work in isolation from other people thus minimizing the danger the unvaccinated employee imposed.

The judgments presented in the article are determined in preliminary proceedings, so they are not a legal precedent. The National Labor Court did not intervene at this stage but, in the main proceedings the Regional and the National Labor Court, can give differing judgements and it will be the legal precedent that prevails. Furthermore, all court judgements are subject to High Court of Justice, so the final word has not yet been said. Furthermore, the obligation to present the Green Pass in entering public places was lifted by June 1st. 2021 due to low rates of infection.

To conclude, there is no detailed statutory or regulation for the court to base the ruling in the case of

the legal question of an employer that forbids entrance of an employee to the workplace due to the absence of vaccine of corona test. The Labor Courts in Israel are activists. In absence of legislation, the Courts have the authority to exercise judicial discretion and decide in way of judicial legislation. The courts interpret Basic Law: Human Dignity and Liberty and finds enshrined in it the rule of right to life. Based on the general rule of the right to life, the right of the employee for privacy and freedom of occupation retreats. The court does not determine that the employer can compel an employee to get vaccinated. The discussion is only about the consequences of the employees' refusal to get vaccinated in regard to entering the workplace.

Protection of workers' personal data regarding COVID-19 vaccination in Poland

At first glance the situation of employers dealing with COVD-19 prevention measures in Israel and in Poland as a member of the European Union looks different. This is because although the problems connected with the protection of personal data concerning employees vaccination and the employers' rights of action against unvaccinated workers are two separate legal issues, Labour Courts in Israel, as described above, have been able to put them together and treat as inseparable parts of one problem to be decided upon the balance of general rules of privacy, dignity and freedom of occupation on the one hand, and the safety at work, and the workers' and clients' right to life on the other hand. Under EU and Polish laws these problems have to be decided separately.

The first question that must be raised when employer's rights and obligations in the COVID-19 situation are to be considered is whether the employer is entitled to enquire about employee's vaccination. A negative answer would question the sense of any further deliberations on the employer's and employee's legal positions in terms of COVID-19 vaccination, as it would be impossible to execute any employer's rights with this regard if it were illegal to get information about this fact in the first place. Health issues are the matter of particularly strict personal data protection in the EU and the employer may acquire personal data on workers' health only in very specific situations, regulated both in the EU General Data Protection Regulation[20] and the Polish Labour Code.[21]

The regulation of personal data protection in the Labour Code (Article 22^1 para.1–3 LC) specifies a number of employee's personal data which are available to be processed by an employer. This provision does not mention any health data that is required to be provided to an employer.[22] And yet, there is Article 22^1 para. 4 LC, which sets a general rule that the employer has the right to demand further employee's personal data that are necessary to exercise a specific entitlement or to enable the fulfillment of a duty. This regulation may be referred to Article 207 para. 2 LC, which obliges the employer to protect the life and health of employees, particularly by ensuring safe and healthy working conditions, with the use of the developments of science and technology. Furthermore, the employer is obliged to organize work in a manner that ensures safe and hygienic working conditions, and to respond to the needs relating to health and safety at work, as well as adapt measures aimed at improving the existing level of health and safety of employees in order to meet the changing working conditions.

Protecting employees from very dangerous infections like COVID-19 is without any doubts "protecting health" and "creating safe and healthy working conditions". What the employer may (and is obliged to) add to employees' protection in this area is to reduce their exposure to coronaviruses. This may only be achieved by excluding the existing and potential carriers of the virus from the workplace. This, in turn, may only be achieved by obtaining information on COVID-19 infection (an updated coronavirus test) or relevant vaccination.

COVID-19 vaccines are developments of science and technology, which increase the security of workers at the workplace, and should be introduced at the workplace while the employers are obliged to use modern scientific inventions to protect workers (Article 207 para. 2 LC). It means that the fulfillment of employer's duties from Article 207 LC and among others protecting workers from contracting coronavirus COVID-19 should legitimate employer's access to workers personal data on possible coronavirus infection (negative test or vaccination certificate) as provided for in Article 22^1 para. 4 LC.

