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Automated Processing of Data on Work Performance and Employee Evaluation: A Case Study of Practices at Amazon Warehouses in Poland.

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Abstract

The subject of this article is the algorithmic employee evaluation system at Amazon's warehouses in Poland. A weekly performance review, the evaluation is a measure of productivity and quality, gathered in real time as warehouse associates scan barcodes throughout the working day. Evaluation results instruct on the employment status of individual workers, without any input from supervisors. The article probes the significance of the European General Data Protection Regulation (GDPR) for bolstering job security at workplaces like Amazon, where HR decisions are automated and based on the processing of work performance data. Article 22 of the GDPR lays down a prohibition for decision-making based solely on the automated processing of personal data. In turn, it establishes the right to human intervention, which might allow employees to avoid the adverse effects of an employee evaluation, if it did not ensure significant human input. Departing from a shop-floor level view of Amazon's employee evaluation system that is reinforced by insight gained through litigation in Polish labour courts, this article argues that the process of evaluating workers is not a purely technical operation that can be consigned to algorithmic management. Employee evaluation must abide by certain legal criteria, which ultimately requires human discretion.

Keyword:s Algorithmic Employee Evaluation; Algorithmic Management; Amazon Warehouses; GDPR; Human Intervention.

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1. Introduction.

In workplaces like Amazon warehouses in Poland,[1] technology has replaced the once personal relationship between employees and their supervisors. Not only is the work process organized remotely by algorithmic management devices, practically all human resources (HR) decisions are automated. At Amazon, technology is used to collect data regarding the number of completed orders, productivity, quality of work and employee absences. On the basis of past trends, the computer system sets productivity quotas, acceptable rates of absences, preferred employment status and a number of other guidelines concerning individual workers, as well as the warehouse collectively. In effect, the process of evaluating worker performance occurs in real time as vast amounts of personal data are analysed by the company's algorithms. Employee evaluation results are then generated by the computer system to direct HR decisions about continuing or terminating the employment contract.

Underlying such use of technology to manage the workplace is the idea, that "unstructured subjective judgment is not rigorous or trustworthy as a way to assess talent or create human resources policies. Instead, data – large pools of objective, generally quantitative data – should form the foundation for decision-making in the HR space".[2] This article takes issue with the narrative that automated decision-making is a more objective and fair method of managing the workforce. In what follows, we present a shop-floor level description of the algorithmic employee evaluation system used in Amazon's warehouses in Poland. We show that this mechanism, likely very similar to performance review systems used by the company at its many other warehouses around the world, is limited to measuring only certain types of employee activity, while omitting others. Whereas the company's algorithms calculate monthly indicators of productivity, quality and attendance, the system makes it virtually impossible for employees to discern what is expected of them. This leads to the one-sided assessment of employees since it is only the employer (with the exclusion of lower and mid-level management), who sets and understands the rules of evaluation. Algorithmic performance review does not stand the test of objectivity and fairness. Instead, this system contradicts the individual nature of the employment relationship as such.

In response to this dilemma, we echo the question posed earlier in the literature: "to what extent can the existing legal concepts and normative framework adequately capture the challenges posed by the increasing use of algorithms in the employment context"?[3] We propose answers through a case study analysis of how the legal problem presented by automated decision-making about employees at Amazon has been tackled in Poland. To this end we interrogate the legal rules of evaluation in Polish labour law and discuss how the courts in Poland have approached this matter. The outcome of the cases examined is less

[1] Amazon Fulfillment Poland Sp. z o.o. currently operates 10 warehouses ("fulfillment centers") in Poland and employs over 70,000 workers directly or indirectly. *See* the company's Polish website, https://biuroprasoweamazon.pl/O-Amazon-w-Polsce/Centra-Logistyki.html (last accessed on 18 August 2023).

[2] Bodie M. T., Cherry M.A., McCormick M.L., Tang J., *The Law and Policy of People Analytics*, in *University of Colorado Law Review,* 88, 4, 2017, 964.

[3] Otto M., *Workforce Analytics v. Fundamental Rights Protection in the EU in the Age of Big Data*, in *Comparative Labour Law & Policy Journal*, 40, 3, 2019, 390.

important than the presentation of legal rationale and arguments that have come to fore in these judicial disputes. As the problem of automated decision-making in the workplace presents legal challenges on a global scale, an examination of how existing, local legal frameworks and judicial institutions have weathered and responded to these challenges stands to inform initiatives at regulating technology on a wider scale. Furthermore, the substantive law and the legal avenues explored in the cases decided in Poland may in fact mirror the legal concepts in place in other jurisdictions, particularly in other civil-law European Union legal systems. Finally, Amazon is a global employer that makes international workplace policy. While the company's internal policies certainly differ from country to country as they are adjusted to local law and the culture of industrial relations, the underlying assumptions in its core policies are standardized. Our aim in this article is to contribute to the wider understanding of how Amazon's workplace policies affect workers and attempt to redefine the employment relationship as such.

