



Voluntariness of Employees' Consent to the Processing of Personal Data

*Legal, Psychological, and Organizational Aspects**

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Abstract

Consent is crucial in the employee-employer relationship, with the employee often in a weaker position. Of particular concern is when the employee grants consent, giving the employer unilateral authorization to impinge on their autonomy. For consent to be genuine, it must be freely given without any coercion or specified content. This article explores the regulation of consent in the European Union's personal data protection laws, highlighting the need for psychological considerations when legislating voluntary consent. The legal definition of voluntary consent for sharing and processing personal data is analyzed, and empirical research raises doubts about the true autonomy of employees when giving or withdrawing consent. The result of the study shows that employees may feel pressured to provide consent, as their livelihood and that of their family may depend on it. Employers should be aware of these issues. In conclusion, we indicate that consent as a tool for shaping the legal position of employees should be abandoned or only permitted in exceptional cases, taking into account both legal and psychological considerations and implementing additional protective measures.

Keywords: employee consent, employee personal data, imbalance of parties in an employment relationship

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1. Introduction

Due to the factual inequality of the position of the parties in the employee-employer relationship and the resulting possibility for the employer to exert pressure on the employee, labor law limits the possibility of employees to autonomously shape their legal situation through independent decisions, regulating the rights and duties of the parties in the form of so-called *ius cogens* or *ius semidispositivum*. Therefore, employees retain only a certain scope of freedom, defined by law, within which they can negotiate the terms of contractual agreements unless this leads to unequal treatment or the minimum standard of rights established by law is violated. Allowing employees some freedom is very important not only because each employee's personal situation is different, but also due to the need to constantly adapt to the dynamically changing economic, social, and technological conditions in which work is performed¹. In addition, guaranteeing the autonomy of employees contributes to maintaining (increasing) their internal motivation to work, which in turn increases their commitment to carrying out duties².

An expression of respect for the autonomy of employees is also the assumption that the employee may, in situations indicated by law, give consent, i.e. unilaterally allow the employer to perform a specific action, i.e. to encroach on the sphere of their right. While the issue of freedom of contract in the employment relationship, in particular the inalienability of certain employee rights, has been and continues to be discussed in the literature³, the matter of expressing consent by the employee to certain actions of the employer, although equally weighty, is shown less interest. In our opinion, consent given by an employee in the framework of an employment relationship should be examined not only in the legal context, but also as psychological and organizational behavior. The fact that the employee feels that they have no choice but to allow the employer to take some action despite not desiring it, or that they have not been objectively informed about the circumstances surrounding the granting of consent, or that the employer will not respect their decision to refuse or withdraw consent, may – according to the literature – lead to various forms of conduct directed against the organization/ employer. It negatively affects the employee's commitment to work, productivity, creativity, etc.⁴

A starting point for further discussion can be found in recital 43 of the GDPR⁵, which indicates that consent should not constitute a valid legal basis for the processing of personal data where there

¹ Enxi ZHOU: The “too-much-of-a-good-thing” effect of job autonomy and its explanation mechanism. *Psychology*, Vol. 11, Iss. 2. (2020) 299–313. <https://doi.org/10.4236/psych.2020.112019>

² Diana MALINOWSKA – Aleksandra TOKARZ – Anna WARDZICHOWSKA: Job autonomy in relation to work engagement and workaholism: Mediation of autonomous and controlled work motivation. *International Journal of Occupational Medicine and Environmental Health*, Vol. 31, Iss. 4. (2018) <https://doi.org/10.13075/ijomeh.1896.01197>

³ Guy DAVIDOV, Non-waivability in Labour Law, *Oxford Journal of Legal Studies*, Volume 40, Issue 3, Autumn 2020. 482–507. <https://doi.org/10.1093/ojls/gqaa016>

⁴ Vanessa K. BOHNS – Rachel SCHLUND: Consent is an organizational behavior issue. *Research in Organizational Behavior*, Vol. 40, 2020. 100138.

