



WYDZIAŁ PRAWA  
i ADMINISTRACJI

Uniwersytet Łódzki

Irmina Miernicka

*Requirements concerning appearance of employees as an interference  
in their sphere of freedom protected by law*

*(Wymagania dotyczące wyglądu zewnętrznego pracownika  
jako przejaw ingerencji w chronioną prawem sferę jego wolności)*

PhD Thesis prepared at the Labour Law Department  
under the supervision of prof. Zbigniew Góral  
and PhD Ewa Staszewska as an auxiliary supervisor

Lodz 2019

Due to the dynamic development of foreign enterprises and large corporations on the Polish market, the rules regarding employee appearance while performing their duties became more restrictive and required both neatness and adequacy to the employee's position. Broadly defined *dress code* is used increasingly often - it concerns mainly the professions and industries in which the contact with a client or a contractor is important. Appearance is one of the main elements of the human image, it also constitutes a tool for non-verbal communication with the world, and elements of it may manifest a specific tradition or help in the protection of health and safety. It is not surprising, therefore, that employers also see the importance and economic potential of an appropriate appearance, it is in their interest that the employees representing them contribute to the strengthening of their positive image and to their distinction on the market. Moreover, by means of such requirements, the employer can ensure order and safety in the work process, as well as facilitate building of relations between colleagues. Undoubtedly, however, regulating the appearance of employees can be a source of potential conflicts. This seemingly marginal issue, in practice, raises many doubts from the point of view of the labor law that do not have direct solutions in the provisions of the applicable law. It is an interference in the employees' sphere of freedom, which is protected by law. For this reason, a detailed analysis of this topic is necessary.

Regarding the methodology of research, the dissertation was prepared primarily based on a formal-dogmatic method. The main subject of the research was the content of labor law norms. However, due to the varied nature of the problems undertaken in this work, it was also justified to refer to selected regulations of other branches of law, including constitutional, civil, and tax law, or acts regulating matters related to the performance of specific professions. The comparative method was used as an auxiliary to supplement the considerations within the Polish law. The solutions in force in the Polish law, relating mainly to the criteria and forms of employee discrimination, were confronted with regulations operating in the legal systems of other countries, such as the United States, Great Britain, France, and Germany. Despite the differences between legal orders and applicable legislation, many problems appearing against the background of this issue were

revealed to be of universal nature, and the solutions already applied in other countries can serve as an example and pattern for Poland as well. It also allowed for presenting diverse ways in which the subject matter is regulated. Due to the specific character of the undertaken topic and the fact that the discussed issue has not yet been further described in the scientific literature, in some fragments of the dissertation, it was necessary to use the journalistic method, which allowed for fully presenting the raised issues and the conclusions drawn from their analysis. This is intentional, serving to organize and justify the considerations.

In the dissertation, I used literature from various branches of law, such as labor law, constitutional law, civil law, tax law. As a supplement, I have used selected titles from the field of psychology, sociology, anthropology, and economic sciences, in some place I have also referred to journalistic articles. Additionally, to fully present the studied issue, it was necessary to analyze selected decisions of Polish courts, including the Supreme Court and the Supreme Administrative Court, and judgments of the European Court of Human Rights, the Court of Justice of the European Union, as well as the case law of foreign national courts. I have also referred to selected interpretations and letters from tax authorities.

This comprehensive approach may, on the one hand, provide valuable guidance for employers so that they can meet their business goals in a manner consistent with the law and morality, and on the other hand, be a tool to facilitate an appropriate assessment if one of the parties decides that their rights in this respect have been violated. Technological and social progress is going to make the introduction of requirements regarding the appearance of employees a more frequent problem that will require a response, both on the part of the doctrine and the jurisprudence. Undoubtedly, this is a topic worth devoting more attention to. In my opinion, proper analysis and elaboration of the above issues allowed for answering most of the posed questions and for creating a dissertation that handles the issues that will be more often addressed among theoreticians and practitioners of labor law.

The main thesis, which I present in this dissertation, is the assumption that the requirements submitted by the employers to the employees, regarding their appearance, are an interference in the sphere of freedom and the rights of the employee, which

is protected by law. Therefore, they cannot be formulated arbitrarily and require adequate legal justification and a proper form. It is also very important to determine the limits of such interference and the effects of their exceeding by the employer. Only well-argued and well-communicated requirements regarding the external appearance, within the limits of the authorized interference, should be considered binding for the employee and, consequently, having specific consequences in the event of non-compliance.