Accordingly, this article argues that Amazon's algorithmic employee evaluation system fails to comply with the minimal standards set in Polish labour law, in following which employers must use fair and objective criteria in evaluating employees and their performance.[4] It is in fact the human element, or subjective judgment in evaluating employees, that actually assures objectivity and fairness in evaluation. We point to this element as a safeguard against legally binding automated decision-making about employees that is already in place in Polish labour law.

It is in this context that we turn to the significance of the European General Data Protection Regulation (GDPR)[5]. Article 22(1) of the GDPR lays down a general prohibition for decision-making based solely on the automated processing of personal data, such as work performance. The regulation establishes the right not to be subject to a decision based solely on the automated processing of personal data, or the right to human intervention. In this last aspect, Articles 22(1) of the GDPR reinforces the interpretation of the role of subjective judgment as a power balancing measure between employer's authority (managerial prerogative) and employee's rights to privacy, personal data protection as well as to being evaluated in using criteria that are fair and objective. In effect, the GDPR may allow employees the right to avoid the negative effects of an employee evaluation (like termination), if significant human contribution was not ensured in its course. As such, it may serve bolstering job security at workplaces like Amazon. In what follows we examine the possible application of this provision of the GDPR in the context of automated employee evaluation.

The information presented in this article derives in part from the authors' own experiences with the company employee evaluation system as warehouse associates at "POZ1", Amazon's distribution centre (referred to in company jargon as "fulfillment center") in Poznań. One of the authors worked at POZ1 during the first year that it opened (since October 2014), while the other author was employed there over the course of 2018-2020 and also served as a shop steward. Both authors' work performance was evaluated by

[4] Polish Labor Code, Article 94(9).
[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016 on the protection 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.

Amazon's system. As members of the rank-and-file trade union OZZ Inicjatywa Pracownicza (Workers' Initiative),[6] the authors represent the company's employees in labour court and therefore another part of the information presented in this article is based on litigation that relates to Amazon's employee evaluation system.

2. Amazon's Algorithmic Employee Evaluation System.

In Amazon's warehouses in Poland, the exercise of managerial prerogatives in the realm of worker performance review is automated. As such, Amazon's computer system collects vast amounts of personal data throughout the working day and uses algorithms to measure two indicators: productivity and quality of work. These indicators are considered independently in separate assessments that are carried out on a weekly basis. An employee's failure to meet only one of these indicators may, under certain conditions, lead to a recommendation for dismissal.

2.1. Productivity Quotas.

Quotas, or what Amazon calls "minimum indicators" of performance are set once a month based on employee productivity in the previous period. The performance indicator is a specific number of products that an employee must, depending on the function, pick from the rack, put on the rack, pack, or sort, among other activities, per hour, on average. The degree to which the quota was achieved by an employee is determined automatically. This is possible because almost every activity that the employee performs requires scanning a barcode. Stickers with barcodes are not only found on products stored in the warehouse, they are also applied to product locations on shelf units, containers and the bins in which products are transported, as well as workstations and identification badges assigned to each individual employee. By constantly scanning various types of barcodes, employees feed the computer system with data not only about their performance, but also about their current location within the workplace, breaks in the work process and periodic fluctuations in the pace of work.

Amazon uses this data towards various ends, some of which fall outside the traditional boundaries of managerial prerogative and have no foundation in labour law. An example of this are penalties for taking 'additional breaks at work', if the system shows that the employee did not perform any registered activity for a period longer than 3 minutes. Called "time off task" in company jargon, such "breaks" in the working sequence refer to time not spent scanning barcodes. Workers might use these moments to comply with health and safety regulations (like fetching a ladder to safely reach for an item on the upper rack of a shelf

[6] Warehouse workers formed the Amazon section of OZZ Inicjatywa Pracownicza soon after POZ1 was opened in December 2014. OZZ Inicjatywa Pracownicza is the largest and the only representative trade union at Amazon, with presence at all 10 of the company's distribution centres in Poland and 1,041 employee members as of 31 December, 2022. *See*: www.ozzip.pl

unit), assist a recently hired employee, replace a broken scanner, walk to their workstation, talk with a co-worker, sit down on a chair to rest, or use the bathroom, among many other possibilities. Punishment for going over 3 minutes in such cases usually involves getting called to the manager's desk for a correctional talk or receiving a warning letter. Employees are often only informed of the total sum of these break periods per unit of time (such as the entire working day).