⁵ 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 the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter

is a clear imbalance between the data subject and the administrator. In this context, the question arises whether – due to the contractual imbalance – consent can be used in the relationship between employer and employee. In Opinion No. 15/2011 of 13 July 2011. the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (referred to as the Article 29 Working Party) pointed out that “where consent is required from an employee and there is actual or potential significant harm associated with not giving it, the consent is not valid [...] as it is not voluntary”⁶. The voluntariness of consent, according to the opinion, cannot be mentioned when consent to data processing is a requirement for obtaining employment. Also, the Supreme Administrative Court, in its judgment of 6 September 2011, concluded that an employee’s written consent, given at the employer’s request, to the collection and processing of his or her personal data in this respect violates the employee’s rights and his or her freedom of expression⁷.

In this article we attempt to answer the question of whether the law on consent given by employees is sufficiently developed; in particular, whether mechanisms such as the possibility of withdrawing consent protect employees’ right to make autonomous decisions and give them a real sense of control over their legal situation. Since national legislators do not always define the notion of an employee’s consent yet use consent as a tool by which the employee can authorize the employer to take a specific action, and national definitions are not universally applicable, we present this issue on the example of the regulation of consent to the processing of personal data adopted by the European legislator, which has defined consent in the provisions of the GDPR.

In this regard, it is worth noting that, although provisions on the protection of personal data draw attention to the specificity of legal relationships in which there is an imbalance between the controller and the data subject, such as the employment relationship and the resulting risks, this is not consistently addressed in the content of the relevant legal regulation as the instrument of consent is allowed to be used as a component of personal data processing in employment relationships. It should be noted that consent is not always the primary or most desirable means of ensuring the lawfulness of the processing of personal data.

The first part of the article presents the concept of consent as the basis for sharing and processing personal data in the provisions of the GDPR. The second part discusses research on the psychological aspects of employee consent. The discussion concerns the use of consent as a prerequisite for processing the personal data of employees and job applicants. In the conclusions, we present an assessment of consent to the processing of personal data in particular as an instrument to legalize certain behaviors by the employer, taking into account the imbalance of the parties to the employment relationship.

referred to as the General Regulation on the Protection hereinafter referred to as Regulation 2016/679 or GDPR, *Official Journal of the EU* L 119 of 04.05.2016, page 1, as amended.

⁶ <https://archiwum.giudo.gov.pl/pl/file/5341>, accessed 19/09/2023.

⁷ I OSK 1476/10.

2. Consent as the legal basis for the employer's processing of the employee's/job applicant's personal data in the GDPR

As a rule, personal data processed by the employer may relate to the recruitment process for a job position; conclusion, performance, and termination of an employment contract; the exercise of the rights and performance of duties of an employee or employer; the performance of activities related to the employees' liability (order, compensation); use of the employee's image in connection with its publication in internal and external communication (Article 6(1)(a), (b) and Article 9(2)(a) GDPR); as well as the implementation of the employer's tasks related to the employment of employees (Article 6(1)(c) and Article 9(2)(b) and (h) GDPR). In addition, the data processed by the employer also includes the pursuit or defense of claims; ensuring security on the premises of the employer's facilities; ensuring the protection of information; planning and analyzing employment; and possibly exchanging information about employees employed by entities belonging to the same capital group (Article 6(1)(f) and Article 9(2)(f) GDPR).

Consent is given in GDPR as one of the legal grounds for the processing of personal data, defined in Art. 4(11). According to this definition, the "consent" of the data subject means freely given, specific, informed, and unambiguous indication of will. The term "consent" has been presented by the European legislator from the constructional point of view in such a way that, as part of so-called information autonomy, the person giving consent confirms in the form of a statement or explicit action that they allow the administrator to process personal data concerning them. However, the data subject's behavior must exhibit specific characteristics. Only a manifestation of will in a manner corresponding to these characteristics constitutes consent within the meaning of the regulation. Thus, it is a form of consent in which the employee/job applicant allows the employer to interfere in the sphere of their exclusivity. As a result of giving consent voluntarily, specifically, consciously, and unambiguously, the prohibition of interference with the employee's or applicant's personal data resulting from the previously applicable legal standard is lifted against the employer.