A similar regulation on the access to employees' health data in contained in Article 9 of the General Data Protection Regulation (GDPR). This regulation basically prohibits processing data concerning health (Article 9.1. GDPR). There are several exceptions to this prohibition. One is the situation, when "processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorized by Union or Member State law, or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject" [Article 9.2(b) GDPR].

This regulation establishes a similar basis of data processing as provided for in the previously analyzed Article 22^1 para. 4 LC. The difference in the premises of data processing between those two provisions is that Article 9.1.(b) of the GDPR requires an additional legal basis in the Member State law or collective agreement, establishing the basis for data processing and appropriate safeguards for the rights and interests of the person whom the processed data concern (the data subject). On the ground of Polish labour law, Article 22^1 para. 4 LC may constitute the additional national legal basis referred to in Article 9.1(b) GDPR. Although this legal basis may be also regulated in collective agreements, owing to the

rather general scope of Article 22[1] para. 4 LC, it would be recommended to adopt a more precise regulation in legislative acts on counteracting COVID-19. In this way the existence of a legal basis referred to in Article 9.1.(b) GDPR would be clear and indisputable.

The other exception to the prohibition of health data processing which could be applied to the scope of issues deliberated here is when the "processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy" [Article 9.2(i) GDPR].

Last but not the least, prohibition of the processing of health data is lifted, when "the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject" [Article 9.2.(a) GDPR]

As the employee's consent on data processing under Article 9.2(a) GDPR is voluntary and cannot be enforced in any way, still there remains a question of the consequences in the event of a worker's refusal to give such a consent to process personal data on COVID-19 infection. Under Polish labour law there are examples of voluntary legal actions to be required of employees, and the failure to do so is threatened by a dismissal. This is for example the case with a competition clause. It is accepted in case law and literature that although a competition clause is voluntary, an employee's refusal to sign it constitutes a legitimate justification of handing in notice to terminate a contract of employment.[23] The employer is not obliged to continue contractual relations with an employee who refuses to secure the employer's interest.

Access to personal data on Covid infection risk (test or vaccination certificate) is a similar situation. A refusal of this consent by the employee restricts the employer's COVID-19 infection counteraction, which should make dismissal of such a person justified.

The provisions of the General Data Protection Regulation mentioned above show that neither this legislative act nor the Labour Code excludes processing employee's data on COVID-19 vaccination by employers. Thus collecting information on workers Covid tests and vaccination is legal as a necessary condition for the employer to ensure effective prevention of the spread of COVID-19 infection.

Employer's rights to manage its workplace

Assuming that the employer is entitled to process personal data and the employee is obliged to deliver information on vaccination, the next problem is the scope of employer's powers regarding unvaccinated employees. In the case of Poland frequent testing cannot serve as an effective and accessible measure of COVID-19 prevention at workplaces. The reason is that there is no free of charge COVID-19 on demand test program here, and commercial tests are still too expensive to administer frequently enough (eg. every 72 hours), to make them an effective preventive measure.

In Poland, as in Israel, there are no specific regulations on the legal position of employees with regard to COVID-19 vaccination. This means that general regulations must be fitted to this particular case. Basing on medical information it should be treated as obvious that vaccination not only significantly reduces the risk of development of heavy illness, but it also reduces the risk of contracting the coronavirus and spreading it around. Vaccination against COVID-19 is a costless, painless, quick and safe medical procedure recommended by health service professionals in all developed countries.

These medical recommendations are an important assumption for the employer in terms of fulfilling managerial competences and duties. An unvaccinated individual is enhancing the risk of other employees contracting the coronavirus, even if they received vaccines themselves. Allowing presence of such a person at a workplace may question the employer's commitment to counteract the risks to health and safety at work in the enterprise (Article 207 para. 1 LC, Article 207 para. 2 pt 1 LC).

Another problem is, that unvaccinated employee is enhancing risk of the workplace lockdown in case in if he/she contracts COVID-19 and is present at the workplace before the signs of infection appear. Vaccination does not fully exclude possibility of getting sick, but this risk is significantly lower, than for the unvaccinated individuals.

