Principles of Polish Labour Law

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WYDAWNICTWO C.H.BECK
WARSZAWA 2018

Recenzent wydawniczy/Peer reviewer: Prof. dr hab. Bolesław M. Ćwiertniak

Tłumaczenie/Translation: Paulina Balińska

Publikacja dofinansowana przez Uniwersytet Jagielloński

Wydawnictwo C.H.Beck Sp. z o.o.
ul. Bonifraterska 17, 00-203 Warszawa

Skład i łamanie: CK Studio
Druk i oprawa: Elpil, Siedlce

ISBN 978-83-812-8979-5

ISBN e-book 978-83-812-8980-1

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Chapter 1. The Notion and Delimitation of the Principles of Polish Labour Law

K.W. Baran, D. Książek

The concept of the principles of law in the system of Polish law, including the principles of labour law raises various doubts, both in the legal sciences and judicature[1]. However, a starting point for further analysis will be an essentially non-controversial view expressed at the beginning of the 1930s[2] according to which the principles of law are the foundations on which codes are built and enliven the intricate mass of norms. They are like the "spirit" of these codes, which should be taken into account when interpreting their provisions and filling in legal gaps.

In the Polish legal literature, the principles of law are defined as "ideas", "interpretative directives", "rules" and even "guidelines for conduct"[3]. They are derived from specific legal norms or groups of legal norms. Therefore, they are always normative. Therefore, the postulates of the legal system cannot be considered the principles of law[4].

It is not possible to challenge an argument that the effectiveness of the legal system in the process of affecting the social life depends on its coherence. Where the coherence is understood as such a set of norms for which the axiological justification can be decoded based on coherent knowledge. The principles of law serve the proper organisation of such system. Until now, in the Polish legal cul-

[1] See in particular: *B.M. Ćwiertniak*, [in:] *K.W. Baran* (ed.), System prawa pracy. Część ogólna *[A System of Labour Law. A General Part]*, Warsaw 2017, p. 970ff.; *T. Zieliński*, Zasady prawa pracy w nowym systemie ustrojowym *[Principles of labour law in the new political system]*, Państwo i Prawo 2001, vol. 12, pp. 3–14.

[2] See *W. Waśkowski*, Zasady procesu cywilnego *[Principles of the Civil Procedure]*, Rocznik Prawniczy Wileński 1930, No. 4, p. 265.

[3] See *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa. Zagadnienia podstawowe *[Principles of Law. The Basic Concepts]*, Warsaw 1974, pp. 24–25

[4] See *J. Wróblewski*, Zagadnienia teorii prawa ludowego *[A Theory of Popular Law]*, Warsaw 1959, pp. 255–260.

ture, the principle of law has been used in two different meanings. A descriptive and directive meaning[5].

Despite the existing division of the principles of law, the problem of establishing the legal consequences resulting from distinguishing the "principle of law", whether based on statutory material or the existing and well established views of legal scholars, is not a new problem and is, as it seems, still provoking a lively discussion[6]. According to Gizbert Studnicki, the concept of legal principle is controversial in the Polish literature and it has various meanings. This view is still valid [7], and thus worth examining in more detail. It seems very reasonable since the phrases or expressions such as "legal principle / principle of law", "principle" or even "rule" are often used interchangeably, in relation to one and the same concept in one and the same text. This prevents appropriate methodological or logical analysis.

The word "principle" has been "coined" by lawyers. It is an ambiguous concept and has different meanings. In the legal language, including the case-law, it does not always refer to the directive of conduct. It is also used to describe a particular type of decision or it formulates some general assessments. This resulted in the need to distinguish descriptive, evaluative and directive expressions[8]. The difficulty, however, is that when reading the doctrinal writings or the case-law, it is difficult and sometimes even impossible, to guess in what sense a given author or a court uses the term "principle" or "principle of law". As it is rightly pointed out, mixing the statements of various linguistic nature is one of the main drawbacks of legal discourse[9]. For this reason, it is worth recalling this characteristic of the various meanings of the "principle of law" according to the above-mentioned division, limiting it to two forms: the principle of law in a directive and non-directive (descriptive) sense as a division generally accepted in the Polish legal culture.

The principles-directives are distinguished from the principles in non-directive sense. In the latter case, we are talking about the legal principles understood descriptively. The principles of law understood as directives are principles of law recognized as norms of a given legal system. Norms which, in one way or another, are superior to other norms. In the case of a non-directive understanding of the

[5] *S. Wronkowska*, [in:] Zarys teorii państwa i prawa *[An Outline of the Theory of State and Law]*, Warsaw 1993, p. 224.

[6] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 8; see: *S. Wronkowska*, Sposoby pojmowania „zasad prawa" *[Understanding the Principles of Law]*, Państwo i Prawo 1972, No. 10 passim.

[7] *T. Gizbert-Studnicki*, Zasady i reguły prawne *[Leagal principles and rules]*, Państwo i Prawo 1988, No. 3, p. 16.

[8] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, pp. 9–10.

[9] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 10.

principles of law, this serves description of the legal system, indicating functional links between the norms, but also indicating the social role of a specific norm or legal concept. While in the case of the principles of law understood as directives, there is quite a uniform semiotic character of statements, in the case of the principles of law understood descriptively it is extremely difficult to define a *genus* of what specifically is considered a principle of law[10].

The principle of law in descriptive terms defines the manner of formation of certain legal concepts (subject of regulation), which actually occurs or the occurrence of which is "only" possible[11]. This is achieved by establishing appropriate and mutually related legal norms[12]. The principle of law in the basic descriptive terms means a model of formation of a specific subject of regulation, which is the "azimuth" for resolution of a particular issue connected with a certain point of view. The model may be either a reporting model or a projected model[13]. It can be conceivable or reconstructed[14]. In addition, the principles in descriptive terms are subject to a further partition, as a result of which abstract and specific principles are distinguished. The first of them relate to the general patterns indicated above, the idea of solving a given problem. In the second case, the rules apply to individualized, valid legal systems[15]. The principles of law in descriptive terms usually have several argumentation functions: a historical function, a scientific and didactic function, a practical function, building the foundations for formulating interpretative directives but also complementing the structural gap[16].

At this point, worth mentioning is an approach taken by Ćwiertniak[17]. Following the analysis of the elements distinguishing these principles, according to the model – who distinguishes, what determines the distinction and what the distinction consists of, the Polish legal scholar has come to several conclusions, important in terms of the descriptive principles. First, the criteria for distinguishing the descriptive principles[18] are of more or less evaluative nature. They refer

[10] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, pp. 28–29.

[11] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 31.

[12] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 38.

[13] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 43.

[14] *S. Wronkowska*, [in:] Zarys teorii państwa i prawa *[An Outline of the Theory of the State and Law]*, Warsaw 1993, p. 225.

[15] *M. Kordela*, Zasady prawa. Studium teoretycznoprawne *[The Principles of Law. Theoretical and Legal Studies],* Poznań 2012, p. 23; *M. Cieślak*, Polska procedura karna. Podstawowe założenia teoretyczne *[Polish Criminal Procedure. The Key Theoretical Concepts]*, Warsaw 1984, pp. 199–200.

[16] *M. Kordela*, Zasady prawa… *[The Principles of Law…]*, p. 25; *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, pp. 28, 50–51.

[17] *B.M. Ćwiertniak*, Pozadyrektywalne rozumienie zasad prawa *[Descriptive understanding of the principles of law],* Studia Prawnicze 1976, vol. 3, p. 52 ff.

[18] B.M. Ćwiertniak refers mainly to the criteria distinguished by *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, [in:] Zasady prawa… *[The Principles of Law…]*, and *J. Wróblewski*, Wstęp do systemu

to the axiological assumptions. Because of the assignment of certain functions to the descriptive principles, such as for example, filling the structural gap or creating interpretation directives, there are certain characteristics ascribed to these directives which, in Ćwiertniak's opinion, indicate that they are not descriptive statements. Third, the basic function attributed to the descriptive principles in the process of study of law – the organising function – has not been limited to the description phase. Even if these principles were distinguished by an evaluation, the very process of their distinguishing was connected with organisation of some specific norms according to some evaluation criteria. Ćwiertniak's study does not offer a definitive conclusion, but quite clearly indicates, as far as I understand, the defects or weaknesses of the criteria for distinguishing the principles of law in descriptive terms. It can be assumed that the author does not question the said division of the principles of law into principles in a directive and descriptive sense, and only emphasizes those elements that are common for both categories of principles, which would only increase the difficulties with which the interpreter will struggle by decoding a specific type of principles of law. First and foremost, certain doubts arise whether the division into descriptive principles and directive principles is logical[19]. If not, then the consistent application of these categories will be impossible, or at least very difficult.

The principles of law, understood as directives, contrary to what *prima facie* seems to be an obvious consequence, cannot be easily distinguished from the principles of law understood in a descriptive manner. The first obstacle to overcome is to determine the content of these principles. The other one will be the difficulty in distinguishing these principles from the principles which are only someone's desiderata about the form of law, from the principles which are considered directives applicable in a given system of law[20]. The attempts made to overcome these problems are based on the scholarly writings of Jerzy Wróblewski[21]. According to Wróblewski, the principles of law should be divided into principles of law in the strict sense and the principles-postulates[22]. The principles of law

prawa cywilnego procesowego *[Introduction to the System of Civil Procedural Law],* Państwo i Prawo 1975, vol. 5.

[19] It seems that this problem was addressed by *Kordela*, [in:] Zasady prawa… *[The Principles of Law…]*.

[20] *M. Zieliński* [in:] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński,* Zasady prawa… *[Principles of Law…]*, p. 53.

[21] See *J. Wróblewski*, Zagadnienia… *[A Theory…]*, pp. 255–260; *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 53 ff.

[22] See *J. Wróblewski*, Zagadnienia… *[A Theory…]*, pp. 255–260; *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[Principles of Law…]*, p. 53 ff.; *J. Wróblewski*, Prawo obowiązujące a „ogólne zasady prawa" *[Positive Law and the "General Principles of Law"],* ZNUŁ 1965, Nauki Humanistyczne, series I, vol. 42, p. 18–20.

in a strict sense are norms of the positive law system which are considered basic principles. These principles are norms interpreted from the legal text, either on the basis of directives of linguistic interpretation or on the basis of more complex interpretation directives. But importantly, they can also be norms inferred from other norms on the basis of the on the rules of inference[23]. On the other hand, according to the author the postulative "principles of law" are various rules that are considered general principles of law but are not such general principles since they lack the status of norms of positive law and there is no logical consequence of these norms[24].

It can be said that in Wróblewski's approach, a postulative principle is the descriptive principle as defined by Wronkowska, Zieliński and Ziembiński. What seems particularly relevant in Wróblewski's approach is the element of legal validity and an element of supremacy. Contrary to the principles of law in a strict sense, the principles-postulates are not, as already indicated, legally binding. This issue is precisely explained by Wronkowska, Zieliński and Ziembiński[25]. The authors have argued that if an attempt is made to resolve a legal problem or issue with a reference to the principles of law understood as directives, it is necessary to confirm the status of the principle as the legally binding principle. If the answer is positive, it is necessary to indicate the legal provision which is the basis for such a conclusion and how it was interpreted, or which inference rules were the basis for the inference of the norms from other norms. If a norm is considered legally binding, based on the views of legal theorists, it is necessary to indicate the facts which turned out to be relevant facts. At the same time, it is strongly emphasized that no directive can be considered a principle of law if it is impossible to indicate the basis on which such principle can be considered legally binding.

In the context of the principles of law in a descriptive sense, the position of the authors of this division is quite significant. In the opinion of Zieliński, when such division is made, an indication of the criteria on the basis of which the legal sciences can distinguish descriptive principles is a very complex task which is achievable only at a high level of generality[26]. One of the arguments is that the various understanding of the term "the principle of law" is ignored as a sufficient basis for delimiting the meaning of this term. This results in combination of directive elements and descriptive elements. Zielinski pointed out to the occur-

[23] *J. Wróblewski*, Prawo obowiązujące… *[The Law in Force…]*, p. 18; *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[The Principles of Law…]*, p. 53 ff.

[24] *J. Wróblewski*, Prawo obowiązujące… *[The Law in Force…]*, p. 21; *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[The Principles of Law…]*, p. 53 ff.

[25] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady prawa… *[The Principles of Law…]*, p. 57.

[26] *M. Zieliński*, [in:] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński,* Zasady prawa… *[The Principles of Law…]*, pp. 32–33.

rence of such situation in civil or criminal proceedings, underlining at the same time the clarity of the distinction made by Cieślak. Therefore, it can be argued that Zieliński's opinion, presented several decades ago, still remains relevant[27].

It should also be emphasized that in the case of reference to the principle-directive, a given party must indicate what obligation is imposed by the principle. Furthermore they must show the basis for recognizing a given principle as legally binding, and more important in comparison with other legal norms. A party that is unable to fulfil this obligation balances between formulating non-binding postulates and assessments that can meet the evaluation criteria for the given acts of interpretation and/or legal inference[28]. It can only be added that the principles of law are not applied like other norms of the system. And the states of affairs designated by them, that are implemented or planned to be implemented, are achieved by other norms of this system. By creating appropriate norms, their accurate interpretation, but also by applying norms which are not principles, and by exercising rights[29].

In analysis of the principles of law, one cannot disregard the relationship between the "principle" and the "rule" as legal categories. The division, considered important in other legal cultures, is perceived as interesting in the perspective of changes in the Polish legal culture, embedded in the widely accepted nomenclature and classification[30]. This division is particularly visible in the concepts of Dworkin and Alexy. Dworkin's concept is treated as a constitutive element of the entire integral philosophy of law[31]. As regards the concepts of Alexy, the majority of them apply to theoretical constructs, not limited to the particularistic approach. He goes beyond a specific dogmatism, embracing the principles in general[32]. I would like to emphasize that it is not my purpose to thoroughly analyze both the principles of law and the rules, but for methodological reasons it is necessary to take a closer look at both of these institutions and the relations between these categories in the theories of both authors, described by Gizbert-Studnicki[33].

For a significant number of Polish legal scholars not only the relation but also the sense of the division into principles and rules appears to be structurally and

[27] *Ibidem*.

[28] *M. Zieliński*, [in:] *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński,* Zasady prawa… *[The Principles of Law…]*, p. 209.

[29] *S. Wronkowska*, [in:] *A. Redelbach, S. Wronkowska, Z. Ziembiński*, Zarys teorii państwa i prawa *[An Outline of the Theory of State and Law]*, Warsaw 1993, p. 226.

[30] *M. Zieliński*, [in:] Wykładnia prawa. Zasady. Reguły. Wskazówki *[Interpretation of Law. Principles. Rules. Guidelines],* Warsaw 2002, p. 34.

[31] *M. Kordela*, Zasady prawa… *[The Principles of Law…]*, p. 44.

[32] *Ibidem*.

[33] See *T. Gizbert-Studnicki*, Zasady i reguły prawne *[Principles and Rules of Law]*, Państwo i Prawo 1988, vol. 3, pp. 16–26.

even ontologically unacceptable[34]. Consequently, the terms under discussion are used synonymously/interchangeably. As I have already mentioned, the relation between the "principle" and the "rule" was very clearly depicted by Gizbert-Studnicki in 1988[35]. The author relied on the concepts of Dworkin and Alexy in a very interesting and very organised manner, especially with regard to the nomenclature he used. It is worth noting that when we analyze the relation between these two categories, i.e. a principle and a rule, we define (project – as pointed out by the author) not only the principle but also the rule, in a specific comparison algorithm, establishing the relations between them.

In Gizbert-Studnicki's analysis, the "principle" partly coincides with the term "principle" in the directive sense, although the author himself stresses that the analysis has been limited to a directive rather than a descriptive approach, and views them as standards of conduct under which a subclass of principles and a subclass of rules can be distinguished. Importantly, the indicated subclasses form a logical division[36]. The mentioned division is structural and refers to the structure of the norms of conduct. If a hypothesis of a norm is fulfilled, it produces certain consequences specified in a disposition of such norm. When such consequences arise, we are dealing with an applicable norm. Otherwise, they are not applicable. Norms with such characteristics are described by Gizbert-Studnicki as rules[37]. Unlike the principles, the rules are devoid of "validity" and "importance"[38]. Therefore, it can be argued that rules are not subject to valuation. Rules can be either complied with or not *(tertium non datur)*[39]. Unlike rules, the principles do not set the consequences. These norms constitute arguments that a certain legal consequence arose[40]. Importantly, the principles can be complied with to a different degree[41], and the distinction between rules and principles is at the level of norms and not provisions[42]. A factor which is decisive for determination whether at the level of a given legal text we are dealing with a principle or a rule is the norm interpreted from the legal text [43].

Tomasz Gizbert-Studnicki's analysis described above was evaluated, among others, by Maciej Zieliński[44] and to some extent referred to by Sławomira

[34] See *M. Zieliński*, Wykładnia prawa… *[Interpretation of Law…],* Warsaw 2002, p. 36 ff.
[35] See *T. Gizbert-Studnicki*, Zasady… *[Principles…]*, pp. 16–26.
[36] *Ibidem*.
[37] *Ibidem*.
[38] *Ibidem*.
[39] *Ibidem*.
[40] *Ibidem*.
[41] *Ibidem*.
[42] *Ibidem*.
[43] *Ibidem*.
[44] *M. Zieliński*, Wykładnia prawa… *[Interpretation of Law…]*, p. 36 ff.

Wronkowska[45]. In Zieliński's opinion, the argument determining the inapplicability of the distinction between "principle" and "rule" and in particular the priority of rules in relation to the principles, is incompatibility with the common intuitions and conceptual framework developed in the Polish legal culture, restricting itself to applying the distinction between "regular norms" and "principles of law"[46]. Therefore, a distinction which is an integral and extremely important part of Polish legal theory. On the other hand, Wronkowska, points to the originality of the concept of principles in Dworkin's theory, modified by Alexy's theory[47].

The concept of Dworkin, presented to the Polish legal culture by Gizbert-Studnicki ("perfected" by other world legal theorists, including Alexy), based on the division into "principles" and "rules", is a universally accepted construct[48]. It is however indicated that the risk associated with acceptance of the concept of Dworkin in the Polish culture relates to the necessity to reject the classic positivist concept of law, because the principles are based on non-positivist criteria. There is also a large number of legal theorists who recognize that there is no need to discard the positivist concept of law, because the principles are valid as formulated in the text but also can be derived from the legal text. As Sarkowicz emphasizes, the division into "principles" and "rules" considerably extends the area of significant problems of legal theory and practice. And what seems particularly important is the question of "weighing" and conflicts of principles[49]. That is something what functions *in extenso* in the concept initiated by Dworkin.

In conclusion, I would like to draw attention to one more issue. In my opinion, Zieliński, who appears to present the clearest views which are in opposition to the applicability of the distinction between the "principle" and the "rule", does not deny the legitimacy of the division into "principles" and "rules". If I understand it correctly, he only points out to its inoperability in the Polish legal culture.

Therefore, I am not going to discuss the value of the presented positions, because it requires a separate study, and at a different level – the theoretical level[50]. However, a certain category of assessments comes to mind inadvertently. First of all, the division between "principles of law in descriptive terms" and "principles of law in directive terms" has its deep roots as well as justification in the Polish

[45] *S. Wronkowska*, [in:] *S. Wronkowska*, *Z. Ziembiński,* Zarys teorii prawa *[An Outline of the Theory of Law]*, Poznań 2001, pp. 79–80, 189.

[46] *M. Zieliński*, Wykładnia prawa… *[Interpretation of Law.…]*, 2002, s. 36 ff. and the literature referenced there.

[47] *S. Wronkowska*, [in:] *S. Wronkowska*, *Z. Ziembiński*, Zarys teorii prawa… *[An Outline…]*, p. 189.

[48] *R. Sarkowicz*, [in:] *R. Sarkowicz, J. Stelmach*, Teoria prawa *[A Theory of Law]*, Kraków 1998, p. 166.

[49] *Ibidem*.

[50] *M. Zieliński*, Wykładnia prawa… *[Interpretation of Law…]*, p. 36 ff.

legal culture. It is also broadly accepted. This does not mean that verification of its applicability is possible within the scope expected by the interpreter. Second, proximity of scopes, obviously not at the ideal level, with the division into "principles" and "rules", is clearly visible and consequently cannot be considered irrelevant, even within the stable Polish legal culture. Third, the differentiation between "principles" and "rules" is *prima facie* more operative at the organising level than the division into "descriptive" and "directive" principles. Fourth, the differentiation between "principles" and "legal rules" was not a basis underlying the analysis of a selected part of law as a generally understood system, which of course can (not) mean its irrelevance in the *in concreto* analysis.

However, worth noting are four arguments of Kordela relating to the "principles of law"[51]: "Argument I: The principles of law are such norms that lay down a requirement to pursue a certain value. The principles of the second category of norms – the ordinary norms, i.e. rules – differ in the subject-matter of the obligation: while the rules formulate an obligation of a particular behaviour or conduct, the principles require the pursuit of a certain value; Argument II: The principle of law as an element of the legal system has a binding status. The fundamental character of a given norm is determined not by its language and significance of functions, but by the type of the subject-matter of the obligation. In order to definitively establish that a given norm is a binding principle (and not a rule) of a given system, the *communis opinio doctorum* is a necessary element; Argument III: The applicable legal principles of a given system create an ordered whole with clear characteristics of the system. Among the principles of law, there is a clearly separable subset of fundamental principles, which are principles not legitimated by other principles. The fundamental principles (of the entire system of law and its subsystems – public and private law, branches of law, legal institutions, etc.) are the normative expression of fundamental axiological choices made by the law-maker acting primarily as a legislator; Argument IV: The application of a principle of law is the application of the rule of law, which is formulated on the basis of this principle. The applied principle exists either alone or with another (different) principle; in the case of majority of the relevant principles, there is either compliance (or neutrality) or conflict. In the event of a conflict of principles, the weighing and balancing process takes place during which the entity applying the law assigns to each of the opposing principles an appropriate "weight" and makes the basis for selecting the one that is most preferred (initial solution). Each act of applying the principle of law is a binding (precedent) act of its specification (concretization).

[51] *M. Kordela*, Zasady prawa… *[The Principles of Law…]*, pp. 276–277.

This monograph is a collective work, but not a joint one. In accordance with the directive of autonomy, the opinions presented in it express individual views of their authors. They decided independently on how to present particular substantive matters.

Chapter 2. Basic Principles of Individual Labour Law

2.1. The principle of the right to work

E. Kumor-Jezierska

The first of the fundamental principles of labour law laid down in the Polish Labour Code[1] is a right to work. According to article 10 of the Labour Code, everyone shall have the right to work freely chosen. Except in the cases prescribed by law, no one can be forbidden to practice his profession. In its original version, article 10 of the Labour Code explicitly expressed the principle of the right to work[2] which was also highlighted in the Constitution of 1952[3]. The current wording of article 10 of the Labour Code refers to a regulation included in article 65 (1) of the Constitution of the Republic of Poland of 1997[4], which provides that every person shall be guaranteed a freedom to choose and to pursue profession and to choose a place of work, unless law provides otherwise. The literal wording of ar-

[1] Act of 26 June 1974 – Labour Code – Journal of Laws *[Dz.U.]* of 1998, No. 21, item 94, as amended.

[2] Article 10 § 1 of the Labour Code: "Citizens of the Polish People's Republic shall have guaranteed work through continuous and comprehensive development of the national economy and rational employment policy. § 2. The right to work is subject to protection in accordance with the rules set out in the Labour Code and in specific laws. § 3. Competent public authorities shall provide citizens with assistance in obtaining employment corresponding to their qualifications, in a manner specified under separate laws". (Journal of Laws *[Dz.U.]* of 1974, No. 24, item 141).

[3] Article 68 (1) of the Constitution of 1952 explicitly provided that "Citizens of the Polish People's Republic shall have the right to work which means the right to employment against remuneration corresponding to the quantity and quality of work". Moreover, article 19 of the Constitution of 1952 emphasized the meaning of work and underlined that "Work is a right, obligation and a matter of honour of every citizen. Through their work, compliance with the work discipline, work competition and improvement of working methods, the working people of towns and villages build the strength and power of their homeland, increase the welfare of the nation and accelerate complete implementation of the socialist system". (Journal of Laws *[Dz.U.]* 1976, No. 5, item 29, as amended).

[4] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws *[Dz.U.]* No. 78, item 483, as amended) eliminated the *expressis verbis* principle of the right to work.

ticle 10 of the Labour Code is different; however it falls within the scope of article 65 of the Constitution[5]. Because of the fact that neither the Constitution nor the Labour Code mentions explicitly the principle of the right to work, in the legal writings this principle is sometimes referred to as the principle of the freedom of labour,[6] the principle of the freedom of employment[7] or the principle of the freedom of choice of work and prohibition of forced labour[8]. The Constitution guarantees to the citizens the freedom of labour[9]. It should also be noted that in Europe the expression the "right to work" is considered one of the constitutional issues which has not been expressed explicitly but as the liberty[10].

The expression "the right to work" is used also in international documents. First to mention is the United Nations Universal Declaration on Human Rights of 1948. According to its article 23 (1): "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". Another act is the International Covenant on Economic, Social and Cultural Rights of 1966 which provides that the right to work includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right (article 6). As regards the European laws, a reference should be made to the Charter of Fundamental Rights of the European Union[11]. According to its article 15 (1)(2): "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State". The European Social Charter of 1961 provides in article 1 titled "The right to work" that: "with a view to ensuring the effective exercise of the right to work, the Parties undertake to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable

[5] *A. Sobczyk*, Prawo pracy w świetle Konstytucji RP *[Labour Law in the Light of the Constitution of the Republic of Poland],* Volume II, [in:] Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka *[Selected Problems and Labour Law Constructs and the Constitutional Human Rights and Freedoms]*, p. 11.

[6] *G. Goździewicz*, [in:] Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, precisely, commentary on article 10 of the Labour Code, argument 1; see: *A. Sobczyk*, Wolność pracy i władza *[Freedom of Work and Authority]*, Warsaw 2015, pp. 31, 153 ff.

[7] *K. Rączka*, [in:] *M. Gersdorf, M. Raczkowski, K. Rączka* (eds.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary],* precisely commentary on article 10, argument 3.

[8] See *W. Perdeus*, [in:] *K.W. Baran* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, precisely commentary on article 10, argument 1.

[9] *L. Florek*, Konstytucyjne gwarancje uprawnień pracowniczych *[Constitutional Guarantees of Workers' Rights]*, Państwo i Prawo 1997, vol. 11–12, p. 207.

[10] *H. Zięba-Załucka*, Prawo do pracy jako przedmiot regulacji konstytucyjnych *[The Right to Work According to the Constitution]*, Praca i Zabezpieczenie Społeczne 2006, No. 2, p. 7.

[11] Official Journal of the EU C 2007, No. 303, p. 1.

a level of employment as possible, with a view to the attainment of full employment; to protect effectively the right of the worker to earn his living in an occupation freely entered upon; to establish or maintain free employment services for all workers, to provide or promote appropriate vocational guidance, training and rehabilitation".

Neither the Labour Code nor the Constitution of the Republic of Poland guarantees that every citizen will find employment in his acquired profession. The right to work freely chosen should be understood as access to such work by persons who meet certain requirements[12]. This right does not involve a claim but it only creates an opportunity to freely choose the work that the person concerned wishes to perform[13]. However, the possibility to perform a specific work is conditional upon holding appropriate qualifications and for certain professions – also upon meeting statutory requirements such as absence of criminal record, Polish citizenship. The legislature may set out conditions which must be met in order to be able to pursue certain work or profession, however they cannot be discretional. The provisions of article 31 (1) of the Constitution of the Republic of Poland will apply[14]. According to this article, any restrictions upon the exercise of constitutional freedoms and rights may be imposed only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. The Supreme Administrative Court *(Naczelny Sąd Administracyjny)*[15] held that the fundamental principles of labour law imply that the principle of the freedom of labour applies not only to the moment of hiring an employee but also to the circumstances when the employee remains in the employment relationship. Consequently, an employee cannot be forced to remain in employment against his will – the employee's right to terminate an employment relationship cannot be effectively restricted.

The essence of the freedom to pursue a profession is to create such legal situation in which everyone will have access to such a profession, conditional only upon talent and qualifications[16]. Under some acts the opportunity to pursue

[12] *K. Walczak*, Komentarz do kodeksu pracy *[Commentary to Labour Code]* (available at Legalis Database), precisely a commentary on article 10, argument 4; *Z. Góral*, Prawo do pracy *[The Right to Work]*, [in:] *K.W. Baran* (ed.), Zarys Systemu Prawa Pracy *[Outline of Polish Labour Law System]*, vol. I, Warsaw 2010, p. 551, see: *Z. Góral*, Prawo do pracy. Studium prawa polskiego w świetle porównawczym *[The Right to Work. A Comparative Study]*, Łódź 1994, p. 5 ff.

[13] See *A. Śledzińska-Simon*, Wolność pracy *[The Freedom of Labour]*, [in:] *M. Jabłoński* (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym *[Exercising and Protection of Individual Rights and Freedoms under the Polish Legal System]*, Wrocław 2014, p. 573.

[14] Judgment of the Constitutional Tribunal of 24 January 2001, SK 30/99, OTK 2001, No. 1, p. 3.

[15] Judgment of 28 March 2005, II FSK 450/2005, not published.

[16] Judgment of the Constitutional Tribunal of 19 October 1999, SK 4/99, OTK 1999, No. 6, p. 119.

a specific profession is conditional upon meeting certain requirements regarding qualifications, for example in the case of lawyers. Such requirements are justified by the public interest, provided that the scope of the requirements set out by the legislature is not arbitrary[17]. There are arguments raised in the labour law literature that the right to work may to some extent be considered claimable, by establishing appropriate protective measures, if we refer to the prohibition of discrimination in employment[18].

The legislature has also introduced restrictions on the performance of specific work by certain categories of persons. First to mention are restrictions on the performance of certain work by pregnant and breastfeeding women (strenuous work, dangerous work or work harmful to health, work which may have a negative impact on their health, course of pregnancy or breastfeeding) (article 176 of the Labour Code) and restrictions on the performance of certain work by minors as specified by law[19] (work which may pose risk to their health (article 204 of the Labour Code)). Moreover, the restrictions on the exercise of the freedom of labour apply also to the age of the employees. Article 7 of the European Social Charter[20] defines the minimum age of admission to employment which shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education. Also, the ILO Convention No. 138 concerning Minimum Age for Admission to Employment adopted in Geneva on 26 June 1973[21] provides that in general the minimum age is 15 years[22]. Other ILO's document relating to the restriction and prevention of child labour is Convention No. 182, concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted on 17 June 1999 in Geneva[23]. As regards EU laws, the fundamental principles regarding child labour were laid down in the Council Directive 94/33/EC of 22 June 1994 on the protec-

[17] *M. Bartoszewicz*, [in:], *M. Haczkowska* (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz *[Constitution of the Republic of Poland. A Commentary]*, precisely, commentary on article 65, argument 4. See judgment of the Constitutional Tribunal of 18 February 2004, P 21/2002, OTK-A 2004, No. 2, item 9.

[18] *W. Pedrus*, [in:] *K.W. Baran* (ed.), Komentarz do prawa pracy. *[Labour Law. A Commentary]*, precisely, a commentary on article 10, argument 2.

[19] Regulation of the Council of Ministers on the list of jobs prohibited to young people and the terms and conditions of employment in some of these jobs *[Rozporządzenie Rady Ministrów w sprawie wykazu prac wzbronionych młodocianym i warunków ich zatrudniania przy niektórych z tych prac]* (Journal of Laws *[Dz.U.]* of 2016, item 1509).

[20] Journal of Laws *[Dz.U.]* of 1999, No. 8, item 67.

[21] Journal of Laws *[Dz.U.]* of 1978, No. 12, item 53.

[22] A Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years (article 2(4) of the ILO Convention No. 138).

[23] Journal of Laws *[Dz.U.]* of 2004, No. 139, item 1474.

tion of young people at work[24]. Under the Polish laws, in principle, employment of a person below the age of 16 is prohibited[25]. All the above mentioned restrictions are aimed at protection of the employed persons and cannot be classified as discrimination.

The constitutional principle of the freedom of labour in a positive sense covers both an opportunity to choose a type of work (qualificative aspect), to choose an employer (personal aspect) and to decide on the place of employment (spatial aspect)[26]. In the literature it has been rightly pointed out that the freedom to choose an employer means not only the possibility to change employment but also to remain in another employment relationship, which means to take up additional employment[27]. However, as regards certain groups of employees, there exist statutory restrictions on the right to take up additional employment. In the case of the majority of officers of uniformed services[28] these restrictions usually mean prohibition on taking up other paid activity outside the service. In such case the purpose of these restrictions is to ensure impartiality of the officers in the performance of their duties as well as to prevent the situations in which taking up additional activity would be in conflict with the principle of "dedication" to the service[29]. On the other hand, as regards separate laws governing employment of specific categories of public sector employees (so called *pragmatyki*), the restrictions involve usually a prohibition of additional employment[30]. Such pro-

[24] Official Journal of the EU L of 28 August 2014, p. 12, as amended.

[25] Under article 191 § 5 of the Labour Code, the Minister of Labour and Social Policy, in agreement with the Minister of Education, may specify in a regulation the situations where the following is exceptionally permissible: employment of young people who have not completed the 8-year primary school; exemption of young people without professional qualifications from the obligation to undergo a vocational training; employment of persons below the age of 16, who completed the 8-year primary school; employment of persons below the age of 16, who have not completed the 8-year primary school.

[26] Judgment of the Constitutional Tribunal of 23 June 1999, K 30/98, OTK 1999, No. 5, p. 101.

[27] See *Z. Góral*, Swoboda doboru pracowników i wolność pracy. Polskie prawo pracy w okresie transformacji w oświetleniu prawa wspólnotowego *[Freedom of Selection of Employees and the Freedom of Labour. Polish Labour Law in the Period of Transformation in the Light of the Community Law]*, Warsaw 1997, p. 37.

[28] Internal Security Agency *[Agencja Bezpieczeństwa Wewnętrznego]* and Intelligence Agency *[Agencja Wywiadu],* Government Protection Bureau *[Biuro Ochrony Rządu],* Border Guard *[Straż Graniczna]*, Customs Service *[Służba Celna]*, the Military Counterintelligence Service *[Służba Kontrwywiadu Wojskowego]*, the Military Intelligence Service *[Służba Wywiadu Wojskowego]*, the Prison Service *[Służba Więzienna].*

[29] *T. Kuczyński*, [in:] *R. Hauser*, *A. Wróbel*, *Z. Niewiadomski* (eds.), Stosunek służbowy. System Prawa Administracyjnego *[An Official Relationship. A System of Administrative Law]*, vol. 11, Warsaw 2011, p. 422.

[30] *Ibidem*, p. 423. These include members of the civil service corps, public officers, court and public prosecution service officers, judges, trainee judges in administrative courts, public prosecu-

hibitions may be waived if the consent for the additional employment is granted by the superior. The superior's decisions in this regard are discretionary since this issue is not regulated in detail in the public sector employment regulations.

Sometimes employers include in the contracts of employment certain clauses concerning the requirement to previously inform the employer on the intention to take up additional gainful activity. There are arguments raised in the labour law literature that any restrictions on taking up additional or future employment, regardless of its form, are invalid if there is no reasonable, real and actual cause or if it causes significant life restrictions for the person (employee) concerned without a good reason or without compensation[31]. The limits on the employer's right to obtain information from an employee are specified by the norms establishing the prohibition of discrimination and violation of personal rights of an employee[32]. Taking up additional employment by employees is acceptable because of a separate calculation of working time by particular employers. However, there is a visible conflict between the protective function of the provisions governing the working time and the principle of the freedom of labour[33].

What limits the full freedom of choice of the employing entity are non-compete agreements during the term of employment relationship and following the end of employment (so called non-compete clause). To the extent specified in a separate agreement, an employee cannot carry out an activity which is competitive to the employer or perform work under an employment relationship or on other basis for an entity which is a competitor of the employer. In the event of a non-compete agreement following the end of an employment relationship, an employee cannot start employment with another employer who runs business competitive to that of the previous employer. The non-compete obligation after the end of an employment relationship which in fact limits the right to work must be very precisely and reasonably specified in an agreement. The principle of the freedom of labour is not violated only if the actual purpose of such clauses is protection against unjustified competition and if the restrictions agreed upon between the parties as regards employment are proportionate to the risk to the employer's interests[34]. Such agreement may be concluded only with an employee

tors, court-appointed curators, and counsellors of the General Counsel to the Republic of Poland *[Prokuratoria Generalna]*.

[31] *A. Sobczyk*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]* (available at Legalis database) precisely, commentary on article 10, argument 3. See a judgment of the Supreme Court of 14 April 2009, III PK 60/08 with a commentary of J. Czerniak-Swędzioł, OSP 2011, No. 7–8, p. 593 ff.

[32] Judgment of the Supreme Court of Poland of 19 January 2017, II PK 33/16, MPP 2017, No. 4, pp. 203–205.

[33] *B. Cudowski*, Dodatkowe zatrudnienie *[Additional Employment]*, Warsaw 2007, p. 148.

[34] *Z. Góral*, O kodeksowym katalogu zasad indywidualnego prawa pracy *[The Labour Code Catalogue of Principles of Individual Labour Law]*, Warsaw 2011, p. 96.

who had access to particularly important information, disclosure of which might cause damage to the employer. Moreover, such agreement is always a fixed-term agreement since the amount of the compensation payable to the former employee is dependent on the duration of such agreement.

A particular manifestation of the freedom of labour is a freedom to choose an employer with whom one wishes to work. However, in the case of a transfer of an undertaking or a part of an undertaking to another employer under article 23^1 of the Labour Code, the freedom to choose an employer is limited. In such situation the new employer who has taken over the entire undertaking or a part thereof becomes, by law, a party to the existing employment relationships. An exception applies to workers hired on a basis other than a contract of employment (article 23^1 § 5 of the Labour Code). However, in such case a manifestation of the freedom to choose an employer is the right of the acquired employee to terminate employment without notice, upon 7-days' notification, within 2 months from the transfer of the undertaking or a part of the undertaking to another employer.

A negative aspect of the constitutional principle of the freedom of labour includes the prohibition of slavery and forced or compulsory labour. The prohibition of (freedom from) slavery was one of the first human rights recognized internationally[35]. There are arguments raised in the jurisprudence that forced labour occurs when there is an actual element of force. In the case of compulsory work, there is an obligation to perform such work set out in legal regulations[36]. In the Labour Code the negative aspect is not taken into account. However, in the Polish legal system the mentioned prohibitions are undisputed and derive not only from the Constitution but also from international agreements ratified by Poland. A strong emphasis on the prohibition of forced labour in connection with the prohibition of slavery and servitude was put in the Convention for the Protection of Human Rights and Fundamental Freedoms[37]. Similar provisions are laid down in the Charter of Fundamental Rights of the European Union[38]. According to its article 5 (1) and (2) no one shall be held in slavery or servitude or be required to perform forced or compulsory labour. Moreover, article 15 (1) of the Charter provides that "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".

[35] *K. Drzewicki*, Prawo do pracy jako normatywny agregat międzynarodowej ochrony praw człowieka *[The Right to Work as a Normative Set of International Protection of Human Rights]*, [in:] *M. Seweryński, J. Stelina* (eds.), Wolność i Sprawiedliwość w zatrudnieniu *[Freedom and Justice in Employment]*, Gdańsk 2012, p. 77.

[36] See *L. Garlicki*, [in:] Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności *[Convention on the Protection of Human Rights and Fundamental Freedoms]*, vol. 1, Commentary on articles 1–18, Warsaw 2010, commentary on article 4, pp. 145–146.

[37] Article 4, Journal of Laws *[Dz.U.]* of 1993, No. 61, item 284.

[38] Official Journal of the EU C of 2007, No. 303, p. 1

In the labour law jurisprudence it has been rightly held that forced labour does not include contractual obligations specified in law such as non-compete agreements or so called loyalty agreements which are signed if an employer finances the costs of professional development of an employee, if an employee can be released from such obligation through payment of the amount proportionate to the costs incurred by the employer[39]. The principle of the freedom of labour is linked to the prohibition of normative imposition of sanctions in the case of failure to take up employment. A person who does not work may usually face a negative moral judgment by other persons. In the teachings of the Catholic Church work is a fundamental dimension of human existence[40]. Work is an obligation stemming from the nature of a human being as a rational being[41].

The public aspect of the freedom of choice of employment consists in an obligation of a state to determine the minimum amount of remuneration for work and to implement a policy aimed at full and productive employment[42]. The provisions of article 10 §§ 2 and 3 of the Labour Code are a reflection of article 65 of the Constitution of the Republic of Poland[43]. Remuneration for work is one of the characteristics of an employment relationship and stems directly from article 22 of the Labour Code. An employee cannot waive the right to remuneration or transfer this right to another person. Article 65 (4) of the Constitution of the Republic of Poland imposes on the legislature an obligation to set out the minimum remuneration for work or the method for determining its amount. However, it does not provide for any guidelines as to the method of determination of such minimum remuneration, leaving to the legislature the full freedom to choose the rules under which the remuneration should be calculated and criteria for calculation of the amount of such remuneration. According to article 10 § 2 of the Labour Code, the state shall determine the minimum wage. Professor Sobczyk pointed out that the guarantee of the minimum wage means interference by the legislature in the rights and freedoms of an employer in the name of protection of an employee against social exclusion[44]. The minimum remuneration is the minimum amount of remuneration of an employee who is employed on a full-time basis in a month. If an employee is not employed on a full-time monthly

[39] See *Z. Góral*, Podstawowe zasady indywidualnego prawa pracy *[The Fundamental Principles of Individual Labour Law]*, [in:] *K.W. Baran* (ed.), System prawa pracy, Część ogólna, Tom 1 *[The System of Labour Law. General Part. Volume 1]*, Warsaw 2017, p. 1022.

[40] See *John Paul II*, Laborem exercens encyclical, Katowice 1981.

[41] *J. Majka*, Rozważania o etyce pracy *[Deliberations on the Work Ethics]*, Wrocław 1986, p. 81.

[42] *M. Gersdorf, K. Rączka*, Prawo pracy. Podręcznik w pytaniach i odpowiedziach *[Labour Law. Questions & Answers Handbook]*, Warsaw 2013, p. 96.

[43] *A. Sobczyk*, Komentarz do prawa pracy *[Labour Law Commentary]* (available at Legalis Database), a commentary on article 10, argument 7.

[44] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 35.

basis, then the minimum remuneration should be determined in an amount proportionate to the number of hours worked by the employee in the month concerned, based on the amount of the minimum remuneration determined on the basis of the Act of 10 October 2002 on the Minimum Remuneration for Work[45]. The mentioned Act further provides that the remuneration must be determined taking into account the minimum hourly rate in relation to the so-called self-employed[46] as well as natural persons who do not conduct business activity, who accept commissioned work or provide services under separate contracts to which laws on provision of services apply, to an entrepreneur[47] or to other organisational unit within their business operations[48]. A contractor or a service provider cannot waive the right to remuneration at the amount stemming from the amount of the minimum hourly rate or transfer the right to such remuneration to another person. The amount corresponding to the minimum rate should be paid at least once a month in the case of contracts concluded for longer periods (article 8a (6) of the Act on the Minimum Remuneration). It is also necessary to determine the method how the number of hours worked under the contract will be confirmed (article 8b of the Act on the Minimum Remuneration). In some cases the hourly rate will not apply (article 8d (1) of the Act on the Minimum Remuneration). First to mention are contracts under which the place and time of performance of work or provision of services is determined by the contractor or the service provider and they are only entitled to a commission-based remuneration. Other contracts which were excluded are those governing provision, for a period exceeding 24 hours, of care, educational and welfare services specified in detail in article 8d (1) (2–5) of the Act on the Minimum Remuneration. The amount of the minimum remuneration as well as the amount of the minimum hourly rate is published in the Official Gazette of the Republic of Poland – *Monitor Polski* – in the form of an announcement of the Prime Minister, by 15 September each year. This amount is subject to annual negotiations within the Council of Social Dialogue *(Rada Dialogu Społecznego)*[49]. The remuneration above the minimum level should be determined taking into account the type, quantity and quality of work, that is in accordance with the guidelines laid down in article 78 § 1 of the Labour Code.

[45] Journal of Laws *[Dz.U.]* of 2017, item 847.

[46] A natural person running business registered in the territory of Poland or in a non-EU Member State or non-EEA Member State, who does not employ workers or does not conclude contracts with contractors.

[47] Within the meaning of the Act of 2 July 2004 on the Freedom of Establishment *(ustawa o swobodzie działalności gospodarczej)* (Journal of Laws *[Dz.U.]* of 2016, item 1829).

[48] Since 1 January 2018 the minimum hourly rate is 13.70 PLN gross.

[49] Since 1 January 2018 the minimum remuneration for work is 2,100 PLN gross.

Article 10 § 3 of the Labour Code addresses another aspect of the right to work, that is an obligation of the state to implement a policy aimed at full and productive employment. On the other hand, article 65 (5) of the Constitution lists specific actions to be undertaken by public authorities, designed to comply with the right to work such as implementation of programmes to combat unemployment, including organisation of and support for vocational guidance and training, as well as public works and intervention works". The functions of the state in the field of promotion of employment, mitigating effects of unemployment and professional activation of unemployed persons and persons seeking work are laid down in the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions *(ustawa o promocji zatrudnienia i instytucjach rynku pracy)*[50]. Moreover, regulations concerning employment support measures are included in the Act of 27 August 1997 on the Professional and Social Rehabilitation and on Employment of Persons with Disabilities *(ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych)*[51] and in the Act of 13 March 2003 on the Specific Rules of Termination of Employment for Reasons not Attributable to Employees *(ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników)*[52].

The essence of the right to work, both in the constitutional sense and under article 10 of the Labour Code, is that the public authorities are obligated to act in order to create jobs[53]. This does not mean that the policy should guarantee employment to all citizens seeking work. Recently, there has been a visible decrease in unemployment rates on the Polish labour market. However, there has long been a problem with the lack of work in prisons. It has been emphasized that even if prisoners cannot demand employment, still the state should ensure the possibility for the prisoners to exercise the right to work by implementation of an appropriate penitentiary policy. However, because the society has put pressure on severe punishment of offenders, it often overshadows the need for vocational readaptation of prisoners which is necessary for their adaptation to normal professional life out of prison after serving their sentence[54].

[50] Journal of Laws *[Dz.U.]* of 2017, item 1065.

[51] Journal of Laws *[Dz.U.]* of 2016, item 2046.

[52] Journal of Laws *[Dz.U.]* of 2016, item 1474.

[53] *A. Sobczyk*, Kodeks pracy… [*The Labour Code…]*, commentary on article 10 of the Labour Code, argument 1.

[54] *T. Zieliński*, Prawo do Pracy – problem konstytucyjny *[The Right to Work – a Constitutional Problem]*, Państwo i Prawo 2003, vol. 12, p. 13.

2.2. The principle of protection of dignity and other rights of an employee

E. Kumor-Jezierska

The concept of dignity has not been defined by the Polish legislature. The human dignity is treated as a foundation of human rights. It is considered a certain cultural category, a universal value that grew out of the classical streams of the European philosophy[55]. In the tradition of the Polish language, human dignity is usually referred to as the "self-esteem" and "self-respect"[56]. The inherent and inalienable human dignity is a source of freedoms and rights of persons and citizens. It is inviolable. The respect and protection thereof shall be the obligation of public authorities (article 30 of the Constitution of the Republic of Poland). Dignity is derived from the nature and essence of humanity and is therefore not given by law[57]. The employer should respect dignity and other personality rights of an employee, and this obligation was elevated to the status of one of the fundamental principles of labour law (article 11^1 of the Labour Code). Employee's dignity is an integral concept. It is not derived only from being an employee but from being a human in general. The meaning of article 11^1 of the Labour Code is that a person whose dignity is violated is granted additional protection under labour law if the violator is an employer[58]. In the labour law literature and judicial decisions, there exists a concept of employee's dignity, identified as self-esteem based on the opinion of a good professional and conscientious employee and on the recognition of the abilities, skills and contribution of an employee by his superiors[59]. In addition, it is argued that the concept of dignity in relation to an employee should be seen as a manifestation of non-instrumental treatment of an employee, employee's empowerment in the work process, which will allow the employee to create self-esteem, thereby increasing his personal commitment to work[60]. The pro-

[55] See *D. Dörre-Kolasa*, Ochrona godności i innych dóbr osobistych pracownika *[Protection of Dignity and Other Personal Rights of an Employee],* Warsaw 2005, p. 3 ff.

[56] *M. Szymczak*, Słownik języka polskiego *[Polish Language Dictionary]*, vol. 2, Warsaw 1982, p. 673.

[57] See *A. Redelbach*, Prawa naturalne, prawa człowieka, wymiar sprawiedliwości. Polacy wobec Europejskiej Konwencji Praw Człowieka *[Natural Law, Human Rights and Justice System. Poles and the European Convention of Human Rights]*, Toruń 2000, p. 96.

[58] Judgment of 10 May 2012, II PK 215/11.

[59] Judgment of the Court of Appeal in Katowice of 29 April 2013, III APa 52/12.

[60] See *H. Szewczyk*, Ochrona dóbr osobistych w zatrudnieniu *[Protection of Personality Rights in Employment]*, Warsaw 2007, p. 274. see: *J.A. Piszczek*, Cywilnoprawna ochrona godności pracowniczej

visions of article 11^1 of the Labour Code stipulate that the employer must respect dignity and other personal rights of an employee, which means that a person applying for a job, and thus having the status of a candidate for employment, can only enjoy the protection of personal rights guaranteed by the Civil Code. The Labour Code does not contain a catalogue of employee's personality rights, and article 11^1 of the Labour Code does not provide for their distinctiveness, however, it obligates to their protection. In the Labour Code, among personality rights the legislature exposed only dignity. In the jurisprudence, a disputable issue is the relation between article 11^1 of the Labour Code and articles 23 and 24 of the Civil Code. It is possible to distinguish two main approaches. According to the first, more convincing view, the issue of protection of the employee's personality rights was not fully regulated in the labour law; hence the existing gap should be filled on the basis of article 300 of the Labour Code by application of articles 23 and 24 of the Civil Code respectively[61]. According to the second view, the provisions of the Civil Code guarantee protection to everyone, and therefore also an employee who suffered from an infringement committed by the employer. Consequently, it is argued that the provisions of articles 23 and 24 of the Civil Code should be applied without reference to article 300 of the Labour Code which orders that the Civil Code should be applied *mutatis mutandis* to the employment relationships. As a consequence, both article 11^1 of the Labour Code and the provisions of articles 23 and 24 of the Civil Code are applied cumulatively[62]. Regardless of the approach taken, when identifying other personality rights of an employee, it is necessary to point out the exemplary catalogue of personality rights protected by law, specified in the Civil Code. It includes: health, freedom, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, home inviolability, scientific, artistic, inventive and rationalizing work. Honour and reputation of a person are concepts which cover all areas of his/her personal, professional and social life. The violation of an honour of a person usually takes place through the dissemination of messages which formulate allegations or negative assessments pertaining to a specific person regarding his- behaviour in personal, family or professional life. It is usually about creating a negative image of such person, about attributing specific behaviour or characteristics to such

[A Civil-law Protection of Employee's Dignity], Toruń 1981, pp. 53–54; *I. Boruta*, Ochrona dóbr osobistych pracownika *[Protection of Personal Rights of Employees]*, PiZS 1998, No. 2, p. 19.