From a practical point of view, it should be noted that it is up to the data controller, who, in the case of data related to the employment relationship, is primarily the employer, to demonstrate that the data subject has consented by way of a statement or other active conduct (an unambiguous, affirmative action) to the processing of personal data. Consent to the sharing and processing of personal data must be the result of a specific action, and therefore should be communicated appropriately. The point is to ensure that there is no doubt that the person giving consent has consented to the processing of data for a specific purpose.

The construction of consent adopted by the European legislator allows the employee (job applicant) to independently dispose of certain personal data. Thus, the decision to provide certain personal data shows the legislator's respect for the autonomy of the employee. The European legislator assumes that,

as a rule, an employee with adequate knowledge of their legal situation may alter it by their behavior, acting intentionally and purposefully.⁸ When making a decision, they may take into account not only their own needs, but also the specific and justified needs of the employer. The employee's autonomy in the aspect of independent disposal of personal data, therefore, includes the freedom to make their own decisions and choices regarding certain personal data, to the extent specified by law. Consent, per the GDPR, is also constructed in such a way as to provide employees and job applicants with control over the processing of their personal data. In the absence of such control, i.e. in a situation where consent is given without meeting the indicated requirements, the consent will be invalid, and thus cannot be the basis for the processing of personal data. Consequently, further processing of personal data will be unlawful.

Voluntariness is mentioned in the first place among the properties that should characterize consent to the processing of personal data by the European legislator. Consent given voluntarily indicates that the person who gives it has a free choice in this respect. This means that the person who gives consent should be able to refuse to give it or withdraw it without suffering negative consequences. The essence of the principle of voluntary expression of consent is freedom from various forms of pressure aimed at forcing it in general or forcing consent of specific content. The attribute of "voluntariness" therefore implies a real possibility for data subjects to make a choice and exercise control over them, which is manifested, for example, in the possibility of withdrawing consent in the event of a change of mind⁹. The European legislator took into account the fact that the position of the administrator and the person giving consent may be unequal in some relationships. Thus, it assumed that, in principle, consent would not be freely given where, for example, there is an imbalance in the relationship between the data subject and the controller (Recital 43 GDPR Preamble), but explicitly allowed consent as a basis for data processing in employment relationships (Recital 155). Therefore, from a formal perspective, the unequal position of the parties in the employment relationship does not exclude the possibility of using consent as the basis for processing the personal data of employees and job applicants. However, it is assumed that this should apply to exceptional situations, which means that in most cases of data processing in the workplace, the legal basis cannot and should not be consent (Article 7a GDPR), due to the nature of the relationship between employer and employee.¹⁰ This relationship is not symmetrical. From a psychological perspective, the employer is the stronger party, backed by experience, knowledge, and legal and organizational assistance. It can therefore be assumed that the employee (job applicant), noticing the asymmetry of this relationship, will consider giving consent not as a voluntary gesture on their part, but rather as a necessary condition for continuing, for example, a recruitment interview or, in general, a condition for accepting a job offer.

⁸ Protection of workers' personal data: General principles. <https://tinyurl.com/k8h6hs7p>

⁹ Dominka DORRE-KOLASA: *Ochrona danych osobowych w zatrudnieniu*, Warsaw 2020, Legalis.

¹⁰ Opinion 2/17, on data protection at work – wp249. <https://ec.europa.eu/newsroom/article29/items/610169/en> accessed 30.10.2022.