The productivity quota is set for a period of one month based on the individual performance of all warehouse associates during the preceding period. For this purpose, the system "calculates" new "performance indicators" at the level of a certain percentile of individual work results, ranked in ascending order. Importantly, it is not possible for all employees to achieve the minimum. The system assumes in advance that a certain number of the least efficient workers, which the company indicates as the 10th percentile, will not meet the productivity quota. Workers who perform at this percentile will receive a negative evaluation result. This particular aspect of the evaluation system has been especially criticized by trade unions.

When employees exert themselves more, the productivity quota rises in the next period. This mechanism is independent of any organizational and technical improvements made in the work process. It may therefore be that the productivity quota increases only because some employees work over and above performance indicators – what the trade unions believe occurs as a rule – despite the lack of any technical improvements[7]. Amazon maintains that since its system of "minimum indicators" does not serve to determine the amount of piecework pay, the legal norm expressed in Polish labour law,[8] which ties the rise of performance quotas to organizational and technical improvements in the work process, does not apply.

In fact, there are many productivity quotas at Amazon. Each function has its own "performance indicator" expressed by the number of "processed" (picked, packed, sorted, stowed and etc.) products per hour of work on average. Due to their similarity, functions are combined into "families" and these are in turn arranged by department (Pick, Pack, AFE, Stow and etc.). The computer system steers an employee's work in such a way that, depending on the priority of orders, it moves them between several or even a dozen or so functions during one working day. Transitions between functions from the same family are not noticed by employees, despite the fact that they differ in productivity quotas. The function does not change the way an employee works. The employee continues to perform the commands that the computer or scanner communicates, except that the characteristics

[7] As one of the trade unions noted in a statement on wage increases in the last quarter of 2017, "recently the quotas (minimum targets) have also grown. Over the period of one year the quota increase for some processes was even 40% (processes: LP-Receive, Pack multi, Returns) or 20-30% (Pack single, Receive, Gifts). Wage rises do not offset the much greater workload." *See*: OZZ Inicjatywa Pracownicza at Amazon Fulfillment Poland Sp. z o.o., *Inicjatywa Pracownicza Amazon o ostatnich podwyżkach* (translation: the Workers' Initiative on the recent wage increases), (4 September 2017), https://www.ozzip.pl/informacje/ogolnopolskie/item/2296-inicjatywa-pracownicza-amazon-o-ostatnich-podwyzki, (last accessed on 18 August 2023).

[8] In § 2, Article 83 of the Polish Labor Code states: work standards are determined in accordance with the level of technological advancement and organization of work. Work standards may be modified along with the introduction of technical and organizational measures that improve the efficiency of work.

of the products that pass through the employee's hands change. This change may not be discernable to the employee. In addition, employees often do not work continuously during the week in the same department of the warehouse (internal rotation), what does not exempt them from being assessed by the evaluation system. Thus, within the evaluation period of one week, an employee is usually subject to many different "performance indicators".

Yet the degree to which an employee meets the productivity quota while performing a given function is not always taken into account in the weekly evaluation. It *is* taken into account only when the *total working time* in a given function during the week is not less than 5 hours. When this condition is met, the degree to which an employee met the productivity quota in relation to the functions they performed is *averaged*. Ultimately, the employee's work is assessed by the percentage of the productivity quota that she achieved (as in, "98% to the target", or "105% to the target"). Considering that employees perform several or even a dozen or so functions during the working week while processing various products of different sizes (setting aside the fact that some processes do not actually distinguish between sizes) or in different departments, in fact, their weekly productivity quota (if a quota were to be extracted for such a time period) does not actually correspond to any quota assigned to a particular function, or which is communicated by managers to employees. In effect, employees have no way of discerning what exactly is expected of them during the working day.

2.2. Quality Quotas.

According to Amazon's workplace policy for its fulfillment centers in Poland, the quality indictor is set as "the number of errors made per one million chances of making an error". The number of errors made by employees in a working week is compared with historical data from the same warehouse department. Errors are detected automatically by the system or by other employees performing the function of quality control. It is always the system that links a specific error to an employee. Quality is also presented to employees in an average value, expressed as percentage to target.

2.3. Evaluation Results.

An employee evaluation can be: 1) negative, if the employee's average performance during the working week is lower than 100% of the productivity quota or 80% of the quality quota; 2) neutral, when the employee's average performance amounts to at least 100% but not more than 120%, or if the quality quota is at least 80% but not more than 100%; or 3) positive, when the employee performs above 120% in productivity or above 100% in quality. A negative evaluation results in the employee receiving 'feedback about the need for improvement', and in certain situations, a "recommendation for dismissal". If the evaluation is neutral, no feedback is issued. If the evaluation is positive, an employee might receive

praise, but this is rare in practice. Printouts from the system are only handed out to employees in the case of negative evaluation.