There is also a question of safety not only of the employees, but also of the clients of the enterprise. Their safety depends on the type of the activity carried out by the employer. Protection of those two groups coexist: unvaccinated workers are more vulnerable to infections transmitted by clients, but are also more likely to infect other people, including clients of the enterprise. The presence of unvaccinated people at the workplace is not the question of how everyone understands individual health protection, the individual risk of contracting the virus and the like. It is the problem of protecting all the employees and the clients against health risks and managing the workplace according to the needs of contemporary developments of health protection.

The employer has a right to manage the workplace and to shape the work environment. It means also choosing and keeping certain individuals in the team, who show skills, capacities and features needed for the job. COVID-19 vaccination may be one of the features qualifying or disqualifying individuals from a workplace. As it has been described above, vaccination of employees

reduced the potentially costly risks of employment. One infected worker who has been in contact with the others may stop the whole enterprise for weeks. There is also the risk of potential claims of COVID-19 victims who contracted it from an unvaccinated employee at the workplace. The employer's managerial rights include the freedom to decide whether to bear those risks or to get rid of an unvaccinated employee. However, COVID-19 vaccination is a matter of individual decisions, it looks proper to extend this freedom to all individuals involved and thus let the co-workers and the employer decide, whether they accept the risk of contacts with unvaccinated persons or not. It is particularly important for the employer who bears the burden of imposing proper health protection at the workplace.

COVID-19 vaccination is not obligatory, so the avoidance of the vaccine does not constitute the basis for the exclusion of an employee from a workplace on grounds of a breach of a duty to fulfil obligatory medical procedures. But still, treating COVID-19 vaccination as a strictly private matter of every individual is wrong, because this decision may affect many people around the infected person. However, under Polish labour law the employer has very limited options of reaction to the fact that an employee has rejected to take COVID-19 vaccine.

In Poland there is no legal basis for rejecting work provided by a person with a valid employment contract on grounds of a lack of vaccination. The general rule is that under an employment contract employer is obliged to employ a worker, (Article 22 para. 1 LC), unless a clearly regulated exception will occur.

One of the exceptions connected with safety at work is regulated in Article 209^2 para. 2 LC. According to this provision in the case of direct and likely threat to life and health employer is obliged to stop work and instruct employees to proceed to safety. This provision does not apply to the presence of an unvaccinated person at the workplace, as the danger caused by this individual is not direct.

In Polish labour law the problem of the presence at a workplace of a worker who is not fully fit or healthy, or whose working capabilities could generally be questioned on a particular day is not clearly or directly regulated, thus the employer's rights towards such a parson sometimes are being questioned. There are no specific provisions on employer's rights towards a sick or incapable worker, so only the general rules may be used.

The basic rule is that under an employment contract an employee is working under employer's direction (Article 22 para. 1 LC), which means that during the working time the employee should remain at the employer's disposal (Article 128 para. 1 LC). For the subject matter under discussion here, the idea of employee's "remaining at the disposal" is absolutely crucial. An employee is at the employer's disposal when he/she is present at the workplace, ready to work, physically and psychologically capable of conducting work.

An employee is not "at the employer's disposal" when he/she is not capable to work even if physically present at the workplace. This happens in the case when the worker is in the state of eg. insobriety, the influence of drugs, intoxication, serious sickness etc. If the employer recognizes a worker's incapability to work he or she should not allow the employee to work and remove him/her from the workplace on the grounds of his or her inability to remain at the employer's disposal.

If an employee visits a health service unit and receives a sick leave based on incapacity to work, the employer is obliged to prohibit this worker from entering the workplace if he/she came to work anyway. A bigger problem occurs when a sick person refuses to visit a doctor and comes to work. The employer is not entitled to force the employee to use a health service, even if the sick employee brigs a danger of spreading infection at the workplace in addition to the fact, that his/her capability to work could be limited. Upon this basis the employer has to decide whether to allow or not allow the employee to work. In the case of a decision not to allow the employee to work, a refusal to accept work, the employer may only suggest such an employee to seek medical advice. However, it must be stressed that the employer's legal position against possible claims of such a worker is weak in the absence of a formal medical statement on the employee's incapacity to work.