The need to provide the employee with the possibility of voluntary consent activates the employer's obligation to refrain from any actions (including any element of inappropriate pressure or inappropriate influence) that violate the employee's (job applicant's) freedom to choose whether to grant or refuse consent. This means that voluntary consent occurs when the employee/job applicant does not feel compelled to give consent and is guaranteed that giving or refusing consent will not result in negative consequences¹¹. In principle, the GDPR stipulates that if the data subject has no real choice, feels compelled to consent, or suffers negative consequences if consent is not given, that consent will be invalid.¹² The voluntary consent of the person applying for employment is not eliminated by the application procedure for obtaining personal data (employer's application). The voluntary nature of consent is also subject to verification through the assessment of the purposefulness and adequacy of the processing of such data. When assessing whether consent has been given freely, Art. 7(4) GDPR plays an important role.¹³ In addition to being freely given, consent should also be specific and informed. Consent must be specific, i.e. it should relate to a specific, explicit, and lawful purpose for which personal data is processed. When asking for consent to process personal data for many different purposes, employers should provide the opportunity for the employee to consent separately for each of these purposes, to allow them to give specific consent¹⁴. This is to reduce the risk that the employer will unlawfully expand the scope of processed data, and thus use the consent for purposes of which the employee was unaware. In this way, the individual granting consent is also provided with real control over the process of data processing. The specificity of consent is closely related to the awareness of the person granting it.

For consent to be considered knowingly given, the employee must have the information necessary to decide to consent. Therefore, it should be borne in mind that an employee/job applicant is often unable, without being provided with additional information by the employer, to independently assess e.g. whether the consent concerns data of a particular category, and therefore consent to the processing of this data should be expressed separately (additionally). The premise of awareness of consent should be understood in such a way that the person giving it is properly informed (should know at least the identity of the controller and the intended purposes of processing personal data)¹⁵ and be aware of the consequences of their actions. However, a specific aspect of giving consent that has been examined in the context of giving consent to the terms of use of a website, online store, or application installed on

¹¹ Maciej NAŁĘCZ: Komentarz do art. 221a k.p. In: W. MUSZALSKI – K. WALCZAK (eds.): *Kodeks pracy. Komentarz*. Warsaw, C. H. Beck, 2021.

¹² See Opinion 15/2011 on the definition of consent (WP187). p. 12.

¹³ Article 7 par. 4 of the GDPR: "When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract." See also Recital 43 of the GDPR, which states: "[...] Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance."

¹⁴ DORRE-KOLASA op. cit.

¹⁵ See Recital 42 GDPR.

a smartphone is worth pointing out. There are many provisions in these types of documents through which the user consents to the storage of their behavioral data (e.g. choices made in the store) and to using this data to profile marketing communications. In the vast majority of cases, however, these documents are not read by consumers, who simply click “next” to be able to use the application, store, or website as soon as possible. Nil Steinfeld’s¹⁶ research has shown that when users of electronic media have the option to indicate their agreement to the terms of use without reading the document, they almost always do so. There is no indication that employees will behave differently if the employer informs them about the consequences of giving consent.

Providing data subjects with access to information prior to obtaining their consent is essential for them to make informed decisions, understand what they are consenting to, and exercise their right to withdraw consent. If the controller does not provide the required information, the control on the part of the consenting person becomes illusory, and the consent will be an invalid basis for data processing.¹⁷ It is therefore for the data controller, and in this case, the employer, to ensure such conditions that the data subject has previously obtained information in an intelligible and easily accessible form¹⁸ and that it concerns all circumstances related to the processing of data for which the consent is given. This information should be expressed in clear and plain language and enable the person to easily determine the consequences of giving consent, thereby guaranteeing that this consent was given in full knowledge of the facts.¹⁹ It is therefore worth emphasizing that in each case of data processing, the employer is under the obligation to indicate the purposes and related legal grounds for the processing of the employee’s (applicant’s) data. The employer is obliged to inform the employee/job applicant about these circumstances at the time of obtaining their data in a clear, legible, and easily accessible way.