Recommendations for dismissal are generated by the system when an employee has been negatively evaluated for the fourth time in a short period. These intervals are specified in the workplace policy. But a rule in the policy allows Amazon to proceed immediately to the fourth stage of the evaluation (recommendation for dismissal) if the employee has already been negatively evaluated 6 times in the past during the year. Significantly, this rule applies even if during other periods in the year, for example, in-between negative assessments, the employee was able to meet or surpass the quotas.

From the workers' perspective, the main problem with Amazon's employee evaluation system seems to be the frequency of evaluation, which instils in workers the constant fear of losing their jobs.[9] This fear also induces the feeling of lack of stability in employment. Further, employees are unable to verify data measured by the algorithms, which greatly weakens their position in relation to the employer. This becomes especially apparent once an employee attempts to bring legal action for an unfair dismissal, which was based on a negative evaluation. Lastly, this system makes the employer's expectations on performance unclear to employees.

3. Litigating Amazon's Algorithms Evaluation System in Poland.

In Poland, judicial assessment of employee evaluation usually takes place when an individual employee files a lawsuit for unfair termination of the employment contract. Until recently, Polish courts assumed that a claimant employee is not entitled to bring action aimed solely at revoking an employee evaluation. Instead, it was argued that an employee evaluation can be examined by a court particularly when it served as the basis for dismissal or if it affected the wage amount. This situation changed with a recent judgment handed down by the Supreme Court of Poland,[10] in which the Court indicated explicitly that an action to repeal an employee evaluation constitutes a civil case in the field of labour law both in the sense of procedural law and substantive law.[11] In effect, the Court admitted that workers are entitled to file lawsuits in labour court so as to initiate judicial control of employee performance reviews. In another judgment, the District Court in Poznań found that an employee's legal interest in litigation may be exclusively based on the claim that by means of the performance review, the employer violated the employee's personal rights. These new interpretations open the possibility for Amazon employees to challenge negative evaluations, regardless of whether they were dismissed or if they experienced any other adverse effects as a result of negative evaluation.

[9] For comparison, in Poland, teachers are subject to performance review once per year, "in order to prevent too frequent evaluation, which could then turn into a repressive measure". Barański A., *Karta Nauczyciela. Komentarz, wyd. X*, 2018, Wolters Kluwer Poland, Warsaw, art. 9(c).
[10] Wyrok Sądu Najwyższego z dnia 17 stycznia 2019 r., sygnatura akt II PK 263/17.
[11] This case concerned the periodic evaluation of an academic teacher. In this situation, as in the case of most employees, labor law does not directly regulate the judicial procedure to appeal such an evaluation.

Up to now, in as far as the authors are aware, no Amazon worker has challenged an employee evaluation in court (in Poland). All cases known to the authors concern employee evaluation only indirectly, that is to the extent that it was the basis for dismissal. In these cases, the employees questioned the evaluation by filing lawsuits in labour court for unfair termination. An important caveat must be mentioned here. The courts ruled in these cases with the broadly accepted thesis in mind that termination of an employment contract with notice is the ordinary way of severing the employment relationship, available to both parties. As such, this form of termination is generally warranted and does not require any particularly serious incentive. It is enough that the reasons for dismissal are indicated in writing and that they are precise, genuine and understandable to the employee.[12] In practice, this means that proving the mere fact of having carried out a performance review, which generated a negative outcome, usually suffices for an employer to substantiate the termination. Issues like the selection of evaluation criteria, or the methodology used in evaluating are typically treated as secondary. In effect, the reason for dismissal is not examined by the court as thoroughly as, for example, when a worker is dismissed due to a serious violation of basic duties (termination without notice).[13]

In 2018 and 2022 the Circuit Court in Poznań (court of second instance) ruled in favour of Amazon in two cases involving employee evaluation. The claimant employees' contracts had been terminated with notice on the basis of negative employee evaluation due to not making the productivity rate. In both cases, the Court found that the employee evaluation, which had been conducted in the manner described earlier in this article, was both objective and fair. In effect, termination of the employment contract was justified in both cases.[14]

Nevertheless, in a third case filed under similar circumstances, already the District Court in Poznań (court of first instance) ruled that Amazon's system of periodic employee evaluation violates Polish labour law.[15] According to the Court, an employee evaluation system cannot be based on constant competition, or what witnesses referred to in their testimonies as a 'rat race'. Moreover, the Court found that an evaluation system that does not actually take into account the employee's positive achievements (praise) is unacceptable. Significantly, the Court established that recommendation for dismissal at Amazon is made only on the basis of the number of negative evaluations ('feedback about the need for improvement') – thus, that it is entirely automated.[16] In ruling on the appeal, the Circuit Court in Poznań shared this argumentation and noted:

All of the employer's internal policies must either comply with norms laid out in the Labour Code, or be more favourable to employees. This is a kind of minimum protection guaranteed to employees by the legislator. The Code's provisions supersede all of the