[61] *D. Dörre-Nowak*, Obowiązek pracodawcy szanowania godności i innych dóbr osobistych pracownika oraz konsekwencje jego naruszenia *[Employer's Obligation to Respect Dignity and other Personal Rights of an Employee and Consequences of Their Violation]* Studia z zakresu prawa pracy i polityki społecznej 1999–2000, p. 134; *M. Dyczkowski*, W sprawie ochrony dóbr osobistych pracowników *[Protection of personality rights of employees]*, PiZS 2001, No. 5, p. 14–19.

[62] *I. Boruta*, Ochrona dóbr osobistych… *[Protection of Personal Rights…]*, p. 20.

person that may result in the loss of confidence needed to pursue a profession or other activity. The harm resulting from such a violation is the feeling of discomfort caused by the loss of respect of other people[63]. The category of personal rights is dynamic and changes over time. Technological and civilization development, moral and legal principles adopted in the society, most certainly have an impact on the emergence of the new categories of personal rights which are accepted in the judicature. The Supreme Court pointed out to the possibility to recognize a (secondary) personal right, separate from life and health of an employee, that is the right to safe and healthy working conditions. The confirmation of this argument is, among others, that one of the basic duties of the employer is to provide employees with safe and healthy working conditions (article 94 (2a) and (4) of the Labour Code)[64]. Moreover, the Supreme Court held that employee's right to rest can be considered a personality right, separate from health and the right to safe and healthy working conditions. The right to rest is the right by which an employee can reconcile his functioning in the employment sphere with other social roles[65]. It is also legitimately argued in the literature on the subject that assignment of an employee to work in inappropriate conditions can be assessed as degrading his dignity, especially when this condition is permanent or long-lasting[66]. In its judgment of 10 January 2017[67] the Supreme Court held that if an employee is entrusted with the performance of work in a mouldy and musty environment (room), it can be considered an infringement of the personality rights of the employee (academic teacher). The Supreme Court found that what can be considered a personal right of an employee is data concerning employee's remuneration. The Supreme Court held that the right to remuneration can be included in the sphere of employee's privacy only following the analysis of all social and economic relations, customs and rules of coexistence. However, it should be acknowledged that the employer should absolutely refrain from disclosing the amount of employee's earnings if the employee explicitly, for justified reasons, objects to revealing to third parties the amount of his remuneration for work or in a situation where such information would encroach on the "sphere of intimacy" of the employee. According to the Court, such a situation would occur if the in-

[63] Judgment of the Court of Appeal in Warsaw – I Civil Division of 28 January 2016, I ACa 215/15.

[64] II PK 311/08, see: *M. Dyczkowski*, W sprawie ochrony dóbr osobistych…*[Protection of Personality Rights…]*, p. 9

[65] Judgment of the Supreme Court of Poland of 21 June 2011, III PK 96/10. Resolution of the Supreme Court of Poland of 13 March 2008, I PZP 11/07. Resolution of the Supreme Court of Poland of 3 June 2008, I PZP 10/07. Judgment of the Supreme Court of 23 July 2009, II PK 26/09.

[66] *H. Szewczyk*, Ochrona dóbr osobistych pracownika uwagi de lege lata i de lege ferenda – cz. 1 *[Protection of Personality Rights of an Employee – De Lege Lata and De Lege Ferenda – Part I],* PiZS 2010, No. 1, p. 4.

[67] III PK 37/16.

formation on the amount of the employee's remuneration affected his private life, e.g. if it disclosed the maintenance payments deductions[68]. The wage secrecy is binding upon the employer and the persons representing the employer who have access to remuneration data. This obligation applies to the provision of information to all entities, unless specific statutory provisions authorize the disclosure of remuneration. For example, in the judgment of 8 May 2002[69], the Supreme Court held that the employer did not violate the employee's personal rights by obliging the employee – in accordance with the provisions of the regulations on granting benefits from the company social benefits fund – to submit a certificate of earnings obtained from his other employer.

Article 11^1 of the Labour Code provides a legal basis for protection of the employee's sphere of privacy. The legal theorists and the courts adjudicating on the employees' privacy issues do not define the concept of "privacy", "private sphere" or "private life" but rather try to determine which matters, states or circumstances belong to the private sphere, and which of them, belong to the so-called sphere of universal accessibility[70]. According to article 47 of the Polish Constitution "everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life". As regards international law, worth noting is article 12 of the Universal Declaration of Human Rights which provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". Also the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[71] refers to this fundamental right in its article 8 and underlines that "Everyone has the right to respect for his private and family life, his home and his correspondence". The right to privacy is strictly related to the issues of protection of personal data and the image of the employee. According to article 94 (9a) and (9b) of the Labour Code, each employer shall keep documentation in matters relating to employment relationship and personal files and shall store them in the conditions preventing their damage or destruction. The personal files are created and kept separately for each employee. It is a collection of various documents, such as contracts of employment, medical certificates, other certificates, employee requests or declarations made by the parties to an employment relationship. Paragraph 6 of the Regulation of the Minister of Labour and Social Policy of 28 May 1996 on

[68] Resolution of 7 judges of the Supreme Court of 16 July 1993, I PZP 28/93.

[69] Judgment of the Supreme Court of 8 May 2002, I PKN 267/01.

[70] *T. Liszcz*, Ochrona prywatności pracownika w relacjach z pracodawcą *[Protection of Employee's Privacy in Relations with an Employer]*, MPP 2007, No. 1, p. 9.

[71] Journal of Laws *[Dz.U.]* of 1993, No. 61, item 284.

the Scope of Documentation Kept by Employers in Matters Relating to Employment Relationship and the Method for Keeping Personnel Files *(rozporządzenie Ministra Pracy i Polityki Socjalnej w sprawie zakresu prowadzenia przez pracodawców dokumentacji w sprawach związanych ze stosunkiem pracy oraz sposobu prowadzenia akt osobowych pracownika)*[72] defines the documents which should be collected in the personnel files. However, Part B of the files may also contain documents other than those listed in the Regulation, if they are significantly related to the course of employment, and their storage is justified and in compliance with law[73]. According to the Supreme Court, it is not a mistake to put in the personnel files the notes and memos regarding employee's behaviour, if the employee is aware of it. In its judgment of 10 October 2003[74] the Supreme Court explained that an employer has the right to document employee's failure to perform his duties. And the employee cannot demand that documentation concerning the course of his employment, be destructed or no longer collected. However, he may request the inclusion of this documentation in personnel files and order the employer to further collect it in such files[75]. A memo concerning a behaviour that may be the reason for punishing an employee with a penalty for breach of workplace order, procedures or policies *(kara porządkowa)* stipulated in the Labour Code, should be limited only to the facts and be devoid of assessment elements[76]. The subject of other memos should only be significant events concerning the course of employment, e.g. refusal to accept a statement of termination of a contract of employment. Personnel files cannot contain documents the scope of which goes beyond the data which can be processed by the employer. Personal data of employees collected and stored in personnel files are a form of personal data processing by the administrator. Every employer, when processing personal data of his employees, should exercise due diligence to protect the interests of employees and candidates for employment. The General Regulation (EU) 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[77] does not

[72] Journal of Laws *[Dz.U.]* of 2017, No. 894.

[73] Judgment of the Supreme Court of Poland of 4 June 2002, I PKN 249/01.

[74] I PK 295/02.

[75] A different view was presented by the Supreme Court in its judgment of 23 November 2010, I PK 105/10, in which the Court held that an employer may not use and attach to the files any warning letters or other indications of breach of duties in order to discipline an employee. Preparation of such letters or notes is considered unacceptable practice. It leads to the circumvention of regulations on the imposition of penalties for breach of order in the workplace, especially in the absence of the possibility to appeal.

[76] See *M. Mędrala*, Notatki służbowe w pracowniczych aktach osobowych *[Memos in Personnel Files]*, PiZS 5/2017, p. 11.

[77] Official Journal of the EU L, No. 119, p. 1. It applies as of 25 May 2018.

introduce specific rules for data processing in the labour relations[78]. The regulation sets out the basic rules for the processing of data. The personal data must be:

- processed lawfully, fairly and in a transparent manner in relation to the data subject;
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed;
- accurate and, where necessary, kept up to date;
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed;
- processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

Article 22^1 of the Labour Code contains a detailed list of data that an employer may request from a candidate for employment or from an employee. The employer may request other information about the candidate only if the obligation to provide it follows from separate provisions. Such an obligation may be explicitly indicated in a legal provision. For example, according to article 4 (4) of the Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service *(ustawa o pracownikach sądów i prokuratury)*[79], the condition for applying for employment in a court or prosecutor's office is that the person applying for a clerk's training submits a statement that there are no proceedings pending against him, prosecuted by public prosecution or relating to fiscal offences. There are also provisions that do not formulate *expressis verbis* the requirement to submit a specific document, nevertheless the need to obtain information about the criminal record can be interpreted from the requirements

[78] Article 88 of the General Data Protection Regulation reserves that "Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship. 2. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place".

[79] Journal of Laws *[Dz.U.]* of 2017, item 246.

stipulated in such provision which should be met by a candidate for employment. For example, civil services may employ only persons who were not punished for an intentional crime or intentional fiscal offence[80]. Such requirements are stipulated also in other separate laws governing employment of specific categories of public sector employees *(*so called *pragmatyki)*. According to article 6 (1)(10) of the Act of 24 May 2000 on the National Criminal Register *(ustawa o Krajowym Rejestrze Karnym)*[81], an employer has the right to obtain information about persons whose personal data were included in the register, to the extent necessary to hire an employee who is subject to the statutory obligation of having no criminal record and full public rights, as well as to determine his right to hold a particular position, pursue a particular profession or conduct a specific business activity[82]. An employer who requests a certificate of no criminal record *(zaświadczenie o niekaralności)* from a candidate for employment, and the obligation to present this document is not prescribed by law, or is seeking to obtain information from third parties regarding conviction of an employee, may be accused of violation of personal rights. An employer may demand from an employee, that is a person with whom an employment relationship has already been established, other personal data, as well as names and dates of birth of the employee's children, if such data is necessary in connection with the fact that the employee may exercise certain rights provided for in the labour law. For example, the other personal data, necessary in connection with the exercise by the employee of special rights provided for in the labour law, may be information about the employee's disability.

Persons who apply for a job often include their photographs in their CVs. An employer cannot demand submission by the candidate for employment of curriculum vitae with a photograph, because the demand to disclose the image does not fit into the catalogue of data mentioned in article 221 of the Labour Code. If a candidate voluntarily provides additional information about himself, such as a photo, then his informed and voluntary consent to use the image for the recruitment process will be an element that legalizes the processing of this data for the recruitment by the employer. After hiring an employee, the employer cannot freely use the employee's image, for example place photos from his CV on the company's website. According to article 81 of the Act on Copyright and Related Rights, the dissemination of the image requires the consent of the person shown

[80] Article 4 (3) of the Act of 21 November 2008 on the Civil Service *(ustawa o służbie cywilnej)* (Journal of Laws *[Dz.U.]* 2017, item 1889).

[81] Journal of Laws *[Dz.U.]* of 2017, item 678.

[82] For example, according to article 4 (5) of the Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service *(ustawa o pracownikach sądów i prokuratury)*, prior to admitting a person to a clerical training, a director of a court or a prosecutor managing an organizational unit, should obtain information about such person from the National Criminal Register.

on it. Exceptionally, consent is not required if the person has received the agreed payment for posing or when he/she is a well-known person, and the image was made in connection with performing public functions, in particular political, social, professional or the image of the person is only a detail of a larger whole such as gathering, landscape, public event.

Sometimes, the internal company regulations provide for an obligation to wear a badge or a service card with the employee's image. In this situation, the employer may require a photo from the employee. Such standpoint was expressed by the Inspector General for the Protection of Personal Data *(GIODO)*. However, if there is no such requirement in the internal regulations, the employer who wishes to legally obtain employee's photo to place it on a badge or service card, must – as a rule – obtain the employee's consent. However, there are professions or the nature of work, where the image of the employee is closely related to the duties he performs, e.g. a security officer. In such case, security considerations make it possible to use the image of the security worker for identification purposes[83].

For many years, the possibility to process biometric data in the labour relations has been a problematic issue. The General Data Protection Regulation (GDPR) contains a definition of biometric data. Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data (article 4 (14) of the GDPR regulation). The problem of the permissible use, including the processing, by the employer of employees' fingerprints to control the working time, has been examined in the case-law. Initially, a view was presented according to which an employer has such a right, but only upon prior employee's consent[84]. The standpoints presented in the later case-law were different. For example, the Supreme Administrative Court, in its judgment of 1 December 2009[85], held that "(…) the lack of balance in the employee-employer relation puts into question the voluntary character of consent to the downloading and processing of data (…). For that reason, the legislator limited, under article 22^1 of the Labour Code, the catalogue of data which may be demanded by

[83] See *E. Kumor-Jezierska*, Komentarz do rozporządzenia w sprawie zakresu prowadzenia przez pracodawców dokumentacji w sprawach związanych ze stosunkiem pracy oraz sposobu prowadzenia akt osobowych pracownika *[A Commentary on a Regulation on the Scope of Documentation Kept by Employers in Matters Relating to Employment Relationship and the Method for Keeping Personnel Files]*, [in:] *K.W. Baran* (ed.), Akty wykonawcze prawa pracy *[Delegated Acts to Labour Law]*, Warsaw 2016, p. 780.

[84] Judgment of the Supreme Administrative Court of 27 November 2008, II SA/Wa 903/08.

[85] Judgment of the Supreme Administrative Court of 1 December 2009, I OSK 249/09. Judgment of a Voivodeship Administrative Court in Warsaw of 18 June 2010, II SA/Wa 151/10.

the employer from the employee. If the consent under article 23 (1)(1) of the Act on the Protection of Personal Data was considered a circumstance legalizing the collection from an employee of data other than those indicated in article 22^1 of the Labour Code, it would constitute a circumvention of this provision. The use of biometric data to control the working time of employees is disproportionate to the intended purpose of their processing within the meaning of article 26 (1) (3) of the mentioned Act on the Protection of Personal Data. Moreover, the Inspector General for the Protection of Personal Data emphasized that in the case of obtaining employees' personal data, other than those indicated in article 22^1 of the Labour Code, the consent of a person, to be considered a legal basis, must be expressed in a voluntary manner. However, in the relationship between an employer and an employee, it is difficult to talk about such a voluntary nature of consent, because there is no subjective balance (there is a relationship of superiority and subordination between the parties), which can often be conducive to enforcing consent[86]. Processing of biometric data is not necessary for the achievement of purpose which is the working time recording. The employee's working time may be controlled by the employer by other means that are less intrusive in the privacy of the employee[87].

The problem of respect for personal rights is connected with the problem of the limits of application of the contemporary methods of controlling employees such as video monitoring of the workplace, checking employees' activity on the Internet, controlling business e-mails, recording telephone conversations, using GPS recorders in employees' business cars, biometric data processing or using lie detectors. According to legal theorists, monitoring means "activities undertaken in order to collect information about employees through observation of the employees, either directly or with the use of electronic devices". There is a proactive monitoring, focusing on preventive actions and assessment of employee's performance and a reactive monitoring undertaken after receiving information about illegal behaviour[88]. It may be either permanent or incidental, evident or secret. Under article 94 (2) of the Labour Code an employer must organise work in a manner which guarantees making full use of the working time as well as achievement by the employees, with the use of their skills and qualifications, of high performance and appropriate quality of work. Such obligation of the employer corresponds with the employee's obligation to perform work diligently and with due care and to observe the working time established in the workplace,

[86] See http://www.giodo.gov.pl/348/id_art/3358/j/pl/ (accessed on 21 December 2017).

[87] Decision of the Inspector General for the Protection of Personal Data of 15 December 2009, DIS/DEC-1261/46988/09.

[88] *A. Lach*, Monitorowanie pracownika w miejscu pracy *[Monitoring of an Employee at Work]*, MPP 2004, No. 10, p. 264.

the work rules and work order, the rules of social coexistence and the principles of occupational health and safety, as well as fire regulations. An employee must also have regard for the welfare of the establishment and protect its property (article 100 of the Labour Code). Therefore, the employer may control the process of work and its results and protect its property. Employers use various forms of control depending on the specifics of the company. In the commercial sector, e.g. in stores, warehouses, employers most often use CCTV cameras. In the transport and construction industry, GPS recorders are often used in company cars and sobriety control is carried out. As regards office and administration employees or those providing consultancy services, employers most often control the activities that they perform on computers.

The GDPR does not directly define the rules of monitoring in the workplace. The regulations related to monitoring were introduced into the Labour Code by the act of 10 May 2018 on the Protection of Personal Data[89], which entered into force on 25 May 2018. Article 22^2 of the Labour Code refers only to the control with the use of technical means for video recording. Pursuant to the said provision, the employer may introduce special supervision over the area of the work establishment or the area around the work establishment in the form of technical means enabling video recording (video surveillance), if it is necessary to ensure the safety of employees, property protection, control of production or to keep secret the information the disclosure of which might cause damage to the employer. The video surveillance may not cover sanitary facilities, cloakrooms, canteens and smoking rooms or premises made available to a trade union organization. However, this does not apply in the situations in which the use of video surveillance in these rooms is necessary to achieve the objectives mentioned before and where it does not violate the dignity and other personal rights of employees, as well as the principles of freedom and independence of trade unions, in particular through the use of techniques that prevent recognition of persons present in such rooms. The employer may process video recordings only for the purposes for which they have been collected and keep them for a period not exceeding 3 months from the date of recording. In the case in which the video recordings constitute evidence in legal proceedings or the employer has become aware that they can be evidence in the proceedings, the time-limit is extended until the final conclusion of the proceedings. After the indicated periods have elapsed, the video recordings containing personal data and obtained as a result of the video surveillance should be destructed, unless separate provisions provide otherwise. The purposes, scope and method of the monitoring are set out in the collective agreement or in the work regulations or in a notice, if the employer is not covered

[89] Journal of laws *[Dz.U.]* of 2018, item 1000.

by a collective agreement or is not obliged to set work regulations. The employer informs employees about the introduction of the video surveillance, in a procedure adopted by the given employer, no later than 2 weeks before it is launched. The employer is obliged to communicate in writing the information about the purpose, scope and method of video surveillance in the workplace before allowing an employee to work. In addition, the employer must mark the premises and the area monitored in a visible and legible manner, by means of appropriate signs or sound notices, no later than one day before the launch of the monitoring.

Another problem that should be noted is the acceptability of control by the employer of the correspondence sent to and received from the employee's e-mail. The secrecy of correspondence is one the rights protected under articles 23 and 24 of the Civil Code. Moreover, article 49 of the Constitution of the Republic of Poland guarantees to the citizens the freedom and privacy of communication. The secrecy of correspondence is also connected with the right of every human being to respect for his private life and the right to keep secret the communications addressed to other persons and institutions. Both traditional letters and e-mails are subject to protection. In the case of correspondence exchanged with the use of a business e-mail box, where the e-mail address includes a name of the employer, there is a presumption that this correspondence is exchanged on behalf of the employer. The presumption that any and all correspondence exchanged by the employee is a business correspondence cannot be relied upon by the employer if the latter allows his employees to use business e-mail also for private purposes[90]. New article 22^3 § 1–3 of the Labour Code includes regulations regarding the monitoring of business e-mails. According to article 22^3§ 1, if it is necessary to ensure the organization of work enabling the full use of working time and proper use of work tools made available to the employee, the employer may introduce control of employee's business e-mail. Importantly, the monitoring of e-mail cannot violate the secrecy of correspondence and other personal rights of the employee. Just as with video surveillance, the relevant provision on business e-mail monitoring should be included in the company's internal regulations or communicated in a notice. Employees should be informed about it and the use of such monitoring should be indicated (article 22^3 § 3 of the Labour Code in connection with article 22^2 § 6–9 of the Labour Code). The presented rules apply, as appropriate, to other forms of monitoring, e.g. telephone calls, GPS, network activity, if it is necessary to achieve the objectives set out in article 22^3 § 1 of the Labour Code.

[90] See *D. Dörre-Nowak*, [in:] *Kodeks pracy. Komentarz [The Labour Code. A commentary]*; *A. Sobczyk* (ed.), Legalis/el/2017, a commentary on article 11^1, argument 12.

It is emphasized in the Polish case-law[91] that employers must not violate the dignity of an employee as a human being, irrespective of whether the employee views the employer's behaviour as harmful and opposes it, or whether he accepts bad treatment. Therefore, in order to establish that dignity has been violated, it is sufficient if in the objective social assessment (assessment of reasonable third parties) specific behaviour of a given person (entity) violates the value of another person. Even if for the assessment that there has been a violation of employee's dignity (article 11^1 of the Labour Code) it is of no importance whether the employee himself considered the employer's behaviour (for example a statement or remark) detrimental to his value, still the employee's reaction to such behaviour may be important in the process of assessing whether the violation of dignity objectively occurred. The employer's obligation to respect the employee's personal rights also includes preventing and counteracting the violation of these rights by other employees[92].

In the era of such extensive IT progress, where the technical capabilities of surveillance of employees using various electronic devices are practically unlimited, protection of dignity and other personal rights of employees has become much more important. Intensive employee control sometimes encroaches upon the privacy or even intimacy of the employee. It was therefore necessary to regulate this complex issue in a transparent manner. The purpose of the drafted national legal framework for the protection of personal data was to ensure that the provisions of the GDPR regulation are fully effective. The advantage of the new regulations is the introduction to the Labour Code of an explicit requirement that the control of employees must be evident. In addition, the provisions specify exhaustively for which purposes the monitoring by employers is acceptable. The introduced changes do not exhaustively regulate all issues relating to control of employees in the workplace. Employee control is connected, for example, with the problem of the acceptability of employee searches by the employer. However, this issue has not been directly regulated in the new provisions of the Labour Code. Until now, in the legal writings, it has been accepted that a search of an employee was possible only to protect an important employer's interest, for example, in the case of suspicion that the employee misappropriates property that

[91] Judgment of the Supreme Court of Poland of 8 October 2009, II PK 111/09. Judgment of the Supreme Court of 10 June 2014, I PK 310/13. Judgment of the Supreme Court of 24 June 2015, II PK 207/14. Judgment of the Court of Appeal in Kraków of 6 June 2013, I ACa 470/13 (available at Legalis Database).

[92] Judgment of the Supreme Court of Poland of 2 February 2011, II PK 189/10. See *Z. Góral*, Kontrola pracownika a zasada ochrony jego godności i innych dóbr osobistych – zagadnienia wybrane *[Control of Employees and the Principle of Protection of Employee's Dignity and other Personality Rights – Selected Issues]*, [in:] *Z. Góral* (ed.), Kontrola pracownika. Możliwości techniczne i dylematy prawne *[Controlling an Employee. Technical Possibilities and Legal Dillemas]*, Warsaw 2010, p. 42.

does not belong to him without the consent or authorization of the employer. A search will be considered lawful if an employer proves that his legal interest is more important than violation of a personal right of an employee. Moreover, the employer should demonstrate that the use of other measures is impossible or very difficult[93]. If an employer intends to search an employee, the employee should be forewarned about the possibility of such control[94].

2.3. The principle of equal treatment of employees

M. Wujczyk

In the Polish labour law, the main objective of the prohibition of discrimination is undoubtedly to regulate the employment relationships and to eliminate the cases of unjust differentiation. The principle of prohibition of discrimination defines the behaviour (and more precisely – a non-acceptable behaviour) of an employer towards the employees. In fact, it applies to any aspect of relations between an employee and an employer, in particular an establishment and termination of an employment relationship, promotion and setting out the terms and conditions of employment.

Moreover, the principle of prohibition of discrimination defines the directions for the creation and development of labour law. It refers also to the generally applicable laws but primarily to internal regulations applicable in the workplace. In the process of enactment of such regulations it should also be ensured that particular provisions should not be discriminatory.

The prohibition of discrimination must also be taken into account in the interpretation of other norms of labour law. No provisions should be interpreted in a manner which would result in unjustified differentiation of a situation of employees. Such standpoint is supported also by articles 9 § 4 and 18 § 3 of the Labour Code. According to the former: "Provisions of collective agreements and other collective arrangements, internal rules and statutes based on law, defining the rights and obligations of the parties to an employment relationship which violate the principle of equal treatment in employment, shall not apply". Article 18 § 3 of the Labour Code states that provisions of contracts of employment and other acts under which an employment relationship is established, which violate the principle

[93] *J. Kosińska*, Przeszukanie pracownika *[Search of an employee]*, MPP 2009, No. 1, p. 6.

[94] A judgment of the Polish Supreme Court of 13.04.1972, I PR 153/72 (available at Legalis Database).

of equal treatment in employment, are invalid. In such case, such provisions should be replaced with relevant provisions of labour law and in the absence of the latter – such provisions should be replaced with non-discriminatory provisions.

Even if it is often denied that the principles of labour law have an educational function, one cannot but notice that the prohibition of discrimination actually plays such a role. The prohibition applies not only to the employer-employee relationship but also to the relations between the employees themselves. In other words, behaviour of the employed persons should not result in discrimination of co-workers. Consequently, the principle of prohibition of unequal treatment specifies what behaviour is not allowed within an employment relationship and the relations in the employing establishment. Therefore, it is undoubtedly educational.

Another function which cannot be denied in relation to the prohibition of discrimination is a cognitive function. As pointed out in the jurisprudence – "knowledge of the principles characteristic of a particular branch of law allows for reasonable decisions to be taken by the employer"[95]. The awareness that none of the employees should be discriminated affects the development of provisions of labour law.

Elevation of the prohibition of discrimination to the level of principle of labour law means that its application is not limited only to the cases described in detail in Chapter IIa titled Equal Treatment in Employment (article 18^{3a}–18^{3e} of the Labour Code), but it also affects all elements of labour law relations. It means that the employer should treat the employees and create their situation in such a manner that the prohibition of unequal treatment is not violated at any time. The obligation refers not only to setting out the terms and conditions of individual employment relationships but also to establishment of internal rules applicable to all employees or to certain groups of employed persons. In my opinion, the obligation arising from the analysed principle should extend also to treatment by the employer of former employees, after termination of an employment relationship, as regards the circumstances relating to that relationship (for example in respect of issuance of letters of recommendation).

It has been pointed out in the labour law literature that the principle of equal treatment (article 11^2 of the Labour Code) is horizontal, which means that it affects the relations between an employee and an employer[96]. It has been argued that unlike other principles, an addressee of the principle of equal treatment is not a state and therefore it is not a public-law principle[97]. Although it is debatable

[95] *T. Zieliński*, Prawo pracy. Zarys systemu. Część I *[Labour Law. An Outline of the System. Part I]*, Warsaw-Kraków 1986, p. 213.

[96] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 256.

[97] *Ibidem*, p. 256.

whether the principles of labour law should be considered solely public-law principles, in my opinion, the horizontal understanding of the principle of equality may be extended also to the principle of non-discrimination in the employment relationship[98]. Therefore, it should be assumed that the principle directly affects an employment relationship and its terms and conditions. Of course, it does not mean that it should not be considered a rule addressed also to public authorities.

It has been rightly noted that the prohibition of discrimination is aimed at protection of employees against exclusion and at integration[99]. The former element is most certainly based on the already mentioned principle of justice. The latter (an integration with personnel) indicates another important element of axiological foundations of the prohibition of discrimination, namely an effort to build a community among workers employed by the employer.

The purpose of the prohibition of discrimination is to ensure equality among employees or groups of employees. In the context of this axiological element of the principle of equality Sobczyk uses the concept of the most favoured treatment[100]. In his opinion its purpose is to level a disproportion in the negotiating position of the parties, resulting from the knowledge barrier and economic pressure encountered by the employee[101]. Therefore, this principle serves to equalize the opportunities of unequal contracting parties. According to Sobczyk, this principle introduces a mechanism according to which "an employee being in the same situation as regards the sphere of his performance, has the same rights as another employee who is in the same situation and who had negotiated the best conditions"[102]. The above deliberations should only help define the axiology of the principle of non-discrimination. Undoubtedly, the prohibition of discrimination is to ensure equal opportunities to all employees. Therefore, in this context, it means strengthening of the negotiating position of an employee. However, it is not the main objective of the discussed principle. In establishing the prohibition of discrimination, the legislature seeks to eliminate from an employment relationship the cases where differentiation is contrary to the generally acceptable values. Therefore, such activity is to guarantee that the employer will not allow unfair treatment (differentiation) of employees. The above implies that the axiological foundations of the prohibition of discrimination should be sought primarily in the concept of justice.

[98] For an opposite view, see: *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 112.

[99] An opposite view, see: *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 111.

[100] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, pp. 256–259.

[101] *Ibidem*, p. 259.

[102] *Ibidem*, p. 259.

In the Polish labour law, the provisions governing the prohibition of discrimination are included in the Labour Code. First to mention is article 11^2 of the Labour Code[103] (setting out the principle of equal treatment) and article 11^3 of the Labour Code[104] (which formulates the prohibition of discrimination). These provisions were extended by addition of chapter IIa (articles 18^{3a}–18^{3e} KP) under the Act of 21 November 2008 on the Amendment of the Labour Code[105]. The purpose of the amendment was to adjust the Polish law to the principles laid down in the Community law.

It should be noted that the anti-discrimination provisions under the Polish labour law have only been in place for a very short time. Therefore, an in-depth analysis has not been possible. Moreover, despite the increasing number of court rulings, still the understanding of particular provisions governing the prohibition of discrimination causes certain difficulties. It is also a consequence of a very narrow regulation of discrimination in the Polish labour law. It seems that many issues should be regulated in a more detailed manner, with greater precision.

2.3.1. The principle of semi-open catalogue of criteria of prohibited differentiation

In the Labour Code, the criteria which cannot be the grounds for unequal treatment of employees by an employer were listed in articles 11^3 and 18^{3a} §1. These include sex, age, disability, race, religion, nationality, political views, union membership, ethnical origin, creed, sexual orientation. In principle, the differentiation is not allowed also on grounds of employment for a fixed term or for unlimited duration or employment on a full-time or part-time basis.

In those provisions, the Polish legislature mentioned various anti-discrimination criteria which should be judged positively. In particular, a reference to a type of a contract of employment under which work is performed, as well as the working time of an employee protects the employees employed for a fixed-term or on a part-time basis against treatment which would be worse when compared with the employees who concluded a contract for an indefinite term or on a full-time basis.

It should be noted that both of the mentioned provisions of the Labour Code, when listing the criteria the application of which in differentiating employees

[103] The provision was added by the Act of 2 February 1996 on the Amendment of the Labour Code and Certain Other Acts *(ustawa o zmianie ustawy – Kodeks pracy oraz o zmianie niektórych ustaw)* (Journal of Laws *[Dz.U.]* No. 24, item 110), which entered into force on 2 June 1996.

[104] *Ibidem.*

[105] Journal of Laws *[Dz.U.]* No. 223, item 1460.

leads to discrimination, use the term "in particular". This implies that discrimination may occur also where criteria other than those listed in the Labour Code are applied. However, the laws do not specify what criteria may come into play. There are two standpoints developed on the basis of the mentioned expression.

According to the first one, the expression "in particular" implies that the catalogue of criteria of prohibited differentiation is open. The legislature used this expression intentionally. This means that discrimination can take place also in situations other than these listed in articles 11^3 and 18^{3a} §1 of the Labour Code[106]. Such opinion was supported also by the Supreme Court, which held that differentiation of employees' duties resulting from personal characteristics not related to the work performed, such as an appearance of the person concerned, constitutes a violation of the principle of equal treatment in employment[107]. In such case it is assumed that the discriminatory criterion exists when it is not objective[108].

According to the second standpoint, a catalogue of the criteria of prohibited differentiation is closed. It was argued that the view "regarding the "open" catalogue of causes (…) is controversial. It not only disregards the wording of § 2 of the mentioned article and of article 18^{3b} § 1 of the Labour Code, but primarily it creates a state of legal uncertainty. Because of the fact that the provisions governing the prohibition of discrimination belong to the laws which limit the ownership, it is necessary to use precise legal language (article 64 (3) of the Constitution of the Republic of Poland provides that the right of ownership may only be limited by a statute). Moreover, the causes of discrimination laid down in § 1 are not uniform. They include certain characteristics (age, sex, disability, orientation, etc.) and the bases of employment (…). There are also other characteristics which are not dependent on the will ("congenital": age, sex, etc.) and characteristics which are dependent on the will ("acquired": political beliefs, union membership. etc.). Therefore, it is not possible to establish a uniform formula to determine whether a certain condition is discriminatory or not. Moreover (…), the discriminatory behaviour is "particularly reprehensible" and requires separate regulation. So there should be a catalogue of such behaviours defined by the legislature. It seems that this "confusion" regarding the catalogue of grounds results from the lack of a sound analysis of the terms "equality" and "discrimination". If we accepted a general principle that employees should be "equal in law" (and the

[106] See *M. Tomaszewska*, [in:] *K.W. Baran* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2012, pp. 126–127; *Z. Góral*, O kodeksowym katalogu… *[The Labour Code Catalogue…]*, p. 157.

[107] Judgment of the Supreme Court of 4 October 2007, II PK 24/07, OSNP 2008, No. 23–24, item 347.

[108] *K. Rączka*, [in:] *M. Gersdorf*, *K. Rączka*, *M. Raczkowski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2010, p. 83.

construct of "replacement" of contractual provisions or internal rules which violate this principle), this would allow for a precise definition of particularly reprehensible cases under the concept of "discrimination"[109].

A detailed analysis of the nature of the catalogue of prohibited differentiation criteria as an exhaustive or open catalogue requires a separate study. Undoubtedly, the problem should be resolved unequivocally by the legislature.

2.3.2. The principle of multiple forms of discrimination

According to article 18^{3a} § 1 of the Labour Code, a direct discrimination occurs where, for one or several reasons mentioned in § 1, an employee was, is or could be treated, in a comparable situation, less favourably than other employees. There was a view presented in the Polish jurisprudence according to which this definition suggests the possibility to recognize that the discrimination was in relation to the past, current or hypothetical state[110]. While a reference to the past raises no doubts, it is not fully clear what is meant by an indication that discrimination occurs also where an employee could be treated unequal as compared with other employees. The Polish legislature has defined the direct discrimination slightly different from the EU laws. Provisions of the directive indicate that discrimination occurs where a person is treated less favourably as compared with the past, current or future treatment of another person in a comparable situation, on grounds of the prohibited differentiation criterion. Therefore, the discriminatory behaviour is referred to how another person was or could have been treated. On the other hand, provisions of the Labour Code refer the future or hypothetical behaviour to the discriminated person[111]. This allows for the possibility that the concept of discrimination may cover more situations, including hypothetical ones. For that reason, some legal scholars argue that this provision should be understood to include the situations in which unequal treatment takes place and a comparison is made to another person which could have been employed in a certain position[112]. Therefore, in compliance with the definition provided for in the EU laws.

[109] *P. Korus*, [in:] *A. Sobczyk*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2014, pp. 62–63.

[110] *M. Tomaszewska*, [in:] *K.W. Baran* (ed.), Kodeks Pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2012, p. 129.

[111] *I. Boruta*, Zakaz dyskryminacji w zatrudnieniu – nowa regulacja prawna *[Prohibition of Discrimination in Employment – New Regulations]*, PiZS 2004, vol. 2.

[112] *M. Tomaszewska*, [in:] *K.W. Baran* (ed.), Kodeks Pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2012, p. 129.

Article 18^{3a} § 4 of the Labour Code provides that indirect discrimination occurs when, as a result of an apparently neutral decision, applied criteria or undertaken action, there arise or might arise disproportions or particularly unfavourable situation concerning the establishment and termination of an employment relationship, terms and conditions of employment, promotion and access to upskilling trainings in relation to all or a significant number of employees who belong to the group distinguished on the basis of one or several grounds specified in article 18^{3a} § 1 of the Labour Code, unless the decision, criterion or action is objectively justified because of a legitimate objective to be attained, and the measures serving attainment of that objective are appropriate and necessary.

It has been pointed out in the Polish jurisprudence that a "three-question test" may help determine whether certain behaviour constitutes indirect discrimination. Three questions need to be answered:

1) Is the purpose of the provision, criterion or practice in compliance with law?
2) Are the means which serve achievement of the purpose appropriate and necessary; could the purpose be achieved by any other means?
3) Was the principle of proportionality between the gravity of discrimination and the interest of the discriminator complied with[113]?

As regards the criteria which may appear only apparently neutral, a reference is made to the physical strength criterion, mobility understood as an easy adaptation to the changing working hours and place of work or a vocational training[114].

Some legal scholars indicate that even if article 18^{3a} § 4 of the Labour Code suggests that indirect discrimination occurs where it relates to all or a large number of employees, still this type of discrimination may occur in relation to an individual employee[115]. They argue that in order to establish that the indirect discrimination took place, it is important that employer's behaviour was not directed to an individual employee. Such arguments should be treated with great caution. The Supreme Court held that the "discrimination referred to in article 18^{3a} § 4 of the Labour Code is indirect because it is not a consequence of employer's behaviour towards an individual employee but towards a whole group of employees, distinguished on the basis of prohibited grounds laid down in article 18^{3a} § 1 of the Labour Code, while such distinction is a result of an apparently neutral decision, criterion or undertaken action and the consequence which occurred or may occur is unfavourable disproportion or particularly unfavourable situation within

[113] *K. Kędziora*, *K. Śmiszek*, Dyskryminacja i mobbing w zatrudnieniu *[Workplace Discrimination and Mobbing]*, Warsaw 2008, p. 40.

[114] *D. Dörre-Nowak*, [in:] *B. Wagner* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Gdańsk 2011, pp. 109–110.

[115] *P. Korus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2014, pp. 63–64.

the scope specified in the mentioned clause, unless such decision, criterion or action is objectively justified because of a lawful purpose which should be achieved, and the measures applied to achieve it are appropriate and necessary. The structure of this provision as well as article 18^{3b} § 1 of the Labour Code imply that the employer bears the burden of proof that there was no indirect discrimination"[116].

The Polish laws also differentiate between harassment and sexual harassment. The former is defined in article 18^{3a} §5 (2) of the Labour Code. According to this provision, harassment means an unwanted behaviour with the purpose or effect of violating the dignity of an employee, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

On the other hand, under article 18^{3a} § 6 of the Labour Code, sexual harassment means every unwanted behaviour of a sexual nature or related to the sex of an employee, with the purpose or effect of violating the dignity of that employee, in particular of creating an intimidating, hostile, degrading, humiliating or offensive environment; such conduct may involve physical, verbal or non-verbal elements. The Labour Code treats the sexual harassment as a type of discrimination on grounds of sex.

It should be underlined that under the Polish laws, for behaviour to be considered harassment two conditions must be met at the same time: violation of dignity of a victim and creation of an intimidating, hostile, degrading, humiliating or offensive environment. In both cases the behaviour of the harasser must be unwanted. The nature of this concept is understood in different ways. On the one hand, arguments are raised that the assessment whether certain behaviour was unwanted is subjective[117]. On the other hand, one could claim that the assessment should be objective and therefore it should be assumed that for the behaviour to be considered unwanted it should be considered unwanted generally in the society[118]. The objective concept was supported by the Supreme Court when considering the issue of violation of personal rights. The Court held that the assessment whether a personal right such as feelings, human dignity or physical integrity (article 24 § 1 of the Civil Code) was violated, cannot be performed on the basis of an individual sensitivity of the person concerned (subjective assessment) because the latter may be very sensitive as a result of personal characteristics or health condition, etc. For that reason, the criteria of assessment of the violation must be objective, which means that account should be taken of the feelings of a broader

[116] Judgment of the Supreme Court of Poland of 4 June 2013, II PK 26/13 (available at Legalis Database).

[117] *L. Florek*, [in:] *L. Florek* (ed.), Kodeks pracy. Komentarz, Warsaw 2011, p. 119.

[118] *A. Rogulska-Kikoła*, *M. Piwowarska-Reszka*, Mobbing i dyskryminacja w stosunkach pracy. Zagadnienia praktyczne *[Workplace Mobbing and Discrimination – Practical Issues]*, Warsaw 2014, p. 119.

group of people as well as the generally accepted standards of behaviour (custom, tradition, etc.). What is also of relevance is a motivation of the offender[119].

In the Polish labour law jurisprudence an argument was raised that "ordinary" harassment occurs on the same grounds as those applicable to discrimination[120]. However, there are also different views. According to them, based on the literal wording of these provisions "the harassment does not have to result in unequal treatment described in § 1–4. The behaviour of the offender which leads to violating the dignity of an employee and creating an intimidating, hostile, degrading, humiliating or offensive environment – is considered a form of discrimination under this provision"[121].

Neither the harassment nor the sexual harassment has to be intentional behaviour of the employer. Such forms of discrimination may also occur where a person who commits harassment is a colleague or a superior of the victim[122].

It has been rightly pointed out in the legal writings that a condition *sine qua non* for the occurrence of the sexual harassment is lack of consent of the harassed person to a specific behaviour[123].

2.3.3. The principle of the prohibition of victimization of persons exercising their rights as a result of violation of the principle of equal treatment

A provision which is to protect against victimization of employees employed under the Polish laws is article 18^{3e} of the Labour Code. It provides that exercise by an employee of his rights as a result of violation of the principle of equal treatment in employment cannot be the basis for unfavourable treatment of the employee as well as it cannot cause any negative consequences to such employee, and in particular it cannot be the cause justifying termination of the employment relationship by the employer with or without notice. Such protection is granted also to an employee who supported in any way the employee exercising his rights as a result of violation of the principle of equal treatment in employment.

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[119] Judgment of the Supreme Court of 11 March 1997, III CKN 33/97, No. 6–7, item 93.

[120] *A. Rogulska-Kikoła*, *M. Piwowarska-Reszka*, Mobbing i dyskryminacja… *[Workplace Mobbing…]*, p. 115.

[121] *M. Tomaszewska* [in:] *K.W. Baran*, Kodeks Pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2012, pp. 130.

[122] *J.K. Warylewski*, Molestowanie w miejscu pracy *[Harassment in the Workplace]*, Sopot 1999, p. 23 ff.

[123] *K. Kędziora, K. Śmiszek*, Dyskryminacja i mobbing… *[Workplace Discrimination…]*, w zatrudnieniu, Warsaw 2008, p. 55.

On the basis of the mentioned regulation, the Supreme Court held that exercise by an employee of his rights as a result of violation of the principle of equal treatment in employment, including seeking clarification and support to other employees in any form, aimed at preventing wage discrimination, cannot be grounds for termination of a contract of employment without notice through the fault of the employee[124].

Also worth noting is article 18^{3a} § 7 according to which if an employee undertakes any actions against harassment or sexual harassment, this cannot cause any negative consequences towards such employee.

The actions which cannot result in retaliation include standing as a witness of a discriminated employee in the proceedings initiated by the latter, actively preventing discrimination by undertaking intervention with the employer[125].

Both article 18^{3e} §§ 1 and 7 of the Labour Code grant protection to an employee. This means that such protection is not guaranteed to a candidate for employment[126]. Such regulation should be criticised. There are no arguments to support the view that persons applying for work, who are covered by the prohibition of discrimination, could be deprived of protection if they exercise the rights granted to a discriminated or harassed person.

2.3.4. The principle of a broad material and personal scope of the prohibition of discrimination

Under the provisions of the Labour Code, it must be stated that the regulations on the prohibition of discrimination apply to employees, i.e. persons employed under a contract of employment, nomination, appointment, cooperative contract of employment and election. Even if it is sometimes questioned by legal theorists[127], it should be accepted that provisions governing the prohibition of discrimination apply also to candidates for employment[128].

According to the Labour Code, employees should be treated equally as regards entry into an employment relationship, terms and conditions of employment, promotion and access to upskilling trainings (article 18^{3a} §1 first sentence

[124] Judgment of the Supreme Court of 26 May 2011, II PK 304/10, OSNAPiUS 2012/13–14/171.

[125] *L. Florek* [in:] *L. Florek* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2011, p. 134.

[126] *A. Rogulska-Kikoła*, *M. Piwowarska-Reszka*, Mobbing i dyskryminacja… *[Workplace Mobbing…]*, Warsaw 2014, p. 153.

[127] *J. Król*, Nowelizacja Kodeksu pracy dotycząca równego traktowania w zatrudnieniu na tle regulacji wspólnotowych *[Amendment of the Provisions of the Labour Code on Equal Treatment in Employment Against the Background of Community Law]*, Radca Prawny 2004, No. 4, p. 94 ff.

[128] *A. Sobczyk* (ed.), Kodeks pracy *[The Labour Code]*, Warsaw 2014, p. 61.

of the Labour Code). It seems that such formulation of the material scope of the prohibition of discrimination allows one to refer it to all aspects in the relations between an employee (candidate for employment) and an employer (potential employer). Another issue mentioned in the previous chapter is unequal treatment following the end of an employment relationship.

2.3.5. Prohibition of wage discrimination

A separate regulation regarding unequal treatment relates to remuneration. According to article 18^{3c} of the Labour Code, employees shall have the right to equal remuneration for equal work or for work of equal value (§1).

Under the Labour Code, remuneration should be understood to mean all components of the remuneration, regardless of their name and character, as well as other work-related financial and non-financial benefits granted to employees (article 18^{3c} §2 of the Labour Code). The work of equal value means work which requires comparable professional qualifications, confirmed by documents specified in separate laws or practice and vocational experience, as well as comparable responsibility and effort (article 18^{3c} §3 of the Labour Code). It has been pointed out in the jurisprudence that what should be taken into account in determining whether the work is a work of equal value is whether it requires qualifications confirmed by documents issued in accordance with applicable laws. Other factors to consider include the scope of the job duties, the scale of responsibility, the physical and mental effort necessary in the performance of work measured by the amount of energy and stress as well as innate or acquired skills[129].

According to the case-law of the Supreme Court, wage discrimination occurs only where employee's remuneration visibly deviates from the remuneration of employees who perform similar work or work of similar value. Different treatment of employees in employment, in terms of e.g. remuneration, is possible. However, it must be based on duly justified needs which allow such differentiation. Such needs may include implementation of a specific employment policy and primarily better access to the labour market and to labour market instruments targeted at development of professional qualifications of young people[130].

According to the case-law, the prohibition of discrimination in employment applies also to a discretionary bonus. In such case, an employee should prove that

[129] *A.M. Świątkowski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2013, pp. 97–98; *T. Liszcz*, Równość kobiet i mężczyzn w znowelizowanym kodeksie pracy *[Equality of Men and Women under the Amended Labour Code]*, PiZS 2002, No. 2, pp. 3–4; *M. Tomaszewska*, [in:] Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2012, p. 141.

[130] A decision of the Supreme Court of 26 March 2013, II PK 330/12 (available at Legalis Database).

he met all the essential conditions listed in article 18^{3a} § 1 of the Labour Code to the same extent as other workers employed in the same department who received their annual bonuses but still was treated worse than the others as regards award of the bonus. In other words, in order to seek award of the discretionary bonus under article 18^{3c} § 1 in connection with article 18^{3b} § 1 (2) of the Labour Code, an employee should prove that the unequal treatment occurred on the basis of one of the grounds listed in article 11^3 and article 18^{3a} § 1 of the Labour Code. Only if such evidence is taken successfully (it is proven that the claimant was discriminated on one of the grounds listed in article 11^3 in connection with article 18^{3a} § 1 of the Labour Code), the respondent employer will need to prove that the differentiation between the remuneration of the claimant and other employees was based on reasonable and fair criteria (article 18^{3b} § 1 of the Labour Code *in fine*)[131].

In the context of the prohibition of wage discrimination, attention should be given to the wording of article 18 § 3 of the Labour Code. Under this article, provisions of contracts of employment and other acts under which an employment relationship is established, which violate the principle of equal treatment in employment, shall be invalid. Such provisions should be replaced with relevant provisions of labour law and in the absence of the latter – such provisions should be replaced with non-discriminatory provisions. If the remuneration specified in a contract of employment is discriminatory, then a decision of the labour court replacing the provisions of the contract of employment with relevant non-discriminatory provisions (article 18 § 3 *in fine* of the Labour Code) may apply to determining the terms and conditions of the existing employment relationship for the future. Where the principle of equal treatment in employment has been violated in terms of the amount of remuneration in the past (in particular following termination of an employment relationship), an employee may seek compensation amounting to the difference between the remuneration he should have received had the principle of equal treatment in employment not been violated and the remuneration actually received (article 18^{3d} of the Labour Code)[132].

2.3.6. The principle of admissibility of equalizing measures

Under article 18^{3b} § 3 of the Polish Labour Code: "The principle of equal treatment in employment is not violated by the actions undertaken for a speci-

[131] Judgment of the Supreme Court of 21 January 2011, II PK 169/10, OSNAPiUS 2012, No. 7–8, item 86.

[132] Judgment of the Supreme Court of 22 February 2007, I PK 242/06, OSNP 2008, No. 7–8, item 98.

fied period aimed at equalization of opportunities of all or a significant number of employees for one or several reasons listed in article 18^{3a} § 1, by reducing, in favour of such employees, the actual inequalities, to the extent specified in this provision".

Therefore, the Labour Code defines two conditions for the adoption of the equalizing measures. The first one is that the persons in whose favour such actions were undertaken belong in the social category which was previously discriminated. The second one is that all persons or a significant number of persons included in a certain group distinguished on the basis of prohibited criteria of differentiation, were previously discriminated in the labour relations[133].

Polish legal scholars agree that equalizing measures cannot lead to employment of a person with lower qualifications only because the latter belongs in the group to which the equalizing measures are applied[134]. I consider this a valid argument. It is also worth noting that it does not follow directly from the wording of the Labour Code.

2.3.7. The principle of reversal of the burden of proof in discrimination matters

Article 18^{3b} §1 *in fine* of the Labour Code provides for a reversal of the burden of proof in discrimination matters to an employer. This was explained in detail by the Supreme Court in its judgment of 9 June 2006[135] in which the Court held that under article 18^{3b} §1 of the Labour Code the principle of equal treatment of employees is violated, with some exceptions, where an employer differentiates the situation on one or several discriminatory grounds, "unless the employer proves that he acted on the basis of objective criteria". The Court rightly pointed out that this provision corresponds with article 10 (1) of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[136]. It provides that Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that

[133] *A.M. Świątkowski*, Kodeks pracy. Komentarz *[The Labour Code. Commentary]*, Warsaw 2010, p. 91.

[134] *K. Kędziora*, *K. Śmiszek*, Dyskryminacja i mobbing… *[Workplace Discrimination…]*, p. 179.

[135] Judgment of the Supreme Court of 9 June 2006, III PK 30/06, OSNAPiUS 2007, No. 11–12, item 160.