3. Methodology

To determine how employees and employers assess, among others, the possibility of autonomous decision-making on granting and withdrawing consent, we commissioned a study using the IDI-individual depth interview method, which is one of the most popular methods of collecting qualitative data. The study was carried out in May 2022 using one of the following online platforms: Google Meet, Microsoft Teams, and Zoom. The essence of the study was to examine the opinions of employees

¹⁶ Nil STEINFELD: “I agree to the terms and conditions”: (How) do users read privacy policies online? An eye-tracking experiment. *Computers in human behavior*, Vol. 55, Part B, 2016. 992–1000.

¹⁷ Guidelines 05/2020 on Consent under Regulation 2016/679. 4 May 2020. https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

¹⁸ Marcelo CORRALES COMPAGNUCCI – Helena HAAPIO – Mark FENWICK (eds.): *Research Handbook on Contract Design*. Cheltenham, Edward Elgar, 2022. <https://doi.org/10.4337/9781839102288>

¹⁹ See Judgment of the Court of Justice of 11 November 2020, C-61/19, The concept of “consent” to the processing of personal data by an online portal, *Orange Romania Sa v. Autoritatea Națională De Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)*. ECLI:EU:C:2020:901.

and employers and capture possible differences between them as to the situations presented in the recorded scenarios. During the meeting, the respondents were presented with incentive material in the form of films, one of which presented a recruitment interview, which is important from the point of view of this text.

The survey involved people of Polish nationality, aged 23-60, working in public and private sector organizations of various sizes (micro-enterprises: up to 10 employees, small: 11-50 employees, medium: 51-250 employees), from industries including medical, commercial, education, state administration, agricultural, production (chemical), financial, training, IT, care, construction, and transport.

The respondents ($n = 16$) included both employees ($n = 8$) employed by one employer under an employment contract and employers ($n = 8$), i.e. company owners/managers/managing other people's work. Women and men were represented equally in each of these groups.

In the first part of the interview, information was collected from the respondents on the sources of their knowledge about the legal conditions for granting consent by employees/job applicants, as well as experiences and observations regarding the granting of consent by them and the employer's compliance with the law and their attitude toward employees refusing consent.

When it comes to interviews, the respondents from the group of employees did not see the benefits of knowing the labor law, because they believed that in practice there was no chance to use it. In their opinion, an employee's recourse to the knowledge of the law in contentious circumstances only aggravates their situation.²⁰ Respondents, especially older ones, had experience in giving consent, and in their opinion, when applying for consent, the employer more or less directly made employees an "offer that they can't refuse". Even if employers informed them of the legal circumstances related to granting consent, they did not indicate that the employee had the right to refuse such consent. It was pointed out that the imbalance of the parties' positions was particularly visible in the context of access to professional legal assistance. In their opinion, employers in contentious situations can count on the help of lawyers who are beyond employees' financial reach. In addition, the survey respondents indicated groups of employees for which there is a higher risk of employers taking advantage of their situation in connection with granting consent. These include groups such as poorly educated people; people without specific qualifications and skills; foreigners, e.g. of Ukrainian nationality; women, especially young mothers; people with tattoos, particular hairstyles (dreadlocks), or piercings; and people with a worldview different from that of the employer.

As for the respondents from the group of employers and people representing them, in their opinion, employees who are assertive and rely on knowledge of the law are perceived negatively. They also confirmed that when it comes to granting consent at the employer's request, the employee's choice is often limited to whether to grant consent to the employer consent or leave the job. Employers associate

²⁰ Study participants also pointed out that the politicization of the situation of the judiciary in Poland means that employees employed in public institutions give up pursuing their rights altogether.

an assertive attitude with insolence, and people asserting their rights are quite clearly defined as hostile and demanding. Some survey participants pointed out that invocation of the law by employees carries the undertone of a threat, e.g. bringing a lawsuit and referring to legal regulations is sometimes perceived by managers as undermining their competencies.

In the second part of the study, the respondents were shown a video of a job interview during which the recruiter (a woman) asked the job applicant (a woman) for permission to ask questions to obtain additional information that would help the employer assess her ability to adapt to a team characterized by high diversity.