[12] Wyrok Sadu Najwyższego z dnia 4 grudnia 1997 r., sygnatura akt I PKN 419/97, and Wyrok Sądu Najwyższego z dnia 2 października 1996 r., sygnatura akt I PRN 69/96.
[13] Pursuant to Article 52 § 1 point 1 of the Polish Labor Code.
[14] Wyrok Sądu Okręgowego w Poznaniu z dnia 18 wrzesnia 2018 r., sygnatura akt VIII Pa 14/18 and wyrok Sądu Okręgowego w Poznaniu z dnia 28 października 2022 r., sygnatura akt VIII Pa 62/22.
[15] Wyrok Sądu Rejonowego Poznań - Grunwald i Jeżyce w Poznaniu z dnia 6 lutego 2019 r., sygnatura akt V P 713/16. The Court found that Amazon's employee evaluation system is an abuse of the law, violating the general rule in Article 8 of the Polish Labor Code.
[16] *Ibid.*

employer's less favourable policies and can be applied directly. […] [T]he assumption that at least 10% of employees, regardless of whether they performed their work objectively with due diligence and in a conscientious manner, will receive a negative evaluation distorts the nature of the employment relationship. In this regard, the employer abused its position by creating a system of competition among employees, which did not involve any form of reward for them, but only the lack of negative effects. Again, it must be emphasized that [in this system] some employee would always be evaluated negatively. This is an extremely anti-worker policy that is contrary to the spirit of labour law. The District Court correctly observed that this policy should not apply.[17]

The cases discussed above show that Polish jurisprudence is not consistent in its legal assessment of the performance review system at Amazon. So far, no such case has been brought before the Supreme Court. In all of the cases examined in this section, the value of the dispute, which is related to the wages that warehouse associates earn at Amazon, was too low for the parties to be entitled to an appeal in cassation to the Supreme Court.[18] The cases discussed here were adjudicated in the legal context that applied before entry into force of the GDPR.

4. The GDPR and Employee Evaluation.
4.1. Human Intervention.

Article 22(1) of the GDPR lays down a general prohibition for decision-making based solely on the automated processing of personal data, such as work performance metrics. In turn, the regulation establishes the right not to be subject to a decision based solely on the automated processing of personal data, or the right to human intervention (as indicated in Recital 71 of the GDPR). In interpreting this article, the following doubt arises: does the phrase "based solely on automated processing" exclude from the scope of application of this provision any act of personal data processing, in which at some stage, a human being takes part? Or, does human participation have to significantly impact the result of automated processing in order for the prohibition to not apply? In other words, what degree of human intervention makes a decision no longer solely based on automated processing?

Ambiguities in the interpretation of Article 22 have been most notably addressed in the Article 29 Data Protection Working Party's guideline text on the GDPR.[19] The guideline advises, that to qualify as human intervention, the data controller cannot "fabricate human involvement", but must "ensure that any oversight of the decision is meaningful, rather than just a token gesture".[20] As such, human input could not be boiled down to rubber-stamping

[17] Wyrok Sądu Okręgowego w Poznaniu z dnia 10 czerwca 2020 r., sygnatura akt VIII Pa 135/19.
[18] According to Article 398^2 § 1 sentence 1 of the Polish Code of Civil Procedure, an appeal in cassation is inadmissible in cases concerning labor law and social insurance, in which the value of the subject of the appeal is lower than 10,000 PLN (about 1,900 GBP).
[19] Article 29 Data Protection Working Party, *Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679*, European Commission, (adopted on 3 October 2017, Revised and Adopted on 6 February 2018.
[20] *Ibid*, at 21.

approval, or "entering data into the system, supervising technical aspects of its functioning, or merely applying the decision taken by the automated system".[21] In the context at hand, genuine human input would require a manager to have the authority to change a computer-generated negative employee evaluation, thereby overriding the algorithm. The manager would also have to be equipped with the competence to consider other factors than just the company's performance indicators in assessing employees. What these 'other factors' are may in fact differ from one workplace community to another.

Automated processing under Article 22(1) of the GDPR will thus undoubtedly still include such manager's activities like handing "feedback" printouts to employees or presenting them notices of contract termination, based on negative performance calculated by the computer system. In these activities, the manager could, in fact, easily be replaced by an algorithm. The prohibition in Article 22(1) of the GDPR would only not apply, if workplace policy instructed managers to verify data generated by the automated employee evaluation system and take into account the employee's contributions that were not captured in the scanning of barcodes.

In effect then, the right to human input expressed in this provision relates directly to data controllers' authority, to use their own discretion when issuing decisions based on the automated processing of personal data. Consequently, a functional interpretation of this provision leads to the conclusion, that the degree of human intervention must, in fact, be quite significant.