[136] Official Journal of the EU L 303 of 2 December 2000, p. 16.

there has been no breach of the principle of equal treatment. In the mentioned judgment the Supreme Court held that article 18^{3b} of the Labour Code should be interpreted in compliance with article 10 of the mentioned Directive. On the basis of such conclusion the Supreme Court invoked two arguments. First, an employee must plausibly demonstrate that he was discriminated, by indicating the relevant facts; second, the employer may rebut such arguments by proving that his actions were based on objective criteria. The above construct resembles *prima facie* evidence applied in the procedures concerning shortages. According to this evidentiary concept, an employee who accepted employer's property subject to the obligatory return or settlement shall be responsible for any shortages in such assets, unless he proves that the damage was caused by reasons beyond his control (article 124 of the Labour Code). In the first phase of the evidentiary procedure the employee should prove that – generally speaking – the employer failed to ensure appropriate conditions for the protection of the entrusted property but he does not have to prove the causal link between such conditions and the shortage. If the employee is able to prove that there existed working conditions which prevented or significantly hampered the protection of the entrusted property, the burden of proof is reversed to the employer, which means rebutting the presumption laid down in article 124 of the Labour Code. In such case the employer has to prove violation of duties by the employee which resulted in the damage. The same applies in the case of discrimination. An employee should indicate the facts which plausibly demonstrate that such discrimination occurred, and the employer wishing to discharge itself of liability must prove that he acted on the basis of objective criteria. This may be evidence relating to the employee or the employer's interest protected by law. On the basis of a similar regulation included in article 4 of the Council Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex, the European Court of Justice held in point 4 of its judgment of 10 March 2005 in C-196/02, Vasiliki Nikolouki that "where employees plead that the principle of equal treatment has been infringed to their detriment and establish facts from which it may be presumed that there has been direct or indirect discrimination, Community law, in particular Council Directive 97/80/EC (…), is to be interpreted as meaning that it shall be for the respondent to prove that there has been no breach of that principle"[137]. A similar view was presented by the Supreme Court of Poland in its decision of 24 May 2005[138] in which the Court held that an employee seeking compensation in re-

[137] http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130da1fd362b1d8724b978f71806eb4d10bf4.e34KaxiLc3eQc40LaxqMbN4Pb3qKe0?text=&docid=54081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=619006 (accessed on 29 August 2018).

[138] Decision of 24 May 2005, II PK 33/05 (available at Legalis Database).

spect of infringement of the principle of equal treatment must first of all prove that he was directly or indirectly discriminated in the employment and only then the employer must prove that in differentiating the employees he acted in accordance with objective criteria.

2.3.8. The principle of admissible exceptions to the prohibition of discrimination

First, it should be noted that the employer may differentiate between the employees on grounds of one of the criteria of prohibited differentiation if the employer proves that he acted in compliance with objective reasons (article 18^{3b} §1 *in fine* of the Labour Code).

Under article 18^{3b} § 2 of the Labour Code, the principle of equal treatment in employment is not infringed by the actions which are proportionate to the achievement of a lawful purpose of differentiation, which consist in:

1) refusal to hire an employee for one or several reasons laid down in article 18^{3a} § 1, if the type of work or the conditions in which the work is performed are such that the reason or reasons listed in that provision are the actual and decisive professional requirement which must be met by the employee;

2) change by the employer of the terms and conditions of employment of the employee in respect of the working time, if this is justified for reasons not attributable to employees, without invoking other cause or causes listed in article 18^{3a} § 1;

3) application of measures which differentiate the legal situation of an employee based on the protection of parenthood, age or disability;

4) application of the seniority of service criterion in determining the conditions of recruitment and dismissal of employees, rules of remuneration and promotion and access to upskilling trainings which justifies the different treatment of employees on grounds of age.

As regards the last of the mentioned conditions of admissible differentiation, the Supreme Court found that the seniority may be a differentiating criterion in the case of recruitment; however a longer seniority does not always prove better professional qualifications. Ten-year job seniority is sufficient preparation for the pursuance of a profession. The job seniority exceeding 10 years does not always distinguish an employee in a positive way and does not always predispose him to promotion[139].

[139] Judgment of the Supreme Court of 13 November 2002, III KRS 30/12 (available at Legalis Database).

Also, the principle of equal treatment in employment is not violated by actions undertaken for a specified time aimed at ensuring equal opportunities for all or a large number of employees distinguished on one or several grounds listed in article 18^{3a} § 1 of the Labour Code, by reduction of actual inequalities in favour of such employees, to the extent specified in that provision (article 18^{3b} § 3 of the Labour Code).

And finally, the principle of equal treatment is not infringed where churches and other religious associations or organisations the ethics of which is based on religion, creed or beliefs, limit access to employment on grounds of religion, creed or belief, if because of the type or the character of the activity of the churches and other religious associations and organisations the religion, creed or beliefs are the actual and decisive professional requirement demanded from the employee, proportional to the achievement of a lawful purpose of differentiation of the situation of such person; the same applies to the requirement that employees should act in good faith and loyalty to the ethics of the church, other religious association or organisation the ethics of which is based on religion, creed or beliefs (article 18^{3b} § 4 of the Labour Code).

2.3.9. The principle of employer's liability for discrimination of an employee

Under the Labour Code, a party liable for the discrimination is an employer. The employer is liable for the discriminatory acts both when these acts are committed by the employer but also where the offender is another employee. In this latter case the liability of the employer is based not on fault but it is a liability based on risk (strict liability). There was a view presented in the literature that "a decisive factor for the scope of liability in the latter case should be whether the employer knew of such behaviour and whether he created conditions in which such behaviour should not occur and the employees had an opportunity to safely and efficiently signal the experiences or observed pathology"[140].

According to the case-law, the employer's liability is liability in delict since the scope of application of the principle of equal treatment and non-discrimination goes beyond the framework of an employment relationship[141].

It must be noted that the employer may be held liable not only for the act which directly discriminates an employee but also for such act which consists in encouraging another person to infringe the principle of equal treatment in em-

[140] *D. Dörre-Nowak*, [in:] *B. Wagner* (ed.), Kodeks pracy 2011. Komentarz *[The Labour Code of 2011. A Commentary]*, Gdańsk 2011, p. 127.

[141] Judgment of the Supreme Court of 6 March 2003, I PK 171/02, OSNP 2004, No. 15, item 258.

ployment or ordering such person to infringe this principle (article 18^{3a} § 5 (1) of the Labour Code).

Polish regulations governing the rights of a discriminated employee are not very developed.

First, a reference should be made to article 18 § 3 of the Labour Code, which states that provisions of contracts of employment and other acts under which an employment relationship is established, which violate the principle of equal treatment in employment, shall be invalid. Such provisions shall be replaced with relevant provisions of labour law and in the absence of the latter – such provisions shall be replaced with non-discriminatory provisions. In the context of this provision, the case-law has indicated that provisions concerning the equal treatment in employment are mandatory, which means that the parties to a contract of employment cannot, not even by an agreement, lay down the terms and conditions of employment in such a manner as to infringe the principle of equal treatment. Therefore, it is not possible to consider legally valid an employee's consent for such determination of his remuneration for work which would violate the principle of equal treatment in employment and which would be equal to waiver of compensation for discriminatory treatment of the employee in the field of remuneration for work[142].

Under article 18^{3d} of the Labour Code, a discriminated employee may demand compensation from the employer. The Polish laws specify only the minimum amount of such compensation that is an amount equal to the minimum wage. The maximum amount is left to the discretion of courts. It is accepted that the compensation should be effective, proportionate and dissuasive[143]. The compensation referred to in article 18^{3d} of the Labour Code covers compensation for material and non-material damage suffered by an employee[144].

Polish laws do not provide guidelines on what should be taken into account in determining the amount of the compensation for discrimination. This is where the case-law comes in. According to the case-law, although the compensation for the damage caused by discrimination should not consist merely in mathematical breakdown of the compared amounts, still in a situation where undoubtedly the wages and bonuses paid to the employee were significantly lower than those payable to other employees performing a comparable work, and none of the parties presented convincing arguments allowing for the assessment of work of the claimant below or above the average, the average remuneration and bonuses paid

[142] Judgment of the Supreme Court of 2 July 2012, I PK 48/12.

[143] Judgment of the Supreme Court of 6 June 2012, III PK 81/11 (available at Legalis Database).

[144] Judgment of the Supreme Court of 7 January 2009, III PK 43/08, OSNAPiUS 2010, No. 13–14, item 160.

to the other employees during particular period seem the most objective category which allows calculating an appropriate compensation for the discriminatory practices applied by the respondent[145].

2.4. The principle of fair remuneration

J. Czerniak-Swędzioł

2.4.1. General remarks

According to a linguistic definition of the Polish term *godziwy* (English "fair"), the synonyms of it are *słuszny* (English right), *rzetelny, uczciwy* (English just)[146] or *odpowiedni* (English appropriate)[147]. The remuneration for work will therefore be considered fair when it is at a level consistent with the legal standards. Hence, colloquially the remuneration which is too low is referred to as unfair or unjust remuneration. In order to protect employees against too low remuneration, the labour law scholars have introduced the right to a fair remuneration for work expressed explicitly in article 13 of the Labour Code as one of the fundamental principles of labour law. Thus, one of the most important elements of the right to work in terms of the social policy of the state is the proper fixing of the remuneration for work which, taking into account the principle of freedom of contract, should depend on the will of the parties to an employment relationship[148]. However, given the protective function of labour law, the interference of the state or social partners in the process of establishing the level of remuneration is permissible and manifests itself in fixing the minimum remuneration for work[149].

The essence of the fair remuneration is that it should – as far as possible in a given society – allow a decent life of an employee and his family[150], a decent

[145] Judgment of a Court of Appeal in Kraków of 29 October 2014, III APa 16/14 (available at Legalis Database).

[146] See: Słownik języka polskiego PWN *[Polish Dictionary],* available at https://sjp.pwn.pl/sjp/godziwy;2462248.html (accessed on 1 December 2017).

[147] See: Słownik języka polskiego *[Polish Dictionary],* available at https://sjp.pl/godziwy (accessed on 1 December 2017).

[148] *M. Włodarczyk*, Indywidualne prawo pracy a polityka społeczna *[Individual Labour Law and Social Policy]*, [in:] *K.W. Baran* (ed.), System prawa pracy. Tom II. Indywidualne prawo pracy. Część ogólna *[The System of Labour Law. Volume II. Individual Labour Law. General Part]*, Warsaw 2017, p. 105.

[149] *Ibidem.*

[150] *A. Sobczyk*, [in:] Kodeks pracy. Komentarz. 3. Wydanie *[The Labour Code. A Commentary],* 3rd edition, Warsaw 2017, p. 53.

standard of living of an employee[151] or provide minimum livelihood at a level corresponding to social and cultural expectations in a given society[152]. It is about relative dignity, because dignity in the social sphere changes with the progress of civilization and the market situation of a given country[153]. The employee should receive fair remuneration even if the market value of his work is lower than the costs necessary to cover the needs related to decent life, because this is the essence of the minimum wage[154]. Therefore, the concepts of fair and minimum wage have a common ground. In the Labour Code, a fair remuneration has two meanings, i.e. fair in the constitutional sense and relating to the minimum wage and fair in the individual sense, relating to a specific job. Therefore, fair remuneration as stipulated in the Labour Code should be appropriate, proper, accurate, fair and just remuneration and should comply with the criteria for determining its amount under article 78 § 1 of the Labour Code[155]. However, it should be kept in mind that the correct determination of the level of remuneration is a complex process on the borderline of law, economy and sociology. When discussing the subject related to the fairness of remuneration for work, it is also impossible to omit the ethical and philosophical aspect. Therefore, in order to perform a comprehensive analysis of the problem, it seems necessary to reach the genesis of the concept of fair remuneration for work (fair pay) not only from the point of view of the labour law or economic sciences, but also the social teaching of the Catholic Church.

2.4.2. The economic aspect of fair remuneration

Remuneration for work in a broad sense has been a very important aspect in economic theory for many years now. It is not possible to talk about fair remuneration in isolation from economic factors and views, in which emphasis is put on the role of needs as a key factor determining the level of remuneration and which question the legitimacy of application of market criteria for determining wages[156]. One of the first economic theories of remuneration is that put forward by Saint Thomas Aquinas, who believed that fair pay should be connected with

[151] *M. Seweryński*, Minimalne wynagrodzenie za pracę – wybrane zagadnienia *[Minimum Remuneration for Work – Selected Issues]*, [in:] *W. Sanetra* (ed.), Wynagrodzenia za pracę w warunkach społecznej gospodarki rynkowej i demokracji *[Remuneration for Work in the Social Market Economy and Democracy]*, Warsaw 2009, p. 58.

[152] *M. Włodarczyk*, Indywidualne prawo pracy… *[Individual Labour Law…]*, p. 105.

[153] *A. Sobczyk*, op. cit., p. 53.

[154] *A. Sobczyk*, op. cit., p. 54.

[155] Judgment of the Supreme Court of 25 August 2010, II PK 50/10.

[156] *Z. Góral*, [in:] *K.W. Baran* (ed.), System Prawa Pracy. Tom I. Część ogólna *[The System of Labour Law. Volume I. General Part]*, p. 1101.

the quantity and quality of the work provided, with the social status of a given person and it should take into account the costs of living of a given person. Another theory emerged only in the 18th century. Its author, Etienne Bonnot de Condillac, pointed to the level of remuneration, which should be determined by the law of demand and supply. Assuming the existence of an ideal market governed by the law of supply and demand, this theory disregarded the possible existence of other factors affecting the level of remuneration, such as costs of living. A step further was taken by David Ricardo, an author of the theory of pay, who claimed that wages constitute payment – the price for work, which must be determined by the law of supply and demand[157]. A significant contribution to the development of the theory of remuneration was made by Adam Smith. He recognized that work is the only final and real measure by which one can evaluate and compare the value of all goods at any time and place, because it is their real price, and money is only their nominal price[158]. He believed that the worst paid workers should earn at least twice as much as their living costs, so that they would be able to provide for at least two children[159]. In the total opposition to the views of the academics specialising in economy who linked the level of remuneration with the market rights, there were views presented by the representatives of the socialist stream[160] who postulated departure from market rules and that the amount of pay should be determined in accordance with the employee's needs[161]. According to the above, in the economic sciences there were two main approaches to the concept of remuneration. The first one treated remuneration as a price for work, regulated by the laws of supply and demand, while according to the second the remuneration was to meet the needs of employees, regardless of the law of demand and supply[162]. Some of the economy scholars, in order to explain the essence of fair remuneration, indicate that if life requires the operation of thermal

[157] See *D. Ricardo*, Zasady ekonomii politycznej i opodatkowania *[The Principles of Political Economy and Taxation],* Warsaw 1957, p. 100 ff. and *D.R. Kamerschen*, *R.B. McKenzie*, Ekonomia *[Economy]*, Gdańsk 1991, p. 671.

[158] *A. Smith*, Badania nad naturą i przyczynami bogactwa narodów *[An Inquiry into the Nature and Causes of the Wealth of Nations]*, Warsaw 2007, pp. 43, 66.

[159] *A. Smith*, Badania nad naturą… *[An Inquiry into…]*, pp. 67–102.

[160] See *M. Święcicki*, Prawo wynagrodzenia za pracę *[The Right to Remuneration for Work]*, Warsaw 1996, p. 13 ff.

[161] See more in *Z. Góral*, Zasada godziwego wynagrodzenia za pracę *[The Principle of Fair Remuneration for Work]*, [in:] *K.W. Baran* (ed.), System Prawa Pracy. Tom I. Część ogólna *[The System of Labour Law. Volume I. The General Part],* pp. 1097–1098.

[162] For more on the theory of wages in economy, see for example: *M. Blaug*, Teoria ekonomii. Ujęcie retrospektywne *[Economic Theory in Retrospect],* Warsaw 1994; *Z. Jacukowicz*, Płaca i praca w warunkach przemian gospodarczych i globalizacji *[Work and Wages in the Era of Economic Changes and Globalisation]*, [in:] *B. Balcerzak-Paradowska* (ed.), Praca i polityka społeczna wobec wyzwań integracji *[Work and Social Policy and the Challenges of Integration],* Warsaw 2003, pp. 172–190.

engines, which can work only if some of the energy is dissipated, then this natural loss should be compensated for the life to exist. Therefore, the remuneration for work done should at least balance the natural dissipation of human capital[163]. In the contemporary economic sciences a view is accepted that the remuneration is not only the price of work understood as a commodity, but it is the total income of the employee for the work done[164]. The employee is treated not only as the owner of the remuneration, but also as a consumer, putting a strong emphasis on the employee's living needs. And, according to economists, the so understood remuneration for work should be considered fair and just.

2.4.3. Role of the social teaching of the Catholic Church in the formation of the principle of fair remuneration

There is no doubt that the social teaching of the Roman Catholic Church played a significant role in the discussion on the subject of fair remuneration[165]. The views expressed by its representatives departed from economic views which treated wages only as simple payment for the work done. The Catholic Church emphasized mainly the subjective treatment of remuneration, which should be a fair payment for the work done, taking into account the living needs of the employee as a human being.

In many papal encyclicals we find references to the concepts of just and fair remuneration[166] and the ethical norms contained in them constitute specific guidelines for the proper conduct of Catholics[167].

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[163] *J. Renkas*, Teoria godziwych wynagrodzeń *[Theory of fair remuneration]*, [in:] Problemy ekonomii, polityki ekonomicznej i finansów publicznych *[Economy, Economic Policy and Public Finances],* Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu, No. 439/2016, p. 296.

[164] See *M. Juchnowicz*, Płaca jako dochód z pracy *[Wage as a Labour Income]*, Polityka Społeczna 1993, No. 11–2, p. 5.

[165] *M. Nowak*, Prawo do płacy godziwej w świetle encyklik papieskich *[The Right to Fair Remuneration in the Light of Papal Encyclicals]* Znaki Nowych Czasów 2004, No. 10; *M. Nowak*, Zasady kształtowania wynagrodzenia za pracę według encykliki Jana Pawła II „Laborem exercens" *[Principles on Remuneration for Work According to the Encyclical "Laborem exercens" of Pope John Paul II]*, [in:] *A. Reda-Ciszewska, M. Włodarczyk* (eds.), Wartości i interesy a prawo pracy. Wokół encykliki Laborem exercens Jana Pawła II *[Values and Interests and Labour Law. Laborem Exercens Encyclical of John Paul II]*, Łódź 2014, p. 107 ff.

[166] *L. Dyczewski*, Płaca sprawiedliwa i słuszna *[Fair and just wage]*, Ethos 1995, No. 4, item 32, p. 121.

[167] Encyclical *Rerum novarum*, of 15 May 1891 of Pope Leon XIII available at http://www.nonpossumus.pl/encykliki/Leon_XIII/rerum_novarum/ (accessed on 19 December 2017). See also Encyclical *Mater er Magistra* of 1961 of Pope John XXIII and Encyclical *Laborem exercens* of 1981 of Pope John Paul II.

Documents published during the pontificate of Pope John Paul II explicitly confirm the right to just payment and treat wages as a way to realize the idea of justice in employment relations[168]. Pope John Paul II wrote in the encyclical *Laborem Exercens*[169] that fair remuneration is such remuneration for an adult man, which allows him to start a family, to provide for the family and to secure its future. In this context, the term "family pay" has come into use. Pope John Paul II defined it as one remuneration paid to the head of the family for work, sufficient to meet the family's needs, with no need for a spouse to take up paid employment outside the home, or through other social benefits, like a family allowance or maternity allowance for a woman who devotes herself exclusively to the family; this allowance should correspond to real needs, i.e. take into account the number of dependents throughout the period when they are unable to take responsibility for their own lives. Family pay, considered to be fair or just, is the one that allows an employee to independently maintain himself and his family. It also includes various social benefits payable by the employing entity[170]. The similar understanding of the fair remuneration is presented also by the Vatican's Charter of the Rights of the Family of 1982[171].

These are not the only papal statements regarding the employee's right to fair remuneration. One of the most important is the encyclical of Pope Leo XIII *Rerum Novarum,* which emphasizes that work should suffice for the employee to meet the living needs that guarantee a decent life, and even, thanks to a cost-effective way of life, allow acquisition of property[172]. All working men have the right to fair and just remuneration[173]. The so understood remuneration should take into account the needs of the employee as a human being. An employee should be treated as a partner of the employer in the provision of services or the production of certain goods, and not only as a "service provider". Therefore, the remuneration cannot be solely based on the concept of pay as the price for the

[168] *Z. Góral*, [in:] *K.W. Baran* (ed.), System Prawa Pracy. Tom I. Część ogólna *[The System of Labour Law. Volume I. The General Part]*, p. 1103.

[169] Available at https://opoka.org.pl/biblioteka/W/WP/jan_pawel_ii/encykliki/laborem.html (accessed on 19 December 2017).

[170] *F.J. Mazurek*, Prawo do pracy w Encyklice *[The Right to Work in the Encyclical]*, [in:] *J. Krucina* (ed.), Laborem exercens. Tekst i komentarz. *[Laborem Exercens. Text and Commentary]*, Wrocław 1983, p. 205 ff.

[171] The Vatican's Charter of the Rights of the Family of 1982, L'Osservatore Romano No. 10, available at http://www.srk.opoka.org.pl/srk/srk_pliki/karta.htm (accessed on 19 October 2017).

[172] *A. Szymański*, Polityka społeczna *[Social Policy],* Lublin 1925, p. 44 quoted after *Z. Góral*, op. cit., p. 1102.

[173] *M. Nowak*, Prawo do godziwego wynagradzania w konstytucjach państw europejskich *[The Right to Fair Remuneration in the Constitutions of the European States]*, PiZS 2002, No. 5, p. 11.

work performed. The Encyclical of Pope Pius XI *Quadragesimo Anno*[174] stresses that the amount of pay should take into account the possibility of satisfying not only the living needs of the employee, but also those of the members of his family. In turn, the fair remuneration should be complemented by the right of the employee to share in profits[175]. Pope Pius XI noticed the fact that pay cannot be unlimitedly high, and its amount may also be influenced by the financial situation of the employing establishment or the common good. In this context, the role of the state is to set the level of wages fairly. Fair remuneration should be set so that it also corresponds to the employer's interests.

2.4.4. Impact of international law on understanding of the principle of fair remuneration in the Polish legal order

Employee's right to a fair remuneration is a fundamental principle of labour law. However, neither the Labour Code nor the other labour law provisions define the concept of fair remuneration. Therefore, its normative meaning is sought in acts of international law, which is not easy because various international laws use different concepts.

The discussion on international legal instruments regarding the fair remuneration should start with the regulations of the United Nations. According to article 23 (3) of the Universal Declaration of Human Rights[176] everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. This act reflects the concept of family pay, but the principles of the Declaration are extremely difficult to implement because of the vagueness of its provisions. Thus, the provisions of the Universal Declaration of Human Rights are only guidelines which should be pursued by the Member States. However, effective practical enforcement may encounter significant problems.

Regulations concerning fair remuneration are included also in article 7(a) Paragraphs I and II of the United Nations International Covenant on Economic, Social and Cultural Rights[177]. "The States Parties to the Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work

[174] Available at http://www.mop.pl/doc/html/encykliki/Quadragesimo%20anno.htm (accessed on 11 November 2017).

[175] *Ibidem.*

[176] The Universal Declaration of Human Rights proclaimed by the United Nations General Assembly on 10 December 1948 in New York.

[177] The Covenant adopted by the United Nations General Assembly on 16 December 1966. Poland ratified this document on 3 March 1977 (Journal of Laws *[Dz.U.]* of 1997, No. 38, item 169).

which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work and a decent living for themselves and their families". The just and favourable conditions of work include – within the meaning of this act – apart from fair wages, which guarantee satisfactory living conditions for the employees and their families, also equal pay without any discrimination. The concept of satisfactory living conditions for employees and their families has not been defined more precisely, and yet satisfactory living conditions can have different meanings in different countries, regions and even individual families. Although this document has been ratified by Poland, in practice the effective implementation of the discussed provisions in national laws is neither simple nor obvious, in particular due to the lack of legal measures enabling effective enforcement of its provisions. Under article 2 (1) of this act, the State Parties must take steps, "to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in" the Covenant. With this in mind, it should be recognized that this act is only a set of guidelines and recommendations that the State Parties should follow and strive to achieve. There is no doubt, however, that the regulations referred to above shape and clearly influence the way of understanding the principle of fair remuneration in the context of international law, in which the elements of justice based on the idea of family pay predominate.

The concept of fair or just remuneration is also present in the legal regulations adopted by the International Labour Organization (ILO), in particular the ILO Constitution which indicates the need to guarantee income that ensures decent living conditions. However, it seems that the most important act adopted by the ILO in the context of the discussed issues is the ILO Convention No. 131[178] concerning Minimum Wage Fixing, with Special Reference to Developing Countries. Under article 3 of this Convention, the elements to be taken into consideration in determining the level of minimum wages shall include the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups as well as economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment. The analysis of this regulation focuses first of all on the elements of equity and those relating to the family pay. It is important that when determining the level of minimum wage, account should be

[178] ILO Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries http://www.mop.pl/doc/html/konwencje/k131.html (accessed on 17 August 2018).

taken of the amount of other benefits that employees and their families receive. For the purposes of this document, the model family is parents plus two children, while a decent level is a modest level below which the living conditions should not descend[179]. The economic factors are also important when determining the level of the minimum remuneration for work and becausethey are vague concepts, they may constitute a "pretext" to set remuneration at a low level. A concretisation of the provisions of ILO Convention No. 131 is the ILO Recommendation No. 135[180], under which the minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families (article 1). The fundamental purpose of minimum wage should be to overcome poverty taking into account the assumptions of the family pay. Article 3 of the Recommendation lays down more specific criteria which should be taken into account in determining the level of minimum wage. The most important of them include: the needs of workers and their families, the general level of wages in the country, the costs of living and changes therein, social security benefits, and the relative living standards of other social groups, economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment. Although the regulation introduces clear guidelines that should be taken into account when determining the minimum wage level, they are based on a high degree of generality. Thus, on the one hand, the abovementioned recommendation explicitly indicates the purpose of the minimum wage as overcoming poverty and meeting the needs of all employees and their families. On the other hand, it allows taking into account the needs of the labour market and preserving competitiveness. The recommendation provides for the application of either a single minimum wage of general application or a series of minimum wages differentiated for groups of employees[181]. The ILO Conventions discussed above have not been ratified by Poland, and although they should not have a direct impact on the domestic legal order, they nevertheless constitute the standard of understanding of the minimum wage. So far, only the ILO Conven-

[179] *T. Liszcz*, Prawo pracy *[Labour Law]*, Warsaw 2011, p. 89.

[180] 191 ILO Recommendation No. 135 concerning Minimum Wage Fixing, with Special Reference to Developing Countries http://www.mop.pl/doc/html/zalecenia/z135.html (accessed on 17 August 2018).

[181] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, pp. 36–38. See also III 5 (1) The system of minimum wages may be applied to the wage earners covered in pursuance of Article 1 of the Convention either by fixing a single minimum wage of general application or by fixing a series of minimum wages applying to particular groups of workers, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:R135:NO.

tion No. 99 concerning Minimum Wage Fixing Machinery in Agriculture[182] has been ratified by Poland, but it does not contain provisions relating to the fairness of remuneration.

However, the most important regulation, the interpretation of which in the context of the discussed issues is probably the most controversial among the labour law theorists, is a legal act of the Council of Europe – the European Social Charter (ESC)[183]. Under article 4 (1) of this act[184], with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake, among others, to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living. The European Social Charter, in the most extensive way, refers to the concept of fair remuneration. Part I of the Charter, paragraph 4 provides that all workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families. Whereas under article 4 entitled "The right to a fair remuneration", the right to fair pay consists of: the right of workers to a remuneration such as will give them and their families a decent standard of living; the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; the right of men and women workers to equal pay for work of equal value; the right of all workers to a reasonable period of notice for termination of employment and protection of remuneration against deductions where deductions from wages can be made only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards. Article 4 (1) of the ESC refers to the concept of family pay that provides employees and their families with a decent standard of living. The concept of "fair remuneration" corresponds to the minimum wage[185] fixed at a sufficiently high level. One cannot but notice that these regulations are also vague and need to be more specific. Therefore, in 1986, the Committee of Independent Experts of the Council of Europe agreed that the amount of remuneration that will provide employees and their families with a decent standard of living should be determined as a percentage of the average wage in a given country. An appropriate level of remuneration indicated in the discussed guidelines is 2/3 or 68% of the average remuneration in

[182] ILO Convention No. 99 of 28 June 1952 concerning Minimum Wage Fixing Machinery in Agriculture (Journal of Laws *[Dz.U.]* of 1997, No. 39, item 176.

[183] The European Social Charter of the Council of Europe adopted in Turin (Journal of Laws *[Dz.U.]* of 1999, No. 8, item 67, as amended), further called the "ESC".

[184] In the 1990s the Council of Europe adopted the European Social Charter (Revised) (Strasbourg, 3 May 1996), available at https://rm.coe.int/168047e175 (accessed on 15 December 2017, further called: "RESC"). This legal act has not been ratified by Poland yet.

[185] *J. Wratny*, Prawo do wynagrodzenia za pracę w świetle zasad sprawiedliwości i równości *[The Right to Remuneration for Work and the Principles of Justice and Equality],* Annales Universitatis Mariae Curie-Skłodowska, Lublin 2015, Vol. LXII, 2, p. 303.

a given country, however, when calculating the remuneration, also other benefits and other non-remuneration income of families should be taken into account[186]. In the late 1990s, the Committee revised its previous guidelines and set a decent level of remuneration at 60% of the average net wage in a given country after deduction of public levies[187]. As can be seen from the above, the standards set by the Council of Europe are too high for Poland[188] to be bound by the provisions of article 4 (1) of the ESC in the years to come[189].

Because of the fact that Poland has ratified all the provisions of article 4 ESC, except article 4 (1), there is a doubt as to whether this provision may in any way affect the Polish legal norms[190]. Polish labour law scholars[191] assume that this provision affects the national regulations and may provide guidelines for the interpretation of the concept of fair remuneration in the national legal system. In fact, the norms of international law can be an inspiration for the Polish legislature. It seems, however, that this fact should be of no great importance since the non-ratified regulations cannot constitute law applicable in Poland. In addition, there are terminological inaccuracies, as Article 4 of the ESC is entitled "the right to a fair remuneration", and the only reference to the fairness of remuneration is made exactly in this article 4 (1) of the ESC which has not been ratified by Poland. Thus,

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[186] *R. Blanpain*, *M. Matey*, Europejskie prawo pracy w polskiej perspektywie *[European Labour Law from the Polish Perspective],* Warsaw 1993, pp. 277–278.

[187] See *A.M. Świątkowski*, Karta Praw Społecznych Rady Europy *[Charter of Social Rights of the Council of Europe]*, p. 136 ff.

[188] According to the data presented by the Polish Social Insurance Institution [*Zakład Ubezpieczeń Społecznych]* in 2016 the minimum remuneration in Poland was 1850 PLN, and the average remuneration was 4,047.21 PLN. In this context the minimum remuneration amounted to 45.71 % of the average remuneration (available at http://www.zus.pl/baza-wiedzy/skladki-wskazniki-odsetki/wskazniki/minimalne-i-przecietne-wynagrodzenie (accessed on 8 October 2017)).

[189] *G. Goździewicz*, Refleksje na temat prawa do godziwego wynagrodzenia *[Reflections on the Right to Fair Remuneration]*, [in:] *W. Sanetra* (ed.), Wynagrodzenia za pracę w warunkach społecznej gospodarki rynkowej i demokracji *[Remuneration for Work in Social Market Economy and Democracy]*, Warsaw 2009, p. 69.

[190] Despite the fact that Poland has not ratified article 4 of the ESC, the mentioned provision is subject to numerous analyses in the literature, for example: *T. Zieliński*, Konsekwencje ratyfikacji Europejskiej Karty Społecznej dla polskiego systemu prawnego *[Consequences of Ratification of the European Social Charter into the Polish Legal System]*, [in:] *B. Oliwa-Radzikowska*, Obywatel – jego wolności i prawa. Zbiór studiów przygotowanych z okazji 10–lecia urzędu Rzecznika Praw Obywatelskich *[The Citizen – his Freedoms and Rights. Selection of Studies Prepared for the 10th Anniversary of the Office of the Ombudsman],* Warsaw 1998, p. 209. *J. Skoczyński*, Prawo do godziwego wynagrodzenia *[The Right to Fair Remuneration],* PiZS 1997, vol. 4, p. 11 ff.

[191] See: *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 36 ff; *A. Sobczyk*, Kodeks pracy. Komentarz, 3rd edition, Warsaw 2017, pp. 55–56; *W. Sanetra*, Kilka uwag o projektowanych zmianach przepisów o wypowiedzeniu umowy o pracę *[Remarks on the Proposed Changes to the Provisions on Termination of a Contract of Employment]*, GSP 2007, vol. XVII, pp. 208–209; *Z. Góral*, *M. Nowak*, Wynagrodzenie za pracę *[Remuneration for Work],* Warsaw 2014, p. 46.

the guidelines indicated in the above-mentioned acts of the international law, although ethically appropriate and extremely valuable, may assist in the interpretation of the concept of fair remuneration for work in the national legal system only in theoretical and legal terms, but without being any binding guidelines.

2.4.5. Fair remuneration in the light of the provisions of the Constitution of the Republic of Poland

Although the Constitution of the Republic of Poland mentions a minimum remuneration for work unlike constitutions of other European states[192], it does not use the concept of fair remuneration. Under article 65 (4) of the Constitution of the Republic of Poland, a minimum level of remuneration for work, or the manner of setting its levels shall be specified by the Act on Minimum Remuneration[193]. However this provision does not indicate any specific method of determining the minimum wage nor does it refer in any way to the concept of fair or just pay[194]. The constitutional provision also fails to prejudge whether the rate of the minimum wage should be equal for all or whether it can be different. The literal wording of this provision does not refer to the right to a fair remuneration for work, nor does it refer to the living needs of the employee or his family[195]. According to the Constitutional Tribunal[196], article 65 (4) of the Constitution is an exception to the principle of free determination of the terms and conditions of a contract of employment, constituting one of the manifestations of the implementation of the fundamental constitutional rights, including the principle of social justice as defined in article 2 of the Constitution. In any case, this provision has been interpreted by the Constitutional Tribunal referring to the social nature of the minimum wage and acknowledging that the minimum wage should be set in such a way as to allow meeting the basic living needs – the minimum standards of decent life[197]. Thus, the function of the minimum wage means, under certain conditions, the state's obligation to provide a minimum standard of living, tailored to specific economic and civilization conditions. In

[192] *M. Nowak*, Prawo do godziwego wynagradzania w konstytucjach państw europejskich, PiZS 2002, vol. 5, p. 13 ff.

[193] Act of 10 October 2002 on the Minimum Remuneration for Work *[ustawa o minimalnym wynagrodzeniu za pracę]* (Journal of Laws *[Dz.U.]* of 2017, item 847).

[194] *P. Winczorek*, Komentarz do Konstytucji Rzeczpospolitej Polskiej z 2.4.1997 roku *[Commentary on the Constituton of the Republic of Poland of 2 April 1997],* Warsaw 2008, p. 159.

[195] *J. Oniszczuk*, Konstytucyjne źródła prawa pracy *[Constitutional Sources of Labour Law]*, [in:] *K.W. Baran* (ed.) System Prawa Pracy… *[The System of Labour Law…],* p. 738.

[196] Judgment of the Constitutional Tribunal of 7 May 2001, K 19/00, OTK 2001, No. 4, item 82.

[197] Judgment of the Constitutional Tribunal of 19 October 1999, SK 4/99, OTK 1999, No. 6, item 119.

constitutional provisions, therefore, the legislator has been obligated to determine a minimum amount of remuneration, which should satisfy the basic needs of all working men.

Fixing the level of remuneration, resulting from a voluntary agreement between the parties and consistent with the provisions on minimum remuneration for work (which may limit the parties' freedom), is in principle recognized as lawful[198]. Therefore, the only competence of state authorities that really and effectively affects the amount of remuneration is the right to fix the level of the minimum wage. It should also be kept in mind that the constitutional obligation of the state is not to provide citizens with high and satisfactory earnings[199], and constitutional provisions cannot be the basis for demanding an increase in the amount of remuneration in individual cases. The principle of fair remuneration derived from the wording of article 65 (4) only exceptionally allows the general state to interfere in the remuneration issues, violating the principle of freedom of contract in relation to both parties to the employment relationship in the public and private sectors[200].

In its judgment of 23 February 2010[201], the Constitutional Tribunal held that the norm resulting from article 65 (4) of the Constitution binds public authorities as to the need to determine a minimum wage, leaving the legislature the freedom to implement this right. On the basis of such an understanding of the discussed regulation, an opinion emerged, according to which article 65 (4) has a value *per se*, as it proposes permanence of the rules for fixing the minimum wage[202]. However, this provision does not actually imply any rules for fixing the minimum wage, unless we consider that a statutory reference included in it plays such role. Arguing with the view that the level of the minimum remuneration for work could be set freely, the Tribunal tried to create a legal framework for its setting. It stated that the minimum wage cannot be lower than the minimum necessary for living, namely the means necessary for the survival of a person in a given society[203]. This results from the obligation to protect human dignity, which implies the need to guarantee chances for personal human development in the surrounding reality[204]. The Constitutional Tribunal, trying to specify in more detail the indicated guidelines, stated that the level of remuneration should not depend only on

[198] *A. Krzywoń*, Konstytucyjna ochrona pracy i praw pracowniczych *[Constitutional Protection of Work and Workers' Rights],* Warsaw 2017, p. 391.

[199] Judgment of the Constitutional Tribunal of 21 April 2004, K 33/03, OTK-A 2004, No. 4, p. 31.

[200] *A. Krzywoń*, Konstytucyjna ochrona… *[Constitutional Protection…]*, pp. 396–397.

[201] Judgment of the Constitutional Tribunal of 23 February 2010, P 20/09, OTK-A 2010, No. 2, p. 13.

[202] *Z. Góral*, op. cit., p. 109.

[203] *A. Krzywoń*, Konstytucyjna ochrona… *[Constitutional Protection…]*, p. 406.

[204] Judgment of the Constitutional Tribunal of 4 April 2001, K 11/00, OTK 2001, No. 3, p. 54.

the value of work, determined according to market rates[205]. Regardless of the law of demand and supply, work should be rewarded fairly in order to fulfil its social function. Nevertheless, the Tribunal notes that there is no uniform definition of fair remuneration[206]. In addition to market elements, the Tribunal indicated other criteria that can be used to determine this level, which are: labour effectiveness, seniority, qualifications, employment in one workplace or a proportional share in the company's profit or in the national income.

Taking into account the assumptions presented above, it should be recognized that article 65 (4) of the Constitution of the Republic of Poland, in combination with other constitutional norms, constitutes a certain guideline in setting the minimum wage rate. If we consider that the addressee of the provision laid down in article 65 (4) of the Constitution is not only the legislature, a question arises whether it is possible to derive from its literal wording an individual personal right, under which a working person has a claim for payment of at least a minimum remuneration for work. This provision has not been addressed to a designated addressee and does not grant directly to anyone a personal right to the minimum remuneration for work, or at least the right under which an individual could raise effective claims[207]. The guidelines indicated in article 65 (4) of the Constitution are implemented in legal acts of a statutory rank, which grant to employees a claim for payment of a minimum remuneration for work. Therefore, article 65 (4) of the Constitution, constituting a guideline for the legislature, does not grant to an individual the personal right to a minimum remuneration for work, because such a right and related claims result from the acts of lower rank. According to the wording of article 65 (4), article 2 and article 30 of the Constitution of the Republic of Poland, the legislature must determine the level of the minimum remuneration for work in such a way that it meets the criteria of fairness.

2.4.6. Fair remuneration for work in the Labour Code

Polish law does not define the concept of fair remuneration for work despite the fact that it is used directly in article 13 of the Labour Code. The current wording of the principle of the right to fair remuneration differs not only from the wording of the previous rule laid down in this article[208] but, according to Góral[209]

[205] *A. Krzywoń*, Konstytucyjna ochrona… *[Constitutional Protection…]*, p. 394.

[206] Reasoning of a judgment of the Constitutional Tribunal of 7 May 2001, K 19/00, OTK 2001, No. 4, p. 82.

[207] *A. Krzywoń*, Konstytucyjna ochrona… *[Constitutional Protection…]*, p. 407.

[208] See *L. Kaczyński*, Ocena nowelizacji kodeksu pracy *[Assessment of the Amendment to the Labour Code]*, Warsaw 1996, p. 23.

[209] *Z. Góral*, op. cit., p. 1108.

it also differs from this right as created under the international and European law. In the current wording, the provision came into force under the amendment of the Labour Code of 1996[210], introducing for the first time the concept of fair remuneration for work. The said amendment "organized" the terminology regarding the minimum remuneration for work. In its earlier version, article 10 of the Labour Code introduced the concept of a minimum amount of remuneration for work, while article 13 of the Labour Code mentioned the lowest wage for work. Article 13 was amended to adjust the Polish law to international regulations[211].

The legislature does not suggest how to understand the right to a fair remuneration, but only indicates it as being one of the fundamental principles of Polish labour law. However, article 13 of the Labour Code lays down the conditions and measures for exercising this right. At the same time, the concept of fair remuneration is not equated with the concept of minimum wage[212]. The provisions of the Act of 10 October 2002 on the Minimum Remuneration for Work[213], which represent an embodiment of the state's wage policy, clarify the principle in question. However, the minimum wage is definitely set at the level of the social minimum, rather than at the level of fairness and of requirements imposed by the acts of international law ratified by Poland. Therefore, since the state authorities or the social partners are obliged to determine the manner of exercising the right to fair remuneration with the use of legal provisions and wage policy, then the only concrete way to implement this right, as indicated in article 13 of the Labour Code, is to fix a minimum remuneration for work. Due to the fact that the obligation to set a minimum remuneration for work is an element of the right to fair remuneration for work, it should be stated that the minimum remuneration for work should meet the conditions of fairness. If, however, we omit the fact that the obligation to set a minimum remuneration for work results from the Constitution of the Republic of Poland then, by adopting the above assumption, the Labour Code should mention a fair minimum remuneration for work, not a right to fair remuneration for work. It cannot be denied that article 13 of the Labour Code as a norm addressed to the state, is a kind of duplication of the public-law norm deriving from the Constitution.

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[210] Act of 2 February 1996 on the Amendment of the Labour Code and of Certain Other Laws *(ustawa o zmianie ustawy – Kodeks pracy oraz o zmianie niektórych ustaw),* Journal of Laws *[Dz.U.]* of 1996, No. 24, item 110.

[211] See for example: *J. Wratny,* Kodeks pracy. Komentarz *[The Labour Code. A Commentary],* Warsaw 2013, p. 27 and *K. Walczak*, Problematyka wynagradzania w świetle Europejskiej Karty Społecznej oraz Zrewidowanej Europejskiej Karty Społecznej i jej odzwierciedlenie w polskich realiach *[The Issue of Remuneration in the Light of the European Social Charter and Revised European Social Charter and its Reflection in Polish Reality],* PiZS 2017, No. 1, p. 3 ff.

[212] *Z. Góral*, op.cit., p. 1108.

[213] Journal of Laws *[Dz.U.]* of 2017, item 847.

It is accepted among the Polish labour law theorists[214] that fair remuneration as described in the Labour Code has two meanings. It is fairness in the constitutional sense, which is realized by the minimum wage. And it is fairness in an individual sense, relating to a specific job. However, as the Supreme Court observed, the dignity in the constitutional sense justifies the fairness of the minimum wage in the Constitution, but it is unrelated to the fairness in article 13 of the Labour Code[215]. It seems, therefore, that the principle of fair remuneration laid down in the Labour Code emphasizes that in the process of determination of wages account should be taken of the needs of an employee and members of his family, an appropriate increase in its amount in the event of an increased amount of work, protection against unlawful its reduction and discriminatory activities. The fairness of the remuneration should be determined individually, because the richer the country or the region, the higher the expected standard of living which can be considered fair. The fairness of remuneration for work will be understood differently in a large provincial city, and will be completely different in a small county town. The level of fair remuneration for work will also be affected by such circumstances as an individual view on this issue of the employer and employee[216]. The amount of remuneration is the subject of negotiations between the parties to an employment relationship and for as long as the level of earnings falls within the limits of fair remuneration, the pension body or the social insurance court cannot interfere in the wage conditions agreed upon by the parties[217].

Therefore, fair remuneration for work is the remuneration which is appropriate, just and accurate. This, in turn, clearly shows that article 78 of the Labour Code is very close to the principle of fair remuneration laid down in the Labour Code. The article specifies the rules for determining the amount of remuneration so that in particular it corresponds to the type of work performed, the qualifications required for its performance, and also the quantity and quality of the work performed. Consequently, the equivalence of remuneration for work is not a principle of labour law but a general guideline determining its amount[218]. Worth noting is an opinion presented in the labour law studies according to which the fair remuneration should not be confused with equivalent remunera-

[214] See *D. Dörre-Nowak*, [in:] *B. Wagner* (ed.), Kodeks pracy 2011 r., Komentarz *[The Labour Code of 2011. A Commentary]*, Gdańsk 2011, p. 71.

[215] See the reasoning of the judgment of the Supreme Court of 25 August 2010, II PK 50/10.

[216] *W. Cajsel*, Uwagi o instytucji godziwego wynagrodzenia za pracę *[Remarks on the Concept of Fair Remuneration for Work],* Radca Prawny 2007, No. 4, p. 64 ff., see also a judgment of a Court of Appeal in Lublin of 15 February 2017, III AUa 931/16 (available at Legalis Database).

[217] Judgment of a Court of Appeal in Łodź of 31 January 2017, III AUa 2133/15 (available at Legalis Database).

[218] See *B. Wagner*, Ekwiwalentność wynagrodzenia i pracy *[Equivalence of Remuneration and Work],* PiZS 1996, vol. 6, p. 1; *G. Goździewicz*, Refleksje na temat… *[Reflections on…]*, p. 68.

tion since the amount of remuneration determined in accordance with article 78 § 1 of the Labour Code does not have to ensure remuneration at a fair level[219]. This statement is true, however since we accept that article 13 of the Labour Code is one of the fundamental principles of labour law, then under article 13 (2) of the Labour Code we must recognize that other provisions of labour law should pursue the right to fair remuneration for work. Therefore, it should be noted that the right to fair remuneration is inseparably connected with the equivalence of performances[220].

The right to fair remuneration, neither before the amendment in 1996 nor now, has been considered as claimable[221]. This view was confirmed by the Constitutional Tribunal in the judgment of 26 November 1997[222], according to which the principle of fair remuneration for work gives a clue to the interpretation of this right as a whole, and thus cannot constitute an independent basis for wage demands. Similar standpoint was presented by the Supreme Court[223]. It clearly emphasized that the right to fair remuneration under article 13 of the Labour Code is only a clue to the interpretation and does not constitute the basis for the employee's claims to increase the remuneration for work above the level of the minimum wage[224]. It is indicated not only by the general wording of this principle but first of all by the second sentence of article 13 of the Labour Code from which it directly follows that specific conditions for the implementation of the discussed principle are laid down in the specific provisions of labour law which, as *lex specialis*, shall apply in the first place[225]. An employee cannot invoke article 13 of the Labour Code to claim increase of the salary agreed upon between the parties,

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[219] *L. Mitrus*, Godność jako podstawa aksjologiczna praw pracowniczych *[Dignity as an Axiological Foundation of Workers Rights]*, [in:] *M. Skąpski*, *K. Ślebzak* (eds.), Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych *[Axiological Foundations of Labour law and Social Insurance Law]*, Poznań 2014, p. 139.

[220] *J. Wratny*, Niektóre dylematy polityki płac a ustawodawstwo pracy *[Dilemmas of Wage Policy and the Labour Legislation],* PiZS 2001, No. 7, p. 6.

[221] See *J. Skoczyński*, Prawo do godziwego…*[The right to fair…],* PiZS 1997, No. 4, p. 14; *Z. Góral*, *M. Nowak*, Wynagrodzenie za… *[Remuneration for…]*, p. 48. *Z. Góral*, op. cit., pp. 636–637; *L. Mitrus*, Godność jako podstawa… *[Dignity as an Axiological Foundation…]*, p. 140.

[222] Judgment of the Constitutional Tribunal of 26 November 1997, U 6/96, OTK 1997, No. 5–6, p. 66.

[223] Judgment of the Supreme Court of 29 May 2006, I PK 230/05, OSNP 2007, No. 11–12, p. 155; see also a judgment of the Supreme Court of 12 July 2011, II PK 18/11, OSNP 2012, No. 17–18, p. 220.

[224] A similar view was presented by *K. Piwowarska*, Gwarancja minimalnej stawki godzinowej w umowie zlecenia i umowie o świadczenie usług – forma ingerencji funkcji ochronnej prawa pracy w prawo cywilne *[A Guarantee of the Minimum Hourly Rate in the Contract of Mandate and the Contract for the Provision of Services – a Form of Intervention of the Labour Law Protective Function in the Civil Law],* MOPR 2017, No. 8, p. 409 ff. See also a judgment of the Supreme Court of 7 August 2001, I PKN 563/00, OSNP 2002.

[225] *M. Nowak*, op. cit., p. 47 ff.

except in a situation where he demands adjustment of the salary to the level of the minimum remuneration[226]. Therefore, employees cannot raise such a claim as long as the amount of the remuneration he receives does not reach a level lower than the minimum set by the state. The Supreme Court held that article 13 of the Labour Code cannot be the basis for claims of employees in individual cases. It noted rightly that it is physically impossible to set rates for employees in court decisions, because this could lead to unequal treatment[227].

In the context of this issue, a view was expressed in the legal writings according to which, exceptionally, in situations of gross violation of article 13 of the Labour Code, in connection with article 300 of the Labour Code, the provisions of article 388 of the Civil Code on exploitation can be applicable. However, the fact remains that in such case the basis of the claim will be the provision of the Civil Code, and the principle of fair remuneration will apply only indirectly[228]. The Constitutional Tribunal[229] stated that article 178 (2) of the Constitution of the Republic of Poland, according to which judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties, does not constitute an independent basis for judges' claims for remuneration higher than those specified in the pay regulations. Article 13 of the Labour Code is a legal norm higher than the provisions on the minimum remuneration[230] and is not a basis for seeking an increase in remuneration[231] but for its correct setting[232]. The labour law theorists consider it a programme provision, addressed primarily to the state[233] or social partners. In the opinion of the vast majority of legal scholars, article 13 of the Labour Code should not be the basis for reduction of the amount of remuneration

[226] Judgment of the Supreme Court of 29 May 2006, I PK 230/05, OSNP 2007, No. 11–12, p. 155.

[227] See *A. Musiał*, Prawo do godziwego wynagrodzenia a roszczenie o podwyższenie wynagrodzenia za pracę – glosa I PK 230/05 *[A Right to Fair Remuneration and a Claim for Increase of the Remuneration – a Commentary on a Judgment I PK 230/05],* MOPR 2007, No. 10, p. 548 ff.