Taking the above into consideration it is even more difficult to think about excluding an employee from a workplace on the basis of his or her refusal to vaccinate.

When the employer does not allow an employee to work without a clearly established legal basis, the employer is in breach of the employment contract. As a result, such an employee must obtain remuneration under Article 81 para. 1 LC, which guarantees remuneration for work that cannot be conducted for the reasons attributable to the employer. This regulation would be applied to all the situations deliberated above, when the employer does not allow the employee to work without a clear legal ground. The employee is entitled to claim a reinstatement to the workplace and the provision of work, this being the employee's basic right under an employment contract.

Lack of vaccination as a grounds for the termination of an employment contract

Basing on the assumption that the employer has the right to shape the working environment, including the working team composition, to ensure that they are relevant to the type of business and meet the needs of the enterprise, a question may be asked as to whether the lack of vaccination could constitute a justified reason to terminate the employment contract by handing in notice to an unvaccinated employee.

The first issue that is raised in discussions over the status of unvaccinated persons is that different treatment

of such individuals in public life is a form of discrimination. This argument is false, as the recent analysis show, the principle of equal treatment does not preclude different treatment of people unvaccinated against COVID-19 (see Wróbel, 2021, pp. 19–38). Under the regulations of the Charter of Fundamental Rights of the European Union (OJ C 326) it is concluded that different treatment of unvaccinated people, eg. by establishing restrictions on their presence in public places with a view of ensuring public health safety is not an unequal treatment. A particular treatment of unvaccinated citizens to control the spread of the virus is an appropriate and necessary measure to secure the protection of both individual and public health of as many people as possible. The protection of individual's health includes protection against infection, while public health protection involves the reduction of the spread of the virus within society. It must be stressed though that different treatment of unvaccinated people should be reduced to the extent necessary to ensure public health protection (see Wróbel, 2021, p. 36).

Regarding the employment regulation it must be noted that discrimination means a different treatment of a person on the grounds of his/her features that are irrelevant to the agreed job (Article 18^{3a} para. 3 LC). Vaccination against COVID-19 cannot be classified as an irrelevant feature of the employee. In the employment context it has to be noted that vaccination is intended to serve the common good and to reduce the risk of infection among the employees.

Terminating the employment contract on the grounds of a failure to satisfy the vaccination requirement seems to be a clearer action in legal terms than restricting access to a workplace for a person with a valid employment contract. The latter is in a way self-contradictory, because on the one hand the employer keeps the employee away from work denying access to the workplace, but the employment contract continues to remain valid, pending with the obligation to employ that particular person. Such an action could be justified in a short term, if employee is getting vaccinated soon. However, in a long term, if the employee is permanently rejecting vaccination it will be unacceptable to keep that person away from a workplace and maintain the employment contract in force.

On a long term or permanent basis, if the employer treats COVID-19 vaccination as a condition of the employee's work capability, the only solution would be to terminate the employment contract with an unvaccinated employee. The Polish Labour Code requires justification for handing in notice in the case of employment contracts concluded for indefinite periods (Article 30 para. 4 LC). The regulation does not specify any particular reasons, using the general clause of a "reason justifying termination of a contract", what obliges courts to decide whether the particular reason in a given case was appropriate to justify dismissal.

In my opinion, vaccination against COVID-19 could in many cases be the basis for the employer's decision to continue the employment relationship with certain employees and to terminate it with the others. But the lack of vaccination should not be treated as a self-standing sufficient reason in all the cases. The justification of dismissal must also refer to the occupational situation at the workplace. It is easy to imagine circumstances lack of vaccination should not be a problem for the general health safety in an enterprise. This may be the case in workplaces where unvaccinated individuals could work in a kind of isolation, without coming in close contact with other workers or clients. In the other cases, wherever possible, the employer may consider offering unvaccinated employees to work online. However, in my opinion, in workplaces where employees are exposed to constant contacts with one another as well as with the clients, the lack of vaccination against COVID-19 may be a justified reason of dismissal.