The dissertation consists of five chapters. Before proceeding with legal considerations *in the strict sense*, the described issue should be outlined from the point of view of social, economic, and cultural conditions. It is important to show the boundaries of the concept of "external appearance of the employee" and its meaning. In addition, it is necessary to present such phenomena as *dress code*, *branding*, or *employer* and *employee branding*, which have a direct impact on employers' requirements regarding the appearance of the employees. The main reasons for employers to introduce such requirements were also discussed. Next, I focused on describing the basics of protecting the freedom and rights of an employee. It is impossible to write about interfering in the protected area of the freedom of an employee without first considering the concept and scope of these freedoms. At the same time, it is necessary to take into account both international standards of protection of the freedom and rights of employees, as well as protection of employee's freedom and rights in Polish law. Chapter I presents these issues.

Subsequently, in Chapter II, I present considerations on the legal justification for the employer's ability to interfere in the external appearance of the employee. It became evident that such a legal justification are many provisions found in the labor law provisions. Admittedly, they do not refer directly to the appearance (except the regulations regarding personal protective equipment, clothing, and work footwear), but they pertain to general obligations of the parties in the employment relationship and dependencies between them. It should be remembered that while the work is being performed, the employee remains under the management of the employer and is obliged to carry out the employer's work-related instructions. I am in favor of the broad definition of this concept, which means that the requirements regarding appearance can also be included in the category

of work-related instructions if they are well-justified. The employee also has an obligation to look after the welfare of the workplace, which may be influenced by the right appearance, affecting the reception of this workplace by clients or contractors. On the other hand, if it is necessary to ensure health and safety at work, the employer is not so much entitled as obliged to interfere with the employee's appearance. In addition, provisions referring directly to the appearance of an employee or elements of this appearance, such as outfit, can be found in other laws regulating the performance of specific professions. The reasons for introducing such rules vary from the preservation of tradition through the desire to set apart this category of employees to security reasons.

After answering the question whether there is a legal justification for the employer's introduction of requirements regarding the external appearance of the employee, it is necessary to analyze in which legal form such requirements can and should be implemented. In some situations, they arise directly from the generally applicable provisions of law and there is no need to introduce additional regulations in this respect. In other cases, however, it is extremely important to specify the expectations of the employer as to the clothing, make-up or hairdo allowed in the workplace. This will greatly facilitate the enforcement of desired behaviors, and in the event of a dispute, it will also be possible to determine whether the regulations introduced by the employer are not excessive and do not exceed the authorized limits of interference in the appearance of employees. Written rules will also be a kind of guide for employees and will allow them to avoid, often unaware, violations of their duties. Most often, such requirements are introduced through the work regulations, as according to art. 104 § 1 of the Labor Code, the work regulations determine the organization and order in the work process and the related rights and obligations of the employer and employees. There can be situations when the employer's work regulations do not apply, or if individual arrangements of the dress code are required for a given employee, due to, for example, his or her position - then the relevant provisions may be included in the employment contract itself. There is also the question of shaping the policy regarding the appearance of employees by way of an employer's recommendation and the company's custom. Chapter III addresses these issues.

Another important research problem, taken up in Chapter IV, is to find the limits of the employer's influence on the external appearance of employees. Undoubtedly, interference in the appearance of the employee is at the same time an interference in the sphere of his or her freedom, because it limits the freedom of self-determination and self-expression, expression of his or her views, and in some situations also manifesting his or her, for example, religious beliefs. Due to the significance of these freedoms, the employer's interference cannot be absolute. By introducing a *dress code*, the employer may abuse his or her managerial rights at the same time, and the basic function of labor law is to ensure proper protection of an employee as an economically weaker party in the employment relationship. However, it should be remembered that the tools of this protection should not be constructed in such a way as to make it impossible for the employer to conduct business. In my opinion, the limits of interference in the appearance of employees is the most important, but also the most difficult and the most complex aspect of the considerations. They are determined primarily by the two main obligations incumbent on the employer, i.e. the obligation to respect the employee's personal rights and to observe the principle of equal treatment and the prohibition of discrimination in employment. It should also be remembered that the limits of employer interference will be different when certain rules regarding the appearance of an employee result directly from the provisions of laws and other acts of generally applicable law. This is the case for workwear, official clothing, and uniforms. Therefore, it is not possible to establish clear limits of employer's interference in the external appearance of employees, as they result from many factors concerning a specific case. However, analyzing this issue based on literature and case law, both domestic and foreign, led me to make the thesis that there are certain general rules that compliance with will protect the employer against allegations of excessive interference in the appearance of employees. In addition, at the end of the chapter, I raised a particularly important question of the effects of the employer's exceeding these limits and violating the related employee rights. An employee may use a wide range of measures, resulting both from labor law provisions and, alternatively, from civil law provisions, depending on the type of violation made by the employer.