[228] See *T. Zieliński*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2000, p. 174; *B. Wagner* [in:] *B. Wagner* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary],* Gdańsk 2004, p. 50.

[229] Judgment of the Constitutional Tribunal of 4 October 2000, P 8/00, OTK 2000, No. 6, item 189.

[230] See *G. Goździewicz*, [in:] *L. Florek* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2011, p. 98.

[231] Judgment of the Supreme Court of 12 July 2011, II PK 18/11, OSNP 2012, No. 17–18, p. 220; judgment of the Supreme Court of 29 May 2006, I PK 230/05, OSNP 2007, No. 11–12, p. 155.

[232] Judgment of the Constitutional Tribunal of 26 November 1997, U 6/96, OTK 1997, No. 5–6, item 66.

[233] *Z. Hajn*, Glosa do Wyroku SN z 7.8.2001 *[A Commentary on a Judgment of the Supreme Court of 7 August 2001]*, I PKN 563/00, PIZS 2002, vol. 6, p. 39 ff.

for work[234]. It should also be mentioned that in the legal writings on the subject the discussed regulation was highly criticised[235]. Not only the value of the norm was questioned, as regards the sphere of application of law, but above all the legal scholars emphasized the necessity to remove it from the Labour Code.

As regards the provisions which specify the principle of fair remuneration, account should also be taken of the specific provisions of the Labour Code regulating the issues of protection of remuneration and overtime work. The right to fair remuneration undoubtedly also corresponds with the principle of equality and non-discrimination in employment as laid down in articles 11^2 and 11^3 and closely related Chapter IIa on equal treatment of men and women. Generally speaking, what follows from the above-mentioned regulations of the Labour Code is the prohibition of unjustifiable differentiation of the situation of employees – in particular men and women – not only in terms of pay for work, but also the entire sphere of employment relations.

2.5. The principle of meeting the vital, social and cultural needs of employees

M. Wujczyk

Under article 16 of the Labour Code, an employer, in accordance with the possibilities and conditions, shall meet the vital, social and cultural needs of employees. Detailed rules governing the distribution of funds assigned to meet the social needs of employees are laid down in the Act of 4 March 1994 on the Company Social Benefits Fund *(ustawa o zakładowym funduszu świadczeń socjalnych)* (Journal of Laws [Dz.U.] of 1996, No. 70, item 355 as amended).

[234] *Z. Góral*, Zasada godziwego… *[The principle of fair…]*, p. 1108 and the literature referenced there, including: *Z. Hajn*, Glosa do wyroku… *[A Commentary on a Judgement…]*, p. 39; *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, pp. 52–53, but there are also legal scholars who present different opinions; see: *A. Tomanek*, Ograniczenie nadmiernych wynagrodzeń kadry menedżerskiej w postępowaniu upadłościowym *[Reduction of Excessive Salaries of Managerial Staff in Bankruptcy Proceedings]*, PiZS 2005, No. 5, p. 14 ff.

[235] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, pp. 53–56.

2.5.1. The principle of a non-claimable nature of an obligation to meet the vital, social and cultural needs of employees

The obligation to meet the vital, social and cultural needs of employees should be complied with only within the available resources. Under the above article, an employee is not entitled to demand any specific benefit. However, it is possible that employees may be entitled to raise certain claims for benefits from the Social Benefits Fund under internal company regulations. Yet this is dependent on the provisions of the internal regulations adopted in an undertaking which undoubtedly depend on the size of the social fund and the number of employees entitled to benefit from that fund[236].

2.5.2. The principle of a non-obligatory nature of the company social benefits fund

The Act on the Social Benefits Funds lays down the rules under which the employers should create a company social benefits fund and the rules for management of such fund. The Company Social Benefits Fund *(Zakładowy Fundusz Świadczeń Socjalnych)* is created by an employer who employs as at 1 January of the year concerned at least 20 full-time equivalent (FTE) employees and an employer who runs his business in a form of a budgetary unit and local government budgetary establishment, regardless of the number of employees. The Fund is created out of the annual basic contribution, calculated in relation to the average number of persons employed. A collective agreement, and if the employees are not subject to the provisions of a collective agreement, the wage rules *(regulamin wynagradzania)* may specify the amount of the contribution payable to the Fund or specify that no fund will be created. The above must be consulted with a company trade union organisation or with an employee appointed by the staff to represent their interests. Employers who are not subject to a collective agreement and are not obliged to issue wage rules, must inform the employees, in due time, that no fund will be created in the undertaking and no holiday benefits will be paid. They must provide such information during the first month of the year concerned in accordance with a procedure applicable in the undertaking concerned (article 3 (3a) of the Act on the Company Social Benefits Fund). Employers who employ less than 20 employees in a given year and who do not run their business in a form of a budgetary unit and local government budgetary establishment may

[236] Judgment of the Supreme Court of 15 July 1987, I PRN 25/87, OSNCP 1988, No. 12, p. 180.

create a Company Social Benefits Fund or pay holiday benefits. The holiday benefits are payable by the employer each year to each employee who benefits from the annual leave in the calendar year concerned amounting to at least 14 successive calendar days (article 3 (3) of the act on the Company Social Benefits Fund).

2.5.3. The principle of cooperation with employees' representatives in the creation of the Company Social Benefits Fund

The terms and conditions governing the use of services and financial benefits from the Company Social Benefits Fund as well as the rules governing the assignment of the resources of the fund to specific purposes are laid down by the employer in the regulations of the Company Social Benefits Fund **agreed upon with the** company trade union organisation. If there is no company trade union organisation in the establishment concerned – the regulations are agreed upon by the employer and an employee appointed by the staff to represent their interests. If the employer uses the fund resources without agreement with the company trade union organisations, a company trade union organisation may demand that the employer transfers into the fund the amounts previously disposed of by him or her[237].

2.5.4. The principle of an exhaustive list (*numerus clausus*) of business purposes in respect of meeting the vital, social and cultural needs of employees

The social activity of an employer financed from the Company Social Benefits Fund includes services provided by the employer in relation to various forms of rest and recreation (such as holidays, holiday camps, winter holidays, excursions), cultural and educational activity (concert, cinema, theatre, opera tickets, organisation of cultural events in the work establishment, etc.), sports and recreation activity (swimming pool tickets, gym membership, organisation of sports competitions and games in which employees and their families may participate, purchase of gear and equipment for the in-house gymnasium and gym, picnics, tennis courts rental, etc.), childcare in crèches, children's clubs, nursery schools and other forms of pre-school education (establishment of in-house crèches, children's clubs, nursery schools and other forms of pre-school education or contri-

[237] Judgment of the Supreme Court of 19 November 1997, I PKN 373/97, OSNAPiUS 1998, No. 17, p. 507.

bution to the costs of nursery school attended by the children of an employee), material assistance – assistance in-kind or financial assistance (allowances, assistance in the case occurrence of random events, retail vouchers, packages for children, etc.), reimbursable and non-reimbursable aid for housing purposes granted under contractual terms (for example, for construction, renovation, modernisation or purchase of a flat).

The list of services which fall within the scope of the statutory social activity is exhaustive. This means that other services provided by the employer to the employees in connection with the employment, such as pension and life insurance, savings and loans scheme, accommodation, food or transport to work, cannot be considered social activity. Similarly, the social activity does not include financing of skill upgrading trainings, severance payments for workers made redundant for reasons attributable to the employer, company healthcare schemes, protective vaccination or contributions to health insurance.

2.5.5. The principle of binding force of the social criterion in meeting the vital, social and cultural needs of employees

The resources gathered in the fund are used to finance the social activity for the benefit of the entitled persons and to co-finance the company social facilities. According to article 2 (1) of the Act, the social activity of the employer shall include the services provided by the employers in relation to various forms of rest and leisure, cultural and educational activity, sports and recreation activity, childcare in crèches and children's clubs by a day carer or nanny, in nursery schools and in other forms of pre-school education, provision of material aid – in-kind and financial aid, as well as reimbursable and non-reimbursable assistance for housing purposes granted under contractual terms. It is disputable whether all resources from the Company Social Benefits Fund must be disbursed in accordance with the social criterion. In its judgment of 20 August 2001[238] the Supreme Court of Poland held that "An employer administering the resources of the Company Social Benefits Fund cannot spend them not in compliance with the internal regulations governing the company social activity, the provisions of which cannot be contrary to the principle of grant of benefits in accordance with the social criterion, which means that the grant of allowances and benefits is dependent on the life, family and financial situation of the person entitled to benefit from the Fund". It is also indicated that the employer who violates the provisions of article

[238] I PKN 579/00, OSNP 2003, No. 14, p. 331.

8 (1) of the Act of 4 March 1994 on the Company Social Benefits Fund by spending the resources of this fund not in compliance with the social criterion, cannot rely on the general clauses laid down in article 8 of the Labour Code (a judgment of the Supreme Court of 25 August 2004, I PK 22/03, OSNAPiUS 2005, No. 6, item 80). On the other hand, recently there have been opinions presented by the judiciary according to which not all benefits from the Company Social Benefits Fund must be absolutely dependent on the social criterion. Such benefits include, for example, team-building events fully financed by the payer which serve joint trips of employees, their recreation and integration. Application of the social criterion to this situation would run counter to the essence of such benefits[239]. An argument raised in support of this view is that all resources of the Fund may be allocated, under internal regulations, to services (benefits) granted under concessionary rules and in such circumstances the principle will apply according to which benefits should be granted following the criteria laid down in article 8 (1), i.e. in accordance with the so called social criterion. On the other hand, if the internal regulations provide that the resources of the fund can be used also for other purposes which still fall within the framework of the social activity – they can set out other terms of use of the benefits such as general access, on equal terms, to team-building events. Such interpretation is supported not only by an explicit wording of article 8 (1) but it also follows from the linguistic and logical interpretation of the second paragraph of this provision. The second paragraph has a broader meaning than the first paragraph. It applies not only to provision of concessionary benefits and services but also to the "use of such services and benefits financed from the Fund", which means that it refers to all benefits (services) which can be financed by the Company Social Benefits Fund. Such standpoint is supported also by a functional interpretation. It is difficult to accept that benefiting from such forms of social activity as team-building meetings, could be dependent on the so called social criterion that is the life, family and financial situation of a person entitled to benefit from the fund. This would be contrary to the essence of the service[240]. The linguistic and logical interpretation is not enough to unequivocally approve the above argumentation to support the possibility to waive the social criterion in distribution of certain benefits from the Company Social Benefits Fund. However, a reference to a functional interpretation supports such standpoint. Such interpretation is rational and allows full achievement of the objectives of the Company Social Benefits Fund.

[239] Judgment of a Court of Appeal in Poznań of 17 October 2013, III AUa 403/13 (available at Legalis Database).

[240] Judgment of the Supreme Court of 23 October 2008, II PK 74/08, OSNAPiUS 2010, No. 7–8, p. 88.

2.5.6. The principle of a non-exhaustive list of persons benefiting from the activity aimed at meeting the vital, social and cultural needs of workers

The list of persons entitled to benefit from the resources of the Company Social Benefits Fund is quite long and was laid down in article 2 (5) of the Act on the Company Social Benefits Fund. These are persons entitled to benefit from the Fund – employees and their families, pensioners – former employees and their families, and other persons to whom the employer granted, in the internal regulations referred to in article 8 (2), the right to obtain social benefits from the Fund. The sole entitlement to benefit from the Fund does not mean thatthe person concerned will in fact obtain such a benefit. A decisive factor is not the fact that the person concerned is included in the list of entitled persons but the life, family and financial situation of such person. It has been indicated in the jurisprudence that granting assistance from the fund is discretionary – granting benefits to all entitled persons is not obligatory and in some circumstances it may even be improper[241].

2.5.7. The principle of employer's responsibility for the proper management of the Company Social Benefits Fund

Article 8 (1) of the Act on the Company Social Benefits Fund is not a basis for granting monetary benefits to all employees. The employer, as a body administering the fund, is responsible for proper spending of the resources of the fund. The method of spending of such resources is controlled by the National Labour Inspectorate *(Państwowa Inspekcja Pracy – PIP)*. If there are active trade union organisations in an undertaking, also such organisations can bring a claim before a labour court for repayment into a bank account of the funds spent contrary to the internal regulations. A matter concerning repayment to the Fund of monies spent contrary to the provisions of the Act of 4 March 1994 on Company Social Benefits Fund is a labour law matter. A respondent in such case is an employer (article 3 of the Labour Code) who has the capacity to be a party to legal proceedings even if such employer is not a legal person (article 460 § 1 of the Code of Civil Procedure). A claimant may be an inter-company trade union organization whose activity covers the employer (a judgment of the Supreme Court of Poland of 16 August 2005, I PK 12/05, OSNAPiUS 2006, No. 11–12, item 182).

[241] *A. Martuszewicz*, Zakładowy Fundusz Świadczeń Socjalnych *[Company Social Benefits Fund]*, Warsaw 2007, p. 87.

2.5.8. The principle of joint activity relating to meeting the vital, social and cultural needs of employees

Under the Act on the Company Social Benefits Fund, the social activity can be conducted jointly by several employers. Article 9 (1) provides that "employers may conduct joint social activity under terms and conditions laid down in an agreement. The provisions of article 8 (2) shall apply *mutatis mutandis*". The effect of the above is that the rules of such activity should be laid down in an agreement on the joint social activity, concluded between the employers who intend to conduct such activity. According to paragraph 3 of this article "the agreement referred to in paragraph 1 shall specify in particular the objects of the joint activity, the rules of conduct of such activity, the method of settlement of accounts and the procedure for termination of the agreement. The agreement may also specify the terms of waiver of its provisions and liability of the parties in this respect".

2.5.9. The principle of continuity of the social activity in the case of transfer of business or an undertaking to another employer

The effects of transfer of a part of business or an undertaking to another employer under article 23^1 of the Labour Code on the functioning of the Company Social Benefits Fund at the previous and new employer's are governed by article 7 (3b), (3c), (3d) of the Act on the Company Social Benefits Fund.

According to the above provisions, the Fund of the new employer should, after each transfer, be increased by the equivalent of the monetary resources of the Fund of the previous employer, in a portion corresponding to the number of the transferred employees. The amount should be adjusted by the receivables and liabilities of the Fund as at the last day of the month in which the part of the business or undertaking was transferred. The purpose of these provisions is to protect the rights of employees for whom such portion of the Fund was created to benefit from the resources of the Fund. They are favourable also to the new employer. According to the linguistic interpretation of article 7 (3b) of the Act on the Company Social Benefits Fund, the transfer occurs by operation of law, therefore the employers are obliged to transfer the funds. In the event of failure to comply with the above-mentioned obligations, the liability regime laid down in article 12a of the Act on the Company Social Benefits Fund may apply. It means that if any employer or entity responsible in the name of the employer for compliance with the provisions of the Act fails to comply with such provisions or undertakes actions contrary to such provisions, he shall be liable to a fine.

The rules of distribution of monies equivalent to the basic contribution charged to the previous employer and relating to the year in which the part of the business or undertaking is transferred should be laid down in an agreement concluded between the two employers.

According to article 7 (3d) of the Act on the Company Social Benefits Fund, the monies shall be transferred within 30 days of the date of transfer of the part of the business or undertaking. A different time-limit may be agreed upon in the concluded agreement.

2.6. The principle of facilitation of professional development of employees

E. Kumor-Jezierska

A direct objective of the state policy aimed at achievement of productive employment is to ensure that everyone has the right to education and access to lifelong learning. The right to education is one of the prerequisites of the right to work[242]. According to the Polish Constitution, everyone shall have the right to education (article 70)[243]. The said right is reflected in various international and European legal acts. It was mentioned in article 26 of the Universal Declaration of Human Rights[244] and in article 13 of the International Covenant on Economic, Social and Cultural Rights[245]. As regards the European law, a reference should be made to article 10 of the European Social Charter which mentions the right to vocational training, and which was ratified by Poland in points 1 and 2[246]. The issues relating to upgrading professional skills were referred to in the ILO documents such as the Convention No. 140, adopted in Geneva on

[242] See *T. Zieliński*, Prawo do Pracy… *[The right to work…]*, p. 13.

[243] Journal of Laws *[Dz.U.]* No. 78, item 483.

[244] The Universal Declaration of Human Rights adopted in Paris on 10 December 1948.

[245] Journal of Laws *[Dz.U.]* of 1977, No. 38, item 169.

[246] Journal of Laws *[Dz.U.]* of 1999, No. 8, item 67. Article 10 "With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake: 1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude; 2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments".

24 June 1974, concerning Paid Educational Leave[247] in which it was emphasized that "paid educational leave should be regarded as one means of meeting the real needs of individual workers in a modern society". Another act of significant importance is ILO Convention No. 142 of 1975 concerning Vocational Guidance and Vocational Training in the Development of Human Resources[248], ratified by Poland in 1979.

A rapidly changing reality and development of innovative technologies require continuous improvement of skills by the employees. Achievement or improvement of professional qualifications has become a valuable resource of measurable value on the labour market, therefore the employees themselves are willing to attain or improve such qualifications. Taking care of the professional qualifications in the free market economy is an important issue for the persons concerned, which affects their functioning on the labour market[249]. Under article 102 of the Labour Code, professional qualifications of employees, required for the performance of work of a specific kind or in a specific position, shall be specified in internal regulations (such as a collective agreement) or in specific laws. Therefore, it is the employer's responsibility to define what professional qualifications are expected from an employee in the performance of work of a specific kind or in a specific position. The legal obligation to upgrade professional qualifications was not directly included in the Labour Code. However it is a factual obligation of workers who want to exist on the labour market[250]. Therefore, in principle, an employer cannot order an employee to participate in skill upgrading trainings without consent of such employee. However, there are certain categories of employees who are formally obligated to improve their professional skills[251]. An em-

[247] Journal of Laws *[Dz.U.]* of 1979, No. 16, item 100 and 101.

[248] Journal of Laws *[Dz.U.]* of 1979, No. 29, item 164 and 165.

[249] Judgment of the Supreme Court of 25 May 2000, I PKN 657/99.

[250] See *A. Wiącek*, Podnoszenie kwalifikacji zawodowych – prawo czy obowiązek pracownika *[Upgrading Professional Skills – Employee's Right or Obligation]*, [in:] *L. Florek*, *Ł. Pisarczyk* (eds.), Współczesne problemy prawa pracy i ubezpieczeń społecznych *[Contemporary Problems of Labour Law and Social Insurance Law]*, Warsaw 2011, p. 268; *D. Klucz*, Problem prawnej natury obowiązku pracownika w zakresie podnoszenia kwalifikacji zawodowych *[A Legal Nature of Employee's Obligation to Improve Professional Qualifications],* MPP 2017, No. 3, p. 120.

[251] For example: Article 76 (1)(6) of the Act of 21 November 2008 on the Civil Service *[ustawa o służbie cywilnej]* (Journal of Laws *[Dz.U.]* of 2017, item 1889): "A member of the civil corps is obliged in particular to: develop his professional knowledge"; article 29 of the Act of 21 November 2008 on the Local Government Staff *[ustawa o pracownikach samorządowych]* (Journal of Laws *[Dz.U.]* of 2016, item 902) "The local government employees participate in various forms of improvement of knowledge and professional qualifications"; article 11 (4)(2) of the Act of 27 July 2005 – of the Act on Higher Education *[Prawo o szkolnictwie wyższym]* (Journal of Laws *[Dz.U.]* of 2016, item 1842) "Members of the teaching staff must improve their professional qualifications", article 82a § 1 of the Act of 27 July 2001 (Journal of Laws *[Dz.U.]* of 2016, item 2062) "A judge shall continuously improve his professional qualifications".

ployer must train employees in OSH regulations (article 237^2–237^5 of the Labour Code). In the labour law doctrine certain doubts arise as to whether the knowledge of OSH is an element of professional qualifications since it is necessary for the protection of employee's life and health[252]. The Supreme Court held that with OSH training an employee becomes acquainted with threats in the workplace and obtains knowledge of OSH rules and regulations as well as the ability to perform work in a safe manner. Therefore, OHS training does not serve attainment of professional qualifications by an employee[253].

Under the Labour Code, the improvement of professional qualifications is considered only in terms of an obligation of an employer who should facilitate upgrading of professional skills by his employees. The obligation was included among one of the fundamental principles of labour law laid down in article 17 of the Labour Code. Moreover, it is repeated in article 94 (6) of the Labour Code. This does not mean that an employee is entitled (has a claim) to demand that the employer participates in employee's upgrading of professional skills, for example by organising and carrying out a computer training[254]. The employer is only obligated to "facilitate" the skills upgrading which means that he should not refuse, without due cause, participation by an employee in any form of training chosen by the latter and should create a positive atmosphere in relation to the learning employees[255]**.** Such facilitation may also consist in changing the work start and end times of the learning employee or provision of professional literature to the learning employee relating to the undertaken professional training. A substantial restriction in this regard may be protection of a legitimate interest of other employees. It somewhat excludes the application of such measures which might violate this interest, such as application of individual working time schedules unfavourable to other employees or imposition of additional duties on other employees[256]. It is pointed out in the literature that the minimum which can be expected is that the employer should not disturb the learning employee, for example by assigning additional duties, overtime work or business trips which would collide with the learning time[257]. Moreover, the employer must also take into account the provisions of article 18^{3b} § 1 (3) of the Labour Code in selecting the employees for participation in skill upgrading trainings. Such employer cannot

[252] See *A. Sobczyk*, Kodeks pracy… *[The Labour Code…]*, a commentary on article 17 of the Labour Code, argument 4.

[253] Judgment of the Supreme Court of 6 September 2012, II PK 31/12.

[254] Judgment of the Supreme Court of 25 May 2000, I PKN 657/99.

[255] *M. Nałęcz*, Szkolenie pracowników *[Employee Training]*, Monitor Prawniczy 2000, No. 9, see resolution of the Supreme Court of 10 March 2005, II PZP 2/05.

[256] *D. Klucz*, Problem prawnej natury… *[A legal nature of…]*, p. 119.

[257] *T. Liszcz*, Prawo pracy *[Labour Law]*, Warsaw 2014, p. 91.

violate the principle of equal treatment in employment and apply unjust differentiation of employees. Therefore, it is important that employers lay down clear and fair rules for the selection of employees to participate in the vocational trainings and that they undertake actions to facilitate participation in trainings by the employees who wish to acquire knowledge or skills without employer's initiative[258].

The principles of labour law are not of themselves the basis for a substantive resolution on the rights and obligations of the parties to an employment relationship, and they are merely guidelines for the interpretation of the provisions of labour law. For that reason, in general a resolution in an individual labour law matter is based on regulations other than the principles of labour law[259]. Specific obligations of an employer and rights of an employee who raises his professional qualifications are governed by articles 102–103^6 of the Labour Code. Improvement of professional qualifications (job skills) is defined in article 103^1 of the Labour Code as acquiring or updating knowledge and skills by an employee, at the employer's initiative or with the employer's consent. The problem is that the laws do not define the manner in which "employer's consent" should be granted or the phrase "at the employer's initiative". It is generally accepted that if an employer concludes with an employee a professional development agreement *(umowa o podnoszenie kwalifikacji zawodowych)* (article 103^4 § 1 or article 103^6 of the Labour Code), he expresses his opinion in such way. However, conclusion of a professional development agreement is not mandatory if the employer does not intend to obligate the employee to remain in employment following the end of the professional training. Therefore, the employer's consent may be oral. The Ministry of Labour and Social Policy, after the amendment of the provisions on upgrading professional skills, presented a standpoint according to which an intention of a person performing a juridical act (here: an employer) may be expressed by any conduct of such person which sufficiently manifests the intention of such person. Therefore, in the light of article 60 of the Civil Code in connection with article 300 of the Labour Code – if an employer grants a certain benefit to an employee improving his professional qualifications (such as a training leave) or grants an optional benefit (such as reimbursement for transport costs), it can be considered an actual consent for the skills upgrading training granted by the employer to the employee[260]. An employer may implement a special in-

[258] *D. Dörre-Kolasa*, [in:] Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, commentary on article 94 of the Labour Code, argument 18 (available at Legalis Database).

[259] Judgment of the Supreme Court of 2 July 2009, II BP 27/08.

[260] See: www.mpips.gov.pl. The amendment to the Labour Code which changed the regulations relating to professional development of employees entered into force on 16 July 2010 (see the act of 20 May 2010 on the amendment of the Labour Code and of the Act on the Personal Income Tax

ternal procedure to be followed by employees to request consent for professional development.

An employee may upgrade any professional qualifications which may help him in his entire professional careers and not only the skills relating to the position already held or other potential position he may hold with the current employer[261]. Therefore, this means any type of learning, the consequence of which is acquiring or development of knowledge or new skills and which is therefore of significant importance for his professional development. It may be any form of education, such as university studies, post-graduate studies, courses, workshops, trainings, conferences, etc. Attention should also be paid to individual interpretations issued by tax authorities regarding the possibility to benefit from personal income tax exemption in respect of additional benefits under article 21 (1)(90) of the Act on the Personal Income Tax. For example, in an individual interpretation issued on 24 December 2015[262] a tax authority found the employer's arguments correct and held that the funding granted to an employee for higher/post-graduate education constitutes employee's income from employment which is subject to exemption under article 21 (1)(90) of the Act on the Personal Income Tax. In the case in question it is of no importance whether the scope of the higher education is required and strictly related to the scope of his present or future duties or not. There are also opposite views presented by the labour law theorists according to which improvement of qualifications should be in connection with the currently performed work or tasks which are to be performed by the employee in the future as a result of a promotion or changes in the organisational structure made by the employer[263]. Moreover, it is also disputable whether an employer may give consent only for a part of the learning process or the consent covers automatically the entire period of education. There are opinions that granting

(Journal of Laws *[Dz.U.]* No. 105, item 655), see also a judgment of the Constitutional Tribunal of 31 March 2009, K 28/08.

[261] See *A. Sobczyk*, Kodeks pracy… *[The Labour Code…]*, a commentary on article 17 of the Labour Code, argument 1; *A. Wiącek*, Podnoszenie kwalifikacji zawodowych w znowelizowanym Kodeksie pracy *[Professional Development Under the Amended Labour Code]*, PiZS 2010, No. 9, p. 16. See also: *A. Dral*, Podnoszenie kwalifikacji zawodowych przez pracowników z inicjatywy i za zgodą pracodawcy *[Professional Development of Employees on the Initiative and Upon Consent of the Employer]*, MPP 2010, No. 11, p. 568.

[262] No. ILPB2/4511–1-1007/15–2/WS, see an individual interpretation of 21 July 2015, Director of Tax Chamber in Warsaw, No. IPPB4/4511–598/15–4/MS1.

[263] See *M. Nałęcz*, [in:], *W. Muszalski* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, a commentary to article 103^1 of the Labour Code, argument 2 (available at Legalis Database); See *A.M. Świątkowski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, a commentary on article 103^1 of the Labour Code, argument 2 (available at Legalis Database). See also *M. Frączek*, O podnoszeniu kwalifikacji zawodowych w kodeksie pracy *[Professional Development under the Provisions of the Labour Code]*, Służba Pracownicza 2010, No. 11, pp. 9–10.

consent for a specific process of professional development covers the entire process of learning[264]. On the other hand, Sobczyk argues that the consent may also cover a part of the professional development process, for example a specific year of the higher education. However he underlines that an employee must be aware of it and the employer should clearly indicate it to the employee. To support this view he further argues that an employer may refuse to grant any consent at all, therefore there is no reason why the consent should not cover only a part of the professional development process [265].

An employer who grants consent or initiates acquisition or updating of knowledge and skills by an employee, undertakes to grant to such employee a training leave amounting to: 6 days – if the employee is to take an extramural exam, a high school final exam (*matura*) or an exam certifying professional qualifications, 21 days in the last year of the higher education – to prepare a thesis and to get prepared for the final exam. The leave should be granted for the days which are working days of the employee in accordance with his work schedule (article 103^1 § 2 (1) 1 and article 103^2 of the Labour Code). The granting of the leave and its duration is conditional upon taking a specific type of an exam. The problem is that the Labour Code does not define the term "extramural exam" or an "exam certifying professional qualifications," etc. In its explanations to the amended provisions the Ministry of Labour and Social Policy indicated that a specific exam can be classified in a certain group of final exams for which a training leave should be granted only under statutory provisions or implementing provisions based on legislative authority. This means that an employee is not entitled to a training leave if a chosen form of professional development does not end with any of the mentioned exams. An employee is not entitled to a training leave also if he upgrades his professional qualifications in the form of training, and an organiser of such training decides on its own that it will end with an "extramural" exam or an exam "certifying professional qualifications"[266]. Apart from the training leave, an employee is entitled to a full or partial day off for the time necessary for the timely arrival at mandatory classes and for the duration of such classes. The Labour Code does not specify a particular amount of the full or partial day off. However, it results indirectly from the class schedule which should specify the dates and times of the mandatory classes. A training leave and other

[264] See: www.mpips.gov.pl.

[265] *A. Sobczyk*, Kodeks pracy… *[The Labour Code…]*, commentary on article 103^1 of the Labour Code, argument 6. See also *T. Duraj*, Podnoszenie kwalifikacji zawodowych pracowników. Wybrane problemy prawne, Aktualne zagadnienia prawa pracy i polityki socjalnej (Zbiór Studiów) *[Professional Development of Employees. Selected Legal Problems. Current Problems of Labour Law and Social Policy (a Collection of Studies)]* Volume II, Sosnowiec 2013, pp. 112, 113.

[266] See: http://www.mpips.gov.pl.

leaves from work are granted by the employer, therefore an employee cannot decide on his own on the date of their commencement[267]. Granting such benefits by the employer is purposeful and an employer retains the right to remuneration for that period. The employer may also grant additional benefits to the employee related to the professional development. Article 103^3 of the Labour Code indicates such examples as: reimbursement for training fees, costs of transport, handbooks and accommodation. Additional benefits may be conditional upon achievement of specific learning results (performance), attendance or proper fulfilment of job duties[268].

An employee who upgrades his professional qualifications at his own initiative, without employer's consent, is not entitled to any benefits under the Labour Code[269]. Obviously, under article 103^6 of the Labour Code an employee may apply to the employer for an unpaid leave or a full or partial day off without the right to remuneration. However, the employer is not obliged to grant such benefits if it were to disorganize work of the employee concerned or work of other employees. What also needs to be examined is a possibility to include in the agreement referred to in article 103^6 of the Labour Code, the provisions concerning grant of additional benefits to the employee. It should be held that under the principle of the freedom of contract the parties may freely agree upon the content of the agreement on the professional development without employer's consent. Therefore, an employer who does not agree to conclude a professional development agreement with an employee under the provisions of articles 103^1 § 3–103^5 § 3 of the Labour Code may, by way of an agreement, grant to an employee also other benefits, different from those listed in article 103^6 of the Labour Code [270].

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[267] Judgment of the Supreme Court of 18 August 2010, II PK 33/10.

[268] *A. Sobczyk*, Kodeks pracy… *[The Labour Code…]*, a commentary on article 103^1 of the Labour Code, argument 3 (available at Legalis Database).

[269] Attention should be given to the regulations which grant qualifications to employees who raise their professional skills also in a situation where an employer did not agree to or did not initiate the process of training of the employee, for example article 34 (2) of the Act on Legal Counsels *[ustawa o radcach prawnych]* (Journal of Laws *[Dz.U.]* of 2017, item 1870) provides that "An employee entered in the list of legal trainees who did not obtain employer's consent to undergo a legal training, is entitled to leave from work to participate in mandatory training without the right to remuneration. Paragraph 3 of this article provides that an employee is entitled to paid leave with the right to 80% of remuneration and amounting to 30 calendar days, in order to prepare for the legal training final exam. The right to such leave may be exercised only once. Paragraph 4 of this article provides that "an employee is entitled to leave from work with the right to remuneration in order to participate in the entrance exam and final exam".

[270] *E. Maniewska*, Umowa o podnoszeniu kwalifikacji zawodowych *[Professional Development Agreement]*, PiZS 2010, No. 11, p. 27. See also: *A. Dral*, Podnoszenie kwalifikacji… *[Professional Development…]* zawodowych przez pracowników z inicjatywy i za zgodą pracodawcy, MPP 2010, No. 11, p. 572. There are also other views presented in the labour law literature. P. Wojciechowski points out that article 103^6 of the Labour Code does not provide for a legal possibility of the employer to

However, in the public sector, the employer's freedom to grant additional benefits to an employee raising professional qualifications is limited because of the public finance discipline.

If the employer intends to obligate the employee to remain in employment upon completion of the skills upgrading training (article 103^4 § 3 of the Labour Code), he must obligatorily conclude a contract with such employee laying down the mutual rights and obligations of the parties. In such case the professional development agreement (commonly referred to as the loyalty agreement or training agreement) must be concluded in writing. This is based on the principle of the freedom of contract (article 353^1 of the Civil Code in connection with article 300 of the Labour Code) according to which the parties may arrange their legal relationship at their discretion, for as long as its terms and purpose do not contradict the characteristics (nature) of such relationship or the rules of the social coexistence[271]. The provisions of such an agreement cannot be less favourable than the minimum laid down in articles 103^1–103^5 of the Labour Code. The labour law scholarship and the case-law has not yet managed to develop a uniform standpoint regarding the legal nature of the professional development agreement. It is pointed out that it is an agreement, separate from the contract of employment, to which provisions of the Civil Code and not the provisions of the Labour Code apply directly[272]. On the other hand, some believe that the professional development agreement is an autonomous clause which supplements the employment relationship with the rights and obligations arising from such a clause[273]. The period of employment following the end of the skills upgrading training should be specified in the agreement and cannot exceed 3 years. In the training agreement the parties may define the scope of additional benefits if the employer decides to grant such benefits, for example coverage of the training fee (tuition), reimbursement for the costs of travel from the place of residence to the univer-

participate in the costs of employee trainings, therefore if such costs are covered even in the minimum amounts the employee may assume that his raising of qualifications falls under the provisions of articles 103^1–103^5 of the Labour Code giving rise to claims for additional benefits such as training leave or leave from work – while retaining the right to remuneration (see: *P. Wojciechowski*, Podnoszenie kwalifikacji zawodowych pracowników po zmianach – zasady i wątpliwości *[Professional Development of Employees After Changes – Principles and Doubts]*, MPP 2010, No. 11, p. 588)).

[271] Judgment of the Supreme Court of 26 April 2006, I UK 260/05.

[272] *A. Sobczyk*, [in:] Kodeks pracy. Komentarz *[Labour Code. A Commentary]*, a commentary on article 103^4 of the Labour Code, argument No. 2 and 6 (available at Legalis Database). See the judgment of the Supreme Court of 28 July 1999, I PKN 180/99; a judgment of the Supreme Court of Poland of 29 November 2000, I PKN 118/00.

[273] See *M. Raczkowski*, [in:] *M. Gersdorf*, *K. Rączka* (eds.), Kodeks pracy. Komentarz, a commentary on article 103^4 of the Labour Code, argument 2. See also: *A. Dral*, Podnoszenie kwalifikacji… *[Professional Development…]*, p. 571. See also resolution of the Supreme Court of Poland of 10 March 2005, II PZP 2/05; a judgment of the Supreme Court of 21 November 2011, II PK 48/11.

sity and reimbursement for the costs of accommodation, reimbursement for the costs of purchase of books. Moreover, the agreement may specify the procedure for granting a training leave; it may determine the form and time-limit in which the employee should file a respective leave request, may provide for the possibility to divide the training leave into parts or for an obligation to submit a schedule of mandatory classes. The agreement may also provide for the solutions which are more favourable to an employee as regards repayment of the costs of training if the employee stops the training or does not commence the training to which he committed himself. If the parties do not agree upon the solutions more favourable to the employee as regards repayment of the costs by the latter, then under article 103^5 § 3 of the Labour Code the employee must reimburse the employer for the costs incurred, proportionately to the period of employment following the skills upgrading training or the period of employment during the training, if:

– the employee fails to improve hisprofessional qualifications or stops improving his professional qualifications without a reasonable cause,
– the employer terminates employment with such employee without notice, at the fault of the employee, during the period of training or during the period of employment following such training the length of which was specified in the training agreement (maximum 3 years),
– the employee terminates the employment during the period of the training or during the agreed period of employment following the end of such training (maximum 3 years); it does not apply to termination of a contract of employment as a result of workplace mobbing,
– the employee terminates employment during the period of the training or during the agreed period of employment following the completion of such training (maximum 3 years),
– the employee terminates employment without notice through the fault of the employer (article 55 of the Labour Code) or because of the workplace mobbing (article 94^3 of the Labour Code), even if no reasons existed to terminate employment under these procedures.

The reimbursement for the costs applies only to additional benefits, such as a training fee, costs of accommodation. Therefore, reimbursement for the mandatory costs incurred by the employer, i.e. remuneration for the period of the training leave or a full or partial day off is possible only where the employee used these benefits contrary to their intended use. The parties may conclude a professional development agreement which does not have to obligate the employee to remain in employment following the training but can merely specify the amount of the additional benefits. Article 103^4 § 1 of the Labour Code does not specify the consequences of non-compliance with the written form of the professional development agreement. Therefore, it should be assumed that such form is re-

served solely for probationary purposes and an oral training agreement will also be valid. However, it is desired that the training agreement is concluded in writing because of the possible conflict as to whether the employer agreed to a paid training leave and full or partial day off for the time necessary for the employee to arrive on time to the mandatory classes and for the duration of such classes or whether he only granted unpaid benefits laid down in article 103^6 of the Labour Code[274].

The professional development is a development of a person as an individual (psychological perspective), person as a member of a group (sociological perspective) and a person as an employee (organisational perspective)[275]. Improvement of qualifications is both in the interest of the employee and the employer since it affects the skills in a broad sense and employee's attitude at work. The Supreme Court of Poland in its analysis of the validity of termination of employment pointed out to the activity of an employee and his initiative and involvement in the field of development of professional qualifications[276]. According to the opinions presented by the Supreme Court and some legal scholars, a professional unsuitability of an employee resulting from lack of appropriate qualifications and skills may be reasonable grounds for termination of a contract of employment[277]. As mentioned above, the wording of article 17 and article 94 (6) of the Labour Code does not imply a normative content, therefore it is not necessary to repeat one and the same obligation in two different articles. It seems that it would be reasonable to eliminate the said principle from the Labour Code and to maintain in force only article 94 (6) of the Labour Code which sufficiently establishes the employer's obligation to facilitate professional development of employees. Article 103^6 of the Labour Code also seems redundant since an employee might file a request for an unpaid leave or for a full or partial day off in order to participate in the mandatory classes under other provisions of labour law. A weak point of the mentioned regulations is also a very general nature of the definition of professional development (improvement of professional skills) and a lack of clarification of the phrase "upon employer's consent" which leaves too much room for interpretation, which consequently may lead to a conflict between the parties as regards the benefits to which the employee is entitled.

[274] *E. Maniewska*, Umowa o podnoszeniu… *[Professional Development…]*, p. 24.

[275] See *K. Januszkiewicz*, Rozwój zawodowy pracownika *[A Professional Development of an Employee]*, Łódź 2009, p. 7.

[276] Judgment of the Supreme Court of 25 May 2000, I PKN 657/99.

[277] Judgment of the Supreme Court of 1 October 1998, I PKN 363/98. See *A. Ludera-Ruszel*, Brak kwalifikacji zawodowych jako uzasadniona przyczyna wypowiedzenia *[Lack of Professional Qualifications as a Reasonable Cause of Termination of a Contract of Employment]*, MPP 2012, No. 11, p. 569.

2.7. Employee favourability principle

E. Kumor-Jezierska

Article 18 of the Labour Code sets out the principle of favourability, which is called also "the principle of protection of employee's rights"[278], "the principle of advantage", "the principle of non-deterioration of employee's legal situation" or "the principle of minimum employee guarantees"[279]. In the labour law literature there are doubts whether this provision includes only one principle of labour law or whether two principles should be distinguished. According to Florek, there are two principles: the employee favourability principle and the principle of legal automatism[280]. On the other hand, Góral argues that the legal automatism laid down in article 18 § 2 of the Labour Code is an integral part of the favourability principle. The author believes that the essence of the favourability principle is based on two elements: prohibition of any derogation from labour laws to the detriment of an employee when establishing an employment relationship and a sanction applied in the case of non-compliance with this prohibition which is invalidity of the questioned provisions and their automatic replacement by such laws[281]. Therefore, this principle is different from other principles of labour law since it refers to a certain specific mechanism of operation of the provisions of labour law in the case where contracts of employment or other instruments establishing employment relationship do not comply with such provisions[282]. Thus, according to Polish legal theorists, article 18 of the Labour Code includes metanorms or specific conflict of law rules[283]. A provision included in a contract of

[278] *M. Gersdorf*, *K. Rączka*, Prawo pracy… *[Labour Law…]*, p. 106.

[279] *W. Perdeus*, Zasada uprzywilejowania pracownika – kilka uwag na tle zarysu sposobów ujmowania zasad prawa pracy *[The Employee Favourability Principle – Several Remarks in the Context of Principles of Labour Law]*, Studia Iuridica Lublinensia vol. XXV, 2016, p. 109. See also: *Z. Góral*, O zasadzie uprzywilejowania pracownika (wybrane uwagi) *[The Employee Favourability Principle (selected remarks)]*, [in:] *M. Seweryński*, *J. Stelina* (eds.), Wolność i sprawiedliwość w zatrudnieniu. Księga pamiątkowa poświęcona Prezydentowi Rzeczypospolitej Polskiej Profesorowi Lechowi Kaczyńskiemu *[A Memorial Book for the President of the Republic of Poland Professor Lech Kaczyński]*, Gdańsk 2012, p. 125.

[280] *L. Florek*, Prawo pracy *[Labour Law]*, Warsaw 2016, p. 15.

[281] *Z. Góral*, [in:] *K.W. Baran* (ed.), Prawo pracy i ubezpieczeń społecznych *[Labour and Social Insurance Law]*, Warsaw 2017, p. 90.

[282] *Z. Góral*, O kodeksowym katalogu zasad indywidualnego prawa pracy *[The Labour Code Catalogue of the Principles of Individual Labour Law]*, Warsaw 2011, p. 200.

[283] See *B.M. Ćwiertniak*, [in:] *K.W. Baran* (ed.), Prawo pracy i ubezpieczeń społecznych *[Labour and Social Insurance Law]*, Warsaw 2013, p. 66; *T. Zieliński*, Prawo pracy. Zarys…

employment or in another act establishing an employment relationship which is less favourable to an employee than provisions of labour law is invalid and is replaced by appropriate provisions of labour law. This principle applies to all employees, which means those employed under a contract of employment *(umowa o pracę)*, appointment *(powołanie)*, election *(wybór)*, nomination *(mianowanie)* or cooperative contract of employment *(spółdzielcza umowa o pracę)*. This refers to the moment when an employment relationship is established as well as the whole duration of such relationship. The sanction of invalidity of certain provisions does not undermine the existence of the whole contract of employment or another act under which an employment relationship is established. In such case a labour law provision which is more favourable to an employee will by law replace the invalid provision of the contract of employment or other act under which employment is established.

The favourability principle refers only to autonomy of will of the parties to an employment relationship. It defines the limits of the freedom of the parties to an employment relationship in establishing their mutual rights and obligations[284]. This regulation fulfils to the fullest extent a protective function of the labour law[285]. However, application of the discussed principle to some of the norms of labour law is excluded. According to the traditional, civil-law division, as regards the binding force of provisions, a distinction can be made between:

– *ius cogens* (also called imperative, categorical or absolute provisions), the application of which cannot be excluded or limited by the will (decision) of the parties or a different custom;
– *ius dispositivum, ius suppletivum* (also called relatively applicable, dispositive, supplementary provisions) which mean provisions that apply when the parties themselves have not regulated the legal consequences in a manner different from this prescribed by such provision. Their main function is to complement the employment relationship to the extent not regulated by the parties;
– semi-imperative norms (also referred to as semi-dispositive, unilaterally mandatory or unidirectional dispositive norms) which define the minimum scope of protection of interests of one party and therefore the application of such provisions may be revoked or limited only if the provisions of the contract

[Labour Law An Outline…], p. 202.

[284] *J. Stelina*, Kodeks pracy. Komentarz *[The Labour Code. Commentary]*, commentary on article 18 of the Labour Code, argument 2, 7 (available at Legalis Database).

[285] See *W. Pedrus*, [in:], *K.W. Baran* (ed.), Kodeks pracy. Komentarz *[The Labour Code. Commentary]*, a commentary on article 18 of the Labour Code, argument 1; See also a judgment of the Supreme Court of 24 November 2004, I PK 6/04, OSNP 2005, No. 14, p. 208.

are more favourable to the party covered by the normative protection[286]. Polish legal texts (in legal language) do not contain the names designating the norms indicated in the title of a given paragraph, but they are distinguished in a descriptive manner[287]. The labour law literature has recognized that indirect norms are not uniform. According to Stelina, it is reasonable to distinguish two groups of indirect norms. There are semi-imperative norms which allow the parties to select a solution specified in advance in such provisions, however with no right to modification (even in favour of an employee). On the other hand, semi-dispositive norms use both mechanisms of binding the addressees – partially imperative (as regards the provisions less favourable to an employee) and partially dispositive (as regards the provisions equally or more favourable to an employee)[288].

The labour law uses the *ius cogens*[289] and *ius dispositivum*[290] to a limited extent. The favourability principle applies only in relation to indirect semi-dispositive norms which permit derogations only in favour of an employee. Obviously it is not easy to determine in each individual case whether derogations in the act establishing an employment relationship are favourable or not in comparison with a model established in the provisions of labour law. Certain doubts arise as to who and when should assess whether a decision in question is favourable to an employee or not. The case-law indicates certain criteria of favourability of the provisions of a contract of employment or other acts establishing an employment relationship[291]. In one of its judgments the Supreme Court, resolving on the admissibility of modification of a notice period of a contract of employment, pointed out that the favourability of a contractual provision should be assessed as at the time of conclusion of an employment relationship and not as at the time of

[286] *Z. Radwański*, *A. Olejniczak*, Prawo cywilne. Część ogólna *[Civil Law. A General Part]*, Warsaw 2017, p. 39, 40.

[287] *Z. Radwański*, *M. Zieliński*, [in:] *M. Safjan* (ed.), Prawo cywilne – część ogólna, System Prawa Prywatnego, Tom 1 *[Civil Law – a General Part. A System of Private Law, Volume 1]*, Warsaw 2012, p. 373.

[288] *J. Stelina*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. Commentary]*, a commentary on article 18 of the Labour Code, argument 4 (available at Legalis database); See also *L. Kaczyński*, Zasada uprzywilejowania pracownika w świetle kodeksu pracy *[Employee Favourability Principle under the Labour Code]*, PiP 1984, vol. 8, p. 69.

[289] For example, article 291 of the Labour Code is a peremptory *(ius cogens)* norm. Limitation periods cannot be shortened or extended by a legal act.

[290] For example, article 150 § 3 and 4 of the Labour Code is *ius dispositivum*. In a collective agreement, internal rules or a contract of employment if the employer is not subject to a collective agreement or is not obliged to set out the internal rules, it is possible to determine a number of overtime hours in a calendar year different from this specified in § 3.

[291] For example, a resolution of the Supreme Court of 7 November 1994, I PZP 46/94; a resolution of the Supreme Court of 9 October 1997, III ZP 21/97.

termination of employment. This assessment should, if possible, be objective and take into account the facts of each case. However, the court also emphasized that in the assessment of the contract terms it is also necessary to take into account the will of the employee who may have an interest in agreeing to seemingly unfavourable solutions. Therefore, even a subjective conviction about the favourability of a contractual provision may be important[292]. It should therefore be emphasized that the employee favourability principle cannot be equated with the inadmissibility of derogations in any situation, and this is also the case when the employee fully deliberately agrees to the derogations from the standard of protection set out in the provisions of labour law[293].

In the labour law literature it is emphasized that the principle of favourability does not require that any doubts should be explained in favour of the employee, but it only prohibits deterioration of employee's position in relation to the minimum level of protection prescribed by indirect norms of labour law[294]. Furthermore, the favourability principle must be excluded if, in specific cases, contractual provisions more favourable than provisions of labour law conflict with the general clause arising from article 8 of the Labour Code[295]. The favourability principle should not be interpreted in a simplified manner and should not be taken to mean that any privileges of an employee which are above-standard, are considered binding[296]. For example, in its judgment of 20 June 2012[297] the Supreme Court of Poland held that an employee who was guaranteed in a contract of employment an excessive and unjustified benefit should expect that such contractual provision may be questioned by an employer invoking an absolute invalidity (article 58 § 2 of the Civil Code in connection with article 300 of the Labour Code). The Court emphasized that it is possible to contractually provide benefits not provided for in the labour law or benefits in a higher amount, but such contractual provisions are subject to review by the labour court, which may declare them void or reduce the amount of the benefit.

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[292] Judgment of the Supreme Court of 26 March 2014, II PK 175/13. See also: *T. Zieliński*, [in:] *T. Zieliński* (ed.), Kodeks pracy. Komentarz *[The Labour Code. Commentary]*, Warsaw 2000, p. 184.

[293] *Z. Góral*, [in:] *K.W. Baran* (ed.), Prawo pracy i ubezpieczeń społecznych *[Labour and Social Insurance Law]*, Warsaw 2017, p. 92.

[294] *W. Perdeus*, Zasada uprzywilejowania pracownika*…[The Employee Favourability…]*, p. 109. See also: A. *Kijowski*, Zakres swobody pracodawcy w korzystaniu z zatrudnienia cywilnoprawnego *[The Scope of Employer's Freedom in Benefiting from Civil-law Employment]*, [in:] *M. Matey-Tyrowicz*, *L. Nawacki*, *B. Wagner* (eds.), Prawo pracy a wyzwania XX wieku. Księga Jubileuszowa Profesora Tadeusza Zielińskiego *[Tadeusz Zieliński's Jubillee Book]*, Warsaw 2002, p. 228.

[295] See *L. Kaczyński*, Zasada uprzywilejowania pracownika w świetle kodeksu pracy *[Favourability Principle under the Labour Code]*, PiP 1984, vol. 8, p. 69.

[296] Judgment of the Supreme Court of 4 April 2012, III PK 85/11.

[297] Judgment of the Supreme Court of 20 June 2012, I PK 13/12.

Attention should also be paid to the understanding of the expression "provisions of labour law" used by the legislature in article 18 of the Labour Code, because it has not been specified what it should actually mean. However, it seems that as regards the acceptable derogations from the provisions of labour law, article 9 § 1 of the Labour Code defines the scope of the labour law. It covers provisions of the Labour Code and provisions of other laws and implementing acts regarding the rights and obligations of employees and employers, as well as provisions of collective agreements and other collective arrangements based on laws, internal regulations and statutes, regarding the rights and obligations of the parties to an employment relationship. In the following paragraphs of article 9 of the Labour Code the legislature also defined the relations between the various sources of labour law. Provisions of collective agreements and arrangements, internal rules and statutes cannot be less favourable to workers than the provisions of the Labour Code and of other laws and implementing acts. It further defines the relations between the provisions of the internal rules and statutes (charters) which cannot be less favourable to workers than the provisions of collective agreements and collective arrangements. Thus, a normative act lower in the hierarchy but more favourable to the employee, has priority in the labour law before an act which is higher in the hierarchy. The same is a relation between norms that follow from the provisions of labour law within the meaning of article 9 § 1 of the Labour Code and a contract of employment or other bases for establishment of an employment relationship[298]. The favourability principle is expressed also in article 241^{13} of the Labour Code, which stipulates that more favourable provisions of the collective agreement, as of the date of its entry into force, shall replace by operation of law the terms and conditions of a contract of employment based on the previous labour laws or terms and conditions of other act being the basis for establishment of the employment relationship. Moreover, the favourability measure is referred to in articles 241^{8} and 241^{26} of the Labour Code.