So far there have been not many cases involving these issues that came within the jurisdiction of the Supreme Court or the common courts. However, judgments involving COVID-19 begin to emerge. An interesting example was the judgment of the District Court in Olsztyn from 29.02.2021[24], which maintained (in the 2nd instance) the dismissal without notice (Article 52 para. 1 pt 1 LC) of the employee who delivered false information to the employer upon his foreign travels, which could have caused a lockdown of the whole enterprise. This happened at the beginning of the pandemic, when all Polish citizens coming back from abroad were obliged to follow a 14-day quarantine. The employee was accepted at the workplace and started working having assured that he had not been traveling abroad, what later appeared to be untrue. This behavior caused a risk of a mandatory quarantine to all workers with whom he had come into a contact at the workplace, which would destroy the working order of the whole enterprise. That is why the employer used the procedure of dismissal without notice, and in the above described judgment his action was found legal.

The case described above only partially relates to the problem of the presence of unvaccinated employees in the work environment. However, it shows that in the context of securing the workplace against the spread of COVID-19 infection and preventing a possible lockdown, the Court considered the employee's obstruction to the execution of the employer's right to manage the workplace a serious breach of the employee's basic duties. Securing the workplace from a quarantine and the epidemiological safety of the employees have been placed by the Court higher in the hierarchy of values than the employee's right to privacy and the right to preserve the job.

Conclusions

The COVID-19 pandemic has created new challenges facing health protection at workplaces. Although the problems are unprecedented, the above analyses of the legal position of employers and employees in Israel and

Poland show that the general provisions on basic constitutional values, occupational health protection and employer's managerial competences are sufficient to deal with the problem of unvaccinated workers at workplaces.

In Israel, the position of the Regional and National Labour Courts has been very clear where the value of common interest embodied in public health protection needs were put above a private interest understood as an employee's right to privacy and right to work. This has led to the confirmation of the employer's right to exclude the unvaccinated employees without an up-dated Covid test from the workplace. However, when the employee consented to frequent corona testing and to working from the isolated position, the court found it as a reasonable solution to maintain the employees position and protect her rights.

The Israeli and Polish legal systems protect similar basic human values, such as the right to life, or the right to health protection, dignity, privacy and occupational freedom. This should lead to similar conclusions regarding the measures to counteract COVID-19 at workplaces. The differences result from the construction of the two legal systems. Israel respects a wider scope of judge's discretion, based on the normative system with common law elements. Rulings described in the article show the advantages of the flexibility available in such a system, which enable proper decisions based on constitutional general provisions to be taken in atypical matters.

On the other hand the legal position of Polish employers is limited by stiff regulations, that had not yet been amended to the needs of COVID-19 counteraction at workplaces. This conclusion applies mostly to regulation on personal data protection which restricts access to health data of employees. Although the article shows the possible ways in which employers may obtain legal access to these data, it is recommended to ensure that a proper legal basis providing legal access to this information is adopted in a statutory legal act.

Notes/Przypisy

[1] In Israel there are two instances of Labor Court: Regional and National that is also the apple instance. Judgements of the National Labor Court may be subject to High Court of Justise review. See: *The Labor Court Law*, 1969. Book of Laws, 1969, 553, 70 [in Hebrew].

[2] https://www.gov.il/en/departments/general/corona-certificates. Nevertheless, people that recovered from COVID-19 were advised by the health care to take the vaccine in order to increase their protection from the disease.

[3] LC (TA) 42405-02-21 Siegal Avishay — Local Council Kochav Yair Zur Yigal, given 21 March 2021, published in Nevo (hereinafter: Avishay) [in Hebrew].

[4] Claim for a temporary remedy from the court prior to the main proceedings is discussed by the court applying two main cumulative conditions: the existence of an apparent right, checked by examining the chances of the main claim, and the existence of a justification for providing remedy before clarifying the claim on its merits, which is examined through the"balance of convenience. See: *Civil Law Procedure Regulations*, 2018. Regulation 95. *Labor Court Regulations (Proceedings)*, 1991. Regulation 129 [in Hebrew].

[5] Vaccine is also available for age 12 through 15-year-olds nowadays.