Although such an employee's protection may seem enough, it must be pointed out that there may be doubts as to whether the employer has indeed abused his or her rights. Due to the blurred limits, depending on many factors, the employee's position, despite a wide range of resources, may be weakened. Moreover, in many cases it may be difficult to prove the causation between the breach made by the employer and the resulting negative effects on the employee.

Finally, in Chapter V, I have analyzed the consequences of not respecting the requirements for the appearance by the employees themselves. It is necessary to ask a question, what if the employee does not comply with the requirements correctly defined by the employer, which do not exceed the limits of the permitted interference. In the first place, it should be considered whether the employee's failure to comply with such requirements can limit his or her access to employment. In the course of the employment relationship, such a case can be classified as the basis of the employee's disciplinary liability - pursuant to art. 108 § 1 of the Labor Code, non-compliance by the employee with a fixed organization and order in the work process may result in an admonition or a reprimand. When clothing or work shoes are required at a particular workplace, the violation of such an obligation by the employee may be the basis for applying, in addition to the previously mentioned penalties, a financial penalty. The possible material liability of the employee if the elements of clothing are an entrusted property must also be considered. Next, the question arises about the possibility of terminating the employment contract by notice given by the employer, the dissolution of the employment contract without the notice of termination is also a debatable issue. This would mean that failure to comply with workplace appearance rules should be considered a serious violation of basic employee duties.

The considerations described above are significant for the labor law, so far no one has thoroughly analyzed them, and the practice shows that these problems occur and are becoming increasingly common. Global progress and the dynamic development of foreign and Polish enterprises on the market mean that the introduction of requirements regarding the appearance of employees in the workplace is a widespread practice. On the other hand,

employees are more aware of their rights and in the face of the ubiquitous uniformity of life, including professional life, they feel a great need to express their identity. Therefore, in my opinion, conflicts in this context are inevitable.

Bearing in mind the above remarks, the question arises whether the appearance of an employee should be explicitly recognized by law as a personal good or a feature protected against unequal treatment and discrimination. In my opinion, if the legislation of a given country provides for an open catalog of protected features or personal rights, as is the case in Poland, there is currently no need to explicitly mention the appearance among them. Conditions and social and economic needs are evolving, and such an open regulation, which has been applied both in the Polish labor code and the civil code, allows for adjusting the application of the law to new working conditions. This takes place mainly through case law and considerations conducted by representatives of science. In this respect, first, the achievements of the ECHR and the CJEU should be appreciated, in their judgments they have repeatedly referred to the issue of violation of personal rights or discrimination of employees by interfering in their appearance. It seems, therefore, that when interpreting Polish regulations and resolving conflicts against this background, both doctrine and judicature should derive precisely from certain general principles developed by the two Tribunals. The decisions of American courts dealing with these issues are also a valuable research material. The discussed issue is so universal that it is fully justified to refer to the achievements of other countries, even if there are significant system differences between them.

The approach proposed above also allows avoiding the introduction of very casuistic solutions that would not complete the regulation of labor law. In my opinion, the most important is the education of parties in the employment relationship in this area and the increase of awareness about potential conflicts in such a way as to minimize the risk of their occurrence. Mainly, it is important to provide guidance to employers on how they should formulate and introduce employee *dress codes*, in order not to (often in a completely unaware manner) violate the employee's personal rights or the prohibition of discrimination. On the other hand, employees must also be aware that their freedoms



in labor relations may be subject to certain restrictions to which they will have to adapt. The experience of France, where the appearance is explicitly mentioned in the provisions of the French Labor Code as a protected feature, shows that such a solution is not a measure to prevent violations of the prohibition of discrimination. In the future, however, due to social development, it may be justified to change the provisions of the Polish law by adding the appearance to the catalog of personal rights and discriminatory criteria. In my opinion, however, it should be preceded by an in-depth analysis and systematization of this problem by the doctrine and judicature. The very notion of appearance is in fact a very vague term, not to mention the attractiveness, which is part of it, additionally characterized by a large dose of subjectivism, and therefore doubts may arise as to what the new protected feature really is.

Thus, I express the hope that this dissertation will contribute to the development of research on the introduction of requirements regarding the external appearance of employees, as well as to the increase in the interest in this issue of both representatives of science and practitioners.

15.04.2019

*Grzegorz Bruma*