The freedom of the parties in respect of wording of the provisions of contracts of employment and other acts under which an employment relationship is established is restricted by the principle of equal treatment in employment and prohibition of discrimination in employment. Pursuant to article 18 § 3 first sentence of the Labour Code, provisions of contracts of employment and other acts under which an employment relationship is established, which violate the principle of equal treatment in employment, shall be invalid. The issue of equal treatment in employment has been expressed in numerous acts of international and EU law for many years. Under the national law, equal treatment of employees is based on article 33 of the Constitution and was included among one of the fun-

[298] Decision of the Supreme Court of 27 February 2003, I PK 361/02, MPP-insert 2004, No. 3, p. 7.

damental principles of labour law laid down in article 11^2 of the Labour Code. It provides that employees shall have equal rights in respect of equal performance of the same duties; this applies in particular to equal treatment of men and women in employment. The equality of rights is not dependent on the existence or non-existence of criteria which are considered discriminatory. The subject of the comparison is only the scope of the employee's duties and the way they are performed[299]. Sometimes an infringement of the principle of equal treatment will be treated also as an infringement of the prohibition of discrimination of workers. In the light of article 11^3 of the Labour Code, discrimination should be understood to mean an unlawful deprivation or limitation of rights arising from an employment relationship or unequal treatment of employees on grounds of sex, age, disability, nationality, race, beliefs, in particular political or religious beliefs and trade union membership, as well as granting some employees, on these grounds, fewer rights than those enjoyed by other employees in the same factual and legal situation[300]. Nevertheless, as pointed out by the Supreme Court, article 18 § 3 of the Labour Code applies to the "ordinary" unequal treatment of an employee, regardless of the criteria applied (discriminatory), because such unequal treatment results in invalidity of contractual provisions (although the final fragment of the mentioned provision refers to discrimination)[301]. The automatic replacement mechanism referred to in article 18 § 3 second sentence of the Labour Code consists in replacement of such provisions with relevant provisions of labour law and in the absence of the latter – such provisions shall be replaced with appropriate non-discriminatory provisions. The problem is to establish which non-discriminatory provisions will apply in the case when it is not possible to replace the invalid provisions with the provisions of the labour law and who is to make these changes. The problem will be visible when the parties to an employment relationship do not reach an agreement as to the introduction of a new non-discriminatory provision. The Supreme Court held that "if it is established that an employer violated the prohibition of discrimination, the labour court may replace the invalid provision of the act that was the source of an employment relationship with the provisions which comply with the principle of equal treatment, determine for the future the terms and conditions of such relationship and as regards the retrospective period, when such violations took place – decide on compensation under article 18^{3d} of the Labour Code"[302].

[299] *A. Sobczyk*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, a commentary on article 11^2 of the Labour Code, argument 2 (available at Legalis Database).

[300] Judgment of the Supreme Court of 10 September 1997, I PKN 246/97.

[301] Judgment of the Supreme Court of 18 September 2014, III PK 136/13.

[302] Judgment of the Supreme Court of 10 May 2012, II PK 227/11.

For many years arguments have been raised in the labour law literature that this principle should be transferred from the chapter concerning the fundamental principles of labour law to the introductory provisions, alongside for example article 9 of the Labour Code. In addition, it is pointed out that article 18 § 3 of the Labour Code is redundant because the provisions which violate the principle of equal treatment in employment are contrary to the respective provisions of the labour law, and therefore are invalid under Article 18 § 2 of the Labour Code and are replaced by appropriate provisions of labour law.

Chapter 3. Specific Principles of Individual Labour Law

3.1. Principles governing establishment of a contractual employment relationship

K.W. Baran, D. Książek

3.1.1. Methods of establishment of a contractual employment relationship

3.1.1.1. General remarks

As regards establishment of an employment relationship, what should be tackled in the first place are methods of conclusion of a contract of employment[1]. More specifically, it is about a legal mechanism (procedure) by which the parties make a consensual declaration regarding establishment of an employment relationship. The starting point for further deliberations will be an observation that the methods of conclusion of a contract of employment are governed by various legal acts, not only statutory ones, but also by specific sources of labour law. This is because the course of the recruitment processes in the industrial relations is highly varied. *De lege lata,* the parties are free to enter into an employment relationship. The freedom arises from article 10 of the Labour Code. Since everyone has the right to work freely chosen – *a fortiori (a maiori ad minus)*, all the more everyone should be free to choose the procedure for the entry into such contract. It is worth emphasizing that the procedure to conclude a contract of employment may be heterogeneous in the sense that it may be a combination of various alternating procedures prescribed by law. An example may be a situation in which a response to an offer includes a proposal to start negotiations.

[1] See *T. Zieliński*, Prawo pracy. Zarys systemu, cz. 2, Prawo stosunku pracy *[Labour Law. An Outline of the System. Part 2. An Employment Relationship]*, Warsaw 1986, p. 9.

It should be emphasized that in this book conclusion of a contract of employment by conduct *(per facta concludentia)* was classified as a specific type of an offer and acceptance procedure. This approach arises out of normative regulations included in the Civil Code[2], even if traditionally the Polish labour law grants it an autonomous status[3].

The general labour law legislation does not provide a comprehensive regulation of the procedures for entry into a contract of employment, but it merely defines some of the areas of a recruitment process in a broad sense. Such mechanisms are described in more detail in separate laws governing employment of specific categories of public sector employees (so called *pragmatyki urzędnicze*)[4]. In order to fill this gap in the labour law, a reference should be made to civil-law regulations. In this context a question arises whether provisions of the Civil Code may be applied under article 300 of the Labour Code. On a textual level this provision applies only to Civil Code provisions applicable to an employment relationship. However, the mechanisms applied by the parties to enter into an employment relationship cannot be classified in material terms as an employment relationship because the latter does not yet exist. However, for teleological reasons, an extensive interpretation should be employed because of the fact that this is an objective legal loophole. In my opinion, under an *ab exemplo* formula, the provisions of the Civil Code governing conclusion of contracts in accordance with the regulation laid down in article 300 of the Labour Code can apply *mutatis mutandis*. The extensive interpretation of the mentioned provision is in fact in compliance with a systemic prohibition of any interpretation which would result in loopholes. Rejection of the *mutatis mutandis* clause laid down in article 300 of the Labour Code would make it necessary to apply directly the provisions of the Civil Code on the methods of conclusion of contracts in the labour relations[5].

Comprehensively, under statutory norms, there are three basic methods of conclusion of a contract of employment: by negotiations, by way of an offer and acceptance and by competition. Due to their nature, an auction and a tender do not apply in labour relations. It is worth emphasizing that the above typology does not limit the possibility to conclude a contract of employment in a different

[2] See article 69 of the Civil Code in connection with article 70 § 1 *in fine* of the Civil Code.

[3] See also *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, p. 9.

[4] See for example article 6 and 26 of the Act of 21 November 2008 on the Civil Service *[ustawa o służbie cywilnej]* (consolidated text, Journal of Laws *[Dz.U.]* of 2016, item 1345 as amended); article 38 of the Act of 21 November 2008 on the Employees of Local and Regional Authorities *[ustawa o pracownikach samorządowych]* (Journal of Laws *[Dz.U.]* of 2016, item 902) or article 36 of the Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service *[ustawa o pracownikach sądów i prokuratury]* (consolidated text, Journal of Laws *[Dz.U.]* of 2017, item 246).

[5] See *B. Gawlik*, Procedura zawierania umowy na tle ogólnych przepisów prawa cywilnego *[A Procedure to Conclude a Contract under General Provisions of Civil Law]*, Kraków 1977, *passim*.

manner. This conclusion is based on the principle of freedom of contract which can be seen in both homologous and heterogeneous mechanisms by which the parties make a consensual declaration of will.

In the present study, guided by the principle of transparency of arguments, I will focus on three homologous methods of conclusion of contracts of employment, namely:

– by way of an offer and acceptance,
– by negotiations,
– by a competition procedure.

3.1.1.2. Conclusion of a contract of employment by way of an offer and acceptance

The essence of the offer and acceptance procedure[6] is that the parties enter into a contract of employment by separate and autonomous declarations of will[7], where one of the parties, the offeror, makes a definite proposal to enter into the contract and the other party, the offeree, approves the offer[8]. In personal terms the offeror and the offeree may be both the employer and the candidate for employment. The mechanism will apply not only to a contract for an indefinite term but also to fixed-term contracts.

In this context a question arises whether a public proposal to enter into a contract of employment addressed to an unspecified group of persons can be considered an offer. In my opinion, a textual wording of article 66 § 2 of the Civil Code does not authorize an affirmative answer since the provision in question clearly indicates that the offer is individualised in personal terms. The above view cannot be changed by the regulations adopted in article 66^1 of the Civil Code since the latter is a *lex specialis* and applies to economic and not employment relations. Therefore, an advertisement published by an employer regarding a vacant post or seeking employees, even if it specifies a type of work and a type of contract, cannot be classified as an offer but rather as an invitation[9] to negotiations to conclude a contract of employment.

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[6] See *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, pp. 9–10.

[7] See *S. Grzybowski*, Prawo cywilne. Zarys części ogólnej *[Civil Law. General Part – an Outline]*, Warsaw 1974, p. 222; *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…],* p. 43 ff.; *Z. Radwański*, Prawo cywilne – część ogólna *[Civil Law – a General Part]*, Warsaw 2009, p. 296 ff.; *P. Machnikowski*, Kierunek zmian w przepisach o zawieraniu umów *[The Direction of Changes in the Provisions Governing Conclusion of Contracts]*, Transformacje Prawa Prywatnego 2003, No. 2.

[8] On the function of an offer, see *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…]*, pp. 45–47.

[9] See *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, p. 296.

An issue which also needs to be tackled is whether an offeror can by one declaration make several offers to an offeree to conclude a contract of employment (e.g. differing as to the type of work). *De lege lata* such situation seems acceptable, however, *natura rerum*, the acceptance of one of them results in expiration of the other.

In the labour relations an offer to conclude a contract of employment should, according to article 66 § 1 of the Civil Code, include substantial provisions of the contract[10]. Certain doubts arise as to which of the provisions should be considered substantial. On the basis of *a completudine* and *a cohaerentia* directives, a reference should be made to articles 22^1 and 29 of the Labour Code. Because of the fact that article 66 § 1 of the Civil Code does not differentiate between objectively and subjectively substantial contractual provisions, it must be assumed that at least two factors prescribed in the two of the Labour Code provisions mentioned above should be taken into account. Specifically, this applies to a type of work, remuneration, working time and a place of work[11]. It seems that *de lege lata* it is a minimum standard of the substantial provisions which should be included in a job offer. On the other hand, there is nothing to prevent an offeror from extending the catalogue of substantial provisions to go beyond the one laid down in article 29 § 1 of the Labour Code. For praxeological reasons, a view can be formulated according to which the more precise the offer in objective terms, the less doubts and disputes following the conclusion of the contract. If however these arise, each of the parties can make a determination before a labour court under article 189 of the Code of Civil Procedure.

The scope of the substantial provisions of the contract formulated by the offeror will by its nature be varied, depending for example on the type of the contract of employment. If a job offer is for a contract of employment for a fixed term, undoubtedly the duration of the contract will be considered a substantial provision within the meaning of article 66 § 1 of the Civil Code. The situation is different[12] as regards contracts for a probationary period since in this regard statutory regulations may be applied alternatively.

The offer may also include other substantial contractual provisions (such as professional qualifications) according to the principle *quod lege non prohibitum, licitum est.* Such provisions must also be accepted by the offeree so that the con-

[10] See *ibidem.*

[11] See *M. Tomaszewska*, [in:] *K.W. Baran* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2016, p. 246.

[12] *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, p. 9 expressed a view that an offer must include at least a specification of objectively substantial provisions of the proposed contract, that is at least a type of work.

tract of employment can be concluded. The offer may also include the whole contract of employment or a template contract of employment.

The offer is a firm declaration[13] of will[14], which means that it is binding upon the offeror and therefore the offeree can, by acceptance of the offer, cause the contract to be concluded. Such interpretation can be derived *implicite* from article 66 § 2 of the Civil Code. A non-binding communication that employees performing a specific type of work or a specific profession are sought, cannot be considered an offer.

In this context, what needs consideration is a temporal scope[15] of the binding force of the offer made by the offeror. According to the principle of freedom of contract, the term may be specified both as a calendar date or even a specific hour, or by an indication of a specific event to take place in the future[16] (for example, signature of an investment contract). In a situation where the offer validity period has not been specified in the offer, the temporal mechanisms laid down in article 66 § 2 of the Civil Code may apply alternatively.

Depending on the communicative situation between the parties, the period of validity of the offer may be varied[17]. If the offer was made in the presence of the offeree or via direct communication means (such as a telephone or an instant messenger), the offer ceases to bind if it was not accepted immediately. If however it was made in any other way (for example, by post, e-mail or text message), it ceases to bind upon expiration of the period during which the offeror could, in the ordinary course of business, receive a response without undue delay. In both of these situations article 66 § 2 of the Civil Code uses vague concepts. The offeree's response being without delay is very difficult to define in abstract terms. It only seems possible to specify in descriptive terms that the period required for responding should allow the offeree to consider the terms and conditions of the contract and to take a reasonable decision[18]. Also in the case of contracts of employment, a pragmatic view formulated by civil law theorists[19] should be adopted

[13] See *S. Grzybowski*, Prawo cywilne… *[Civil Law…]*, pp. 222–223; *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, p. 298.

[14] In the civil law studies, making an offer is usually classified as a unilateral juridical act or as an element of a process of formation of a bilateral juridical act that is a contract. See: *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, p. 298.

[15] See also *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…]*, p. 48 ff.

[16] See *P. Machnikowski*, [in:] *E. Gniewek* (ed.), Kodeks Cywilny. Komentarz *[The Civil Code. A Commentary]*, Warsaw 2008, p. 168.

[17] See *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, pp. 299–300; *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…]*, pp. 48–57.

[18] As rightly pointed out by Grzybowski (Prawo cywilne… *[Civil Law…]*, p. 223), without delay means without undue delay and not immediately.

[19] See *P. Machnikowski*, [in:] *E. Gniewek* (ed.), Kodeks cywilny… *[The Civil Code…]*, p. 169.

according to which the period of validity of the offer does not exceed the duration of the meeting or an interview during which the offer was made[20].

If the offer is made "otherwise" – article 66 § 2 *in fine* of the Civil Code – the temporal limit for the response was specified in accordance with an undue delay factor. By its very nature it will be varied and will depend primarily on the method of communication between the parties. It is rightly pointed out that it is not universal for the offeree[21]. Depending on the status of the latter, and in particular on whether he is a natural or legal person, the period to respond to an offer in an ordinary course of business, can be materially different. An example of such situation is a statutory obligation to present an offer to conclude a contract of employment to a governing body of the offeree (e.g. a management board). This is an example of a qualitative difference, in temporal dimension, as regards a decision to accept an offer by a natural person. In the event of delayed response to an offer in labour relations, the mechanism described in article 65 of the Civil Code will apply.

An offer ceases to bind when the offeree refuses to accept it. It can be done in any form. A subsequent change of the opinion by the offeree does not affect the validity of the offer.

According to civil law theorists, an offer – also an offer to conclude a contract of employment – is accepted by a firm declaration to conclude such contract[22]. *A limine*, because of the statutory written form of a contract of employment, an opinion according to which the contract can be concluded by any conduct of the offeree which can be an expression of his will, should be rejected. Such interpretation has its axiological justification in the protective function of labour law.

Another directive which applies in the labour relations is the one formulated in article 68 of the Civil Code according to which acceptance of an offer with reservations or amendment of its contents (for example as regards the method of calculation of the remuneration) should be considered a new offer[23]. All legal mechanisms described above apply to the so called counter-offer.

A contract of employment is concluded by way of an offer and acceptance upon receipt by the offeror of offeree's declaration of acceptance of the offer[24]. In such a case, the employer – regardless of whether he was an offeror or an offeree – is obligated to confirm conclusion of the contract in accordance with the provisions of article 29 § 2 *in fine* of the Civil Code.

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[20] As regards defective acceptance of an offer, see: *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…]*, pp. 93–98.

[21] See *P. Machnikowski*, [in:] *E. Gniewek* (ed.), Kodeks cywilny… *[The Civil Code…]*, p. 169.

[22] See *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, p. 301.

[23] See article 70 of the Civil Code.

[24] See *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, p. 302; *S. Grzybowski*, Prawo cywilne… *[Civil Law…]*, p. 224.

3.1.1.3. Conclusion of a contract of employment by conduct (per facta concludentia)

A specific form of conclusion of a contract of employment on the basis of an offer[25] is establishment of an employment relationship by admission to work of a person who expressed willingness to take up a specific employment[26]. A contract of employment is concluded where the conduct of both parties clearly implies that they are willing to cooperate in the performance of work. Such view is shared also in the case-law of the Supreme Court[27] which accepted that declarations of will of the contracting parties do not have to be explicit in their content. According to article 60 of the Civil Code, an intention of a person performing ajuridical act may be expressed by any conduct of such a person which sufficiently manifests his/her intention. The "sufficiency" factor on the part of the employee refers to taking up and performance of work, and on the part of the employer – to admission to perform the work under terms and conditions laid down in article 22 of the Labour Code. Such admission may be either active (for example by specification of the scope of duties, giving instructions on the method of performance of work, distribution of the work equipment) or passive, by tacit acceptance of the performance of work. In the latter case, a universal directive – *qui tacet, consentire videtur* – applies. In this context, it is useful to note an opinion of the Supreme Court of 8 October 1987, I PRN 47/87[28], in which the Court held that a contract of employment is concluded despite not being in writing, if a managing person declared that he is an employer, managed the work and paid the remuneration.

Where a contract of employment is concluded *per facta concludentia*, a problem arises in differentiating between these contracts and civil-law contracts governing provision of work. In this regard there are general delimitation mechanisms in force laid down in article 22 § 1 of the Labour Code – from an obligation of personal performance to remuneration and employer's risk. Obviously, a declaration of will *per facta concludentia* must be made by the entities that have the capacity and entitlement to enter into a contract of employment.

A minimum standard for this method of conclusion of a contract of employment is specification of a type of work[29]. This can be done by generalization of

[25] As regards acceptance of an offer by commencement of performance of the contract, see: *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…]*, p. 104 ff.

[26] *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, p. 9.

[27] Judgment of the Supreme Court of 31 August 1977, I PRN 112/77.

[28] Służba Pracownicza 1988, No. 3, p. 29.

[29] See *M. Gersdorf-Giaro*, Zawarcie umowy o pracę *[Conclusion of a Contract of Employment]*, Warsaw 1985, p. 181.

the professional activities actually performed by the person admitted to work and by such person's professional qualifications and character.

By nature, what raises doubts in the case of conclusion of a contract of employment by conduct is a type of such contract. *De lege lata,* it is not possible to formulate an abstract directive since a context in which a person was admitted to work is always a decisive factor. Therefore, the opinions expressed in the case-law of the Supreme Court are not universal. In its judgment of 12 September 1990 the Supreme Court held that if an employing establishment proposed in writing the exact duration of the contract of employment as well as its terms and conditions and the employee commenced performance of duties and further received remuneration, then a contract of employment for a fixed term was implicitly concluded. On the other hand, in its judgment of 4 November 2009, IPK 105/09[30], the Supreme Court held that in the case where a contract was concluded following a termination of a contract for a fixed term, it should normally be assumed, as in the case in question, that a contract for an indefinite term was concluded. It should be emphasized that *de lege lata* there is no presumption that a contract for an indefinite term has been concluded where the parties continue an employment relationship following the end of a contract for a probationary period or another fixed-term contract. It is only the examination of conduct of the parties that allows determining their intent as to conclusion of a new contract in temporal dimension. If however the parties did not cover these elements within the scope of their – at least implied – declarations of will, the directive laid down in article 18 § 1 of the Labour Code will apply.

As regards the temporal dimension of conclusion of a contract of employment by conduct, a directive laid down in article 70 § 1 *in fine* of the Civil Code should be applied. Therefore, it can be assumed that a contract is concluded upon commencement of work. In such case the employer should comply with the obligations arising from 29 § 2 of the Labour Code. Because of the fact that in the case of conclusion of a contract *per facta concludentia* it is not possible to confirm to the employee the terms and conditions of performance of work prior to its commencement, it should be assumed, for teleological reasons, that the employer should do it immediately following commencement of work, as soon as he becomes aware of it.

[30] Not published.

3.1.1.4. Conclusion of a contract of employment by negotiations

The essence of the negotiations procedure[31] in conclusion of a contract of employment is that the parties, the candidate for employment and the employing entity will conduct negotiations in order to agree upon the terms and conditions of provision of work under a contract of employment. This involves a multilevel communication process in which the negotiating parties provide each other with information and formulate postulates and assessments in order to reach a consensus regarding the terms and conditions of employment. The consensus is reached gradually, through arrangement of particular contractual clauses.

The laws in force do not specify the forms of negotiations. Therefore, according to the principle of freedom of contract, they can take the form of either direct contact or a contact through the means of communication, both traditional (such as letters) or electronic (such as e-mails, text messages, social networks). The parties themselves decide on the methods of the negotiations. Of course, the means of communication can be changed according to the specific needs. Consequently, they can be heterogeneous (for example both via telephone and e-mail).

Article 72 of the Civil Code provides a framework for the negotiation procedure. It applies in the labour relations only where an employer and a candidate for employment conduct negotiations in order to conclude a specific contract of employment. *A contrario*, it should be assumed that its provisions do not apply in a situation where the purpose of the negotiations is only to prepare a draft contract[32]. For the sake of loyalty, each of the parties in the negotiations should inform the other party of its intentions. In a such case a decision to conclude a contract is taken already after the end of the negotiations on the basis of a ready draft contract of employment. There are no legal obstacles to re-opening the negotiations on the basis of such a draft contract.

The negotiations regarding the conclusion of a contract of employment may be conducted not only by the employing entity and the candidate for employment but also by their authorized representatives[33]. It seems that a general power of attorney is not sufficient in this regard. A principal should clearly specify that the authorization relates to conclusion of a contract of employment therefore he should grant a specific power of attorney[34]. In the case of the employing

[31] See deliberations of *Gawlik* (Procedura zawarcia… *[A Procedure to Conclude…]*, p. 7) concerning negotiations.

[32] See a general civil law analysis by *B. Gawlik*, Procedura zawarcia… *[A Procedure to Conclude…]*, p. 25 ff.

[33] In this respect a directive laid down in article 107 of the Civil Code will apply.

[34] See *J. Strzebińczyk*, [in:] *E. Gniewek* (ed.), Kodeks Cywilny. Komentarz *[The Civil Code. A Commentary]*, Warsaw 2008, p. 246.

entity, it is also possible to grant a power of attorney to perform specific acts[35], to perform repeated acts and a commercial power of attorney *(prokura)*[36]. In the course of the negotiations, a job applicant may be represented also by his statutory representative.

Negotiations on the conclusion of a contract of employment require specification of their substantive scope, which means all aspects of the contract which are of significant importance to the parties. It does not have to be formalized, however a preparation of their catalogue might be useful.

A subject-matter of the negotiations may be all the factors which affect the employment relationship, not only those defined statutorily. This means that, in accordance with the procedure stipulated in article 72 of the Civil Code, the parties can make arrangements different from those following from specific sources of labour law. However, it is worth emphasizing that because of the semi-imperative nature of the civil law norms, the direction of the negotiations may be solely to increase the standards. Application of the mechanisms laid down in article 72 § 1 of the Civil Code does not justify limitation of rights or increasing the obligations prescribed by law.

A contract of employment is concluded by negotiations if the parties reach a consensus on all its provisions which were a subject-matter of the negotiations. *A contrario* from article 72 § 1 *in fine* of the Civil Code I conclude that if the agreement is not reached even with regard to one element of the negotiations only, the contract will not be concluded. A textual interpretation of the mentioned provision clearly prejudges that the negotiating consensus must refer to the entire substantive area of the negotiations rather than to several factors such as a type of work or amount of the remuneration, even if in practice such factors were the most essential. However, it does not mean that the parties, in line with the principle of freedom of contract, cannot restrict the original scope of the negotiations and conclude a contract of employment in a limited version. As a result, any actions which have not been agreed may be rejected and replaced by labour law norms or may be the basis for further negotiations which consequently result in conclusion of an agreement amending the terms and conditions of employment.

Reaching a consensus on several issues which were a subject-matter of the negotiations does not mean conclusion of the contract until all matters covered by the negotiations are not successfully negotiated. Both the employing entity and the candidate for employment will until then maintain their freedom to de-

[35] See *ibidem*, p. 246.

[36] See article 109^1 of the Civil Code. See more in: *B. Kozłowska*, Udzielenie prokury *[Granting a Commercial Power of Attorney]*, PPH 1996, No. 5, p. 77 ff.

cide on their declaration of will to conclude a contract of employment; during the course of negotiations on particular contractual clauses the parties are not bound by the declarations made. Under article 72 § 1 of the Civil Code a claim for conclusion of the negotiated contract – also a contract of employment – may be raised only where all the negotiated elements were agreed upon. Therefore, the determination of the scope of the negotiations is of such practical significance. It is obvious that they can go beyond the provisions laid down in article 29 § 1 of the Labour Code.

If the sole purpose of the negotiations was to prepare a draft contract of employment, then each of the parties may withdraw from the arrangements made, even if they were drafted in full. An exception is when the draft contract has all features of a preliminary contract and its provisions *explicite* obligate to conclusion of a final contract, which in this case will be a contract of employment.

Article 72 § 2 of the Civil Code provides for liability of the party who commenced or conducted the negotiations in violation of good practices[37]. In particular, this will be the case when a party did not have an intention to conclude a contract. In practice this may occur where the employing entity operating in the commercial sphere commences negotiations with a candidate for employment who has high professional qualifications only to prevent or delay his employment in a competitive company. In particular, a deliberate delaying of the negotiations, even by multiplying apparent proposals or deliberate misleading of a person applying for job, for example by arousing his excessive expectations as to promotion or making disproportionate promises in the negotiations regarding secondment to profitable work abroad, generates compensation claims. Violation of good practices in the course of negotiations between the employing entity and the candidate for employment relates not only to the ethical and moral sphere but also to the organizational and functional sphere. Therefore, provision in the course of the negotiations of untrue or manipulated information may be classified as violation of good practices within the meaning of article 72 § 2 of the Civil Code, and can infringe the fundamental principles of fairness[38].

Under article 72 § 2 of the Civil Code there is no doubt that the compensation stipulated in this article covers all damage caused in the course of the negotiations within a so called negative contractual interest. The latter includes both the actual losses and lost profits which the party in the negotiations could have reached if it did not participate in the negotiations. In the labour relations a significant

[37] In the labour law literature (*J. Piątkowski*, Prawo stosunku pracy… *[Employment Relationship Law]*, Toruń 2009, pp. 395–396) the concept of good practices is identified with the concept of good faith.

[38] See *J. Piątkowski*, Prawo stosunku pracy… *[Employment Relationship Law…]*, pp. 395–396.

issue is whether the compensation can include the remuneration payable to the candidate for employment which the latter lost as a consequence of disloyalty of the employing entity and the resulting non-conclusion of the contract of employment with another employer. In my opinion, a textual wording of article 72 § 2 *in fine* of the Civil Code supports a view that such damage can be counted towards compensation if a preliminary contract of employment has already been concluded with another employing entity and as a result of the negotiations conducted without an intent to conclude a contract, the parties did not sign the final contract. Such interpretation is supported by a *lege non distinguente* argument since the above provision does not differentiate between the categories of lost profits.

A highly important issue in the negotiations on the conclusion of a contract of employment is a regulation adopted in article 72^1 of the Civil Code. The provision defines the mechanisms of protection of information disclosed subject to confidentiality. In personal terms it applies to both parties – participants in the negotiations – both the employing entity and the candidate for employment. On the other hand, in material terms, it applies to information disclosed subject to confidentiality. Therefore, it protects only the information which was indicated by the party, either explicitly (e.g. orally or in writing) or by conduct, to be confidential information. This may apply to organisational and technical information, financial and economic information as well as personal information (such as *curriculum vitae*).

Against the background of the provisions of article 72^1 of the Civil Code, a question arises regarding a material relation between the mentioned article and article 22^1 of the Labour Code. In my opinion, article 72^1 of the Civil Code is a *lex specialis* when it comes to confidential information. In practice it seems that it protects mainly the interests of the employing entity as regards the information disclosed in the course of the negotiations by the employing entity to the candidate for employment.

De lege lata, the protection clause regarding confidential information obtained in the course of the negotiations applies also to third parties. It means that a recruiter cannot disclose information obtained from a candidate for employment to other entities (for example its subsidiaries). In essence, the mechanism works also in the opposite direction and it refers to information obtained subject to confidentiality by persons applying for job. By that I mean a situation where a person who obtained confidential information in the course of the recruitment negotiations further concluded a contract with another employer and disclosed to the latter the information, thus causing damage to a would-be employer. It is worth emphasizing that the protection under article 72^1 of the Civil Code is continuous and is subject to temporal restriction.

The negotiations under article 72 § 1 of the Civil Code which ended[39] with a consensus should always result in conclusion of a written contract of employment. However, it should be underlined that non-compliance with the written form does not result in invalidity of the contract[40]. On the other hand, an employer is obligated, not later than before commencement of work by the employee, to confirm to the latter in writing the terms and conditions of the contract agreed upon in the course of the negotiations. The employer must include in such confirmation all the provisions which are a prerequisite for the consensus. However, the confirmation of the contract alone cannot be equated with the contents of the contract of employment concluded in the negotiations. There is a risk that an employer may distort the arrangements made in the course of the negotiations. In such case an employee may file a claim with a labour court for determination of the terms and conditions of the contractual employment relationship under article 189 of the Code of Civil Procedure. It should refer to specific elements agreed upon in the negotiations, and distorted, either intentionally or unintentionally, in the confirmation. For the claim to be effective, it is necessary that an employee has appropriate evidence, which may be very difficult given the informal course of the negotiations.

3.1.1.5. Conclusion of a contract of employment in a competition procedure

The essence of the competition procedure is that a contract of employment is concluded as a result of a public procedure aimed at selection of the best candidates for employment according to specific selection criteria. The legal mechanisms applicable in this respect in the Polish labour legislation are particularistic in such sense that they are regulated by different sources of law, both primary and secondary legislation. *De lege lata,* there is no single statutory regulation to unify the competition procedure. The particularistic nature of this procedure for conclusion of contracts can be seen in the naming. Next to the term "competition" *(*Polish *konkurs)*[41] which best reflects the characteristics of this method of conclusion of the contracts of employment, the legal provisions use also such concepts as "selection"[42] or "recruitment". Because of the character of this study,

[39] As regards a so called progressive formation of a contract see: *B. Gawlik*, Procedura zawierania… *[A Procedure to Conclude…]*, p. 29 ff.

[40] Judgment of the Supreme Court of 4 November 2009, I PK 105/09.

[41] This term was used in article 3b (1) of the Act on the Employees of Courts and Public Prosecution Service.

[42] See *J. Stelina*, Nabór na stanowiska urzędnicze w samorządowych jednostkach organizacyjnych *[Selection of Official Staff in the Organisational Units of Local and Regional Authorities]*, [in:] *B. Cudowski*, *J. Iwulski* (eds.), Z aktualnych zagadnień prawa pracy i ubezpieczeń społecznych. Księga

my deliberations will be of general theoretical nature and the normative regulations included in the separate laws governing employment of specific categories of public officers *(pragmatyki)* will serve as an example. In terms of comprehensiveness of dogmatic research, a descriptive presentation of particular procedures for selection of employees serves no purpose.

A starting point for further deliberations will be an argument that the competition procedure is a characteristic method of conclusion of a contract of employment in the public services in a broad sense[43] and in the justice system. It is worth emphasizing that this procedure applies not only to contractual but also to non-contractual employment. Because of the topic of this study, I will focus solely on the former group of the employed persons. *Nota bene,* it cannot be excluded that the competition procedure for conclusion of a contract of employment can be applied in the private sector if specific sources of labour law provide for such a type of selection procedures. However, the fact remains that it is specific mainly for the public sector employers[44]. Its axiology is anchored in the constitutional right of access to public service on equal footing. Therefore, the laws should guarantee transparency and fairness of the recruitment process. Some of the separate laws governing employment in the public sector *(pragmatyki)*[45] specify these fac-

jubileuszowa Profesora Waleriana Sanetry *[Of Current Labour Law and Social Security Legal Issues. A Jubilee Book for Prof. Walerian Sanetra]*, Białystok 2013, p. 402 ff.

[43] See *H. Lewandowski*, Stosunek pracy na podstawie umowy o pracę regulowany przepisami szczególnymi (pragmatykami pracowniczymi) *[Employment under a Contract of Employment Governed by Specific Laws]*, [in:] *Z. Niedbała*, *M. Skąpski* (eds.), Problemy zatrudnienia we współczesnym ustroju pracy. Księga jubileuszowa na 55-lecie pracy naukowej i dydaktycznej Profesora Włodzimierza Piotrowskiego *[Employment Problems in Modern State of Labour Law. A Jubilee Book for the 55th Anniversary of Academic Work of Prof. Włodzimierz Piotrowski]*, Poznań 2009, p. 127; *Ł. Pisarczyk*, Umowa o pracę jako podstawa zatrudnienia w administracji publicznej *[A Contract of Employment as a Basis of Employment in the Public Administration]*, [in:] *M. Seweryński*, *J. Stelina* (eds.), Księga pamiątka poświęcona Prezydentowi Rzeczypospolitej Polskiej Lechowi Kaczyńskiemu *[A Jubilee Book in Memory of the President of the Republic of Poland Lech Kaczyński]*, Gdańsk 2012, p. 218 ff. This applies both to the central and local government administration; see for example *A. Giedrewicz-Niewińska*, Nowe przepisy o podstawach nawiązania stosunku pracy z prawnikami samorządowymi *[New Laws on the Employment of Local and Regional Authority Employees]*, MPP 2009, No. 40, p. 183.

[44] In personal terms, the competitive procedure for the conclusion of a contract of employment applies in particular to contract civil service employees, contractual local and regional authority employees, and court and public prosecution personnel. The above list is illustrative only and is not exhaustive.

[45] See article 11 (1) of the act on the employees of local and regional authorities *[ustawa o pracownikach samorządowych]* and *D. Książek*, *B.M. Ćwiertniak*, [in:] *K.W. Baran* (ed.), Prawo urzędnicze. Komentarz *[Public Servants Law. A Commentary]*, Warsaw 2014, pp. 536–537; *R. Skwarło*, Nabór na stanowiska urzędnicze *[Recruitment into Official Posts]*, [in:] *K. Kawecki*, *S. Płażek* (eds.), Ustawa o pracownikach samorządowych. Komentarz ze wzorami regulaminów, zarządzeń i uchwał *[Act on the Employees of Local and Regional Authorities. A Commentary with Template Internal Rules, Orders and Resolutions]*, Warsaw 2009, pp. 32–34.

tors and provide that the procedure of selection for vacant official posts is open and competitive.

In general theoretical terms, the competition procedure leading to conclusion of a contract of employment can be divided into four main phases (stages):
– initial phase,
– selection phase,
– decisive phase,
– final phase.

The initial phase of the competition procedure leading to the conclusion of a contract of employment is informative and preparatory. On the one hand, under the applicable laws the employing entity must make a public announcement on the recruitment into the vacant posts, and on the other hand a number of organisational and technical activities must be undertaken.

Announcements on vacant positions are strictly regulated by statutory provisions. They should include various information, starting from formal information (such as the name and address of the public office, required documents and a place and date of their submission[46]), and ending with substantive information (such as the position, requirements[47] and scope of responsibilities, terms and conditions of employment[48]). These laws are imperative. Violation of such laws by the employing entity may result in cancellation of the competition procedure, but not in cancellation of the contract of employment which was concluded as a result of violation of these norms[49]. At the initial phase of the competition procedure the compliance with the principles of fairness and transparency is guaranteed by statutory mechanisms according to which a time-limit for submission by the candidates of the required documents cannot be less than 10 days. A textual

[46] See article 28 (1–3) of the Act on Civil Service, article 13 of the Act on the Employees of Local and Regional Authorities.

[47] The labour legislation establishes preferences as regards employment of persons with disabilities. See article 29a (1) of the Act on Civil Service and article 13a (2) of the Act on the Employees of Local and Regional Authorities. On this topic see also: *B. Przywora*, Czy przysługujące osobom niepełnosprawnym preferencje w administracji są zgodne z konstytucją *[Is the Preferential Treatment of Persons with Disabilities in the Administration in Compliance with the Constitution]*, Prz. Sejm. 2013, No. 4, p. 162 ff.

[48] See *J. Stelina*, [in:] Prawo urzędnicze… *[Public Servants Law…]*, p. 123 ff.; *D. Książek*, *B.M. Ćwiertniak,* [in:] Prawo urzędnicze…*[Public Servants Law…]*, p. 545 ff.; *D.E. Lach*, *S. Samol*, Nabór do pracy w samorządzie terytorialnym a zasada równego traktowania w zatrudnieniu *[Recruitment to Local and Regional Authorities and the Principle of Equal Treatment in Employment]*, [in:] *M. Stec* (ed.), Stosunki pracy pracowników samorządowych, Warsaw 2008, p. 125 ff.

[49] See *B.M. Ćwiertniak*, Z zagadnień naboru na stanowiska urzędnicze w samorządzie terytorialnym – kilka refleksji *[Recruitment to Local and Regional Authorities – a Few Reflections]*, Rocznik Administracji i Prawa, Sosnowiec 2010, p. 68 ff.; *M. Stec* (ed.), Stosunki pracy pracowników samorządowych *[Employment of the Self-government employees]*, Warsaw 2008, p. 33 ff.

wording of the provisions[50] governing this issue raises no doubt that the time-limits are minimal and may be extended by the recruiting entity (e.g. an office) as needed.

The essence of the selection phase in the competition procedure to establish an employment relationship is selection of the best candidate or candidates for employment. The process is conducted by the selection boards[51]. Their status in the Polish labour law system is varied since some of the provisions strictly regulate it[52] while other leave it to the employer to regulate it internally. The examples illustrating the latter are articles 29a (1) of the Act on Civil Service and article 13a (1) of the Act on the Employees of Local and Regional Authorities. These norms do not specify the rules of the functioning of the boards, leaving such regulation to the employing entity, who should issue a respective order or instruction[53]. Such general regulation raises certain concerns regarding the transparency of the activities of the public administration. *De lege lata,* I propose that a selection mechanism should be introduced for the civil service and the employees of local and regional authorities, applicable in the recruitment of court and public prosecution staff.

The activity of the selection boards is based on the evaluation of candidates for employment in terms of specific selection criteria. It is rightly pointed out in the literature[54] that such evaluation can be based only on the previously defined criteria. The competition procedure is aimed at verification of knowledge, skills and aptitudes necessary for the performance of employee's duties. In particular, an object of the evaluation may be theoretical knowledge, an ability to apply it in practice, knowledge of working methods and techniques as well as of organisation and functioning of the administration[55]. If the selection board violates the criteria, the candidates may pursue their rights before court, both a labour court and an administrative court. This also applies to persons with disabilities who enjoy relevant priority in employment in the main sectors of public administration[56].

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[50] See article 28 (3) of the Act on Civil Service, article 13 (1) of the Act on the Employees of Local and Regional Authorities.

[51] As regards collegiality as an instrument of transparency in the functioning of the public administration, see: *W. Kisiel*, [in:] *A. Stec*, *K. Bandarzewski* (eds.), Unormowania antykorupcyjne w administracji publicznej *[Anti-corruption Regulations in the Public Administration]*, Warsaw 2009, pp. 39–40.

[52] See article 3 (6) of the Act on the Employees of Courts and Public Prosecution Service; see also: *T. Duraj*, [in:] Prawo urzędnicze… *[Public Servants Law…]*, p. 830 ff.

[53] See *J. Stelina*, [in:] Prawo urzędnicze… *[Public Servants Law…]*, pp. 128–129.

[54] *Ibidem*, p. 129.

[55] See for example article 3a (2) and 3b (4) of the Act on the Employees of Courts and Public Prosecution Service; see also *T. Duraj*, [in:] Prawo urzędnicze… *[Public Servants Law…]*, p. 830 ff.

[56] See article 29a (2) of the Act on Civil Service, article 13a (2) of the Act on the Employees of Local and Regional Authorities.

The selection phase of the competition procedure ends with identification of the best candidates for employment. In the civil service[57] and local and regional authorities[58] the selection board must select 5 candidates[59]. On the other hand, as regards courts and public prosecution service, the Act provides for an obligation to indicate one person only. However, a reserve list may also be prepared, including candidates for internship if more persons can be employed or if the candidate gave up employment.

Indication by the selection board of five best candidates for employment in the civil service or local or regional authority does not mean conclusion of a contract of employment. Moreover, a candidate does not have a substantive claim for establishment of an employment relationship. The decisive phase of the competition procedure consists in selection by a competent entity, within the administrative structure, of the candidate with whom the contract of employment will be concluded. Neither the Act on Civil Service nor the Act on Employees of the Local and Regional Authorities[60] regulate precisely the mechanism of selection from among the five candidates, which in practice means a broad scope of discretion. This may give rise to some pathology (such as nepotism). Therefore, it should be assumed that when deciding on selection of an employee, the employing entity should follow the general principles of labour law. By this I mean in particular an equal treatment directive which applies – *lege non distinguente* – under article 18^3 § 1 of the Labour Code also in the case of recruitment in the public administration. Therefore, any discriminatory practices[61] during the competition, in particular on the grounds listed in that provision, are unacceptable. If the principle of equal treatment is violated in relation to a candidate in the competition, such candidate is entitled to compensation under article 18^{3d} of the Labour Code. However, he cannot demand conclusion of a contract of employment[62].

[57] See *A. Dubowik*, Rygor selekcyjny i nabór do służby cywilnej w świetle ustawy z 2008 roku *[Selection and Recruitment to Civil Service under the 2008 Act]*, PiZS 2009, No. 8, p. 16 ff.; *T. Liszcz*, Nabór do służby cywilnej po nowelizacji ustawy *[Recruitment to Civil Service after Amendment of the Law]*, Kontrola Państwowa 2006, No. 1, p. 88.

[58] See *J. Stelina*, Nabór na stanowiska urzędnicze… *[Selection of Official Staff…]*, pp. 409–410.

[59] I share an opinion of Płażek (*S. Płażek*, Nabór na stanowiska urzędnicze w samorządzie terytorialnym *[Recruitment to Self-government Official Posts]*, PPP 2012, No. 3, p. 60) that an organisational unit is free to name less than five candidates. This opinion is strongly supported by *a fortiori* argumentation.

[60] See *S. Płażek*, Nabór na stanowiska… *[Recruitment to…]*, p. 60 ff.

[61] See *H. Szewczyk*, Stosunki pracy w samorządzie terytorialnym *[Labour Relations in the Local and Regional Authorities]*, Warsaw 2012, p. 115.

[62] See *J. Stelina*, Nabór na stanowiska urzędnicze… *[Selection of Official Staff…]*, pp. 409–410.

The final phase of the competition procedure covers mainly formal and information activities. By this I mean preparation of a recruitment report[63] and information on the results of such recruitment[64]. Such mechanisms are a statutory reflection of transparency of the competition procedure. The last element of that procedure is signature of a contract of employment with a selected candidate.

3.1.2. Right of the employing entity to obtain information on the candidates for employment

3.1.2.1. Introduction

In the recruitment process in a broad sense particularly important is obtainment of information on the candidates for employment. It has long been accepted by labour law theorists[65] – both at the axiological and functional level – that an employer has the right to information on the candidate, and in particular on his suitability to perform certain work. This is justified by a personal risk borne by the employer as a party to an employment relationship. On the other hand, in obligation terms[66], it is derived from the freedom to select an employee as an element of autonomy of will of the parties and the principle of loyal cooperation between the parties[67].

De lege lata, the basis for demanding information from a person who applies for job is article 22^1 § 1 of the Labour Code[68] and the regulation of the Minister of Labour and Social Policy of 28 May 1996 on the scope of documentation kept by employers in matters relating to employment relationship and the meth-

[63] See article 30 (1–3) of the Act on Civil Service, article 14 of the Act on the Employees of Local and Regional authorities.

[64] *D. Książek*, *B.M. Ćwiertniak*, [in:] Prawo urzędnicze… *[Public Servants Law…]*, p. 553 ff.

[65] See *M. Święcicki*, Prawo pracy *[Labour Law]*, Warsaw 1968, p. 170; *J. Brol*, [in:] *J. Jończyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 1977, p. 78 ff.; *W. Szubert*, Zarys prawa pracy *[An Outline of Labour Law]*, Warsaw 1980, pp. 108–109; *K. Kolasiński*, Problemy prawne przekazu informacji o pracowniku związane ze zmianą zatrudnienia *[Legal Problems Related to the Provision of Information on an Employee in Connection with a Change of Employment]*, PiZS 1978, No. 4, p. 31; *L. Florek*, [in:] *L. Florek* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2009, p. 167.

[66] See *M. Gersdorf-Giaro*, Zawarcie umowy… *[Conclusion of a Contract…]*, Warsaw 1985, p. 82; *A. Drozd*, Prawo podmiotu zatrudniającego do pozyskania informacji o kandydacie na pracownika *[A Right of the Employing Entity to Obtain Information on a Candidate for Employment]*, Warsaw 2004, p. 30 ff.

[67] See: *Z. Radwański*, [in:] *Z. Radwański* (ed.), System Prawa Prywatnego, t. 2, Prawo cywilne – część ogólna *[A System of Private Law, vol. 2, Civil Law – General Provisions]*, Warsaw 2008, p. 413.

[68] See *M. Barański*, Obowiązki informacyjne osoby ubiegającej się o zatrudnienie pracownicze *[Information Obligations of a Candidate for Employment]*, PiZS 2016, No. 4, pp. 25–26.

od for keeping personnel files *(rozporządzenie Ministra Pracy i Polityki Socjalnej z dnia 28 maja 1996 w sprawie zakresu prowadzenia przez pracodawców dokumentacji w sprawach związanych ze stosunkiem pracy oraz sposobu prowadzenia akt osobowych pracownika)*[69]. Inclusion of this issue partially in a normative act of such rank[70] raises serious doubts in the context of article 51 (1) of the Constitution of the Republic of Poland since the Constitution explicitly indicates the statute as the exclusive basis for the obligation to disclose personal information. Therefore, we propose *de lege ferenda* that all the mechanisms for obtainment of information on candidates for employment should be laid down in section two of the Labour Code.

Another problem to be analyzed is whether the legislature issuing the regulation on personnel files has not gone beyond the material scope of the legislative authority under article 298^1 of the Labour Code. Such legislative authority applies to matters relating to an employment relationship. In our opinion an answer to such question should be negative. We believe that obtainment of recruitment documentation is in a direct functional relation with an employment relationship.

Under article 22^1 of the Labour Code[71] an employing entity has the "right to demand" and under § 1 (1) of the regulation on personnel files, an employing entity "may demand" from a candidate for employment the documents specified in both of these provisions. This creates a problem whether the candidate is obligated to submit them to the employing entity. The existence of such obligation has been questioned by labour law theorists[72]. Because of the nature of the recruitment process, we believe that submission of the documents should be classified as a legal burden that is a duty imposed on a candidate for employment, in his own interest, non-compliance with which may cause adverse consequences for such person as regards job prospects.

In analyzing the issue of provision of information, particularly important is the temporal dimension. There was a controversial opinion presented[73] in the labour law literature according to which documents should be submitted to the

[69] Journal of Laws *[Dz.U.]* No. 62, item 286, as amended.

[70] See *K.W. Baran*, [in:] *K.W. Baran* (ed.), Zarys systemu prawa pracy, t. I, Część ogólna prawa pracy *[An Outline of the Labour Law System, vol. I, General Provisions of Labour Law]*, Warsaw 2010, p. 385 ff.

[71] See *M. Tomaszewska*, [in:] *K.W. Baran* (ed.), Kodeks pracy.… *[The Labour Code…]*, p. 194 ff.; *M. Gersdorf*, [in:] *M. Gersdorf*, *K. Rączka*, *M. Raczkowski* (eds.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2010, p. 148; *J. Piątkowski*, Prawo stosunku pracy… *[Employment Relationship Law…]*, p. 396; *M. Barański*, Obowiązki informacyjne… *[Information Obligations…]*, p. 26.

[72] See *A. Drozd*, Prawo podmiotu zatrudniającego… *[A Right of the Employing Entity…]*, p. 58 ff. See also an opposite opinion presented by *M. Barański*, Obowiązki informacyjne… *[Information Obligations…]*, p. 27.

[73] See *A. Drozd*, Prawo podmiotu zatrudniającego… *[A Right of the Employing Entity…]*, p. 37.

employing entity when it is "almost certain" that the candidate concerned will be employed. We do not share this view since it has no normative or functional justification. *De lege lata* there are no time restrictions in this regard. Such standpoint is justified also by *lege non distinguente* argumentation since the applicable norms do not differentiate between the phases of the recruitment process. In our opinion, during each phase (whether it is an offer and acceptance procedure or the negotiations procedure), at conclusion of a contract of employment the employing entity may demand from the candidate the information on his career development and professional qualifications. Such interpretation is supported also by teleological purposes. The point is that obtainment of the information duly in advance allows for more objective and in-depth evaluation of the candidate for employment which is of major importance in the recruitment process.

3.1.2.2. The right to obtain information from the candidate for employment

An issue which should be analyzed is what information, and in particular what documentation can be demanded by the employing entity from a candidate for employment. First, it is necessary to differentiate between the recruitment documentation and the information included in such documentation according to the formula that the documentation is a carrier of information. This is the information provided in the recruitment process which is of major importance in normative terms since article 51 (1) of the Constitution of the Republic of Poland refers to information and not to documentation which may contain a broad variety of contents.

We will start the deliberations on the recruitment information with an explanation what documentation can be demanded by the employing entity from a candidate. The basic standards in this area are laid down in article 22^1 § 1 of the Labour Code[74]. A list included there is exhaustive (positive *numerus clausus*). It is worth emphasizing that a regulation adopted in § 1 (1) of the regulation on personnel files does not fully correspond with the statutory scope and goes beyond the statutory framework in § 1 (5) of the regulation in question.