[6] In Regarding the benefit inherent in vaccines for the purpose of reducing infection, see press release from the global Pfizer company. https://investors.pfizer.com/investor-news/press-release-details/2021/Real-World-Evidence-Confirms-High-Effectiveness-of-Pfizer-BioNTech-COVID-19-Vaccine-and-Profound-Public-Health-Impact-of-Vaccination-One-Year-After-Pandemic-Declared/default.aspx

[7] Section 7(a) *Basic Law: Human Dignity and Liberty*, 1992. Book of Laws, 1992, 1391, 150 [in Hebrew].

[8] *Basic Law: Freedom of Occupation*, 1994. Book of Laws, 1994, 1454,90 [in Hebrew].

[9] In Israel there is no constitution, however Basic Laws serve as constitutional laws that receive a wide interpretation by the courts.

[10] Section 146(8) the Local Councils Order, 1950, Regulation Files 127, 178 [in Hebrew].

[11] Section 3 Basic Law: Human Dignity and Liberty [in Hebrew].

[12] See LA (National) 363/07, Sharona Arbiv v. Poamix Ltd., issued on 26.05.2010 published in Nevo. [in Hebrew].

[13] Laws and regulations about corona virus in Israel are (partial list): Law for the Amendment and Enforcement of Emergency Regulations (New Corona Virus — Restriction of Activity), 2020, Book of Laws, 2810, 128. There is a temporary order that is amended from time to time by the Knesset (Israeli Parliament) Special Authority Regulations for Dealing with the New Corona Virus (Temporary Order) (Restriction of Activity and Additional Provisions), 2020 Regulation Files 8766, 2770. The purpose of the green pass is to constitute an entry permit for recovering and vaccinated people to places and buildings. The validity of the green pass was extended until 31.12.2021. In section 8B — the green pass is regulated, how it issued and what details are on it Initially the green pass restrictions of entry were for public places and businesses such as shopping malls, library etc. Amendment 31, 2021 — March 2021 — restrictions were lifted for shopping malls and several places. Other business the restriction remained such as: swimming pools, gym, culture hall, hotels. Special Authority Regulations for Dealing with the New Corona Virus (Temporary Order) (Restriction of Activities of Institutions Conducting Educational Activities), 2020, Regulation Files 8764, 2748, — some of the regulations have expired [in Hebrew].

[14] A request for permission to appeal by the applicant was denied by the National Labor Court see: RA(National) 3955-04-21 Siegal Avishay — Local Council Kochav Yair, given April 10, 2021 published in Nevo [in Hebrew].

[15] LC(Hai)33232-03-21 Sigalit (Gingol) Pickstein — Shufersal Ltd. Given March 26, 2021 published in Nevo (hereinafter: Pickstein) [in Hebrew].

[16] Section 8D of the Labor Inspection Organization Law, 1954, Book of Laws, 1954, 164, 202 [in Hebrew].

[17] LC(Jerusalem)15897-06-21 , Rebeca Aharony v "Mifal Hapayis", Israel's state lottery, July 6, 2021, published in Nevo [in Hebrew].

[18] AR (National) 3955-04-21 , Siegal Avishay — Kochav Yair Municipality, April 10, 2021, published in Nevo [in Hebrew].

[19] See examples: AR (National), 15681-05-21 Ori Chen v Natanya Municipality, May 11, 2021, published in Nevo: a request of a social worker in the respondent, for temporary relief to prevent dismissal or suspension due to her refusal to present a negative corona test result every 72 hours. PA (Tel Aviv-Yafo), 2819-03-21 Moran Vizensky — Raanana Municipality, June 2, 2021 — a yoga instructor [in Hebrew].

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[21] The Act of 26.04.1974 Labour Code, unified text: Dziennik Ustaw 2020, item 134200 as amended, hereinafter "LC".

[22] Even the certificate of pre-employment and periodic medical examinations of employees contain only information on their ability or inability to work, without specifying any details.

[23] See Supreme Court judgement of 12.02.2013 (II PK 165/12), LEX nr 1321731

[24] IV Pa 79/20, LEX 3123600.

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