The script of this film was created based on previous quantitative research and described a situation in which, during a job interview, a applicant applying for a job is asked by the recruiter for additional consent to additional questions about the information that cannot be obtained without the consent of the applicant. The job applicant submits such a statement, and then the recruiter asks her, among other things, whether she would have a problem working with a person living in a same-sex relationship. The applicant answers all questions, but after a time she announces that she withdraws her consent to the processing of information about her attitude towards same-sex couples. The whole situation was acted out by a pair of actresses and was very realistic. Respondents expressed their opinion on the situation presented in the film and assessed the applicant's chances of getting a job.

After watching the film, respondents from both groups assessed the applicant's chances of getting a job negatively, indicating that they were very small or nonexistent. Everyone knew and emphasized that although the applicant had the right to withdraw consent, in their opinion, it is very important when evaluating a applicant whether their behavior is consistent, and that a change of mind may indicate otherwise.

4. Discussion

For an individual's consent to be considered as an instrument by which they shape their legal position, the individual must have the capacity to give consent, and the consent should be the result of a free and informed decision. A characteristic feature of the employment relationship is the asymmetry of the positions of the employee and employer, despite the fact that they are formally considered equal. There may be many reasons for this. The most important is the economic aspect. The employment relationship serves to secure the existence of the employee and their family, which means that the employee may act in conditions of economic coercion. In addition, due to economic, technological, and social changes, and thus the differences among people providing work (such as, for example, education and qualifications, the value of remuneration, and adjustment to the needs of the labor market), their actual position vis a vis the employer is not equal. In an asymmetric relationship, where

the refusal of consent is incompatible with the employer's interest, the employee or job applicant may sometimes fear that the employer will not respect the refusal, which may then lead to serious consequences. Therefore, legislators try to protect employees by introducing provisions showing that the employer enforcing negative consequences toward an employee who refuses or withdraws consent is unlawful. However, these regulations do not always have the expected effect; moreover, some of them may also have a negative effect and worsen the situation of the employee/job applicant. This is because giving consent by an employee (job applicant) is not only an activity regulated by law, but is also psychologically conditioned behavior. Both from the perspective of law and psychology, the actions of a subject solely under the influence of coercion (compelling factors) excludes free will, i.e. voluntary decision-making²¹. The legal consequence of such action will be the invalidity of the legal act (for example, as under Article 58 of the Polish Civil Code).

In addition to coercion in the above sense, it should also be taken into account that people's behavior is determined by various factors; in particular, they are strongly influenced by unconscious and automatic mechanisms. These automatisms occur in many areas of our lives and are often completely unconscious – this is the case, for example, with the “authority effect” studied on many levels in social psychology. Many experiments have shown that people are capable of, for example, electrocuting others²², administering unknown drugs to patients against procedures²³, or violating other people's rights during job interviews²⁴ only because the command to do so came from an authority figure. Since, as stated here earlier, the relationship between the employer and the employee is asymmetrical, it can be assumed that the employer's statements, even if they formally take the form of requests or suggestions, will be treated as orders from an authority, which may deprive the given consent of the attributes of voluntariness and awareness.

Therefore, it is worth considering whether the measures used by a legislator to support the autonomy of the employee, such as providing them with the possibility to withdraw consent, actually protect the employee, and whether the exercise of such a right may not put them in a disadvantageous position.

Based on the conducted research, we assume that the rule of consistency has a double meaning in the case of employees who agree to certain actions. On the one hand, people feel an inner need to be consistent, in particular concerning decisions they make and actions taken; and on the other hand, society also expects people to be consistent²⁵. Socially, inconsistent behavior is perceived negatively. An expectation that an employee who has given consent, for example, to the processing of additional

²¹ Romana KADZIKOWSKA-WRZOSEK: Wolna wola w świetle badań współczesnej psychologii nad procesami samoregulacji i samokontroli. *Psychologia Społeczna*, Vol. 15, 2010. 330–344.

²² Dariusz DOLIŃSKI – Tomasz GRZYB: Posłuszni do bólu. *Wydawnictwo Smak Słowa*, 2017.