Under paragraph § 1.1 (6) of the regulation on personnel files, an employer may demand other documents if they must be submitted under separate laws. The above mechanism applies mainly in the public employment[75]. Against the

[74] See an extensive material interpretation of this provision formulated by the Supreme Court in its resolution of 12 December 2011, I UZP 6/11, OSNP 2012, No. 9–10, item 122. See also *R. Golat*, Ograniczenia pracodawcy w żądaniu danych osobowych *[Restrictions of the Employer's Right to Demand Personal Data]*, Sł. Prac. 2011, No. 2, p. 6 ff.

[75] See *H. Szewczyk*, Ochrona dóbr osobistych w zatrudnieniu *[Protection of Personality Rights in Employment]*, Warsaw 2012, *passim*.

background of the mentioned provision of the regulation, certain doubts arise on how to understand the meaning of the term "separate laws", and in particular whether the entitlement to demand other documents from a candidate for employment may be provided for by the secondary legislative acts or even specific sources of labour law (such as collective agreements[76] or other collective arrangements). A pro-constitutional interpretation based on a directive laid down in article 51 (1) of the Constitution of the Republic of Poland clearly excludes the possibility to establish non-statutory entitlements for the employing entity.

A person applying for a job may also submit to the employing entity other documents specified in § 1 (2) of the regulation on personnel files[77]. However, the employing entity is not entitled to demand them. In particular it applies to curriculum vitae, letters of recommendation or opinions[78] from the previous employers. On the other hand, there are no legal obstacles that would prevent the employer from verifying the data (for example through social networks).

As regards the recruitment documentation, special attention should be given to a personal questionnaire referred to in § 1 (1)(1) of the regulation on personnel files. It does not specify what information should be included in such a questionnaire. A template appended to the regulation includes only non-binding suggestions. Therefore*, de lege lata*, there is a blank regulation which does not say what specific information can be demanded from a job applicant. Thus, there is a risk that the employing entity, by creating its own questionnaire, may arbitrarily specify the information which it wants to obtain. However, the information cannot go beyond the scope which is expressly specified in article 22^1 § 1 of the Labour Code and § 1 of the regulation on personnel files. Such interpretation is justified by a broadly understood constitutional concept of protection of privacy. Therefore, there is no doubt that provisions of article 45 and article 51 (1) of the Polish constitution apply also in labour relations.

In this context it seems to be of crucial importance what information cannot be demanded by the employer from a candidate for employment, both in the questionnaire and at the following stages of the recruitment process. Obviously, they cannot be exhaustively listed. The information presented below is exemplary. More specifically, the employing entity cannot demand the information concerning:

a) a personal status of the candidate[79], including:
   – marital status;

[76] Differently, *A. Kamińska*, Kodeks pracy a przepisy o ochronie danych osobowych *[Labour Code and the Laws on the Protection of Personal Data]*, St.Pr.PiPSp. 2012, p. 13 ff.

[77] See *M. Barański*, Obowiązki informacyjne… *[Information Obligations…]*, p. 26.

[78] See also *J. Piątkowski*, Prawo stosunku pracy… *[Employment Relationship Law…]*, p. 397.

[79] A controversial opinion on a disclosure of "sensitive" data: *M. Barański*, Obowiązki informacyjne… *[Information Obligations…]*, p. 27.

- health condition (for example information on diseases, psychiatric treatment, pregnancy)[80];
- financial status (e.g. ownership of real properties, vehicles, savings);
- beliefs, political opinions, military service[81];

b) family status (e.g. number of children, family plans, place of residence and employment of family members, their financial and professional status);
c) previous employer (e.g. information on his technology, structure, marketing strategy or personnel).

De lege lata, certain doubts may arise as regards obtainment of information on criminal proceedings pending against a person applying for a job as well as conviction.

In analysing the scope of prohibited questions we cannot overlook the assessment of the situation in which such questions have already been asked. We should start our deliberations with the concept of "the right to lie". The concept which, simply put, means giving a false answer to an unlawful question put to a candidate for employment. It has its strong roots in the German and Swiss law, with some existence also in the Polish legal literature[82]. A starting point for admissibility of the right to lie is an *a priori* connection with an unlawful act of a potential employer. According to the supporters of this theory, a conduct of the candidate for employment should be classified as a necessary self-defence which *in principio* applies also to the category of personal rights. This argument raises no doubts. To justify it, a reference is made to article 423 of the Civil Code underwhich anyone acting in self-defence to repulse a direct and lawless attempt at his own interest or another person's interest, shall not be liable for the damage inflicted on the attacker, as a specific emanation of *venire contra factum proprium,* an example of *imperio rationis*[83]. This needs to be analysed in more detail. First of all, the liability under article 423 of the Civil Code may be excluded when the attack is unlawful (i.e. contrary to law or the rules of social coexistence) and direct and the self-defence against the attacker is necessary[84]. Moreover, in our opinion, what should also be kept in mind is the principle of proportionality. It seems that if a recruiter – whether it be a future employer or a third party such as a recruitment agency – asks a discriminatory or generally unlawful question, a sufficient

[80] See *A. Drozd*, Prawo podmiotu zatrudniającego… *[A Right of the Employing Entity…]*, p. 170.
[81] See *ibidem*, p. 187 ff.
[82] See *A. Drozd*, Prawo podmiotu zatrudniającego… *[A Right of the Employing Entity…]*, p. 162 and the literature referenced there.
[83] *Ibidem*, p. 165; *L. Florek*, *T. Zieliński*, Prawo pracy *[Labour Law]*, Warsaw 2003, p. 293; *Z. Radwański*, Wykładnia oświadczeń woli składanych indywidualnym adresatom *[Interpretation of Statements Made to Individual Addressees]*, Wrocław 1992, p. 194.
[84] Judgment of the Supreme Court of 4 May 1965, IV CR 5/65.

defence for the candidate will be not to answer such question. It is difficult to accept (not only on the basis of legal or praxeological argument) the creation of a situation which is not grounded in reality and which might last for an unspecified time. The possible consequences of such a situation, which *ab initio* did not exist, may lead to an unfavourable situation, and not only in relation to the person who at the time of the event already enjoys an employee status but also in relation to an employer – for example in the event of pregnancy or disability. It is worth noting that the employment relationship is a continuous relationship with a changing factual status. An employer who is unaware of the disability, soon after the start of employment may *in concreto* assign an employee to work which cannot be performed by a person with a certain degree of disability. This is because the employer may rely on the information obtained from the then candidate for employment if the lapse of time does not imply the change in a health condition of the employee. Not answering a question is appropriately proportional and *in extenso* protects a personal right of a candidate for employment. The necessary self-defence cannot be reduced to establishment of an employment relationship at any cost. It must be kept in mind that a candidate with whom an employment relationship was not established is entitled to pursue his rights in court. This will be discussed further below. If we accepted the right to lie, this could only be in exceptional situations and should involve an obligation of a candidate (already an employee), to take actions, usually by making a respective statement to the employer, aimed at deletion of the information or correction of false information.

It is not difficult to imagine that there will be situations in which the employer will ask such questions and in principle it will not be considered unlawful. An employee who takes up employment is not obligated to disclose the fact that she is pregnant if the work she intends to perform is not prohibited by reason of protection of maternity[85]. A *contrario*, if the future employee would be exposed to work in prohibited conditions, such question seems not only legal but also necessary. *In concreto,* the legality of refusal to establish an employment relationship may be dependent on the type of the contract. In a situation where a long-term contract is considered, in particular a contract for an indefinite term, the legality of the refusal to establish an employment relationship would be unjustified. This is confirmed also by the European case-law[86]. In a such situation, if a candidate for employment gives an answer which is untrue, this may give rise to disciplinary consequences, for example this may be a cause of loss of confidence in the employee further resulting in termination of a contract of employment.

[85] Judgment of the Supreme Court of 17 April 2007, I UK 324/06, MPP 2007, No. 12, p. 654.

[86] Judgment of the Court (Sixth Chamber) of 3 February 2000. Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern.

In practice, a problem arises whether there is an obligation on the part of the candidate for employment to attach a photograph to the questionnaire. Neither the Labour Code, nor the above-mentioned regulation on the personnel files imposes such obligation on the candidate for employment; however the latter is free to add such photograph. It is worth emphasizing that improper use of a photograph of a candidate could subject the employer to a claim of discrimination based on age, sex, race, nationality or even ethnic origin. Consequently, it will be possible for a person applying for a job to raise compensation claims under article 18^{3d} of the Labour Code or even in accordance with general rules laid down in the provision of civil law.

3.1.2.3. Legal consequences of violation by the employer of the right to obtain information on the candidate for employment

The multidimensional nature of the provisions of labour law, as one of the effects of diffusion of labour law norms in the catalogue of sources of labour law in a large sense, determines a multidimensional nature of sources of liability of an employing entity to the candidate for employment. First, the legal issues should be considered in terms of the provisions of labour law. Such provisions, quite precisely, specify the procedure which may be initiated by a candidate for work claiming unlawful action. The above provisions govern prevention of discrimination in employment and mobbing. One of the principles of labour law laid down in article 11^1 of the Labour Code is an obligation of the employer to respect dignity and other personality rights of an employee. It is supplemented by article 11^3 of the Labour Code. Another category of norms applicable in such situation are provisions of Chapter II of the Labour Code which refer explicitly also to the stage of establishment of an employment relationship. Under article 18^{3b} of the Labour Code, the principle of equal treatment in employment is violated (with certain reservations mentioned below) where an employer differentiates the situation of an employee on one or more grounds specified in article 18^{3a} § 1 (1) of the Labour Code which results in particular in a refusal to establish or in termination of an employment relationship. Under article 18^{3d} of the Labour Code, a person in relation to whom the employer violated the principle of equal treatment in employment shall have the right to compensation amounting to not less than the minimum remuneration determined under separate laws.

The provisions of civil law are secondary to the provisions of labour law by application of article 300 of the Labour Code under which a person applying for a job may pursue hisclaim under article 415 of the Civil Code. Illegal activities of an employer in the case concerned may be classified as delict.

Claims may be pursued also under article 24 of the Civil Code, under which anyone whose personal right is threatened by someone else's actions may demand that such actions be ceased unless they are not unlawful. In the case of violation, such person may demand that the violator undertakes actions necessary to remedy the violation, in particular makes a respective statement in a proper form. In accordance with the principles laid down in the Civil Code, such person may also demand monetary compensation or payment of a relevant amount of money to a specified social purpose. If, as a result of violation of a personality right, a financial damage was caused, the harmed person may demand remedy of such damage in accordance with general principles. Another basis may be article 448 of the Civil Code under which if a personality right is violated a court may award in favour of the one whose personal right was violated, an appropriate sum of money as a remedy for the harm suffered or, upon demand of the harmed person, award an appropriate sum for a social purpose indicated by the latter, regardless of other means necessary to remedy the violation. It seems that a catalogue of claims available to a candidate for employment is quite broad.

As regards the consequences, it is important against whom the claims should be put forward in the case of a multi-stakeholder recruitment process. We share an opinion that a claim against an entity who intends to employ a candidate exists also in a situation when such entity does not run the recruitment process itself but through a third party. According to the Supreme Court, a claim for compensation for refusal to establish an employment relationship may be raised against an employer also where the principle of equal treatment in employment was violated in the course of recruitment by an authority outside the structures of the employer[87].

3.1.3. Form of a contract of employment

3.1.3.1. Introduction

As regards establishment of an employment relationship, particularly important isthe form of conclusion of a contract of employment. As regards contractual employment relationships, a directive formulated in article 29 § 3 of the Labour Code is of key importance. In material terms, it applies to all categories of contracts, both for an indefinite term and for a fixed-term.

The mentioned provision of the Labour Code explicitly provides that a contract of employment should be concluded in writing. It does not differentiate

[87] Judgment of the Supreme Court of 5 May 2011, II PK 181/10, OSNP 2012, No. 11–12, item 139.

between various written forms therefore, according to a *lege non distinguente* principle, it is reasonable to assume that as regards conclusion of a contract of employment all written forms provided for in the Civil Code, both ordinary and qualified, may be applied (under article 300 of the Labour Code). The second category includes:
– written form with a certified date,
– written form with an officially certified signature,
– a notarial deed.

The interpretation option adopted here is supported also by *a fortiori* argumentation (*a minori ad maius)*, according to which if a contract of employment can be concluded in an ordinary written form, all the more it can be concluded in qualified forms. Such interpretation is also justified by the protective function of the labour law which is one of the guarantees of legal certainty in the labour relations. The fact remains that both in normative and functional terms article 29 § 2 of the Labour Code restricts the freedom to choose a form of juridical acts strongly emphasised in the civil law studies[88].

Under article 29 § 2 of the Labour Code a question arises whether a contract of employment can be concluded in any form other than a written form. *Implicite,* according to the wording of the second sentence of the provision in question it seems acceptable. In our opinion the possible options are oral form and electronic form. As regards the latter, we make an assumption expressed in the civil law jurisprudence by Radwański[89], according to which an electronic form is separate from the written form because of different statutory requirements. As with the written form, we share the view based on *a fortiori* argumentation, according to which an electronic form of a contract of employment may be a qualified form with an effect of certified date.

There is an opinion frequently expressed in the labour law jurisprudence that a contract of employment may be concluded by conduct *(per facta concludentia)*. We do not share this view as we think that establishment of an employment relationship by conduct is a method and not a form.

3.1.3.2. Written form of a contract of employment

As has already been said, the requirement laid down in article 29 § 2 of the Labour Code to conclude a contract of employment in writing does not dictate

[88] See *M. Pazdan*, O projektowanym unormowaniu formy czynności prawnych *[On the Planned Regulation of Form of Juridical Acts]*, Rejent 2001, No. 9, p. 17 and the literature referenced there.

[89] *Z. Radwański*, [in:] *Z. Radwański* (ed.), System Prawa Prywatnego, t. 2, Prawo cywilne – część ogólna *[The Private Law System, Vol. 2, The Civil Law – the General Part]*, Warsaw 2003, p. 165 ff. See also: *K. Górska*, Zachowanie zwykłej formy pisemnej czynności prawnych *[An Ordinary Written Form of Juridical Acts]*, Warsaw 2007, pp. 32–33.

the choice of a specific form by the parties under the freedom of contract principle. The labour laws in force do not regulate this issue in detail. Therefore, under article 300 of the Labour Code a reference should be made to the Civil Code, first of all to article 78. In § 1 it defines the requirements for the so called "ordinary written form[90]. In model terms[91], these include:

1) handwritten signatures of all of the parties on one document including a declaration of will;
2) exchange of the documents including a declaration of will, each signed by one of the parties;
3) exchange of the documents including a declaration of will of one party and signed by the same party.

In this context a question arises whether all above-mentioned models of conclusion of a contract in an ordinary written form apply to contracts of employment. Undoubtedly, the first one in which the parties sign a mutual document best fulfils the directive of legal certainty in the labour relations. The other two, which involve exchange[92] of documents, may generate various doubts, at least in temporal terms, as regards the date of conclusion of the contract, which may result in threatening the interests of the parties, in particular of an employee. *De lege lata*, there are no direct normative arguments which would justify their elimination from industrial relations, however a protective function of the labour law suggests they should be applied with caution. In practice this means that a contract of employment may be included in one or in two documents. Therefore, it is possible that an employer may send to a candidate for employment identical copies of a contract of employment with his signature, and the employee will send back one copy. It is also possible that each of the parties may prepare a document expressing an undertaking of such a party and will sign and give it to the other party who will do the same[93].

In this context a problem arises at a temporal level as to when the contract of employment is concluded. In this respect the regulation laid down in article 26 of the Labour Code is of key importance. Therefore, if the parties specified in a contract of employment a date of commencement of work, then the employment relationship is established on that same date. However, if this factor has not been specified, according to a textual wording of the said provision, it will take place on the date of conclusion of the contract. In the case of exchange of documents in

[90] See *Z. Radwański*, Prawo cywilne… *[Civil Law…]*, p. 230; *J. Strzebińczyk*, [in:] *E. Gniewek* (ed.), Kodeks Cywilny. Komentarz *[The Civil Code. A Commentary]*, Warsaw 2008, pp. 215–216.

[91] See *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 52.

[92] See article 78 § 1 *in fine* of the Civil Code in connection with article 300 of the Labour Code.

[93] See deliberations of K. Górska (*K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 53) on the technical aspects of conclusion of contracts in an ordinary written form.

a manner specified in article 78 § 1 *in fine* of the Civil Code, the contract is concluded at the time when a declaration reached the other party in such a manner that the latter could become acquainted with it (articles 78 § 1 and 61 § 1 of the Civil Code in connection with article 300 of the Labour Code). Such interpretation option is justified both by *a completudine* and *a cohaerentia* argumentation.

Article 78 § 1 of the Civil Code *expressis verbis* establishes a principle according to which an ordinary written form requirement is met, also in the case of a contract of employment, when there is a document[94] containing declarations of will of the parties and their signatures. In the civil law studies[95] it is rightly pointed out that such document may only be a carrier of a declaration of will on which a hand signature of appropriate durability may be placed (such as paper)[96]. It is worth emphasizing that a contract of employment itself does not have to be drawn up personally by the parties and they can use generally available text editors.

According to a semi-imperative directive laid down in article 29 § 2 of the Labour Code, a contract of employment is concluded in writing, and more specifically with the use of graphic signs, in compliance with the structure of the language concerned. In this context, a question arises in which language a contract of employment should be concluded under the Polish legal system. The provisions of key importance are articles 7 and 8 of the Act of 7 October 1999 on the Polish Language[97]. Article 7 of the 1999 Act demonstrates a clear preference for the Polish language in employment matters if a contract is to be performed in the territory of the Republic of Poland. According to the case-law[98] an obligation to use the Polish language applies in particular to those foreign employers who employ Polish-speaking workers in the territory of Poland. The statutory priority for the Polish language was confirmed by article 8 (1) of the Act on the Polish

[94] See for example *K. Knoppek*, Dokument w procesie cywilnym *[A Document in a Civil Procedure]*, Poznań 1993, *passim*; *Z. Radwański*, [in:] *Z. Radwański* (ed.), System Prawa Prywatnego… *[The Private Law System…]*, p. 121 ff.; *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 57 ff.

[95] See *D. Szostek*, Czynność prawna a środki komunikacji elektronicznej *[Juridical Acts and Means of Electronic Communication]*, Kraków 2004, p. 231 ff.; *S. Grzybowski*, [in:] *W. Czachórski*, System prawa cywilnego. Część ogólna, t. 1 *[System of Civil Law,The General Part. vol. 1]*, Wrocław 1985, p. 624; *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 70 ff.

[96] See *Z. Radwański*, [in:] *Z. Radwański* (ed.), System Prawa Prywatnego…, *[The Private Law System…]*, p. 124; *W. Kocot*, Wpływ Internetu na prawo umów *[Impact of the Internet on the Contract Law]*, Warsaw 2004, p. 334.

[97] Consolidated text, Journal of Laws *[Dz.U.]* of 2011, No. 43, item 224, as amended.

[98] See judgment of the Regional Administrative Court *[Wojewódzki Sąd Administracyjny, WSA]* in Wrocław of 18 June 2008, IV SA/Wr 573/07.

Language. An exception[99] to the rule is laid down *expressis verbis* in paragraph 1b according to which a contract of employment can be drawn up in a foreign language upon request of a person who performs work, who speaks this language and is not a Polish citizen, who was advised of his right to draw up the contract in the Polish language. The above provision, as a specific norm, cannot be interpreted broadly, in accordance with the *exceptiones non sunt extendendae* directive. This means that a contract of employment can be concluded in a language other than Polish only where all the statutory conditions are met. This view is supported by *expressio unius est exclusio alterius* directive.

In this context a question arises as to the consequences of violation of the provisions of the Act on the Polish Language if a contract of employment is drawn up in a foreign language. In our opinion such conduct may result in imposition of sanctions on the person performing acts in labour lawunder article 218 § 1a of the Criminal Code, if the conduct is malicious and persistent. Moreover, if there is a dispute between the parties to the contract, there is nothing to prevent application of a mechanism laid down in article 473 of the Code of Civil Procedure.

Another question worth considering is which language version is binding if the contract was drawn up in two languages. According to article 8 (1) of the Act on the Polish Language, the Polish version shall prevail. Only in the case specified in paragraph 1b of this article, the parties themselves may indicate the official version under their broadly understood freedom to define the form of a juridical act.

A necessary element of the ordinary written form of any contract of employment is signatures of the parties. Without going into detailed analysis, we should only make a reference to the findings made in the civil law studies[100] which apply, *mutatis mutandis,* also in the labour law. A starting point for further deliberations will be an argument that a signature is a hand graphic sign which identifies the person who makes it. In this context, a mechanical imprint of a signature (for example of a person acting on behalf of the employer) seems ineffective. It should contain at least a surname[101]. First name or names are not necessary – this is in compliance with the idea of reasonable formalism.

[99] See also article 2 (2)(2) of the Act on the Polish Language which refers to national and ethnic minorities using a regional language.

[100] *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 107 ff. and the literature referenced there.

[101] See *S. Grzybowski*, [in:] *W. Czachórski* (ed.), System prawa cywilnego *[System of Civil Law…]*, p. 328; *Z. Radwański*, [in:] *Z. Radwański* (ed.), System Prawa Prywatnego… *[The Private Law System…*, p. 125. *K. Knoppek*, Dokument… *[Document…]*, p. 48; *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form]*, p. 121 ff.

The signature does not have to be legible. It is sufficient to put it in a manner characteristic of the signatory[102] and allowing identification. In the functional terms, the signatures on the contract of employment confirm a definite decision to establish an employment relationship. By way of exception, the mechanism laid down in article 79 of the Civil Code in connection with article 300 of the Labour Code may be applied to this contract.

Apart from ordinary written form, a contract of employment can be concluded also in a qualified form which follows from *a fortiori* argumentation. Pursuant to the provisions of the Civil Code applied under article 300 of the Labour Code, it is legally justified to accept that a contract of employment can be concluded with a certified date[103], with an official confirmation of a signature[104] or even in the form of a notarial deed. Application of these qualified written forms in the labour relations does not stem from statutory provisions. However, it cannot be excluded that such an obligation will stem from the provisions of specific sources of labour law or from arrangements made in the course of the negotiations on the contract. In practice, it may be necessary because of a specific status of an employee in the workplace where for example his competences must be defined in a specific manner.

In concreto, a situation may occur when one of the parties, in particular an employee, is illiterate. In such case an assumption, *in principio,* that a contract cannot be concluded would *de lege lata* be not justified, in particular taking into account the principle of the right to work. Through a directive of article 300 of the Labour Code a mechanism laid down in article 79 of the Civil Code should be applied. An illiterate person can make a declaration of will in written form in such a manner that he makes a fingerprint on a document and next to the fingerprint a person authorized by the latter will print a name and surname of the illiterate person and signs or in such a manner that instead of the person making the declaration the document will be signed by a person authorized by the latter and the signature will be certified by a notary, a head of a commune, city or municipality with a note that the signature was placed upon request of the illiterate person. It should also be kept in mind that for a notarial deed to be valid it is sufficient to indicate that a person participating in the deed did not sign it either because he is illiterate or could not sign it. It is not necessary to include in the no-

[102] See *S. Grzybowski*, [in:] *W. Czachórski* (ed.), System prawa cywilnego… *[System of Civil Law…]*, p. 624; *Z. Radwański*, [in:] System Prawa Prywatnego… *[The Private Law System…]*, p. 125; *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 131 ff.

[103] See *P. Gilowski*, Data pewna a forma oświadczenia woli z datą pewną *[Certified Date and a Form of a Declaration of Will with a Certified Date]*, Rejent 2001, No. 3, pp. 35–40; *Z. Radwański*, [in:] System Prawa Prywatnego… *[The Private Law System…]*, p. 149.

[104] See *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, p. 208 ff. and the literature referenced there.

tarial deed a detailed note describing the reason why such person could not sign, in particular where the circumstances in which the deed was concluded unambiguously indicate the health condition of the person concerned[105].

3.1.3.3. Conclusion of a contract of employment in electronic form

Analysis of the possible forms of conclusion of a contract of employment should also include an increasingly popular electronic form. Also in this case, through article 300 of the Labour Code, a reference is made to the provisions of the Civil Code. Under the existing legal systems, a core of the specific forms, and such is reserved for contracts of employment, is undoubtedly a document covering graphic signs, bearing a signature, which is nothing more but a materialization of declarations of will, as specified in article 78 of the Civil Code. However, one of the increasingly important forms is electronic transfer of information, from a computer to a computer. It is difficult to list all the advantages of this formula, but worth noting is a speed of the transfer which is practically unlimited in temporal or spatial terms[106]. Therefore, following the changing reality of legal transactions (juridical acts), in article 78^1 of the Civil Code the legislature provided for an electronic form of a juridical act. According to this provision, an electronic form is complied with where a declaration of will is made electronically and signed with a qualified electronic signature.

It is worth noting that article 60 of the Civil Code which determines the essential features of a declaration of will, *in extenso*, for example through semiotic directives, covers also declarations of will expressed with the use of a computer technology[107]. A question arises what point is there, in methodological terms, in distinguishing between the scopes of the written form and electronic form. An answer to this question should be sought not only in the civil law system as a comprehensive platform for analysis of civil law issues, mainly theoretical, but also in article 78^1 § 2 of the Civil Code, that is at the strictly legislative level. According to systemic arguments, not every method of recording a declaration of will has a written form. The written form, *de lege lata*, requires a handwritten signature that is a specific act which cannot be effected with the use of an electronic recording[108]. On the other hand, in legislative terms, under article 78^1 § 2

[105] Decision of the Polish Supreme Court of 4 December 1973, III CRN 294/73, OSNCP 1974, No. 11, item 193.

[106] *Z. Radwański*, Elektroniczna forma czynności prawnej *[Electronic Form of Juridical Acts]*, Mon. Praw. 2001, No. 22, p. 1107 ff.

[107] *Ibidem*, p. 1110 and 1111.

[108] *Ibidem*, p. 1111. See *J. Barta*, *R. Markiewicz*, Internet a prawo *[Internet and Law]*, Kraków 1998, p. 65 ff.; *A.K. Bieliński*, Charakter podpisu w prawie cywilnym materialnym i procesowym *[A Signature in the Substantive and Procedural Civil Law],* Warsaw 2007, p. 197 ff.

of the Civil Code, a declaration of will made in electronic form is equal (specifically equivalent) to a declaration of will made in writing. Under the previous legal regime, the legislature made a reservation that the equivalence of a declaration made in electronic form with a written form exists, provided that law or the juridical act does not stipulate otherwise. *De lege lata*, each declaration made in electronic form, according to article 78^1 § 1 of the Civil Code, is equalized with the written form. Such wording of the provision equalizes the electronic form with the written form and thus determines the relations between the two concepts. The scope of the designators of "written form" does not cover the designators of "electronic form". *In fine*, not only at the methodological but also at empirical level, these two forms should be treated separately and such a division has been adopted in this study.

No concept of electronic form, different from this adopted under the civil law, has been created in the labour law legislation, even if such possibility exists[109]. The electronic form of conclusion of a contract of employment requires that certain legal requirements are met. First of all, it must be noted that not every act in electronic form will meet the conditions necessary to consider the electronic form within the meaning of the civil law as an equivalent of an ordinary written form. As mentioned above, a declaration made in electronic form as part of the juridical act to conclude a contract of employment must be accompanied by a qualified electronic signature. Only after this condition has been met, the mentioned form can be considered equivalent. The said requirement does not apply only to a candidate for employment/future employee, but also to the employer, if they wish to use this form. It is also possible that only one of the parties uses such form. Against this background, what needs to be analyzed is a regulation included in article 25 of regulation No. 910/2014, under which an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form or that it does not meet the requirements for qualified electronic signatures[110]. Therefore, conclusion of a contract of employment with the use of an electronic signature which does not meet the requirement laid down in article 78^1 § 2 of the Civil Code is no equivalent to the ordinary written form reserved for a contract of employment but will produce all the related legal consequences. In analyzing the electronic form of conclusion of a contract of employment, several important issues need to be explained. First, it is necessary to define an electronic signature and then its qualified form. It can already be assumed that not every electronic signature will de-

[109] *Z. Radwański*, Elektroniczna forma… *[Electronic Form…]*, p. 1113.

[110] See comments of *K.M. Szymorek-Chachuły*, Elektroniczna postać umowy o pracę *[Contract of Employment in Electronic Form]*, MPP 2015, No. 12, p. 637.

termine the electronic form of a juridical act in the analysed scope of conclusion of a contract of employment within the meaning of the provisions of the Civil Code. Not every electronic signature will be a qualified electronic signature. To clarify these issues, first a reference should be made to the repealed Act on Electronic Signature[111]. Under article 9 (3) of the Act on Electronic Signature, an electronic signature means data in electronic form which is attached to or logically associated with other data in electronic form and which is used for identification of the signatory. The above definition of electronic signature had such a broad scope so that it could *pro futuro* cover any methods for generating signatures, provided that the signatory could be identified[112]. A currently applicable Act of 5 September 2016 on Trust services and Electronic Identification *(ustawa o usługach zaufania oraz identyfikacji elektronicznej)* does not introduce a definition of an electronic signature[113]. Neither does it define a qualified electronic signature. A source of both of the definitions is Regulation (EU) No. 910/2014 of 23 July 2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC[114], the purpose of which is harmonisation of the digital market, and the provisions of which apply directly in all Member States of the European Union[115]. Under article 3 (10) of the Regulation 910/2014, an electronic signature means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign. On the other hand, according to article 3 (1) of the Regulation 910/2014, a qualified electronic signature means an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures. For the electronic signature to be given a status of a qualified electronic signature, each of the above-mentioned conditions must be met jointly[116].

A person making an electronic signature is always a natural person holding an electronic signature creation device. In the case of conclusion of a contract of employment, an employee will act in his own name, and a person representing

[111] *R. Podpłoński*, *P. Popis*, Podpis elektroniczny. Komentarz *[Electronic signature. A Commentary]*, Warsaw 2004; *M. Jarucha-Jaworska*, Podpis elektroniczny *[Electronic Signature]*, Warsaw 2002.

[112] *M. Maciejewska-Szałas*, Forma pisemna i elektroniczna czynności prawnych. Studium prawnoporównawcze *[Written and Electronic Form of Legal Transations. A Comparative Study]*, Warsaw 2014, p. 353 ff.

[113] Journal of Laws *[Dz.U.]*, item 1579.

[114] Official Journal of the EU L 257 of 28 August 2014, p. 73.

[115] See *M. Jarucha-Jaworska*, Rozporządzenie eIDAS. Zagadnienia prawne i techniczne *[eIDAS Regulation, Legal and Technical Aspects]*, Warsaw 2017, *passim*.

[116] *Ibidem*, p. 358 ff.

the employer will act on behalf of another natural person employing workers, a legal person or an organisational unit without a legal personality.

An electronic signature verified with a certificate produces legal effects if it was placed during the validity of the certificate. An electronic signature placed during a period of suspension of the certificate used for its verification produces legal effects once such suspension is repealed.

Data in electronic form signed with a qualified electronic signature produce the same legal effects as documents signed with a handwritten signature, and a qualified electronic signature based on a qualified certificate issued in one Member State is recognized as a qualified electronic signature in all other Member States.

Under the previously applicable laws, the possibility to use the electronic form for a contract of employment was a complex issue and could not be reduced only to its technical aspects. Equivalence of an electronic form with an ordinary written form is one thing, and it is quite another to obligate the other party to impose a specific form. The form reserved for a contract of employment is first of all a written form. As mentioned above, the "written" form in a broad sense covers all specific forms. If an act reserves an ordinary written form, the parties are free to choose a form other than a written form[117]. In such case the parties were entitled, on the basis of *pactum de forma*[118], "only" to agree upon an electronic form which seems quite difficult at the stage of conclusion of a contract of employment if it cannot be imposed by one of the parties. This is because at this stage the parties are not certain as to the establishment of an employment relationship. Therefore, it will be difficult to negotiate *in concreto* a form of conclusion of a contract, when establishment of a legal relationship between the parties is not certain. It appeared that a temporal sequence of particular actions undertaken by the parties was of significant importance. However, nothing prevented an electronic form of a contract of employment from being a result of clear arrangements or *per facta concludentia*. *De lege lata*, the mentioned difficulties no longer exist, in particular taking into account the provisions of article 78^1 § 2 of the Civil Code.

As regards the electronic form of a contract of employment, an important issue is defects in consent. A question arises whether a traditional catalogue of the

[117] *Z. Radwański*, Elektroniczna forma… *[Electronic Form…]*, p. 1113.

[118] See deliberations on the form in: *E. Drozd*, Forma czynności prawnych zastrzeżona wolą stron *[Form of Juridical Acts Reserved by the Parties],* ZNUJ Prace z Wynalazczości i Ochrony Własności Intelektualnej 1974, vol. 1, p. 41 ff.; *E. Drozd*, Problematyka formy czynności prawnych na tle art. 77 k.c. *[Form of Juridical Acts under Article 77 of the Civil Code]*, St. Praw. 1973, vol. 38, 201 ff.; *J. Gwiazdomorski*, Nowe przepisy o formie czynności prawnych *[New Laws on the Form of Juridical Acts]*, [in:] Księga pamiątkowa ku czci Kamila Stefki *[A Memorial Book Dedicated to Kamil Stefko]*, Warsaw 1967, p. 78 ff.

defects is sufficient in relation to the electronic form. In the literature, a reference is made to the defects which *a priori* can be associated with digital matters, namely an error, distortion by a messenger or threat. It is not difficult to imagine a problem with establishing a line between human error and an error generated by an electronic device, for example taking into account the so-called virtual sovereignty. Also in this case a distinction can be made between an *error in persona* and *error in corpore*. However, it seems very difficult to rely on *error in persona* because of a specific anonymity of electronic trading[119].

3.1.3.4. Oral contract of employment

Next to the written form, an oral form of conclusion of a contract of employment is one of the two most popular forms existing in the labour relations. There are at least several reasons for that and they are of different legal and praxeological importance. People communicate with one another with the use of signs, usually verbal signs, and this in turns creates a language with semantic rules of certain objectivity. When analyzing the meaning of an expression we do not take into account mental acts but rather a certain inter-subjective state[120]. Apart from the theoretical legal aspect, the normative and dogmatic dimension is also of significant importance. Undoubtedly, the labour law legislature has its contribution, resulting in popularization of this form of conclusion of contracts of employment. On the one hand, it reserves the written form *ad probationem*, which *a priori* undermines its role, and on the other hand it introduced (until the last amendment of the Labour Code) a certain, time-defined[121] area to confirm the concluded contract in writing. This had to shift the weight, at least to a certain degree, to the oral form since the legislature provided for the possibility of later confirmation. Therefore, the oral form, in the absence *ab initio* of the written form, played a significant role in creation of the contractual employment relationship. At present, the oral form, as a substitute of the written form, would be considered a delict since *de lege lata* the oral arrangements should be finalized in writing even prior to the establishment of the contractual employment relationship. It is worth emphasizing that other forms, mentioned and analyzed above, still play a relatively marginal role in the discussed scope of establishment of a contractual employment relationship.

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[119] *A.K. Bieliński*, Charakter podpisu… *[A Signature…]*, p. 191 ff.

[120] *K. Ajdukiewicz*, Język i poznanie, t.1, *[Language and Cognition, vol. 1]*, Warsaw 1960, p. 145 ff.; *Z. Radwański*, *A. Olejniczak*, Prawo cywilne – część ogólna *[Civil Law – General Part]*, Warsaw 2013, p. 233 ff.

[121] Act of 25 June 2015 on the Amendment of the Labour Code and Certain Other Laws *[ustawa z dnia 25 czerwca 2015 o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw]* (Journal of Laws *[Dz.U.]* item 1220).

As regards the oral form in temporal terms, unlike in the case of the written form, the question when the contract of employment is concluded is not of such importance. As with other forms, a reference should be made to a general regulation included in article 26 of the Labour Code. If the parties agreed in the contract of employment upon a date of commencement of work, then the same date should be considered the date of establishment of an employment relationship. In literal terms, if such a date is not agreed upon, this occurs on the date of conclusion of the contract. This means orally. For obvious reasons, the regulation laid down in article 78 § 1 *in fine* of the Civil Code will be irrelevant since the parties do not exchange documents containing declarations on conclusion of the contract, as no such documents exist. Considering the above, it is necessary to emphasize the principle laid down in article 60 of the Civil Code, under which subject to statutory exceptions an intention of a person performing a juridical act may be expressed by any conduct of such person which sufficiently manifests his intention. Consequently, the conduct of the persons establishing an employment relationship should be subject to these regulations. Each consequential and visible set-up or occurrence, taking into account the existing semantic rules, will be an equally treated juridical act[122]. Under article 61 of the Civil Code, a declaration is made when it reached the person concerned in such a manner that the person was able to become acquainted with it. A declaration is effectively revoked, when the revocation reached the person concerned at the same time or earlier than the declaration. In this context, a question remains in which language a contract of employment can be concluded under the Polish legal system. As in the case of the written form, also the oral form involves making respective declarations of will by the parties. Also in this case an azimuth will be a regulation adopted in article 7 and 8 of the Act on the Polish Language. Article 7[123] provides explicitly for the prevalence of the Polish language in employment matters if a contract of employment is performed in the territory of the Republic of Poland. The statutory priority for the Polish language was confirmed by article 8 (1) of the Act on the Polish Language. An exception[124] to the rule is laid down *expressis verbis* in paragraph 1b according to which a contract of employment can be drawn up, but also agreed upon orally based upon *a cohaerentia* argument, in a foreign language upon request of a person who performs work, who speaks this language and is not a Polish citizen, who was advised of his right to draw up the contract in the Polish language. The above provision, as a specific norm, cannot

[122] *Z. Radwański*, *A. Olejniczak*, Prawo cywilne… *[Civil Law…]*, p. 234.

[123] Article 7 (1) (2) of the Act on the Polish Language.

[124] Article 2 (2)(2) of the Act on the Polish Language which refers to national and ethnic minorities using a regional language.

be interpreted broadly in accordance with the *exceptiones non sunt extendendae* directive. This means that a contract of employment can be concluded in a language other than Polish only where all the statutory conditions are met (in compliance with *expressio unius est exclusio alterius* directve).

In considering the oral form under the Act on the Polish Language, still relevant is the issue of the possible consequences of violation of the provisions of the act by concluding a contract orally in a language other than Polish. In our opinion, as with the written form, such conduct may result in imposition of sanctions on the person performing acts in labour law under article 218 § 1a of the Criminal Code, if the conduct is malicious and persistent. If there is a dispute between the parties to the contract, a mechanism laid down in article 473 of the Code of Civil Procedure may be applied.

Also in this case, certain doubts may arise as to which language version is binding if declarations of will were made in two or more languages. Under article 8 (1) of the Act on the Polish Language, the Polish version shall prevail. Only in the case specified in paragraph 1b of this article, the parties themselves may indicate the official version under their broadly understood freedom to define the form of a juridical act.

3.2. Principles of transformation of an employment relationship

M. Wujczyk

An analysis of the provisions of labour law allows one to distinguish several forms of transformation of an employment relationship. First, an employment relationship may be transformed as a result of a unilateral act of an employer. The Polish legislation provides for a number of possibilities to make this change. The employer may change the wage and working conditions, for example by:

- notice of change to wage and/or working conditions,
- assignment of an employee to other work because of specific needs of the employer,
- assignment of an employee to other work because of a downtime,
- assignment of an employee to other work because of the employee's situation.

Because of the limited scope of the present study, I shall only analyse the notice of change to wage and/or working conditions (*wypowiedzenie zmieniające*) and assignment to other work.

Second, a transformation of an employment relationship can be based on the mutual will of the parties taking the form of an agreement to change the wage or working conditions.

And finally, an employment relationship may be transformed irrespective of the will of the parties to an employment relationship, by virtue of law. This applies in particular in the case of transfer of business to another employer, which results in the change of the employer.

3.2.1. Principles of transformation of an employment relationship under a notice of change to wage and/or working conditions

3.2.1.1. The principle of a dominant role of the employer in respect of the notice of change to wage and/or working conditions

Under the Labour Code, a party entitled to give a notice of change to wage and/or working conditions *(wypowiedzenie zmieniające)* is an employer. The legislator has not decided to grant such a right to an employee. This is explicitly laid down in article 42 of the Labour Code, which provides in §§ 2 and 3 that a notice of change to wage and/or working conditions may be addressed only to an employee. In both of the mentioned provisions an addressee of the notice of change is an employee[125]. The fact that an employee is not granted the right to give such a notice was clearly confirmed by the Supreme Court which held that: "Under article 42 § 1 of the Labour Code, provisions on termination of a contract of employment shall apply accordingly to the notice of change to wage and/or working conditions while such a notice is considered effective if an employee was offered new terms and conditions of employment in writing (article 42 § 2 of the Labour Code). The wording of this provision is sufficient to argue that the notice of change can be given by an employer only. An employee may never exercise this right in such sense that he cannot, under article 42 of the Labour Code, unilaterally change the terms and conditions of employment"[126]. Therefore, an employee who is not satisfied with the terms and conditions of employment may only propose an agreement to change the wage or working conditions.

[125] Judgment of the Supreme Court of 26 June 2012, II PK 277/11, OSNP 2013, No. 13–14, item 154.

[126] Judgment of the Supreme Court of 3 August 2012, I PK 80/11, OSNP 2013, No. 15–16, item 175.

3.2.1.2. The principle of mutatis mutandis application of the provisions on termination of a contract of employment to the notice of change to wage and/or working conditions

Under article 42 § 1 of the Labour Code, provisions on termination of a contract of employment shall apply, *mutatis mutandis*, to the notice of change to wage and working conditions. Legal theorists have indicated that the *mutatis mutandis* application of law "consists in the most normal application of certain provisions to the second framework of reference, however the provisions which are irrelevant or contrary to the provisions which already govern the relationships in question are completely excluded from application or their wording is changed to some extent"[127].

3.2.1.3. The principle of limited application of the notice of change to wage and/or working conditions

Under article 42 § 1 of the Labour Code, provisions on termination of a contract of employment shall apply, *mutatis mutandis*, to the notice of change to wage and/or working conditions. As regards the type of a contract to which the notice may apply, the mentioned provision allows one to conclude that a notice of change is in principle admissible in the cases when a contract of employment may be terminated upon notice. Therefore, it may be argued that the notice of change (to wage and/or working conditions) should always be admissible in the case of a contract of employment for an indefinite term (setting aside the restrictions on the notice of change resulting from a particular protection granted to certain groups of employees). According to the provisions of the Labour Code, such a contract may be terminated by notice at any time, regardless of the time that had elapsed since establishment of the employment relationship.

3.2.1.4. The principle of a complex structure of the notice of change to wage and/or working conditions

There is a broad consensus among the legal scholars that a notice of change must include two elements: it must indicate which of the essential elements of the contract of employment are to be changed and must specify new terms and conditions proposed by the employer to the employee to become effective at the end of the period of notice. The respective declaration of will should explicitly specify the elements to be changed. A notice of change which merely sets out new terms and conditions in a very general manner allowing for various interpretations cannot be considered correct. The offer of employment under new terms

[127] *J. Nowacki*, Studia z teorii prawa *[Studies of Theory of Law]*, Kraków 2003, p. 459.

and conditions should be specific. An unspecific statement will not produce legal effects and will not change the wage or working conditions[128].

The legal effects provided for in article 42 of the Labour Code will not be produced if the employer first offers the new terms and conditions of employment and then gives a notice of change in respect of the previous terms and conditions. This is contrary to the structure of the notice of change under which the change of the wage or working conditions is effective if the employee has been offered new terms and conditions in writing. Therefore, the offer is an element which does not open but rather closes the process of change of the terms and conditions of employment. In its judgment of 7 January 1997[129] the Supreme Court of Poland rightly held that a declaration of will setting out the new rules of remuneration of an employee is not a notice of change if it does not include a declaration on termination of the previous terms and conditions and the proposed change (article 42 of the Labour Code). If the two elements are absent, then the employer's declaration to the employees that they will be remunerated differently may be treated only as a proposal to change the contracts of employment by mutual agreement between the parties. However, it must be emphasized that the mentioned ruling does not deny the concept which allows temporary separation of *essentialia negotii* of the notice of change but it merely indicates that such a notice is not effective if the employer only offers new terms and conditions of employment.

Employer's declarations on termination of the previous wage and working conditions and proposing new terms and conditions of employment do not exhaust the structure of the notice of change. The element constituting the juridical act is acceptance or non-acceptance by the employee of the changed terms and conditions of employment. Whether the employment relationship continues on the new terms and conditions or the employment relationship is terminated at the end of the notice period depends on the employee's behaviour.

Under article 42 of the Labour Code, the employee may:

1) By the mid-point of the notice period agree to the change of the employment relationship
2) By the mid-point of the notice period object to the new terms and conditions of employment
3) Give no opinion on the new terms and conditions proposed by the employer in the notice of change

[128] Judgment of the Supreme Court of 10 September 1998, I PKN 309/98, OSNP 1999, No. 19, item 613.

[129] Judgment of the Supreme Court of 7 January 1997, I PKN 51/96, OSNP 1997, No. 16, item 288.

The employee who accepts the new terms and conditions proposed to him may agree to introduction of such terms and conditions. Some Polish legal scholars argue that employee's consent is not a declaration of will but only an component of the facts "the main element of which is a declaration of will of the employer on termination of the wage and working conditions and proposing the new terms and conditions"[130]. Therefore, the consent is treated only as an actual act with legal implications. However, it is difficult to support this view.

If employee's consent was considered a declaration of will, this would mean that he can change his mind only to a limited extent. Such declaration can be effectively revoked, when the revocation reached the person concerned at the same time or earlier than the declaration (article 61 § 1 of the Civil Code).

A consequence of employee's consent will be conversion of the wage or working conditions to these proposed by the employer in the notice of change, at the end of the notice period. It must be stated that employee's consent does not result in conversion of a notice of change into an agreement to change (the terms and conditions of employment).

An employee must oppose by the mid-point of the notice period.

The laws do not specify the requirements regarding the form in which the employee should declare his consent or opposition to the proposed terms and conditions of employment. Therefore, the declaration can be made in written, oral or implied form – the most important is that it is understandable to the employer. This view is supported by article 60 of the Civil Code, underwhich a declaration of will of a person can be made by any conduct which sufficiently manifests the will of that person[131].

A situation in which an employee accepts only a part of the proposed wage and working conditions and rejects the other is not acceptable. The employee's statement must relate to all elements of the employment relationship indicated by the employer in the notice of change. As a consequence, acceptance of a part of the terms and conditions and rejection of the remaining part should be treated as an opposition *in toto* to the proposal submitted by the employing establishment[132]. However, in many cases where such a declaration is made, the employee and the employer agree upon only such changes which are accepted by the em-

[130] *T. Bińczycka-Majewska*, Zmiana treści umownego stosunku pracy *[Change to the Terms and Conditions of a Contractual Employment Relationship]*, 1985, p. 84.

[131] *J. Górecki*, Forma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym *[A Form of Obligation Contracts and Property Contracts in the Private International Law]*, Katowice 2007; *K. Górska*, Zachowanie zwykłej formy… *[An Ordinary Written Form…]*, Warsaw 2007; *W. Kocot*, Elektroniczna forma oświadczeń woli *[Electronic Form of Declarations of Will]*, PPH 2001, No. 3; Judgment of the Supreme Court of 18 June 2010, V CSK 430/09, OSNC 2011, No. 2, item 25.

[132] *T. Bińczycka-Majewska*, Zmiana treści… *[Change to…]*, p. 88.

ployee. In such case it should be considered that the employer's notice of change to wage and/or working conditions is withdrawn and the change of the terms and conditions to the extent acceptable by both of the parties is made under an agreement to change the wage or working conditions.

3.2.1.5. The principle of a dual effect of the notice of change to wage and/or working conditions

As already mentioned, the notice of change, may produce two different effects depending on employee's behaviour. If an employee agrees to the change of the wage or working conditions or fails to file an opposition within a prescribed time-limit, then the change becomes effective in accordance with employer's declaration. The new terms and conditions will enter into force the next day following the end of the respective notice period. The change of the terms and conditions of employment does not require any formal change of the contract of employment.

If the employee, by the mid-point of the notice period, makes a statement in which he refuses to accept the proposed wage or working conditions, the employment relationship will terminate upon expiration of the notice period. This will happen regardless of the intent of the employee[133].

3.2.1.6. The principle of limited material scope of the notice of change to wage and/or working conditions

The most significant element of the notice of change is specification which elements of an employment relationship are subject to such notice. The starting point in defining the material scope of the notice of change is article 42 § 1 of the Labour Code. It provides that the notice of change applies to the contractual wage and working conditions. On the basis of the above it is possible to specify two elements determining the obligation to apply the analysed concept in the case of an intention for a unilateral change of the wage and/or working conditions by the employer:

1) The change applies to wage and/or working conditions
2) The wage and/or working conditions derive from the contents of the contract of employment.

Salwa made an attempt to define the criteria which should be applied to identify the wage and/or working conditions. According to the author, an element can be considered a wage and/or working condition within the meaning of article 42 of the Labour Code, if it has the following characteristics:

[133] Judgment of the Supreme Court of 16 April 1999, I PKN 116/99, OSNP 2000, No. 17, item 645.

1) It must be a component part of the performance of work or remuneration for work
2) It must be an independent, distinct element, different from other elements
3) The distinction should follow from the intention of the parties or intention of the employer
4) It must determine a specific legal or factual situation of an employee regarding the provision of work or the wage entitlements[134].

It is more difficult to establish when the wage and/or working conditions stem from the contract of employment.

It is necessary to establish when the wage and/or working conditions stem from the contract of employment. Some legal scholars argue that these are only the elements of a contract of employment established by the will of the parties to an employment relationship. But this view cannot be accepted[135]. If this was the case, then failure of the parties to determine in the contract of employment the remuneration or the place of work would not result in the obligation to apply the notice of change procedure in the case of employer's intention to change such terms and conditions.

In my opinion the wage and working conditions stemming from a contract of employment can be divided into two groups. First, these are the terms and conditions agreed upon by the parties to the contract. They can result from explicit arrangements. In such case they will usually be reflected in the written part of a contract of employment. The agreed terms and conditions are also those which were not subject to negotiations between the future employee and the employer but there is a consensus between them that such terms and conditions will apply. For example in a situation where the parties agreed upon the type of work but did not specify the place of performance of such work – since it is obvious to both parties that the work will be performed only in the premises of the employer.

The second group of the wage and working conditions stemming from a contract of employment are the elements which were not agreed upon by the parties in the course of the negotiations and hence were not subject to a consensus between them. Yet they are necessary for the performance of the contract. For example, if the parties specify only a type of work and do not specify the place of performance of work and the remuneration payable to an employee, it cannot be concluded that such circumstances do not constitute a contract of employment. They should be specified taking into account all the circumstances in which the contract of employment was concluded.

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[134] *Z. Salwa*, Przedmiot wypowiedzenia zmieniającego *[A Notice of Change to Wage and/or Working Conditions]*, PiP 1983, No. 1, p. 34.

[135] *M. Gersdorf, K. Rączka, M. Raczkowski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2011, p. 312.