4.2. Article 22(2) of the GDPR.

The right to human input is not absolute. Article 22(2) of the GDPR provides three exceptions to the general prohibition on automated decision-making based on the processing of personal data, if the decision:

a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;
b) is authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
c) is based on the data subject's explicit consent.

We will examine these clauses in the reverse order. Firstly, an employee's consent, even if obtained upon signing the employment contract, can be withdrawn at any time. Following Article 7(3) *in principio* of the GDPR, the data subject has the right to withdraw consent to the processing of his or her data at any time. As stated in Article 7(3) *in fine*, it must be as easy to withdraw as it is to give consent. Clearly then, if an employer's right to dismiss workers based on a negative algorithmic evaluation of their performance was conditioned

[21] Otto M., nt. (3).

only by an employee's consent, it would in theory at least, be very difficult for the employer to actually impose this method of evaluation.

In the second clause, the GDPR locates the legal premise for this exception in other Union or Member State normative acts. In effect, its inspection requires a discussion of employee evaluation in the context of Polish labour law.

4.3. Employee Evaluation in Polish Labor Law – Substantive Law.

As a derivative of managerial prerogative associated with running a workplace, employee evaluation is undoubtedly an employer's right. Polish labour law does not regulate how this right should be exercised besides setting a minimal standard, by which employers must use fair and objective criteria in evaluating employees and their performance.[22] Employee evaluation can be independent (a periodic review) or it can be functionally related to another HR decision (for instance, it might precede the intention to terminate an employment contract). The Supreme Court of Poland has held that the periodic evaluation of an employee consists of 'a series (an aggregate sum) of specific evaluations (opinions) expressed according to specific criteria, which on the one hand have the value of objectivity (an average score), but which on the other hand are not free from individual assessment on the part of supervisors'.[23] Yet what in this judgement the Court considered a side effect of the procedure of composing an aggregate employee evaluation, in fact makes for its bottom line; that is, individual discretion on the part of managers. An evaluation should, in effect, be the sum of its objective and subjective parts. Further, as the Court has argued, workers must know and be able to understand in advance what the employer expects of them.[24] As such, employees must be familiar with both the methods used to conduct a performance review as well as the criteria applied, before starting work.

Importantly, employee evaluation should be comprehensive, in that it cannot be used as punishment for incidental behaviour. This essentially distinguishes an evaluation from disciplinary action.[25] The Polish Labour Code contains a closed catalogue of penalties that employers can apply against workers who engage in disorderly conduct.[26] The use of other forms of punishment is considered an offense against the rights of workers.[27] In this context, the Supreme Court of Poland ruled that the practice of handing out 'warning letters' to employees regarding particular behaviours and then using such letters to justify termination

[22] Article 94(9) of the Polish Labor Code. It is worth noting, that some branch-specific acts (*pragmatyki służbowe*) do contain more detailed regulations on this matter.
[23] Postanowienie Sądu Najwyższego z dnia 6 kwietnia 2011, sygnatura akt II PK 274/10.
[24] Wyrok Sądu Najwyższego z dnia 10 listopada 1998 r., sygnatura akt I PKN 428/98.
[25] For more on this subject in the Polish legal context, *see*: Krzyżaniak P., *Interes publiczny w rozgraniczeniu funkcji oceny pracowniczej i kary porządkowej w zakładzie pracy,* in *Monitor Prawa Pracy,* 2, 2019, 14-18.
[26] In accordance with Article 108 § 1 of the Labor Code, possible penalties are a warning, or a reprimand. These penalties can only be applied in situations that are listed in this provision, or upon failing to comply with the adopted organization and order of the process of work, regulations on occupational health and safety and fire protection, as well as the adopted methods of confirmation of an employee's arrival and presence at work and justification of any absences from work.
[27] According to Article 281 § 1(4) of the Labor Code.

is unacceptable.[28] Similarly, lower courts in Poland have found other types of 'correctional letters', drawn up by supervisors, to constitute a violation of labour law.[29] It would thus be unacceptable to restrict an employee evaluation to specific behaviour, types of employee activity or aspects of their work, while omitting others. Such practice could lead employers to deploy their right to evaluate employees within legal parameters reserved for the regime of employee disciplinary liability. Separating these two types of managerial prerogative is important, because the regime of disciplinary liability is allowed to infringe upon an employee's personal rights[30] to a much greater extent than a performance review. The need for this distinction becomes more palpable when the employee evaluation system violates employee privacy, which is made possible by automated algorithmic management.