²³ Charles K. HOFLING – Eveline BROTZMAN – Sara DALRYPLE – Nancy GRAVES – Chester M. PIERCE: An experimental study in nurse-physician relationships. *The Journal of nervous and mental disease*, Vol. 143, Iss. 2. (1966) 171–180.

²⁴ Wim H. MEEUS – Quinten A. RAAIJMAKERS: Obedience in modern society: The Utrecht studies. *Journal of Social Issues*, Vol. 51, Iss. 3. (1995) 155–175.

²⁵ Elliot ARONSON: *The social animal*. San Francisco, W. H. Freeman 1992.

personal data, will withdraw their previously given consent does not take into account the fact that consistency is a highly conditioned thinking mechanism. Such withdrawal is even less likely to take place considering that the employee is the weaker party in the employment relationship. Therefore, simply providing the employee with the possibility to withdraw consent is not a real instrument of employee protection. In addition, it should be borne in mind that the mere use of the employee's option to withdraw consent to the acquisition and processing of personal data may expose them to a negative assessment of the employer/recruiter, because inconsistent behavior is negatively assessed²⁶.

Another important aspect related to giving consent by employees is good communication in the workplace between all groups of stakeholders, including managers and employees, as the employer is obliged to inform employees about their rights, e.g. about the possibility of granting and withdrawing consent to the processing of personal data. Undoubtedly, communication is of great importance for the proper functioning and development of any organization, and employees are a particularly important resource. The issue of communication with employees is also important because they form a diverse group in many respects, which makes it necessary to adapt the content (and sometimes also form) of messages to different audiences. Communication is not only about transferring information from one person to another, but about making it an effective process. Effective communication is one in which the information given, for example, by the manager and read by the employee, is as similar as possible²⁷. It is not easy to achieve this effect, because in the process of transferring information we encounter various limitations. Distortion of the communication process may result, among others, from the different positions of the parties in the employment relationship. In our opinion, a special area of employer-employee communication is precisely informing employees about their rights and the actual assertion of these rights by employees. We are particularly interested in cases where the law makes the possibility of the employer's encroachment on the employee's right conditioned by the employee's consent, thus also allowing the employee to refuse or withdraw consent. As mentioned, distortion in the communication process can arise from the asymmetrical nature of the employer-employee relationship. Therefore, both at the level of introducing legal regulations regarding the possibility of expressing consent by the employee, such as the processing of personal data, and in specific factual situations, such as when the employee gives consent to the employer to use their image, psychological aspects must also be taken into account. For example, the "rule of consequences" – where an employee may fear negative consequences if they refuse to consent – may impact their decision-making. If an employee does give their consent, but feels that their refusal would not be respected by the employer, this could lead to a decrease in their commitment to work. Therefore, a manager who communicates with employees should be aware of specific psychological limitations and know potentially effective ways to overcome them. They should also understand the broader

²⁶ ARONSON op. cit.

²⁷ Ricky GRIFFIN: *Fundamentals of management*. Cengage Learning, 2021.

consequences for the entire organization resulting from the fact that employees do not feel fully free and aware when making certain decisions.

5. Conclusions

As a result of granting consent, a specific legal relationship arises between the employee/job applicant who grants it and its addressee, i.e. the employer. The addressee of the consent, i.e. the employer, obtains the authorization to enter the legal sphere belonging to the consent giver as specified in the consent, e.g. personal data. In the case of personal data, consent is an important basis for processing data. It is not easy to apply in practice, as evidenced by the plethora of legal regulations and documents devoted to it. The legal regulation of consent in the GDPR, although concerning the protection of personal data, is theoretically universal. Therefore, it is worth analyzing it from different perspectives. The primary feature of consent as an instrument by which the entity grants it and autonomously shapes its legal situation is its voluntariness. Voluntariness is to give effect to the possibility of withdrawing previously expressed consent at any time, with effect for the future. Taking into account the psychological aspects of making and implementing the decision to withdraw consent, we believe that the employee's autonomy in the process of expressing consent, in particular to the processing of personal data, is not strengthened by the possibility of its withdrawal, even if upholding such consent is contrary to the employee's interest. This is because inertia has a strong influence on behavior and taking advantage of this opportunity is contrary to the principle of consistency, which strongly determines people's actions. Equipping employees/job applicants with the option of withdrawing consent also does not take into account the fact that using the option to change the decision exposes employees/job applicants to a negative assessment by the employer. People who reverse their previous decisions are assessed worse than those who refuse to agree to certain actions from the beginning.