Polish labour law scholars mostly agree that article 42 § 1 of the Labour Code imposes an obligation to give a notice of change only where the wage and/or working conditions stemming from a contract of employment change to the detriment of an employee. Supporters of this view argue that according to this provision the notice of change to the mentioned conditions is not necessary where the conditions are changed in favour of an employee. This interpretation of article 42 of the Labour Code is not correct. An employer is not entitled to unilaterally change the terms and conditions of a contract, irrespective of whether such change improves or aggravates the employee's situation.

In fact, a change of the wage and/or working conditions in favour of an employee very often omits the notice of change procedure. However, it does not result from the employer's entitlement to decide unilaterally on the change of the applicable terms and conditions for the better but from the fact that such employee usually accepts such terms and conditions implicitly. Therefore, an agreement amending the terms and conditions of a contract of employment is concluded by conduct[136]. However, in such instances, the employer bears a risk of non-acceptance by the employee of the new terms and conditions. The non-acceptance may be either explicit (for example when an employee opposes the new terms and conditions) or implied (for example when an employee does not proceed to work under the new terms and conditions or sends back the benefits to which he did not agree). It should be noted that an implied change to the terms and conditions of a contract of employment to the detriment of an employee is also possible (for example in the case of a long-term provision of work in a place of work other than this agreed upon in the contract). However, in such case it needs to be established that the employee actually accepted the change of his working conditions. However, the Supreme Court ruled that an agreement to transform an employment relationship is not concluded between the parties by the mere fact that the employer ceased to pay a specific part of the remuneration, with the employee being passive (silent). It is possible that an employee, for different reasons, does not react to non-payment of a specific component of his remuneration and does not demand such payment in legal procedure until the expiry of the period of limitation[137].

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[136] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 303. Such standpoint was confirmed by the Supreme Court in the judgment of 21 October 2003, I PK 512/02, OSNP 2004, No. 22, item 380. The Court held that: "Change to the wage conditions in favour of an employee and consisting in granting a higher remuneration in order to be effective must be confirmed expressly or impliedly"; see judgment of the Supreme Court of 29 May 2007, I PK 320/06 (available at Legalis Database).

[137] Judgment of the Supreme Court of 19 December 1996, I PKN 23/96, OSNP 1997, No. 15, item 270.

In the case of assessment of the concept of favourability for the purposes of the notice of change procedure, the objective understanding should be rejected in favour of the subjective approach. As rightly held by the Supreme Court of Poland of 21 May 1999[138], in order to establish whether a change to the terms and conditions of employment made unilaterally by the employer was unfavourable to the employee, account should be taken of the subjective perception of the change by the employee. Determination whether the change to the terms and conditions is favourable should be made individually in relation to each employee[139].

3.2.1.7. The principle of formalism of the notice of change to wage and/or working conditions

For a notice of change to be effective, an employer must meet a number of formal requirements. These include: making a declaration in written form, observance of a relevant notice period, informing the employee of appeal procedures available to him or her, giving a reason in the case of a contract for an indefinite term, language in which the notice is made. It is worth noting that the formal requirements of the notice of change are to a large extent consistent with those applicable in the case of giving a notice of termination of a contract of employment which stems from a reference, included in article 42 § 1 of the Labour Code, to the provisions governing the latter.

The *mutatis mutandis* application of the provisions on the definitive notice of termination to the notice of change to wage and working conditions of employees employed under a contract for an indefinite term implies that the employer who wishes to give such notice of change must comply with the so-called trade union consultation procedure. It is a procedure in which a trade union representing an employee is notified of an intention to change the wage and/or working conditions of the employee so that the trade union can raise objections, if any (article 38 in connection with article 42 § 1 of the Labour Code). The *mutatis mutandis* application of the procedure of cooperation with trade unions in the case of an intention to give a notice of change to wage and/or working conditions was confirmed by the Supreme Court in its ruling of 19 May 1978 in which it held that "the procedure of consultation *[of the employer with a company trade union organisation – M.W.]* laid down in article 42 § 1 in connection with article 38 of the Labour Code, preceding the notice of change to wage and working conditions is aimed at enabling assessment *[by the trade union organisation – M.W.]* whether such a decision is justified from the perspective of workers' collective, taking into account the facts of the case concerned. Therefore, it is necessary to communi-

[138] Judgment of the Supreme Court of 21 May 1999, I PKN 88/99, OSNP 2000, No. 15, item 586.
[139] Judgment of the Supreme Court of 18 December 1991, I PR 428/90.

cate *[to the company trade union organisation –M.W.]* not only the causes justifying *[in employer's opinion – M.W.]* the change itself but also the new wage and working conditions which the employer intends to propose to the employee"[140].

3.2.1.8. The principle of legitimate cause of the notice of change to wage and/or working conditions

The *mutatis mutandis* application of the provisions on the definitive notice of termination to the notice of change to wage and working conditions may result in the necessity to specify the causes of such notice. It is necessary only in a situation where the wage and/or working conditions are to be changed to a person employed under a contract for an indefinite term. *A contrario*, there is no such obligation where the notice of change relates to an employment relationship established under a contract for a probationary period or a contract for a fixed term (including a temporary replacement employment contract).

The present chapter will describe the most typical examples, recognized in the Polish case-law and jurisprudence, considered legitimate causes of the notice of change (to wage and working conditions). Pursuant to article 45 § 1 in connection with article 42 § 1 of the Labour Code, a cause underlying the notice of change should justify such notice. The expression "justifying cause" is a general clause. It is not possible to set out a catalogue of all causes justifying the notice of change (a positive catalogue) or an exhaustive indication of situations in which the notice of change would not be justified (so-called negative catalogue)[141]. Setting out such a catalogue (which is limited by nature) would significantly reduce the number of cases in which the employer might give a notice of change to wage and/or working conditions.

The assessment whether the circumstances specified by the employer justify the notice of change should always be made *ad casum*, which means in relation to a specific case. However, according to legal writings and judicial decisions, it is possible to indicate typical circumstances which were identified as justifying the notice of change. What can be helpful are cases in which termination of a contract of employment was justified because, in principle, in these situations the notice of change to the terms and conditions of such contract would also be justified. According to an opinion presented by the Supreme Court, a notice of change may be justified both by causes underlying a definitive termination of

[140] Judgment of the Supreme Court of 13 December 1976, I PRN 113/76.

[141] *L. Florek*, [in:] *L. Florek* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2011, p. 258.

a contract of employment and by other causes adequate to the notice of change to wage or working conditions[142].

In my opinion, the the Supreme Court's view, according to which termination of a contract of employment is a regular procedure to end an employment relationship, will apply accordingly also to the notice of change (to wage and/or working conditions). For that reason, the causes underlying a notice of change, as with the definitive termination, do not have to be significant[143]. It should be stated that employer's notice of change to wage and/or working conditions of an employee who organizes his work on his own is legitimate, if the employee does not achieve the results comparable to other employees. The notice of change is also legitimate when the employer wishes to select employees in a manner which guarantees best performance of duties if the employer may expect that hiring new employees would allow achievement of better results[144].

The cause of the notice of change must be the actual cause. Actual cause of the notice is not only a cause existing at the time when the employer gives the notice to an employee but also a cause which is supposed to come true within a specified, near future (for example at the end of the notice period)[145].

The circumstances specified in the notice of change to wage and working conditions must be specific. This means that an employer cannot merely use a general statement but should specify the cause[146]. The mere indication that the employee "failed to meet the employer's expectations in relation to the position held" without specifying what were the expectations in question, cannot be considered a specific and actual indication of the cause justifying the termination within the meaning of articles 30 § 4 and 45 § 1 of the Labour Code[147], and a notice of change under article 42 § 1 of the Labour Code. The specific indication of the cause justifying the notice of change should be assessed taking into account other circumstances which are known to an employee and which clarify the cause[148]. Indication of facts and actual circumstances relating to an employee

[142] Resolution of the Supreme Court of 27 June 1985, III PZP 10/85, OSNC 1985, No. 11, item 164.

[143] Judgment of the Supreme Court of 1 July 1998, I PKN 218/98, OSNP 1999, No. 15, item 480; of 6 December 2001, I PKN 715/00, Pr. Pracy 2002, No. 10, item 34; of 2 October 1996, I PRN 69/96, OSNP 1997, No. 10, item 163.

[144] Judgment of the Supreme Court of 2 October 1996, I PRN 69/96, OSNP 1997, No. 10, item 163.

[145] *A.M. Świątkowski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2010, p. 227.

[146] Resolution of the Supreme Court of 27 June 1985, III PZP 10/85, OSNC 1985, No. 11, item 164; judgment of the Supreme Court of 12 December 2001, I PKN 726/00, OSNP 2003, No. 23, item 566.

[147] Judgment of the Supreme Court of 12 December 2001, I PKN 726/00, OSNP 2003, No. 23, item 566.

[148] Judgment of the Supreme Court of 2 September 1998, I PKN 271/98, OSNP 1999, No. 18, item 577.

or his behaviour in the process of work or events – even beyond employee's control – which influence the employer's decision, meet the requirement of indication of a specific cause (article 30 § 4 of the Labour Code)[149].

For a notice of change to be legitimate, it is sufficient that at least one of the causes is justified[150]. If however none of the indicated causes can alone sufficiently justify the notice of change, they can jointly make such notice justified[151].

3.2.1.9. The principle of judicial control of correctness of the notice of change to wage and/or working conditions

The Polish legislature has not decided to introduce any separate forms of protection allowing employee's appeal against erroneous notice of change. Under a reference in article 42 § 1 of the Labour Code, the relevant provisions governing termination of a contract of employment will apply. This mechanism is not completely appropriate. Application of the provisions on definitive termination to employee's claims raised under a notice of change gives rise to significant uncertainties and not always properly protects employee's interests.

Until the wage and/or working conditions are changed, an employee may demand that such change is declared ineffective. Upon expiry of the notice period the employee may challenge the accuracy of the notice of change and demand reinstatement of the previous terms and conditions of employment. This claim is derived from respective application of article 45 § 1 of the Labour Code[152].

In the ruling allowing the employee's claim the court will reinstate the previous wage or working conditions which applied prior to the notice of change. However, the ruling will have an effect only for the future. The employer will have to apply the original wage or working conditions after the ruling on reinstatement of such conditions becomes valid and final.

If the terms and conditions of employment were changed in relation to an employee employed under a contract for a specific term (contract for a probationary period, contract for a fixed term), then the compensation claim is the only claim which can be raised by the employee. Thisrestriction was introduced in relation to claims of an employee appealing against termination of a contract of employ-

[149] Judgment of the Supreme Court of 14 May 1999, I PKN 47/99, OSNP 2000, No. 14, item 548.

[150] Judgment of the Supreme Court of 5 October 2005, I PK 61/05, OSNP 2006, No. 17–18, item 265.

[151] Judgment of the Supreme Court of 8 January 2007, I PK 187/06, OSNP 2008, No. 3–4, item 35.

[152] Article 45 § 1 of the Labour Code provides that "If it is established that termination of a contract of employment concluded for an indefinite term is unjustified or violates the provisions of law governing termination of contracts of employment, the labour court will – at employee's request – declare the notice of termination ineffective, and if the contract has already been terminated it will decide on reinstatement of the employee under the previous terms and conditions or on compensation".

ment. The amount of the compensation claimable by an employee depends on the type of the contract of employment concluded with the employer[153]. As regards a fixed-term contract of employment, compensation is payable at the amount of a remuneration for a period from 2 weeks to 3 months, however not less than the remuneration for the notice period (article 47^1 in connection with article 42 § 1 of the Labour Code). On the other hand, as regards a contract for a probationary period, the amount of the compensation equals the amount of the remuneration for the period from the change of the wage or working conditions until termination of the contract (article 50 § 1 in connection with article 42 § 1 of the Labour Code)[154]. However, if the notice of change to wage and/or working conditions is given to a pregnant employee or an employee on maternity leave, to an employee – father raising a child during a period of the maternity leave, as well as to an employee during a period of protection of employment under provisions of the Act on Trade Unions, then the employee's rights are governed by article 45 § 3 in connection with article 42 § 1 of the Labour Code (in accordance with article 50 § 5 in connection with article 42 § 1 of the Labour Code). This means that the mentioned categories of employees who are subject to special protection may demand compensation for the entire period of application of the changed working conditions.

An employee cannot demand reinstatement of the previous wage and/or working conditions or compensation if the employer specified in the notice of change a notice period shorter than the one required[155]. Under article 49 in connection with article 42 § 1 of the Labour Code the new terms and conditions will enter into force only upon expiry of the required period, and the employee is entitled to perform work during such period on the previous conditions[156]. In other words, an erroneous specification by the employer of the notice period does not affect its length[157].

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[153] *M. Łyszkowski*, Odmienne traktowanie terminowych umów o pracę jest uprawnione *[A Different Treatment of Fixed-term Contracts of Employment is Justified]*, PiZS 2009, No. 5, pp. 23–26; Resolution of the Supreme Court of 9 November 1990, III PZP 19/90, OSNC 1991, No. 5–6, item 62.

[154] *J. Brol*, Zawieranie i rozwiązywanie umów o pracę *[Conclusion and Termination of Contracts of Cmployment]*, Warsaw 1980, p. 193.

[155] See more in *T. Libera*, Zawieranie i rozwiązywanie umów o pracę *[Conclusion and Termination of Contracts of Employment]*, Warsaw 1998, p. 88.

[156] Article 49 of the Labour Code provides that "in the case of application of a notice period shorter than the required one, the contract of employment shall be terminated upon expiry of the required period and the employee shall be entitled to remuneration until termination of the contract".

[157] As regards interpretation of article 49 of the Labour Code, see more in: *P. Wąż*, Prawne konsekwencje wadliwego rozwiązania umowy o pracę przez pracodawcę *[Legal Consequences of Defective Termination of a Contract of Employment by an Employer]*, MPP 2007, No. 11, p. 570.

3.2.2. Principles of transformation of an employment relationship by a unilateral assignment of an employee to other work due to specific needs of the employer

Under article 42 § 4 of the Labour Code an employer is granted the right to unilaterally change the type of work with no need to give a notice of change to wage and/or working conditions. This is subject to numerous requirements. The employer may assign an employee to other work, if:

1) there are reasonable needs on the part of the employer;
2) the period of assignment to other work does not exceed 3 months in a calendar year;
3) assignment to other work does not result in reduction of the remuneration;
4) the assigned work corresponds with the employee's qualifications[158].

Now I would like to focus on specification which elements of a contract of employment can be changed in this procedure. There is no agreement among legal scholars on this problem. According to the most restrictive view, a unilateral instruction from an employer may include only a change of the type of work, and it cannot apply to other elements of a contract of employment, in particular a place of work. On the other hand, a more liberal view allows the possibility to change, under article 42 § 4 of the Labour Code, the working conditions other than the type of work, in particular if it follows from the change of the type of work[159]. An argument put forward in support of this standpoint is that a change of the type of work is often connected with the necessity to change the place of work. If such change was considered not possible, it would significantly restrict the exercise of rights laid down in article 42 § 4 of the Labour Code[160]. Further arguments in favour of this view can also be found in the case law of the Supreme

[158] *J. Szmit*, Powierzenie innej pracy *[Assignment of an Employee to Other Work]*, MPP 2009, No. 7, p. 348; *J. Szmit*, Powierzenie innej pracy chronionemu działaczowi związkowemu na podstawie art. 42 § 4 KP *[Assignment of a Protected Trade Union Activist to other Work under Article 42 § 4 of the Labour Code]*, PiZS2009, No. 2, p. 19 ff.; *K. Bukowski*, Uwagi na temat czasowej zmiany rodzaju pracy i wypowiedzenia zmieniającego *[Remarks on a Temporary Change of a Type of Work and a Notice of Change to Wage and Working Conditions]*, PiZS 1980, No. 4, pp. 57–61; *M. Mędrala*, Wybrane problemy związane ze wskazaniem miejsca pracy w umowie o pracę *[Selected Problems Connected with Specification of a Place of Work in a Contract of Employment]*, MPP 2009, No. 3, p. 467; *R. Brol*, Powierzenie pracownikowi innej pracy *[Assignment of an Employee to Other Work]*, Sł. Prac. 2001, No. 3, p. 27; *R. Sadlik*, Kiedy wymagane jest wypowiedzenie zmieniające? *[When to Give a Notice of Change to Wage or Working Conditions?]*, Mon. Praw. 2006, No. 10.

[159] *L. Florek*, [in:] *L. Florek* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 281.

[160] *A. Marek*, Miejsce wykonywania pracy – ważny składnik umowy *[A place of work – an important element of a contract of employment]*, Sł. Prac. 2004, No. 3, p. 13.

Court of Poland. In its judgment of 16 February 1995[161], the Supreme Court held that an employee who fails to appear at the place of work designated by the employer under article 42 § 4 of the Labour Code, which is situated in other town and reports to work at the current place of work does not show an intention to give up his job within the meaning of article 65 § 1 of the Labour Code *[no longer in force – M.W.]*.

In my opinion, a unilateral change, under article 42 § 4 of the Labour Code, of the working conditions other than the type of work, is not acceptable, also where it would be a consequence of assignment of work of other type. Such interpretation is supported by several arguments. First, article 42 § 4 of the Labour Code is an exception to the general prohibition of unilateral change of working conditions by the employer in a procedure other than a notice of change to wage and/or working conditions. For that reason, this provision should be interpreted restrictively, in accordance with a generally accepted principle: *exceptiones non sunt extendendae.* Second, the change of the type of work is subject to numerous restrictions. One of them is the prohibition on the assignment of work which does not correspond with the qualifications of an employee. The analysed provision does not provide for such guarantees as regards change of the place of work. In particular, there is no reservation that the new place of work should be within a distance enabling employee's arrival at work within a reasonable time. It cannot be excluded that as a result of change of the type of work the employee will have to move to another town which is very distant from the place agreed upon in a contract of employment (it can be even a different part of the world). In such case, performance of duties by the employee may be very difficult or even impossible. And finally, it should be noted that a change of the place of work may result in a significant increase of costs of performance of work by an employee. The analysed provision does not provide for reimbursement for the increased costs incurred by the employee. Consequently, remaining in an employment relationship may be no longer economically reasonable for the employee since the costs of arrival at work and temporary change of the place of residence may significantly exceed the amount of the remuneration received from the employer[162].

For that reason, it should be considered that article 42 § 4 of the Labour Code may be the basis only for a change of the type of work. If the change of the type of work entails a change of the place of performance of work as agreed upon in a contract of employment, the employer may not exercise this right.

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[161] Judgment of the Supreme Court of 16 February 1995, I PRN 122/94, OSNP 1995, No. 15, item 189.

[162] See *E. Szemplińska*, Konsultacje i wyjaśnienia *[Consultations and explanations]*, PiZS 1998, No. 10, p. 46; *W. Cajsel*, Kwestia „związania" pracownika poleceniem pracodawcy *[The binding force of employer's instructions]*, Radca Prawny 2000, No. 1, p. 60.

3.2.3. Principles of transformation of an employment relationship under an agreement to change the terms and conditions of employment (agreement to change the wage and/or working conditions)

A change to wage or working conditions does not require giving a notice of change if an employee and an employer mutually declare their intention to change such conditions. Consequently, they conclude an agreement under which new terms and conditions are included in the contract of employment. Such agreement is called an amendment agreement or an agreement to change the wage or working conditions.

3.2.3.1. The principle of equal rights of an employee and an employer in respect of transformation of an employment relationship under an agreement to change the wage and/or working conditions

The offer to conclude the agreement may be put forward either by an employer or by an employee. Such agreement is concluded after the parties have agreed upon the elements which the parties consider necessary for the validity of such agreement. Both the employee and the employer may refuse to accept the offer to change the wage and working conditions. Such refusal cannot be considered an abuse of rights. The absence of an obligation to conclude an agreement to change the wage and/or working conditions was mentioned by the Supreme Court in its judgment of 17 September 1997. The Court held that an employer is not obliged to accept employee's proposal to transfer him or her to less strenuous job, unless such obligation stems from specific laws[163].

3.2.3.2. The principle of a broad material scope of the agreement to change the wage and/or working conditions

Under the agreement to change the wage and/or working conditions the parties may change any wage and working condition arising from a contract of employment, both in favour and to the detriment of an employee. In other words, the scope of freedom of the parties as regards setting out new terms and conditions of an employment relationship under such an agreement corresponds with the limits of their freedom to set out the terms and conditions of employment at the time of conclusion of a contract of employment[164]. These limits are defined

[163] Judgment of the Supreme Court of 17 September 1997, I PKN 268/97, OSNP 1998, No. 13, item 393.

[164] *T. Bińczycka-Majewska*, Zmiana treści… *[Change to…]*, p. 12.

first of all by the freedom of contract[165]. Under article 18 § 1 of the Labour Code, the parties to such agreement cannot change the terms of employment to be less favourable than those prescribed by the provisions of labour law. Otherwise the terms and conditions set out in the agreement will not apply and will be replaced by the previous terms and conditions or by the provisions of labour law.

It is worth noting that under an agreement to change the wage and/or working conditions the parties may change not only the wage and working conditions but also other elements of a contract of employment (such as its term or type of the contract).

The change can be made at any time during the employment relationship. It is possible also during protection periods in which a notice of change to wage or working conditions is prohibited[166]. The Supreme Court explained that provisions of article 32 (2) of the Act on Trade Unions do not constitute a legal obstacle to changing the working terms by an agreement to change, to the detriment of an employee[167]. It is in compliance with the principle: *volenti non fit iniuria*.

A change to terms and conditions of employment does not have to be permanent. The parties may agree upon a period in which such terms and conditions, other than the previous ones, will apply[168].

3.2.3.3. The principle of freedom of form of the agreement to change the wage or working conditions

The Labour Code does not provide for any specific form of agreement to change the wage and/or working conditions. However, the parties can make such a reservation in a contract of employment. According to the Supreme Court, parties to a contract of employment may reserve that any change to such contract can be made only in writing and that effectiveness of the actions taken by the parties

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[165] *A. Bigaj*, Granice swobody umów w kontekście umownego stosunku pracy *[Limits of freedom of contract in the context of a contractual employment relationship]*, Palestra 2013, No. 11–12, pp. 128–136; *B. Wagner*, Zakres swobody umów w pracowniczym stosunku pracy *[The Scope of Freedom of Contract in an Employment Relationship]*, Kraków 1986, pp. 119–134; *L. Florek*, Swoboda umów w prawie pracy *[The freedom of contract in labour law]*, [in:] *M. Seweryński*, *J. Stelina* (eds.), Wolność i sprawiedliwość w zatrudnieniu. Księga pamiątkowa poświęcona Prezydentowi Rzeczpospolitej Polskiej Profesorowi Lechowi Kaczyńskiemu *[Freedom and Justice in the Employment. A Jubilee Book of the President of the Republic of Poland Lech Kaczyński]*, Gdańsk 2012, pp. 87–95; *L. Florek*, Swoboda umów… *[The freedom of contracts…]*, pp. 175–191.

[166] *J. Strusińska-Żukowska*, Wypowiedzenie i porozumienie zmieniające *[A notice of change and an agreement to change the wage or working conditions]*, Pr. Pracy 1998, No. 7, p. 19.

[167] Judgment of the Supreme Court of 13 March 1997, I PKN 39/97, OSNP 1997, No. 24, item 492.

[168] Judgment of the Supreme Court of 15 May 1997, I PKN 164/97, OSNP 1998, No. 7, item 213. In this judgment the Court held that: "The parties may conclude an agreement to convert a contract of employment into an employment relationship by appointment for a fixed term at the end of which the contractual employment relationship will be re-activated".

is conditional upon compliance with written form requirement. According to article 76 of the Civil Code, applicable to contracts of employment under article 300 of the Labour Code, if the parties stipulate in a contract that a specific juridical act between them should be made in a specific form, that act takes effect only if that form is observed. If, however, the parties stipulate that the act should be made in writing without specifying the consequences of non-observance of that form, in case of doubt it should be assumed that such form was stipulated solely for evidentiary purposes[169].

Under article 300 of the Labour Code, provisions of the Civil Code on defects in consent may be applied to the agreement to change the wage and/or working conditions[170].

3.2.4. Principles of transformation of an employment relationship under applicable laws

A change to wage and working conditions may not require a notice of change if the laws governing such conditions are amended. As regards the impact of the possible amendment to the generally applicable laws on the wage or working conditions, there are four situations which should be considered:

1) the new laws introduce the terms and conditions which are more favourable to an employee;
2) the new laws introduce the terms and conditions which are less favourable to an employee;
3) the previous laws governing the wage and working conditions are no longer applicable and were replaced by new provisions;
4) the new laws do not introduce any changes.

3.2.4.1. The principle of binding force of transitional provisions

Before we go into a case-by-case analysis, it is necessary to remember that in order to establish how the new laws affect the terms and conditions of an employment relationship, and in particular whether they change the wage and/or working conditions, a reference should be made first of all to the provisions of the legal act which introduces such changes. Such acts often include transitional provisions which directly specify the rules under which the parties to an employment relationship are bound by the new regulations. Such interpretation rules may be

[169] Judgment of the Supreme Court of 5 September 1997, I PKN 250/97, OSNP 1998, No. 11, item 330.

[170] *T. Zieliński*, Zarys wykładu prawa pracy, Część II *[Lectures on Labour Law, Part II]*, Katowice 1978, p. 35 ff.

derived also from the legal acts to which such amendment is introduced or from systemic laws governing the fundamental principles applicable to the branch of law concerned. Below I will describe the situations in which the transitional provisions do not clearly specify the impact of the introduced provisions on the wage and working conditions in individual employment relationships.

3.2.4.2. The principle of favourability (principle of advantage)

If the new laws introduce the wage or working conditions which are more favourable to an employee than those previously agreed upon by the parties, such previous conditions will change. It is a consequence of the principle of automaticity laid down in article 18 § 2 of the Labour Code. According to this provision, any provisions of contracts of employment that are less favourable to an employee than the provisions of labour law shall be invalid; they shall be replaced by appropriate provisions of labour law. Such change of the working conditions stemming from a contract of employment will be effective with no need to give a notice of change to wage and/or working conditions. It should be noted that the parties, even prior to the amendment, may agree upon such terms and conditions to be similar with or more favourable than the new regulations. In such case the amended act will not affect the wage and working conditions agreed upon between the employee and the employer.

3.2.4.3. The principle of introduction of the terms and conditions less favourable than the previous ones

Introduction, under the generally applicable laws, of the terms and conditions which are less favourable to an employee than those previously applicable under a contract of employment may have a different effect, depending on whether the new laws are mandatory norms (imperative) or non-mandatory norms (semi-imperative)[171].

In the former case, the wage and/or working conditions will change by virtue of law, with no need to give a notice of change to wage or working conditions. The freedom of the parties to an employment relationship is limited by the mandatory norms which cannot be waived.

On the other hand, if the norms introducing the working conditions less favourable than those agreed upon between the parties to an employment relationship are semi-imperative norms, the contract of employment will not be changed. The conditions agreed upon between the parties will be more favourable than those laid down in the generally applicable laws and therefore, under article 18

[171] *J. Nowacki*, Ius cogens – ius dispositivum, St. Praw. 1993, No. 2–3, p. 31 ff.

§ 1 of the Labour Code, the employment relationship will be governed by the former.

If the laws governing the terms and conditions of a contract of employment are repealed, it will not result in change of the conditions binding upon the employee. This is because the wage and working conditions were included in the contract of employment. Under article 18 § 2 of the Labour Code, when provisions of labour law are more favourable than the provisions of a contract of employment, the latter should be replaced by the former. Although the provisions are eliminated from juridical acts and have no further effect, still this does not result in repeal of the wage and working conditions implemented to the contract of employment. The above mechanism does not apply to the wage or working conditions which do not stem from a contract of employment. As rightly pointed out in the case-law, article 18 § 2 of the Labour Code applies only to such elements of an employment relationship which stem from a contract or from another act which is the basis for establishment of an employment relationship. Therefore, if employee's right stems from law (article 56 of the Civil Code in connection with article 300 of the Labour Code), then repealing such act automatically deprives the employee of his right to such benefit, with no need to make any declarations by the parties, also where the repealing act does not include any transitional provisions providing for such automaticity[172].

It is obvious that any amendment to law which does not result in change of the working conditions will not affect the terms of a contract of employment in this regard.

It is necessary to mention one more situation where the conditions change by virtue of law, as a consequence of the amendment to the generally applicable laws. Parties may agree in a contract of employment upon specific wage or working conditions by reference to a act (when the intention of the parties is that the wage or working conditions change in the case of amendment to the act). In such case an amendment to the act will result in a change to wage or working conditions with no need to give a notice of change to such conditions.

3.2.4.4. The principle of change to the terms and conditions of employment as a result of transfer of an undertaking

One of the most frequent examples of transformation of an employment relationship is a transfer of an undertaking to another employer. This is governed by article 23(1) of the Labour Code. As a result of transfer the new employer will assume the rights and obligations under the existing employment relationship.

[172] Judgment of a Court of Appeal (SA) in Gdańsk of 29 June 1992, III APr 34/92, OSP 1993, vol. 5, item 107.

The current employment relationship is only being transformed. The new employee becomes, by virtue of law, a party to the employment relationships. Therefore, he does not have to terminate the current contracts or enter into new or additional contracts[173].

3.3. Principles regarding termination of an employment relationship

M. Lekston

3.3.1. General principles

3.3.1.1. The principle of dichotomy of termination of employment

As regards the procedures for termination of employment, the general labour laws accept a traditional model which differentiates between expiration and termination[174]. According to this model, termination of employment is the result of legal actions of the parties, while the expiration takes place in connection with other legal events that are not juridical acts. In the case of expiration, the employment relationship ends as a result of a specific factual situation which produces such consequences under provisions of labour law, without the need to make any declarations of will by the parties. The employer only acknowledges this state and issues a certificate of employment confirming the previous existence of an employment relationship. As regards termination of employment, the parties have to make unilateral declarations of will or perform a bilateral act (an agreement between the parties).

Exemplification of specific facts may lead to the conclusion that in practice there may be situations in which termination of an employment relationship may occur in unusual circumstances, i.e. without the parties making explicit declarations of will and without occurrence of any events causing termination of the contract of employment[175]. In such case a reasonable question arises whether the

[173] Judgment of the Supreme Court of 8 September 1990, I PR 251/90; OSNC of 1991, No. 10/12, item 130.

[174] See *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.), Prawo pracy *[Labour Law]*, p. 193; *L. Florek*, *T. Zieliński*, Prawo pracy… *[Labour Law…]*, p. 91; *T. Liszcz*, Prawo pracy *[Labour Law]*, Warsaw 2005, p. 145.

[175] Judgment of the Supreme Court of 19 March 2002, I PKN 209/01, OSNP 2004 No. 5, item 79. The Supreme Court was resolving a situation where a company ceased its business even if it was not

employment relationship has ended at all, and if yes, then was it as a result of termination or expiration. It would then be possible to consider whether this situation is a loophole in the labour law, and therefore it would be appropriate to apply – under article 300 of the Labour Code[176] – the provisions of the Civil Code[177] on expiration of obligations[178]. This view would be contrary to a generally accepted argument according to which provisions of civil law on expiration of obligations do not apply in the labour relations since the events which cause expiration of obligations under the civil law are regulated separately in the labour law[179]. Therefore, the absence of regulations concerning the exceptional situations in which an employment relationship ends should be treated as an axiological or technical loophole and the end of an employment relationship should be subject to a unilateral or bilateral implied termination of an employment relationship[180].

The distinction between expiration and termination of an employment relationship is made both in the provisions of the Labour Code and the provisions of specific labour law acts, in particular those governing employment in the public sector (so-called *pragmatyki*).

Under article 63 of the Labour Code, a contract of employment shall expire in cases prescribed by the Labour Code or by specific laws. From the *lege non distinguente* argument it can be derived that causes other than those laid down in the Labour Code do not have to be of statutory level, however an appropriate statutory authorization will be necessary, and in such sense the list of causes of termination of employment is closed[181]. The causes prescribed by the Labour Code include: death of an employee (article 63^1), death of an employer (article 63^2), expiration of a 3-months' period of absence from work caused by a pre-trial detention (article 66) and a regulation laid down in article 74 of the Labour Code, according to which an employee who, in connection with an election, is

deleted from a commercial register and employees were not informed of the cessation of business by the employer. As regards circumstances in which an employment relationship ends despite the absence of statutory or contractual prerequisites, see: *A. Sobczyk*, Niewłaściwe ustanie stosunku pracy *[Improper termination of an employment relationship],* PiZS 2014, No. 1, p. 8 ff.

[176] Act of 26 June 1974 – Labour Code, Journal of Laws *[Dz.U.]* of 1974, No. 24, item 141, consolidated text, Journal of Laws [*Dz. U.*] of 1998, no. 21, item 94, as amended.

[177] Act of 23 April 1964 – Civil Code, consolidated text, Journal of Laws *[Dz.U.]* No. 2014, item 121.

[178] See *B. Cudowski*, O niektórych kontrowersjach w sprawie ustalenia sposobu ustania stosunku pracy *[Some controversies regarding the metod of termination of employment]*, PiZS 2010, No. 12, p. 2 ff.

[179] *T. Zieliński*, Prawo pracy. Zarys systemu. Część I *[Labour Law. An Outline of the System. Part I]*, Warsaw-Kraków 1986, p. 141.

[180] *B. Cudowski*, O niektórych kontrowersjach… *[Some controversies…]*, pp. 6–7.

[181] *K.W. Baran*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 429. According to the author, expiration of an employment relationship under specific sources of labour law would directly undermine the protective function of labour law.

on unpaid leave, has the right to return to work with an employer who employed him or her at the time of the election, to the position equivalent to the previously held in terms of remuneration, if he reports his return within 7 days of termination of employment established by election. Failure to meet this condition will result in termination of employment, unless it was due to reasons beyond the employee's control. There are various causes of expiration of an employment relationships not prescribed in the Labour Code but stipulated in specific laws governing both the general employment relationships (article 18 (2) of the Act of 11 March 2003 on Military Service of Professional Soldiers *(ustawa o służbie wojskowej żołnierzy zawodowych)*[182], under which the employment relationship of an employee called up for professional military service expires on the day on which the employee reports to this service), as well as laws governing employment of certain categories of public servants (article 20 (5c) of Teacher's Charter, according to which a contractual employment relationship expires after 6 months of inactivity of the employee).

Expiration, as a form of ending an employment relationship relates also to non-contractual relations where the basis for such employment are otheracts in law (juridical acts) establishing such relationship listed in article 2 of the Labour Code. Legal theorists agree that regulations regarding termination of a contract of employment apply also to non-contractual labour relations, unless specific provisions regulate this matter differently[183]. However, most often it is the special regulations that formulate a catalogue of causes that result in the expiration of a non-contractual employment relationship, in particular this established by nomination. The events which produce such consequences include: refusal to take an oath, loss of citizenship of an EU Member State or of another state whose citizens are entitled, under international agreements or Community law, to take up employment in the territory of the Republic of Poland, valid imposition of a disciplinary penalty of removal from the civil service, conviction by a final judgment for an intentional offence or intentional fiscal offence (article 70 (1–4) of the Act on Civil Service *(ustawa o służbie cywilnej)*) or determination that a nomination was based on false or invalid documents, or a valid court decision on loss of civil rights (article 127 (1–2) of the Act on Higher Education *(ustawa Prawo o szkolnictwie wyższym)*). As regards expiration of a cooperative contract of employment, under article 186 § 1 of the Cooperative Law *(Prawo spółdzielcze)*, this occurs upon termination of membership in the cooperative.

[182] Consolidated text, Journal of Laws *[Dz.U.]* of 2010, No. 90, item 593, as amended.

[183] *A. Sobczyk*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2017 (available in Legalis Database).

Termination of an employment relationship takes the form of a juridical act which can be either a unilateral declaration of will of an employer or an employee or a bilateral agreement on termination of a contract of employment. In the case of a declaration of one of the parties to an employment relationship, such declaration can be made with or without notice period. Moreover, an employee can make a declaration on termination of employment upon 7-days' notice in accordance with article 23^1 § 4 of the Labour Code. Detailed considerations on this subject are the essence of the principle of the exhaustive list of procedures for termination of employment.

Certain doubts are raised in the labour law literature as regards legal classification of termination of an employment relationship established on the basis of a fixed-term contract of employment in the event that its term has expired. It can be assumed that this will not be the result of an juridical act, as above, but the lapse of time or completion of work, and in fact these are legal events that are not acts in law the occurrence of which results in the termination of an employment relationship[184]. Without questioning the doubts that arise, it seems that one should opt for treating the analyzed termination procedures as juridical acts of the parties aimed at terminating the employment relationship. This is suggested by the fact that the respective provisions are included in the part of the Labour Code governing termination and not expiration of a contract of employment. Consequently, an employment relationship ends as a result of will of the parties declared upon conclusion of a contract of employment, which can be a specific form of termination agreement[185].

3.3.1.2. The principle of correlation between termination of an employment relationship and the act establishing such employment relationship

In accordance with a generally accepted convention, in analyzing the problem of termination of employment, it is necessary to distinguish between employment relationships established on the basis of a contract of employment and non-contractual employment relationships. Article 2 of the Labour Code defines the term "employee" and sets out a catalogue of acts which can be the basis for estab-

[184] *Z. Sypniewski*, Fakty prawne powodujące ustanie stosunku pracy – charakterystyka ogólna *[Legal facts causing discontinuance of an employment relationship – general characteristics]*, [in:] *T. Zieliński* (ed.), Z problematyki prawa pracy i polityki socjalnej, t. 6 *[Problems of Labour Law and Social Policy, vol. 6]*, Katowice 1983, p. 106; *Z. Salwa*, Wygaśnięcie umowy o pracę *[Expiration of a contract of employment]*, PiZS 2000, No. 2, p. 18 ff.; judgment of the Supreme Court of 28 July 1999, I PKN 174/99, OSNP 2000, No. 21, item 786.

[185] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 249; *B. Cudowski*, O niektórych kontrowersjach… *[On Controversies…]*, p. 3.

lishment of an employment relationship. They include a contract of employment *(umowa o pracę)*, appointment *(powołanie)*, nomination *(mianowanie),* election *(wybór)* and a cooperative contract of employment *(spółdzielcza umowa o pracę)*. A type of the act creating an employment relationship will determine not only the character of employment relationship and its characteristics but also the way in which such relationship ends.

The possible ways of discontinuance of an employment relationship established under one of the contracts specified in article 25 of the Labour Code, are laid down in article 30 of the Labour Code, which mentions an agreement between the parties, a notice of termination, a termination without notice and a termination upon expiry of the term of the contract. Detailed deliberations on the above-mentioned procedures are presented below.

As regards an employment relationship established under a cooperative contract of employment, in principle it will be subject to –the Cooperative Law[186], as stipulated in article 77 § 2 of the Labour Code. This type of employment applies only in a relation between a workers' cooperative and its member[187]. The specific provisions of the Cooperative Law are the basis for application of the concept of expiration of the employment relationship and termination upon notice and without notice by one of the parties. The cooperative contract of employment may be terminated also during the term of membership, by a mutual agreement between the parties, which must be combined with a notice of termination given by an employee.

An employment relationship based on election is established if the election results in the obligation to perform work as an employee. According to the Act of 21 November 2008 on the Local Government Staff *(ustawa o pracownikach samorządowych),* examples of such employment include an employment relationship between a head of a commune or city mayor and other members of a district administration (if statutes so provide), marshal or other members of regional administration (if statutes so provide)[188]. Under article 73 § 2 of the Labour Code, an employment relationship established by election is terminated upon expiry of the mandate, which means that the mere fact of termination of employment is secondary to the expiration of the mandate in the systemic dimension, defined by local government regulations and the Electoral Code.

An employment relationship based on appointment is established in cases laid down in specific laws, and under article 70 § 1 of the Labour Code an em-

[186] Act of 16 September 1982 – Cooperative Law *(Prawo spółdzielcze)*, Journal of Laws *[Dz.U.]*, No. 30, item 210 as amended.

[187] Judgment of the Supreme Court of 24 February 1998, I PKN 540/97, OSNAPiUS 1999, No. 3, item 88.

[188] Journal of Laws *[Dz.U.]* No. 223, item 1458, as amended.

ployee employed under appointment may be at any time – immediately or within a specified time-limit – removed from office by the body which appointed him or her. The act of dismissal alone, just like the act of appointment establishing such employment relationship, produces a dual legal effect. In the organizational sphere, it results in dismissal of a person from a position he holds, while in the sphere of the employment relationship it causes its termination. However, while the effect in the organizational sphere occurs immediately, under article 70 § 2 of the Labour Code, the dismissal is equivalent to termination of a contract of employment, and exceptionally, when the act of dismissal is based on causes laid down in article 52 or 53 of the Labour Code, the dismissal is equivalent to termination of a contract of employment without notice (article 70 § 3 of the Labour Code). As emphasized in the legal writings, the practical dimension of "equivalence" consists in indicating the date of termination of employment specified by relevant provisions[189]. This kind of observation justifies the argument about a specific nature of the dismissal as an appropriate procedure for terminating the employment relationship established by appointment. An employment relationship established by appointment can be terminated also by a mutual agreement between the parties[190].

According to article 76 of the Labour Code, an employment relationship is established by nomination in cases prescribed by separate laws. *De lege lata*, the legally binding employment relationships established by the act of nomination exist in particular in the sphere of education[191], higher education[192] or civil service[193], as well as employment based on the previously established employment relationships in public offices[194] and in the organizational units of courts and public prosecution service[195]. Applicable regulations governing employment in the public sector determine not only the nature of these employment relations with respect to their terms and conditions, but above all they exhaustively regulate their establishment and termination. Considering the latter's scope, it can be

[189] *W. Korus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2017 (available at Legalis Database).

[190] Judgment of the Supreme Court of 22 December 1976, I PRN 121/76, OSNC 1977, No. 8, item 140.

[191] Act of 26 January 1982 – The Teacher's Charter *[Karta Nauczyciela]*, Journal of Laws *[Dz.U.]* No. 3, item 19, as amended.

[192] Act of 27 July 2005 on Higher Education *[Prawo o szkolnictwie wyższym]*, Journal of Laws *[Dz.U.]* No. 164, item 1365, as amended.

[193] Act of 21 November 2008 on Civil Service *[ustawa o służbie cywilnej]*, Journal of Laws *[Dz.U.]* No. 227, item 1505, as amended.

[194] Act of 16 September 1982 on the Employees of Public Offices *[ustawa o pracownikach urzędów państwowych],* Journal of Laws *[Dz.U.]* No. 31, item 214, as amended.

[195] Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service *[ustawa o pracownikach sądów i prokuratury]*, Journal of Laws *[Dz.U.]* No. 162, item 1125, as amended.

argued that in terms of the procedures both expiration and termination will be possible, while termination can be effected both by bilateral agreement between the parties and a statement of one of the parties with or without a notice period, although not always it follows *expressis verbis* from the wording of the specific provisions. However, it should be noted that for the correct analysis of individual employment relations of individual employees, it will be necessary to refer to applicable specific provisions, because the mechanisms proposed by the legislature may vary significantly.

To sum up, it should be emphasized that the formulation of the principle of correlation between the termination of employment and the basis for its establishment seems justified, because despite terminological and structural convergence, the normative dimension of the provisions of labour law does not entitle the application of uniform rules determining the termination of an employment relationship to any type of employment. Only exceptionally it will be possible when applicable provisions include an appropriate authorization. A mechanism which uniforms all the employment relationships, regardless of their basis, is introduced by article 23^1 § 4 of the Labour Code, under which within 2 months from the transfer of an undertaking or a part of an undertaking to another employer, an employee may terminate the employment with a prior notification of 7 days. Although the legislature provides that it should produce the same effects as termination of a contract of employment by the employer upon notice, its separation seems to be intentional, as discussed in the part of the chapter on unilateral acts in law (juridical acts).

3.3.1.3. The principle of exhaustive list of procedures for termination of an employment relationship

Termination of an employment relationship, regardless of the basis of establishment of such relationship, is possible only in accordance with the procedures laid down in applicable labour laws or, alternatively, following from the opinions presented in the legal writings and the case-law. The parties are free to select an appropriate procedure; however they are bound by the list prescribed by the legislature.

The procedures for termination of an employment relationship established under a contract of employment are specified *expressis verbis* in the Labour Code. Under article 30 § 1 (1)–(4) of the Labour Code, a contract of employment is terminated by a mutual agreement of the parties, by a declaration of one of the parties with a notice period, by a declaration of one of the parties without a notice period or upon expiration of the term of the contract. By the time of the changes introduced by an amendment to the Labour Code, namely the Act of 25 June

2015 on the Amendment of the Labour Code and Some Other Acts[196] which entered into force on 22 February 2016, the referenced provision provided also for a procedure of termination of a contract of employment on the date of completion of work for which the contract was concluded which in fact applied to a contract of employment concluded for the period of performance of a specific task. When this type of a contract of employment was deleted from the catalogue of contracts of employment, its logical consequence was also a deletion of article 30 § 1 (5) of the Labour Code. Parties to a contractual employment relationship, taking legal actions aimed at its termination, are bound by the mechanisms prescribed in this regard, and the list of procedures laid down in the Labour Code should be considered exhaustive. The same applies to employment relationships established under a contract of employment, but which are subject to specific laws governing employment of public sector employees. In such situations the laws explicitly specify the applicable list of procedures for terminating a contract of employment or refer to the appropriate application in this regard of the provisions of the Labour Code analyzed above.

By analogy, this issue should be considered in the case of employment relationships established on a basis other than a contract of employment.

If an employment relationship is established under a cooperative contract of employment, it can be terminated either by notice by one of the parties or without notice by the cooperative. The parties may also conclude an agreement terminating the contract. In the context of termination of a cooperative contract of employment, it is also important that it is connected with a membership in a workers' cooperative and cessation of the cooperative employment relationship will be correlated with cessation of membership.

An employment relationship established by election is terminated upon expiration of a term of office. Therefore any juridical acts of the parties are indifferent.

Termination of an employment relationship established by appointment is possible by removal from office, however under article 69 of the Labour Code the parties may also conclude a termination agreement or a contract of employment may be terminated by notice by an employee.

Specific laws governing employment relationships established by nomination, referred to in article 76 of the Labour Code, provide for the possible procedures of their termination and so they will create a list of the possible procedures. Taking into account the applicable normative conditions, in this regard it should be noted that an employment relationship can be terminated by a mutual agreement between the parties (article 71 (6) of the Act on Civil Service, article 123 (1)(1) of the Act on Higher Education), by a notice of termination by one of

[196] Journal of Laws *[Dz.U.]* of 2015, item 1220.

the parties (article 71 (1) and (6) of the Act on Civil Service, article 123 (1)(2) of the Act on Higher Education), or by termination without notice by an employer (article 71 (7) of the Act on Aivil Service, article 123 (1)(3) of the Act on Higher Education). Certain doubts may arise as regards termination with immediate effect of an employment relationship established by nomination because of the fact that there are no public sector employment regulations on this issue. However, it will be appropriate to treat the lack of this right of the appointed employee as an unregulated issue, which consequently leads to the application in this respect of article 55 of the Labour Code, according to a general clause providing for the application of generally applicable laws in matters not regulated by specific laws governing employment of specific categories of public sector employees *(pragmatyki)*[197]. There are at least three arguments in support of the above. First, since none of such public sector employment regulations, which allows employment relationships by nomination, provides that an employee can make a statement of termination of the employment relationship without notice, in fact this matter is unregulated. Omission by the legislator of the discussed issue in some of the regulations, and at the same introduction of appropriate provisions in other regulations, would be a purposeful action, preventing the possibility to refer to the provisions of the Labour Code. Second, it is assumed that the employee's right to immediate termination of employment in the circumstances referred to in article 55 of the Labour Code is universal and is not dependent on the basis of the employment relationship, and it is connected with the constitutional principle of freedom of labour which is understood not only as the right of choice of a profession and a place of work in a positive sense, but also in a negative sense, that is a possibility to terminate an employment relationship. Third, axiological considerations should also be taken into account in combination with the circumstances provided for in article 55 of the Labour Code, under which an employee has the right to terminate an employment relationship without notice. It is obvious that it is necessary to provide immediate protection to an employee when his fundamental rights have been violated, regardless of the basis of an employment relationship[198]. Acceptance of the arguments that both of the parties can make a statement of termination of an employment relationship with immediate effect supports an appropriate balance in this area, provided for in the presented classification of procedures for termination of employment.

[197] See *J. Stelina*, Charakter prawny stosunku pracy z mianowania *[A Legal Nature of an Employment Relationship Based on Nomination],* Gdańsk 2005, p. 188.

[198] *E. Mazurczak-Jasińska*, Rozwiązanie stosunku pracy z mianowania *[Termination of an Employment Relationship Based on Nomination],* Warsaw 2010, pp. 131–132.

Regardless of the basis of establishment of an employment relationship, an employee may submit a statement of termination of an employment relationship upon 7-days' advance notice under article 23^1 § 4 of the Labour Code.

It can be concluded that introduction by the legislature of the catalogue of acts in law resulting in termination of an employment relationship established under a specific act, supplemented by interpretation of laws, plays an organisational role. Moreover, it creates legal certainty for the parties and, above all, for the addressee in the case of a unilateral declaration of will.

3.3.1.4. The principle of separateness of procedures

The principle of separateness of procedures for termination of employment means, on the one hand, the prohibition on duplication of several unilateral or bilateral statements in the context of termination of a specific individual employment relationship, also with respect to the expiration and termination dichotomy, and on the other hand, the need to terminate the employment relationship in a precisely defined manner. With the exhaustive list of the possible methods of ending an employment relationship, in particular relating to its termination, the party or the parties may choose one of them, justified in the circumstances concerned.

In practical dimension it means that in the legal transactions (juridical acts) there should be certainty as to the method of termination of the previously established employment relationship. It is of significant importance in the context of the labour law regulations governing enforcement of claims in connection with termination of employment. They are different in the case of expiration of an employment relationship and different when the parties make declarations of will in this respect. Also the type of the statement and the person making the statement determine the possibility and type of claims that can be submitted and pursued in a dispute procedure in connection with termination of employment.

Given the normative dimension of the principle described in this paragraph, worth noting is article 36 § 6 of the Labour Code, under which if one of the parties gives a notice of termination of a contract of employment, the parties may agree upon an earlier effective date of termination, however such agreement does not modify the regime of termination of the contract of employment. This is because the agreement between the parties relates to the effective date of the termination and not the choice of the procedure for termination of a contractual employment relationship. Although the aforementioned provision refers to a contractual employment relationship, there is no reason why the parties should not apply it also where one of the parties has terminated the employment relationship which was established on a basis other than a contract of employment.

On the other hand, an agreement terminating an employment relationship can be concluded also after the notice of termination has been given by one of the parties, but before the lapse of the notice period. In this case, consent to the conclusion of the agreement terminating an employment relationship by the party who has given a notice of termination constitutes an implied withdrawal of the previously submitted notice of termination[199]. There is nothing to prevent the parties from concluding an agreement on termination of the employment relationship even if it has been previously terminated as a result of employer's statement without a notice period. An opposite conclusion would be contrary to the principle of freedom of contract[200].