It follows then, that there is no place in Polish labour law for automated decision-making that is legally binding for employees. The use of algorithms to track and assess performance, like in the case of Amazon, inevitably leads to a one-sided employee evaluation. Once such an evaluation becomes one-sided, it ceases to meet the criteria of *objectivity and fairness*. In Polish labour law, as mentioned earlier, it is both the employees as well as their performance that are to be evaluated.[31] An evaluation should therefore be a holistic appraisal of an employee that is not restricted only to that employee's selected aspects or activities. In disciplinary action, it is not the employee who is 'evaluated', but the disorderly conduct. Notably, disciplinary procedure also requires human input, as the employer must first give a hearing to the employee, before imposing a penalty.[32] Labour law in Poland does not actually provide for anything in between the general, global evaluation of an employee and their performance, and a penalty for specific, incidental conduct. In both, the human factor is indispensable. Finally, it seems that blurring the distinction between evaluation and punishment is a feature of the employer's powers enhanced by algorithmic management. As we have shown here, in the Polish context, these are separate legal regimes that cannot be merged at the employer's will.

4.4. Employee Evaluation in Polish Labor Law – Procedural Law.

Turning to a more procedural consideration of clause "b" in Article 22(2) of the GDPR, the law in Poland does not provide explicit legal protection to employees who question the act of conducting an employee evaluation. Although the Polish Supreme Court established the existence of a judicial route for litigation that aims to repeal or change an employee evaluation, for a long time no substantive legal basis for such litigation was recognized.[33] Instruments of civil procedure, whereby a claimant can demand that a court establish the existence or nonexistence of a legal relation or right,[34] were excluded from application since,

[28] Wyrok Sądu Najwyższego z dnia 23 listopada 2010 r., sygnatura akt I PK 105/10.
[29] Wyrok Sądu Okręgowego w Świdnicy z dnia 6 września 2017 r., sygnatura akt IV Ka 433/17.
[30] Understood as health, freedom, honor, or freedom of conscience, among others.
[31] The Polish Labor Code, article 94(9).
[32] The Polish Labor Code, article 109 § 2.
[33] *See*: Postanowienie Sądu Najwyższego z dnia 4 lutego 2009 r., sygnatura akt II PK 226/08.
[34] Litigation described in article 189 of the Polish Code of Civil Procedure.

as it was argued, a negative periodic evaluation does not, by itself, create any right or legal relation. Further, it was argued that claims to establish a legal relation or right cannot effectively aim at establishing facts that are not of a law-shaping nature. In effect, it was maintained that labour courts could examine employee evaluations only indirectly, as a source of accompanying ailments. As the Court explained in one of its judgments, "[i]t cannot [...] be ruled out that a negative evaluation can affect employee rights or obligations. It can also infringe upon an employee's personal rights. However, in each of these cases, it would be necessary for the claimant employee or the court to indicate specific substantive legal grounds for the asserted claims".[35]

Only in 2019, in a judgement that was already discussed earlier in this article,[36] the Polish Supreme Court pointed directly to the availability of both a procedural judicial route and a substantive legal claim, to employees who were evaluated negatively. This judgment, however, concerned the periodic evaluation of an academic teacher. It is impossible to predict how the courts will react in the future to litigation brought by workers from other professional groups, like warehouse associates, against the very act of evaluation, when it does not involve further adverse effects. Although this judgment, in our opinion, opens an opportunity for all employees, it does not yet determine the existence in Polish law of "suitable measures to safeguard the data subject's rights and freedoms" or the "legitimate interests" of employees against automated data processing. Importantly, the GDPR specifies that these legal measures must be "suitable", thus not just any, legal measures. In sum, the lack of judicial protection for claims aimed at repealing an employee evaluation in the strict sense, forces the prospective employee-claimant to demonstrate specific adverse effects to the employment relationship that would give legal grounds for litigation. This obstacle effectively precludes the application of the exception in Article 22(2) letter b of the GDPR in the case of automated evaluation without employee consent.

4.5. Article 22(2) letter c of the GDPR.

It remains to determine whether conducting an employee evaluation in an automated manner is necessary for entering into, or performance of, an employment contract. In answering this question, we must refer again to the standards of employee evaluation laid out in Polish labour law. As discussed above, for the application of objective and fair evaluation criteria the human factor must be meaningfully harnessed in the course of evaluation. Effectively, it already seems that automated data processing, based on statistical methods and imbued with a margin of error by definition, may not ensure a proper degree of individualization in evaluating employees.