We would also emphasize the fact that making a decision to consent to something and accepting responsibility by employees for what results from this consent requires anticipating the consequences of the consent, and for this, knowledge is required about the conditions of its granting and the potential effects of both granting consent or refusal thereof. In connection with the above, attention should be paid to the potential imbalance of the parties to the employment relationship in the area of legal knowledge. In this context, the fulfillment of the employer's information obligations toward employees and providing them with legal assistance in the process of granting consent is of particular importance. This could be done, for example, by providing the advice of an independent lawyer in due time before the consent is granted. In our opinion, the actual access to legal knowledge related to granting consent that can be provided to employees and related professional support determines the scope of autonomy that employees should have in order to use consent as an instrument by which

they can shape their legal situation. Therefore, if we are unable to realistically ensure such conditions, the employee's/job applicant's consent should not be the basis for shaping their legal situation; in the context discussed herein it should not be a basis for personal data processing.

In this connection, the situation of employees/job applicants from groups particularly vulnerable to pressure from the employer deserves special attention. The situation of immigrants, among whom a special place in Europe is currently occupied by people from Ukraine as a large and unique group (mainly women with children), is worth mention. Their situation is aggravated by the lack of language fluency and, consequently, more difficult access to knowledge about the law, including labor law in force in the country where they seek and perform employment. In such circumstances, the person managing employees should be aware that taking advantage of the unequal position of the other party in negotiations, even if it does not lead to a violation of the law, is subject to moral evaluation. Therefore, it can be considered unethical behavior to take advantage of the fact that a job applicant will disclose, for example, additional data during an interview, or will allow their image to be used for marketing purposes because they feel compelled to do so, needing a job that, in the conditions of competition on the labor market, is an important good.

It should also be emphasized that trust is what makes it possible to overcome communication problems between the parties, particularly when their positions are unequal. However, the level of trust varies from country to country: Poland, for example is characterized by a particularly low level of social trust, which of course could have influenced the results of our research. However, taking into account that EU regulations are addressed to many and quite different countries, it is even more necessary to appeal for the psychological aspect to be taken into account, e.g. at the stage of creating EU law on giving consent by an employee in an employment relationship.

Considering the above, it seems reasonable to ask the question again whether consent at all, even exceptionally, should be the basis for the processing of the personal data of employees/job applicants. If we nevertheless assume that it should be, because the fact of the imbalance of the parties is not a sufficient argument to deprive the employee of the right to make autonomous decisions, then we should also consider whether all available means have been used to provide employees with real and effective protection in specific situations. If, however, this is not the case, the range of means used for this purpose should be expanded to include instruments other than the right to withdraw consent, such as the right to lie in a situation where the employer wants to obtain consent from employees/job applicants to process information to which they are not entitled²⁸. It is also possible to consider introducing a presumption that the consent was given involuntarily, and the employer could overcome

²⁸ For example, in Switzerland, employees are granted the right to lie as a necessary defense against a direct and unlawful attack by the employer, which is considered to be asking employees prohibited questions during recruitment. Manfred REHBINDER: *Schweizerisches Arbeitsrecht*. Stämpfli, 1979.; Andrzej DROZD: *Prawo podmiotu zatrudniającego do pozyskiwania informacji o kandydacie na pracownika*. LexisNexis, 2004.

it with other evidentiary means than just referring to the content of the agreement with the employee/
job applicant.