Polish labour law sets the rule that in their duties as employees, workers are obliged to perform work both conscientiously and with due diligence.[37] While due diligence represents an indicator of employee performance that can be measured in an objective manner,

[35] Wyrok Sądu Najwyższego z dnia 31 stycznia 2017 r., sygnatura akt I PK 49/16.
[36] Wyrok Sądu Najwyższego z dnia 17 stycznia 2019 r., sygnatura akt II PK 263/17.
[37] The Polish Labor Code, article 100 § 1.

conscientious performance cannot be measured objectively. This fact rules out the prospective role of automated employee evaluation in performing the employment contract, at least in the current state of technological development. Further, since the terms of employment contracts as well as those of other legal acts, on the basis of which the employment relationship is established, cannot be less favourable to the employee than the provisions of labour law,[38] so the automated employee evaluation could not be a necessary precondition for entering into, or performance of, an employment contract. In the event that automated employee evaluation was postulated in internal workplace policies, its application would still be excluded by the general rules of Polish labour law. [39]

5. Conclusions.

It follows that Article 22(1) of the GDPR allows employees an effective right not to be subject to an employer's decision based on automated data processing. This right should not raise any doubts in so far as it pertains to decisions concerning the employment contract. The case whether an automated employee evaluation is an example of a decision within the meaning of Article 22(1) of the GDPR has yet to be settled definitively. It is important to remember that in describing the notion of "decision", after the words "produces legal effects", the rest of Article 22(1) of the GDPR reads, "or similarly significantly affects" the data subject. This last part considerably extends the catalogue of possible impact that a decision might have in the sphere of employee interests. As the Article 29 Data Protection Working Party explains, for data processing to significantly affect someone, "the decision must have the potential to", for instance, "significantly affect the circumstances, behaviour or choices of the individuals concerned".[40]

The Court of Justice of the European Union (CJEU) is currently hearing the first case, in which it has been asked to interpret Article 22 of the GDPR.[41] Notably, the CJEU is deciding, whether an automated credit score rating (an evaluation of the data subject) established by a credit information agency on the basis of automated processing (for the purpose of deciding if a bank enters into a loan contract with the data subject), already amounts to a decision in the sense of Article 22(1). If in its judgment, the CJEU adopts a broad interpretation of the notion of a decision under Article 22(1), findings in this case might prove important for the issue at hand.

More broadly, automated decision-making based on profiling simply runs counter to the nature of employee subordination (or the principle of performing work under the employer's unilateral control), which characterizes the employment relationship. That subordination is understood as a human to human relationship. Due to its strict nature and wide scope, it simply has to be individualized to an extent that is not guaranteed by algorithms. In this respect, automated management presents the further risk, already noted in the literature, of

[38] Pursuant to The Polish Labor Code, article 18 § 1.
[39] The Polish Labor Code, article 9.
[40] Article 29 Data Protection Working Party, nt. (19).
[41] Case C-634/21, *SCHUFA Holding and Others (Scoring)*, 15 October 2021.

leaving managerial prerogative unchecked and therefore no longer able to reconcile with "the respect of the human dignity of workers necessary in democratic societies founded on equality principles".[42] As we have shown in this article, Polish labour law already contains a safeguard intended to rationalize and limit managerial prerogative in this respect. That safeguard is the role of human supervisors and their personal discretion in the process of employee evaluation. It is the human factor, which assures that an employee evaluation abides by the legal standards of objectivity and fairness. Such understanding of the relevance of the role of human supervisors and their individual judgment is reinforced by Article 22 of the GDPR. Importantly, failure to use this authority of individual discretion on the part of supervisors may be associated with an employee's right to refuse to be subject to the effects of automated individual decision-making.

Finally, the norm expressed in Article 22 of the GDPR may allow for preventing the further concentration of managerial prerogative in HR processes. As we have described in this article, algorithmic management has reduced or depreciated the role of managers. In the case of Amazon warehouses in Poland, neither individual managers who come into daily contact with employees, nor management on the national level has any actual bearing on the algorithmic evaluation system. This process does not mean the erosion of employer's managerial prerogative as such, but rather its greater concentration within the company's hierarchy. In large, international enterprises like Amazon, the automated employee evaluation system is designed and implemented on a central level by the IT provider. The system is likely administered in the company's EU headquarters in Luxembourg or even at the company's United States headquarters in Seattle. In effect, authority does not disappear, but moves to a higher level that is less discernable to employees and less susceptible to their initiatives. Moreover, this hierarchical concentration of managerial prerogatives makes no consideration of the values specific to a particular workplace community, which should be taken into account when evaluating employees. The decoding of these values is in fact an eminently human task, which can only be conducted by a human-member of such a community. Article 22 of the GDPR might set a new standard for the greater role in authority of individual managers, at least in making HR decisions. For employees, this might contribute to bolstering security and stability in employment. In terms of the social impact of the law, or in this case, how the law affects social relations inside the workplace, this provision might in effect lead to rendering relations between the employer and employees more democratic, as workers stand to gain more voice on the job.

[42] De Stefano V., *"Negotiating the Algorithm": Automation, Artificial Intelligence and Labour Protection*, in *Comparative Labour Law & Policy Journal*, 41, 1, 2019, 20.

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