It is also possible that following termination of an employment relationship or conclusion of an agreement on termination of employment, but before the date on which employment ends, one of the parties can make a statement terminating the employment relationship without a notice period, with immediate effect, if there are circumstances which allow such statement to be made.

One can also imagine a situation where after one of the parties applies a certain regime of termination of an employment relationship and before the date of its definitive termination, certain events occur which can constitute grounds for expiration of the contract of employment or of the employment relationship established on a basis other than a contract. Then expiration will be the regime ending this legal bond.

The mentioned constructs, possible in individual cases, do not contradict the principle of separateness of procedures for termination of an employment relationship. On the contrary, they prove that regardless of what circumstances accompanied the process of termination of employment, it ends according to one of the procedures stipulated in the provisions of the labour law.

3.3.1.5. The principle of the optional nature of a notice of termination of a contract of employment

Termination of an employment relationship in connection with a statement made during the employment relationship generally takes the form of an optional termination, regardless of the act establishing the employment relationship.

The freedom to remain in an employment relationship, expressed in the unrestricted possibility to terminate it, can be treated as completion of the principle of

[199] Judgment of the Supreme Court of 8 January 2010, III PK 47/09.

[200] Judgment of the Supreme Court of 29 September 1998, I PKN 346/98, OSNP 1999, No. 20, item 652 and a commentary of A.M. Świątkowski on judgment of the Supreme Court of 20 April 1983, I PRN 54/83, PiZS 1984, No. 4, p. 67.

freedom of employment, expressed in article 11 of the Labour Code[201], although certain doubts may arise as to whether it follows directly from this provision[202]. From the point of view of both parties to an employment relationship, the freedom to remain in such a relationship means that laws do not define the action terminating the employment relationship as being forbidden or prescribed, but left to the discretion of the employee and the employer. Restrictions of the so understood freedom of the parties are associated primarily with the protection of sustainability of employment, which in the circumstances prescribed by law prevents the employer from effectively terminating the employment relationship, as discussed further below. If the restriction defined in such a way is treated as a negative aspect of the freedom to remain in an employment relationship, then the essence of the analyzed principle will be the positive aspect, understood as the obligation to terminate the employment relationship in the circumstances prescribed by law. Such mechanism is an element that excludes the employer's autonomy in development of his employment situation.

A voluntary nature of the juridical acts terminating the relationship is independent of the basis of establishment of such relationship. Moreover, it applies not only to a bilateral agreement between the parties, but also to unilateral declarations of will of an employer or an employee with or without notice or upon notification. A party or the parties, not hindered by the legislature, will decide whether to take actions aimed at ending the employment relationship, even where it can be objectively concluded that circumstances occurred which authorize the parties to take up such actions, in particular the actions involving an authorization of a party to terminate an employment relationship without notice.

The obligatory termination of an employment relationship by the employer is an exception to the principle stipulated in the regulations governing employment of public sector employees, referring to termination of an employment relationship by virtue of law. The obligatory termination of employment in connection with a two-time negative evaluation of the employee is a rule under the public servants law (article 27 (9) of the Act of 21 November 2008 on the Local Government Staff *(ustawa o pracownikach samorządowych)*, article 71 (1) of the Act of 21 November 2008 on Civil Service *(ustawa o służbie cywilnej)*, article 13 (1)(1) of the Act of 16 September 1982 on the Employees of Public Offices *(ustawa o pracownikach urzędów państwowych),* which may apply also to nominated

[201] See *A. Dral*, Powszechna ochrona trwałości stosunku pracy. Tendencje zmian *[Protection of Sustainability of Employment. A Tendency to Change],* Warsaw 2009, p. 35.

[202] *A. Sobczyk*, [in:] *A. Sobczyk* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 36, in which the author clearly reserves that article 11 of the Labour Code applies to establishment of an employment relationship and its conditions and modification and it does not apply to the already existing legal relationship.

officials in courts and public prosecution service under article 22 of the Act of 18 December 1998 on the Employees of Courts and Public Prosecution Service *(ustawa o pracownikach sądów i prokuratury)* as well as in the higher education (article 124 (2) of the Act on Higher Education *(ustawa – Prawo o szkolnictwie wyższym)*). The same should apply in the case of a conviction by a final judgment for an intentional offence or intentional fiscal offence committed by a court official or public prosecution service official according to article 12 (1) of the Act on Employees of Courts and Public Prosecution Service, or loss of good repute by a civil servant under article 71 (1)(3) of the Act on Civil Service. From the literal wording of the above-mentioned provisions it may be concluded that competent authority acting on behalf of the employer is obligated to make a declaration of will to terminate an employment relationship. Certain doubts arose in connection with the wording of the Act on the Local Government Staff as to whether it is necessary to make a declaration of will to terminate the employment relationship. Since the legislator states that a repeated negative assessment results in termination of employment (article 27 (9) of the Act on the Local Government Staff *(ustawa o pracownikach samorządowych)*), then it could be assumed that service of a decision on the repeated negative assessment is equivalent to submission of such declaration and in fact replaces such declaration. However, the necessity to make a respective declaration of will was confirmed by the jurisprudence[203].

In this context it is also important to note that the exception to the principle of optional nature of the declarations aimed at terminating an employment relationship must have a normative authorization through the appropriate wording of the *expressis verbis* provisions.

Obviously, the so formulated principle of termination of employment will not apply to its expiration, because in this case, as mentioned before, a specific event produces such consequences under the labour laws alone. The same applies to expiration of a term of office in the case of employment relationship established by election, where the events prescribed by systemic laws will result in termination of this employment relationship.

3.3.1.6. The principle of the freedom to conclude an agreement on termination of an employment relationship

An agreement on termination of an employment relationship, as a bilateral juridical act, is in fact an agreement between an employee and an employer in which the mutual statements of the parties refer to an intention to terminate the

[203] Judgment of the Supreme Court of 7 March 2012, II PK 155/2011, OSNP 2013/3–4, item 31.

employment relationship and to the effective date of such act[204]. In this sense, the sole statement of an employer specifying the date of such termination is not sufficient for the conclusion of the agreement on termination of the employment relationship[205].

When classifying the legal agreement terminating an employment relationship, a reference should be made to the freedom to contract between legal entities. Under article 353^1 of the Civil Code, the parties concluding an agreement may arrange their legal relationship at their discretion, for as long as its terms and purpose do not contradict the characteristics (nature) of such relationship or the rules of social coexistence.

Provisions of labour law do not provide for any components of the agreement on termination of an employment relationship, which means a freedom of the parties for as long as the wording of such agreement expresses the intention of the parties to terminate the employment relationship. The above cannot lead to a conclusion that the parties can freely lay down the provisions of the agreement terminating the employment relationship, because, like any other agreement, it will be subject to assessment in terms of its compliance with law and rules of social coexistence, in particular as to whether the purpose of such an agreement is not to circumvent the law (article 58 of the Civil Code in connection with article 300 of the Labour Code)[206]. It should be emphasized that the provisions of the agreement which would result in the employee being harmed, e.g. a waiver of holiday entitlements by the employee, are also considered unacceptable. Such clauses would be invalid but would not cause invalidity of the agreement itself.

The proposal to terminate the employment relationship may be put forward either by an employer or by an employee. It is important that the proposal of a party to an employment relationship should indicate that the requested regime of termination of an employment relationship should be an agreement between the parties, otherwise there would be no grounds for assuming that such a regime was requested and any letter addressed to the other party will be treated as an invitation to negotiations regarding termination of the contract of employment[207]. Since the agreement is most often concluded in an offer and acceptance procedure, such proposal is in fact an offer within the meaning of article 66 ff. of the

[204] Judgment of the Supreme Court of 14 November 2009, I PK 94/2009; B. Wagner calls this agreement an agreement terminating an employment relationship – see: *B. Wagner*, Zakres swobody umów… *[The Scope of Freedom of Contract…]*, p. 141 ff.

[205] *Ibidem.*

[206] *Ibidem*, p. 143. The author indicates that in terms of employer's interest, circumvention of law may consist in application of the agreement between the parties instead of a unilateral act as an act with "simplified" procedure, in order to achieve the intended effect, i.e. termination of the employment relationship.

[207] Judgment of the Supreme Court of 15 July 2008, III PK 9/2008, OSNP 2009/23–24, item 313.

Civil Code[208]. Under article 66 § 2 of the Civil Code, an offer must include a firm proposal to conclude an agreement and specify at least its substantive provisions. In the case of an agreement on termination of an employment relationship, a substantive provision will only be that the employment relationship will be terminated by the parties as a result of conclusion of such agreement[209]. A consequence of submission of an offer is that the offeror is bound by it. The proposal ceases to bind upon the offeror only when it is not accepted by the other party within a prescribed time-limit or immediately if it was submitted without specifying the date for response. The agreement on termination of an employment relationship may be concluded also as a result of negotiations. In such case, under article 72 of the Civil Code, the agreement terminating the employment relationship will take effect if the parties agree on all its provisions which were negotiated[210].

Termination of an employment relationship, resulting from the agreement concluded between the parties, will take effect on the date indicated freely by the parties in the agreement, even if such a date was much later than the date of conclusion of the agreement[211]. If the date of termination of the employment relationship is not indicated, it will terminate on the date of conclusion of the agreement[212].

If the parties agreed upon the date of termination of an employment relationship by an agreement between the parties, then a postponement of the date of termination of a contract of employment by the employer, upon employee's request, does not undermine the agreed regime of termination of the contract, if the circumstances do not imply otherwise[213].

A party proposing to conclude an agreement terminating the employment relationship is not obligated to indicate the cause justifying such action. The causes of termination of an employment relationship are indifferent in terms of the effectiveness of the agreement between the parties. However it does not mean that these causes are devoid of any legal significance. A reference can be made to a situation when the causes of termination of employment established under a contract of employment are on the part of the employer because in such case

[208] Judgment of the Supreme Court of 4 October, I PKN 58/2000, OSNAPiUS 2002/9, item 211.

[209] *M. Lewandowicz-Machnikowska*, Rozwiązanie umowy o pracę za porozumieniem stron *[Termination of a contract of employment by agreement of the parties]*, MPP 2008, No. 7, p. 360.

[210] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, pp. 233–234.

[211] Judgment of the Supreme Court of 4 November 2004, I PK 653/2003, OSNP 2005/14, item 204; judgment of the Supreme Court of 12 November 2003, I PK 593/2002, Mon. Praw. 2004, No. 14, p. 662.

[212] Judgment of the Supreme Court of 11 January 2001, I PKN 844/2000, OSNAPiUS 2002, No. 18, item 432.

[213] Judgment of the Supreme Court of 1 August 1990, I PR 258/90, OSNCP 1991, No. 8–9, item 114.

the cause may be of significant importance in terms of the obligation to make a severance payment to the employee[214], pursuant to the Act on the Collective Redundancies.

Although there is no formal requirement to justify the agreement terminating the employment relationship, the factual circumstances and the reasons for termination of the employment relationship should not be omitted. "If the employee's proposal to terminate the employment relationship by an agreement between the parties is caused by the employer's failure to comply with the obligations under the contract of employment, the employee may demand compensation on general terms" (article 471 of the Civil Code via article 300 of the Labour Code)[215].

Although the written form has significant evidential value, the effectiveness of the agreement terminating the employment relationship is not dependent on the observance of a particular form, and the employment relationship may also be terminated by conduct (*per facta concludentia*)[216].

3.3.2. Principles relating to unilateral notices of termination of an employment relationship

3.3.2.1. The principle of written form

Under article 30 § 3 of the Labour Code, a statement of each of the parties on termination of a contract of employment with or without notice, should be given in writing. The main question is whether the expression "in writing" is an autonomous regulation of labour law, or whether it is equivalent to the written form of the declaration of will referred to in the Civil Code, which would determine application of the civil-law mechanisms under article 300 of the Labour Code. A question which should be answered is, what are the legal consequences of non-compliance with the written form obligation by the person making a declaration of will to terminate the contract of employment. Moreover, a reference should be made to non-contractual bases.

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[214] *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.), Prawo pracy… *[Labour Law…]*, p. 195; see also a judgment of the Supreme Court of 4 November 2010, II PK 109/2010, in which the Supreme Court explicitly stated that a termination of a contract of employment by agreement between the parties for reasons not attributable to employees is not a separate legal category as regards regimes of termination of an employment relationship but one of the cases specified in article 30 (1)(1) of the Labour Code.

[215] Judgment of the Supreme Court of 18 October 1990, I PR 323/90, OSP 1992, No. 3, item 54.

[216] Judgment of the Supreme Court of 20 August 1997, I PKN 232/97, OSNP 1998, No. 10, item 306; judgment of the Supreme Court of 13 October 1999, I PKN 297/99, OSNP 2001, No. 4, item 115; judgment of the Supreme Court of 7 December 1999, I PKN 385/99, OSNP 2001, No. 8, item 268.

The written form of a declaration of will is regulated in article 78 § 1 of the Civil Code which provides that compliance with such form requires that a handwritten signature be placed on a document containing the declaration of will, while the contents of the declaration itself do not have to be handwritten. A signature is understood to mean a written or certified handwritten sign[217]. Under article 78 § 2 of the Civil Code, declarations of will made in electronic form with an advanced electronic signature verified by a valid qualified certificate are equivalent to written form. Hence, there is no doubt that under the civil law, the written form is observed if provisions of article 78 §§ 1 and 2 of the Civil Code are complied with. Respective application of this provision under the labour law, in particular as regards the statement of termination of the contract of employment, would require that the person making the declaration should place his hand signature under such declaration or affix an advanced electronic signature. Unless we allow such a modification of the norm of article 78 of the Civil Code within its proper application under the labour law which would lead to the conclusion that a notice of termination of a contract of employment could be given by means of distant communication, in written form. However, this would lead to establishment of a new legal norm because of the change of the applied provisions of the Civil Code[218]. As regards the above question, it is possible to consider whether the labour law regulates the autonomously discussed problem of the form of a notice of termination or a statement of termination of a contract of employment without notice, which would result in the inability to properly apply the provisions of the Civil Code. An argument in support of this view may be a clear difference between the expression "a statement in writing" and "a statement in written form" used in different normative contexts, both by the Labour Code and the Civil Code, what may raise certain doubts as to whether an intention of the legislature who requires that the notice of termination or statement of termination of a contract of employment be made in writing, actually means the written form within the meaning of the Civil Code[219]. Without going into detailed analysis, a reference should be made to an established case-law. According to the Supreme Court, it should therefore be accepted *de lege lata*, that the obligation to give a notice of termination of a contract of employment "in writing" as stipulated in article 30 § 3 of the Labour Code means a requirement to comply with the ordinary written form obligation within the meaning of article 78 § 1 of

[217] See in particular a resolution of 7 judges of the Supreme Court – Civil Chamber of 30 December 1993, III CZP 146/93, OSNCP 1994, No. 5, item 94.

[218] *T. Wrocławska*, Problemy dopuszczalności rozwiązywania umów o pracę za pomocą środków komunikowania się na odległość – artykuł dyskusyjny *[Acceptability of termination of contracts of employment by means of distance communication – a discussion]*, PiZS 2006, No. 11, pp. 10–11.

[219] *Ibidem*, pp. 12–13.

the Civil Code[220]. An argument in support of it, raised by the Supreme Court, is the fulfilment of a guarantee function of labour law in relation to the notice or statement of termination of an employment relationship[221]. It is worth noting that the case-law also allows that a declaration of termination of employment can be made in electronic form, provided that a statement in the ordinary written form will be drawn up and sent at the same time[222]. In fact, the legal effect will be produced only on the date when the written statement reaches the other party to an employment relationship, even if the declaration in electronic form reached that party earlier (which will normally be the case) in such a manner that such party was able to become acquainted with it.

In connection with the wording of article 30 § 3 of the Labour Code, a question arises as to whether a notice of termination or a statement of termination of a contract of employment without notice made not in written form will produce the legal effect, i.e. whether it will result in termination of the employment relationship. As stated by the Supreme Court, "employer's statement of termination of a contract of employment can be expressed by any conduct which sufficiently manifests his will, also by implication, despite its formal defect (article 30 § 3 of the Labour Code). A statement made in such form (oral, via phone) does not result in invalidity of such juridical act, however in such case an employee is entitled to raise a respective claim prescribed by law before a court"[223].

As regards the form of a unilateral statement of termination of an employment relationship established under a cooperative contract of employment, the provisions of article 191 of the Cooperative Law will apply, under which when a cooperative terminates a cooperative contract of employment with or without notice or changes the wage or working conditions, such statement should be made in written form and should specify the cause justifying the termination. Despite the structure of the provisions on employee's claims arising from the failure to meet the prescribed form, as laid down in articles 188 (1) and 189 (2) of the Cooperative Law, it should be assumed that, by analogy, as in the case of contractual employment relationships, the statement of the cooperative will be valid and will effectively terminate the employment relationship, and only exercise by

[220] Judgment of the Supreme Court of 24 August 2009, I PK 58/2009, OSP 2010, No. 5, item 52.

[221] Such arguments may raise certain doubts in that the legal certainty which should be guaranteed by the legal form may also be guaranteed by other forms of declaration of will – see M. Giaro for a commentary on a judgment of the Supreme Court of 24 August 2009, I PK 58/2009, OSP 2010, No. 5, p. 373 ff.

[222] Judgment of the Supreme Court of 18 January 2007, II PK 178/2006, OSNP 2008, No. 5–6, item 59.

[223] Judgment of the Supreme Court of 5 May 2016, II UK 280/15 (available at Legalis Database).

the employee of his right to raise claims in this respect can render it ineffective due to the failure to comply with the prescribed form of the declaration of will.

In the context of employment relationships established by appointment, under article 70 § 1^1 of the Labour Code, a dismissal of the appointed employee should be in writing, which clearly corresponds with the form of the act of appointment. However, similarly, as in the case of contractual employment relationships, failure to comply with the written form does not make the dismissal invalid[224]. As regards the employment relationships established by nomination and election, the applicable laws do not resolve what should be the form of the statement of termination of such relationships. Hence in the absence of such regulation, the provisions of article 30 § 3 of the Labour Code should apply respectively, including the consequences of non-compliance with the written form as mentioned above.

When it comes to the regimes of termination of a contract of employment by unilateral declarations of will, it should be emphasized that article 30 § 3 of the Labour Code does not apply to employee's statement of termination of a contract of employment upon 7-days' notice in connection with the transfer of an undertaking or a part of an undertaking to another employer. As regards the form of this statement, it would mean that it can be effectively made without the written form, however as emphasized in the labour law legal writings, for evidence purposes an employee should make such statement in writing[225].

The above observations, regarding the form of unilateral statements of termination of employment, justify an argument that these statements, made without the written form prescribed by law, are relatively effective. A statement that is not in compliance with law in terms of its form is not invalid. Any claims of the addressee in this respect will be unfounded, except for claims made by an employee employed in a labour co-operative under a cooperative contract of employment.

3.3.2.2. The principle of making a statement to the addressee

Service of a unilateral statement of termination of an employment relationship, in particular the moment which determines the effectiveness of such service, is not governed by the provisions of the Labour Code or any other labour law statute. It is therefore necessary to apply the provisions of the Civil Code by reference from article 300 of the Labour Code with regard to the employment relationship established on each of the bases listed in article 2 of the Labour Code.

[224] Judgment of the Supreme Court of 14 May 2012, II PK 238/11, OSNP 2013, No. 7–8, item 81.

[225] *W. Muszalski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2017 (available at Legalis Database).

Pursuant to article 61 § 1 first sentence of the Civil Code, a declaration of will made to the other party is effectively made when it reached the person concerned in such a manner that the person was able to become acquainted with it[226]. Therefore, employee's refusal to accept the employer's written notice of termination is of no legal importance[227]. In order to determine that the declaration of will has been effectively served upon the employee, it is of decisive importance whether he was given the opportunity to become acquainted with its contents, and not to establish the fact that he actually became acquainted with it. At the same time, it is important that it is a real, not hypothetical, opportunity to become acquainted with the statement, taking into account specific and not abstract conditions[228].

Provisions of article 61 of the Civil Code apply, obviously, primarily to the situation when the notice of termination is handed over in person, but also when it is sent by post[229]. Currently, due to the economic development and the increasing importance of the new technologies, a generally accepted method of transfer of information, also in labour relations, are the means of distant communication. Therefore, a question arises whether service of the statement of termination of an employment relationship with the use of such means meets the requirements laid down in article 61 § 1 first sentence of the Civil Code. The question becomes all the more justified, given that § 2 of article 60 of the Civil Code, added by an amending act in 2003[230], provides that a declaration of will expressed in electronic form is effectively made to the other party when it was entered into means of electronic communication in such a manner that the person concerned was able to become acquainted with it. Leaving aside the form of a declaration of will, it should be considered important that the legislator allowed, in the civil law relations, that a declaration of will can be effectively served with the use of electronic means of communication. Another thing is whether it is possible to transfer the provisions of article 61 § 2 of the Civil Code to the labour law in relation to a notice of termination of an employment relationship.

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[226] Judgment of the Supreme Court of 14 January 2011, II PK 157/2010; a judgment of the Supreme Court of 6 November 1980, I PRN 109/80, OSNCP 1981, vol. 6, item 107.

[227] See *R. Sadlik*, Gdy pracownik odmawia przyjęcia wypowiedzenia *[When an employee refuses to accept a notice of termination]*, PiP 2005, No. 11, p. 12 ff.

[228] See the reasoning to a judgment of the Supreme Court of 9 December 1999, I PKN 430/99, OSNP 2001, No. 9, item 309; a judgment of the Supreme Court of 6 October 1998, I PKN 369/98, OSNAPiUS 1999, No. 21, item 686.

[229] Judgment of the Supreme Court of 9 September 2011, III PK 5/2011; a judgment of the Court of Appeal in Warsaw of 15 September 2011, III APa 34/2011, OSA 2012, No. 4, item 7, p. 73.

[230] Act of 14 February 2003 on the Amendment of the Civil Code and of Certain Other Laws (Journal of Laws *[Dz.U.]* No. 49, item 408).

In a resolution of 2 October 2002, the Supreme Court held that service upon the employee, via fax, of employer's letter of termination of a contract of employment is effective and causes the time-limit prescribed in article 264 § 1 of the Labour Code to run, but it violates article 30 § 3 of the Labour Code[231]. The standpoint of the Supreme Court was approved in the literature[232], however voices have been raised which called into question the argument that a letter sent by fax should be considered a declaration of will[233]. As regards this issue, it is important that the party to an employment relationship has the opportunity to become acquainted with the contents of the notice of termination of employment. *Per analogiam*, a similar possibility exists when a declaration of will is sent by electronic mail. As in the case of a fax where it is possible to print a confirmation of receipt of the letter by the addressee, in the context of e-mail this function is fulfilled by the confirmation of receipt of the message. Such arguments may plead for allowing the communication between the parties in the employment relationships, also with regard to a notice of termination by means of distance communication. Opponents argue that there is a greater risk, as compared with the personal service or service by post, that the statement will be falsified, sent by an unauthorized person or distorted in the process of transmission[234].

3.3.2.3. The principle of causality of employer's notice of termination of employment

This principle involves an obligation of the employer to provide justification for the notice of termination of the employment relationship by indicating causes for submission of such declaration, as an element of the mechanism of general protection of sustainability of employment. The protection of sustainability of employment is primarily associated with the assumption that an employee is an economically weaker partner and hence the protection consists basically in the implementation of legal restrictions of the full freedom of an employer to terminate the employment relationship[235]. The constitutional basis of protection of sustainability of employment relationship is in particular article 24 of the Con-

[231] OSNP 2003, No. 20, item 481.

[232] Commentary of A.M. Świątkowski on the mentioned resolution of the Supreme Court, Palestra 2004, No. 3–4, p. 265.

[233] Commentary of T. Liszcz on the mentioned resolution of the Supreme Court, OSP 2004, No. 3 p. 467.

[234] *Ibidem.*

[235] *G. Goździewicz*, Przemiany w zakresie ochrony trwałości stosunku pracy w Polsce – wybrane zagadnienia *[Transformations in the field of protection of sustainability of employment in Poland – selected issues]*, [in:] *G. Goździewicz* (ed.), Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej *[Protection of the Sustainability of Employment in the Social Market Economy]*, pp. 17–18.

stitution of the Republic of Poland, under which "work shall be protected by the Republic of Poland". Within the meaning of the general protection of sustainability of employment, three elements are taken into account[236]. First, termination of an employment relationship must be legitimate; second, the causes of termination must be consulted with a trade union and third, an employee must be entitled to appeal against the termination.

Considering the methodology of these deliberations and the typology of the principles of labour law applicable to termination of an employment relationship, the essence of the discussed principle will be the employer's obligation to indicate the cause of termination, while the next two elements will be qualified as the elements of other principles relating not only to notice of termination but also to termination of employment without notice.

By formulating the obligation to name the causes of termination by the employer, the legislature creates a mechanism that protects an employee from free interference by the employer with the duration of the employment relationship and its cancellation in isolation from the actual circumstances of the employee's work in accordance with the previously established obligation. In this sense, the principle of causality of the employer's statement will correlate closely with the protective function of labour law.

The principle in question should be applied to all creating acts laid down in article 2 of the Labour Code.

Moreover, according to the literal wording of article 30 § 4 of the Labour Code, the obligation to indicate the cause of termination is imposed only on the employer and applies only to a contract of employment concluded for an indefinite term[237]. Therefore, if the notice of termination is given by an employee, there is no legal requirement to specify causes. In this sense, the lack of obligation to justify the termination of a fixed-term contract of employment should be treated as an exception to the principle of causality of employer's statement.

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[236] See *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.), Prawo pracy… *[Labour Law…]*, p. 192; *A. Wypych-Żywicka*, Powszechna ochrona trwałości stosunku pracy *[General protection of sustainability of an employment relationship]*, [in:] *J. Stelina* (ed.), Leksykon prawa pracy. 100 podstawowych pojęć *[A Lexicon of Labour Law. 100 Key Concepts]*, Warsaw 2008, pp. 190–193.

[237] As noted by the Constitutional Tribunal in its judgment of 2 December 2008, (P 48/07; OTK-A 2008, vol. 10, item 173), the fact that the obligation to indicate the cause of termination is restricted to a contract for an indefinite term does not contradict the constitutional principles of equal treatment and social justice, because fixed-term contracts and contracts for an indefinite term meet different social functions, which in turn justifies the differentiation of their protection standard. In this context, worth noting is a standpoint of the European Court of Justice expressed in a ruling of 13 March 2014. The Court held that the 2-weeks' notice period granted to fixed-term workers in Poland discriminated them in comparison to permanent workers, which could lead to changes in the construction of article 33 of the Labour Code, as regards the requirement to indicate causes of termination.

The views presented in the literature and the case-law, regarding termination of a contract by the employer, distinguish between the formal element, which is indication of a specific cause and a substantive element, which is the legitimacy of the cause given. "The provisions of article 30 § 4 of the Labour Code apply to the formal indication of the cause of termination of a contract of employment, and not the actual occurrence of such cause and assessment whether it is the cause justifying the termination (article 45 § 1 of the Labour Code)"[238]. Of course, this does not mean that there are no rules applicable to the employer when formulating the cause of termination of a contract of employment for an indefinite term. The cause of termination should be actual and specific[239]. If a notice of termination of a contract of employment specifies an apparent cause (not real, not existing) this means that the cause justifying the termination within the meaning of article 30 § 4 of the Labour Code was not specified at all[240].

It is emphasized in the literature that if an employer specifies the cause of termination of a contract of employment for an indefinite term, it is not his declaration of will but a declaration of knowledge. This means that it is not subject to interpretation in accordance with the rules laid down in article 65 § 1 of the Civil Code, under which a declaration of will should be explained as required by the circumstances in which such declaration was made, the rules of social coexistence and the established practice[241]. The statement of termination of a contract of employment made by the employer must demonstrate the essence of the allegation made to the employee, while "the issue whether the cause is indicated to the employee in a sufficiently specific and understandable manner is a matter of establishment of facts"[242].

It should be noted that provisions of the Labour Code do not include a list of causes justifying termination of a contract of employment for an indefinite term (a positive catalogue) or a list of circumstances which cannot constitute grounds for termination of a contract of employment to an employee (a negative catalogue). In particular provisions which do not include an exhaustive list or at least an exemplification, the legislature sometimes specifies certain events which cannot constitute grounds for termination of a contract of employment. The examples include: article 23^1 § 6 of the Labour Code (a transfer of an undertaking or

[238] Judgment of the Supreme Court of 24 March 1999, I PKN 673/98.

[239] See *P. Prusinowski*, Funkcje obowiązku podania konkretnej przyczyny uzasadniającej rozwiązanie umowy o pracę *[An obligation to specify a cause justifying termination of a contract of employment]*, MPP 2012, No. 9, p. 458 ff.

[240] Judgment of the Supreme Court of 13 October 1999, I PKN 304/99, OSNAPiUS 2001, No. 4, item 118; see also a judgment of the Supreme Court of 17 October 2006, II PK 31/06 and a judgment of the Supreme Court of 7 October 2009, III PK 34/09.

[241] See *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 244.

[242] Judgment of the Supreme Court of 11 February 2005, I PK 178/04.

a part of an undertaking to another employer cannot constitute a cause justifying termination of a contract of employment by the employer), article 18^{3e} of the Labour Code (exercise by an employee of his rights as a result of violation by the employer of the principle of equal treatment in employment may not be a cause of termination of the employment relationship by the employer) or article 67^{9} of the Labour Code (the employee's refusal to change the conditions of performance of work in the form of telework, as well as ceasing to work in the form of telework, cannot be a cause justifying the termination of a contract of employment by the employer). A positive catalogue of causes of termination of employment is included in article 196 of the Labour Code, however it applies only to young people employed under a contract for vocational preparation. Contrary to appearances, the omission by the legislature in the provisions of the Labour Code of the catalogue of causes of termination of a contract of employment concluded for an indefinite term may serve to protect the sustainability of an individual employment relationship, because it allows the authorities applying the law to take into account the circumstances of each individual case of termination of a contract of employment with an employee.

The concreteness of the cause justifying the termination of a contract of employment has many times been the subject of considerations of the judicature. In its judgment of 11 January 2011, the Supreme Court held that[243] "the obligation of the employer to indicate a specific cause of termination of a contract of employment does not mean that he has to specify it in a very detailed manner, with descriptions of all facts and events, documents, dates and the indication of particular actions or omissions, which in the employer's judgment constitute the cause justifying the termination of the contract of employment". The requirement "can be met by specification of the category of events if the circumstances of the case imply that specific causes of the termination are known to the employee"[244]. According to the Supreme Court, the degree of the concreteness of the cause of termination of a contract of employment should be adequate to the type of work performed by the employee and the position held by the latter[245]. Moreover, in its judgment of 26 May 2000 the Supreme Court held that[246] if the employer failed to name a concrete cause justifying termination of a contract of employment, this does not render the employer's statement defective if the employer has otherwise indicated the cause to the employee. As regards the moment when the notice of termination is given to an employee, the Supreme Court emphasized that "the

[243] I PK 152/10.

[244] Similar: a judgment of 26 March 1998, I PKN 565/97, OSNP 1999, No. 5, item 165.

[245] Judgment of the Supreme Court of 15 April 2004, I PK 445/03.

[246] I PKN 670/99, OSNP 2001, No. 22, item 663.

statement of the employer alone must specify beyond any doubt the essential complaint against the employee justifying termination of his employment relationship. The cause of the termination may be further indicated in a more specific and detailed manner, however this does not remove the defectiveness (vagueness) of specification of such cause in the notice of termination[247].

Whether the cause of termination is justified or not should be resolved in the context of the principle according to which a notice of termination given by one of the parties is treated the by judicature as an ordinary measure aimed at termination of the contract of employment, the application of which is not conditional upon occurrence of specific circumstances and the employer may use it in different circumstances, in keeping with the need to rationalise employment[248]. Therefore, the legitimacy of the notice of termination does not have to be proven by some extraordinary causes[249], and the causes alone do not have to be of major importance or cause damage on the part of the employer[250]. On the basis of these arguments, the legitimacy of a notice of termination should be assessed in each individual case. Because of the absence of catalogues (positive or negative) of the causes of termination of a contract of employment, the employer must assess its legitimacy, and in the event of a dispute, the cause indicated in the employer's statement will have to be assessed by the court[251].

The case-law of the Supreme Court and its numerous opinions concerning legitimacy of termination of a contract of employment within the meaning of article 45 of the Labour Code, may be treated as an interpretative guideline. In personal terms, it is worth noting that the required legitimacy of a notice of termination, treated as an element of universal protection of sustainability of employment, means that what should be taken into account in the first place is the employee's interest. However, undoubtedly, when assessing the legitimacy of a particular cause, the employer's interest is also of significant importance[252]. The criteria for assessingthe legitimacy of causes of termination of a contract of employment were spelt out in the resolution of the Supreme Court of Poland of 27 June 1985 (still partially valid), according to which in assessing the legitimacy

[247] Judgment of the Supreme Court of 8 January 2008, I PK 177/07; see also judgment of the Supreme Court of 22 June 2005, I PK 258/2004, OSNP 2006, No. 3–4, item 52.

[248] Judgment of the Supreme Court of 1 December 1997, I PKN 419/97, OSNAPiUS 1998, No. 20, item 598.

[249] Judgment of the Supreme Court of 6 December 2001, I PKN 715/00, Pr. Pracy 2002, No. 10, item 34; judgment of the Supreme Court of 6 January 2009, II PK 108/08.

[250] Judgment of the Supreme Court of 3 January 2007, I PK 79/07.

[251] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 320.

[252] Judgment of the Supreme Court of 19 February 2009, II PK 156/08; judgment of the Supreme Court of 4 November 2010, III PK 23/10; judgment of the Supreme Court of 19 May 2011, III PK 75/10.

of termination, interests of both parties to an employment relationship should be taken into account[253]. The most instructive for the issue in question[254] is the reasoning of the judgment of the Supreme Court of 19 April 2010[255], which refers to the above-mentioned resolution and in which the Court held that "a cause of termination of a contract of employment may lie both on the employer (liquidation or bankruptcy, technological and organisational changes or economic factors resulting in redundancies, search for a more rational employment structure, etc.) and the employee (non-compliance with job responsibilities, lack of care for the interests of the employing establishment, undertaking gainful activity competitive to the employer) and be either at fault or at no fault of the parties. However, the assessment of legitimacy of termination of an employment relationship in accordance with this procedure should always take into account legitimate interests of both of the parties and the purpose, terms and conditions and the implementation of the relationship, and other circumstances which relate to an employee but are of personal or family nature, may in exceptional cases be the basis for declaring the notice of termination as being contrary to the rules of social coexistence".

Opinions on the legitimacy of termination of a contract of employment expressed by labour law theorists on the one hand indicate the lack of possibility to achieve the purpose of an employment relationship taking into account the rules of social coexistence[256], and on the other hand, the existence of an objective cause connected either with an employee or his behaviour or the needs of an employer[257].

The above deliberations remain valid also with regard to the laws governing employment of public sector employees where a contract of employment is the basis for establishment of an employment relationship and which require that the provisions of the Labour Code should be applied *mutatis mutandis* (article 128 of the Act on Higher Education, article 18 of the Act on the Employees of Courts and Public Prosecution Service) or contain particular catalogues of causes of termination of a contract of employment upon notice (for example article 20 of the Teachers' Charter, which refers to the total or partial liquidation of a school or organizational changes causing a reduction in the number of branches in a school or change of teaching plan preventing further employment of a full-time teacher).

[253] III PZP 10/85, OSNCP 1985, No. 11, item 164; arguments II, IV, V, VI, IX, XIII are still valid.

[254] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 321.

[255] II PK 306/09.

[256] *J. Brol*, Nieuzasadnione wypowiedzenie umowy o pracę według art. 45 Kodeksu pracy *[Unreasonable termination of a contract of employment under article 45 of the Labour Code]*, PiP 1977, No. 8–9, p. 139.

[257] See *J. Loga*, Refleksje nad nieuzasadnionym wypowiedzeniem umowy o pracę przez zakład pracy *[Reflections on unreasonable termination of a contract of employment by an employer]*, PiZS 1980, No. 2, pp. 28–29.

According to the principle of analysis of all bases of an employment relationship, it is necessary to refer the mentioned principle to a cooperative contract of employment and to non-contractual relations.

Under article 187 of the Cooperative Law *(Prawo spółdzielcze)*, a cooperative can terminate a contract of employment only in the case of reduction of employment dictated by the economic need or where a member is granted pension rights.

Specific regulations which provide for a nomination *(mianowanie)* as an appropriate basis for establishing a relationship include a catalogue of causes justifying the termination of employment. For example, article 71 of Act on Civil Service mentions a two-time negative assessment of an official, a medical examiner's statement of a permanent incapacity to work that prevents him from performing his duties, loss of good repute, liquidation of the office or refusal to undergo medical examination. It is worth emphasizing that due to the autonomous nature of each regulation governing employment relations established by nomination, the catalogues of causes of their termination are not homogeneous. Moreover, certain causes may justify dismissal of a specific employee upon notice and in other cases they can result in a dismissal without notice.

An exception to the mentioned principle will be employment relationships established by appointment *(powołanie)* and this is due to the fact that an employer is free to terminate them by dismissal. As mentioned before, a statement of dismissal can be made at any time and without specifying a cause, therefore its effectiveness is not conditional upon its justification.

As regards employment relationships established by election *(wybór)*, because of the above-defined specific and consequential character of the termination in relation to events causing expiration of the term of office, it is impossible to talk about declarations of will of an employer aimed at termination of an employment relationship, and therefore they will not fall within the personal and material scope of the analyzed principle. However, it should be noted that in systemic terms the impact of events resulting in expiration of the term of office on the existence of an employment relationship may also be considered in the context of the causality of the legal effect.

Finally, it is worth noting that as regards all employment relationships, regardless of the act establishing such a relationship, an element of the analyzed principle will also be the causes of termination of employment in the so-called collective redundancies' procedure or individual layoffs under the Act of 13 March 2003 on Special Rules Governing Termination of Employment for Reasons Not Attributable to Employees[258].

[258] Journal of Laws *[Dz.U.]*, No. 90, item 844, as amended.

3.3.2.4. The principle of increased protection of relationships of nominated employees

Specific regulations which provide for a nomination *(mianowanie)* as the appropriate basis for establishing an employment relationship include an exhaustive catalogue of causes justifying the termination of employment. In the Polish labour law literature this is called an increased general protection of sustainability of an employment relationship, characteristic of the act establishing the relationship. It seems that in such perspective it may constitute the essence of the distinguished principle connected with the termination of employment, at the same time corresponding to the above-mentioned principle of causality of the employer's statement of termination of employment, characteristic of nomination.

To a large extent, the increased protection of sustainability of employment established by nomination is a compensation for the greater subordination of a nominated employee to the employer, which is manifested in the employer's entitlement to unilaterally lay down the terms and conditions of such employment.

It should further be noted that, *de lege lata,* legal provisions use an exhaustive list of causes of termination of employment relationships established by nomination which stands in clear opposition to the requirement to justify termination of an employment contract established under a mutal consent of the parties. Such a normative mechanism is applied in the Act on the Civil Service (article 71 (1) and (2)), the Act on the Employees of Public Agencies (article 13 (1)) and under the mechanism of *mutatis mutandis* application of the same provision in the Act on Employees of Courts and Public Prosecution Service (article 18), Act on the Higher Education (article 124 (1) and in a period preceding the transformation of employment relationships established by nomination into relationships based on a contract of employment for unlimited term in the Act on the Local Government Staff (article 55 (1)).

It is worth stressing at this point that we are now facing far-reaching transformations of the legal nature of employment relationships established by nomination. As regards the increased protection of sustainability of employment relationship established by nomination, the legislature included in it the circumstances specified by vague expressions. Termination of employment with a nominated academic teacher for "other important cause" (article 125 of the Act on Higher Education) or termination of employment with a civil servant on the grounds of loss of good repute (article 71 (1)(3) of the Act on Civil Service), may be treated as a normative aspect of this process. Assuming that an element of the analyzed increased protection of sustainability of employment of nominated employees is an exhaustive list of causes of termination of such employment relationship, then creating a norm with the use of general clauses somehow opens

this list. Inclusion by the legislature of general clauses in the catalogues of causes of termination of an employment relationship can be treated as a step away from the conventional concept of increased protection of sustainability of employment of a nominated employee[259].

3.3.2.5. The principle of employee's freedom to unilaterally terminate employment

It is emphasized by legal theorists that an employment relationship may be terminated both by the employee and by the employer[260]. Nevertheless, the employer is subject to more restrictions (general protection, specific protection). The employee must only comply with thewritten form requirement and with the notice period[261] or a requirement to make a respective statement of termination of employment within a prescribed time-limit (article 23^1 § 4 of the Labour Code).

Particularly important in the context of relation between this principle and the previously analyzed principles is that an employee who terminates employment by notice is not obligated to specify a cause justifying such termination. As regards a contractual employment relationship, this follows from the literal wording of articles 30 § 4 and 32 of the Labour Code and as a reference to the specific laws which provide for a contract of employment as a basis for establishment of an employment relationship. Similarly, a mechanism of reference will justify extension of their application to non-contractual employment relationships established by appointment and nomination, as well as those based on a cooperative contract of employment. Because of the specific character of expiration of an employment relationship established by election, in this context also the analyzed principle has an indifferent dimension. However, a logically similar construct may be an expiration of a term of office as a result of employee's resignation, in which case there is also no obligation to provide justification.

3.3.2.6. The principle of causality of termination of employment without notice

The present principle is determined by two directives. First, in the case of termination of an employment relationship with immediate effect, both parties are

[259] See *J. Stelina*, Ochrona trwałości zatrudnienia w pozaumownych stosunkach pracy *[Protection of sustainability of employment in non-contractual employment relationships]*, [in:] *G. Goździewicz* (ed.), Ochrona trwałości stosunku pracy… *[Protection of the Sustainability…]*, p. 126.

[260] *L. Mitrus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2017.

[261] *Ibidem.*

required to provide justification. Second, both the employer and the employee are bound by a list of prerequisites prescribed by the Labour Code or by specific laws which provide for the regime of termination of employment without notice. Importantly, the principle formulated in this way refers to both the contractual employment relationship and the cooperative contract of employment, as well as the non-contractual bases of employment. However, as was the case with the previously mentioned principles, an employment relationship established by election which ends upon expiration of the term of office, will have specific characteristics in connection with a clear systemic context.

As regards the employment relationship established under a contract of employment, the analyzed principle is determined by two provisions. Under article 52 of the Labour Code, a contract of employment may be terminated by an employer without notice due to reasons attributable to an employee, which include: gross violation of basic employee's duties, commission by an employee, during the term of the contract of employment, of an offence which makes it impossible to continue his employment in the position held if the offence is evident or established by a final judgment, or loss of qualifications necessary to hold a certain position. Article 53 of the Labour Code names the causes justifying the termination of a contract of employment without notice. However, these are not attributable to an employee. They include absence from work caused by illness which lasts for a period specified in that provision or an excused absence from work exceeding 1 month, for reasons other than illness. Termination of a contract of employment by an employee with immediate effect is possible under article 55 of the Labour Code due to gross violation by the employer of basic duties to an employee or where the work performed by the employee is harmful to his health and the employer did not transfer the employee to other work within a time-limit specified in the medical certificate. As regards the contractual employment relationships under the specific laws governing employment in the public sector, there are two possible normative constructs. The above principles will apply to the majority of them by reference to the provisions of the Labour Code (article 9 (1) of the Act on Civil Service, article 43 (1) of the Act on the Local Government Staff, article 128 (1) of the Act on Higher Education). Exceptionally, such specific laws establish a catalogue of premises justifying termination of a contract of employment without notice. For example, in article 12 (6) of the Act on the Employees of Courts and Public Prosecution Service, in addition to the premises mentioned above and relating to the increased protection of sustainability of employment established by nomination, the legislator provides that article 52 of the Labour Code should apply *mutatis mutandis*.

In the context of employment relationships established by nomination, the analyzed principle is clearly connected with the increased general protection of

sustainability of such employment relationships. As regards the specific laws governing employment in the public sector, they provide for exhaustive catalogues of causes justifying termination of an employment relationship established by nomination with immediate effect. Article 126 of the Act on Higher Education provides that an employer can make such statement of termination in the event of permanent inability of an academic teacher to work in the position held, failure to provide on time a decision confirming the ability to work after periodic or control medical examination, commission of acts listed therein related to scientific misconduct in a broad sense or, finally, conviction by a final judgment for an intentional crime. Similarly, Under article 71 (3) of the Act on Civil Service, an employment relationship with a nominated official can be terminated in the case of absence of the latter from work due to illness exceeding one year. Article 71 (7) of that act names the conditions similar to those prescribed by article 52 of the Labour Code. The catalogue of causes justifying immediate termination of an employment relationship laid down in article 14 of the Act on Staff of Public Offices includes conviction by a final judgment with deprivation of public rights or of the right to pursue a profession, imposition of a disciplinary penalty of dismissal from official work, culpable loss of professional qualifications necessary to pursue work in the position held or loss of the Polish citizenship. Termination of an employment relationship established by nomination without notice by an employee will correlate with the causes laid down in article 55 of the Labour Code, which results from its *mutatis mutandis* application.

An employment relationship established under a cooperative contract of employment can be terminated without notice only for the causes which justify such termination under the Labour Code without employee's fault, listed in article 53 of the Labour Code (article 189 § 1 of the Cooperative law), and on the employee's part the provisions of article 55 of the Labour Code will apply *mutatis mutandis*.

An employment relationship established by appointment can be terminated by the employer by dismissal, with no need to specify the cause. However, if the employer wishes to terminate the employment relationship with immediate effect, without a notice period, he will have to justify the dismissal by reference to one of the causes laid down in article 52 of the Labour Code, which follows explicitly from article 70 § 2 of the Labour Code. On the other hand, there are no normative obstacles that would prevent an employee from making such declaration of will under article 55 of the Labour Code applied *mutatis mutandis.*

Termination of an employment relationship established by election (Polish *wybór*) by way of expiration of a term of office is always a termination with immediate effect. Even if this mechanism does not fully correlate with other acts

establishing an employment relationship, however in systemic terms, expiration of a mandate always involves causes specified in those provisions.

The above deliberations which refer to each basis of employment relationship and which are the essence of the principle of causality of a unilateral statement of termination of employment without notice, entail acceptance that such a declaration of will of a party aims at termination of employment under a special regime in which termination by notice should be considered a regular mode.

3.3.2.7. The principle of consultation of a dismissal with a trade union

Consultation with a trade union on the termination of employment is an element of the universal protection of sustainability of employment relationship, related to the notice of termination regime. In principle, it applies to employment relationships established under a contract of employment for an unspecified term, where the employer is required to provide a respective justification. However, an analysis of specific laws leads to the conclusion that this procedure may be applied also in other regimes or acts establishing an employment relationship.

In normative terms, the trade union consultation is governed by article 38 § 1 of the Labour Code, under which an employer shall communicate the intention to terminate the contract of employment for an indefinite term concluded with an employee to a company trade union organisation representing the employee and specify the reasons for such termination. As regards the regime of termination of a contract of employment without notice, article 38 of the Labour Code applies *mutatis mutandis* under articles 52 § 3 and 53 § 4 of the Labour Code.

Article 38 of the Labour Code allows a trade union organisation to assess whether actions taken by the employer in relation to a specific employee, aimed at termination of his employment relationship, are justified. Under this article the employer may also obtain information from which he can assess the correctness of his decision on dismissal of the employee[262].

The linguistic interpretation of article 38 of the Labour Code authorizes the conclusion that its scope is limited only to an employee employed under a contract of employment for an indefinite period. Termination of a different contract of employment within the meaning of article 25 of the Labour Code does not obligate the employer to follow the procedure of consultation of the causes of termination. Similarly, by way of exception, article 38 of the Labour Code will not apply if a contract of employment for an indefinite term is terminated because of a liquidation or bankruptcy of the employer (article 41^1 of the Labour Code).

[262] *A.M. Świątkowski*, Indywidualne prawo pracy *[Individual Labour Law]*, Gdańsk-Kraków 2001, p. 507.

Employer's obligation to notify his intention to terminate the employment relationship exists only where the employee is represented by a trade union organization. *A contrario,* the provisions of article 38 of the Labour Code will not be applicable if there is no trade union organisation in the employer's establishment or none of the active trade union organizations represents the employee[263]. According to labour law theorists, in practice this should be considered a typical situation with the broadest reference framework, covering the majority of employees in Poland[264]. Importantly, given that not all employees can benefit from this type of protection it seems perfectly reasonable to argue for abolishment of the obligation of trade union consultation which manifests unjustified differentiation of the situation of employed persons[265].

The rules of representation of employees in the labour relations are laid down in article 23^2 of the Labour Code, under which if the labour laws provide for cooperation between the employer and a trade union organization in individual employment matters, the employer is obliged to cooperate in such matters with the company trade union organization representing the employee – member of the trade union or to consent to defence of rights of an employee who is not a union member – in accordance with the Act on Trade Unions. Under article 7 (2) of the Act on Trade Unions, trade unions represent the rights and interests of their members, and at the request of a non-member employee a trade union may defend his rights and interests towards the employer. This is of central importance in the context of employer's cooperation with the trade union[266]. Another provision which is of crucial importance for the analysed issue is article 30 (2^1) of the Act on Trade Unions. Pursuant to this provision, in individual matters aris-

[263] See a judgment of the Supreme Court of 16 March 2009, II PK 63/08, in which the Supreme Court held that that the obligation of trade union consultation prescribed in article 38 § 1 of the Labour Code refers to a company trade union organisation representing the employee. If there is no such organisation or the existing organisation does not represent the employee, then the employer is released from the obligation to consult and therefore will not violate the provisions of article 38 of the Labour Code; similar view was presented by the Supreme Court in a judgment of 11 September 2001, I PKN 624/2000, OSNP 2003, No. 16 item 377, in which the Court held that the legal norm covered by article 38 § 1 of the Labour Code can be violated only if the employee benefits from a union representation of his employee rights.

[264] *J. Piątkowski*, Udział związku zawodowego w rozwiązywaniu stosunku pracy – niedoskonałości regulacji prawnej *[Participation of a trade union in termination of an employment relationship – imperfections of legal regulation]*, [in:] *G. Goździewicz* (ed.), Ochrona trwałości stosunku… *[Protection of the Sustainability…]*, p. 142.

[265] *Z. Salwa*, Przemiany prawa pracy początku stulecia a jego funkcja ochronna *[Transformations of labour law at the beginning of the century and its protective function]*, [in:] *M. Matey-Tyrowicz*, *L. Nawacki, B. Wagner* (eds.) Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego *[Labour Law and the Challenges of the XXI Century. A Jubilee Book for Professor Tadeusz Zieliński]*, Warsaw 2002, p. 302.

[266] *K.W. Baran*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 189.

ing out of an employment relationship in which the provisions of the labour law oblige the employer to cooperate with the company trade union organization, the employer must ask the organization for information about employees who use this organization to defend their rights[267]. It is enough for the employer to address the trade union organization only once[268], and the information should be updated at the initiative of the trade union or the employee concerned[269]. If the information is not provided within five days, the employer is released from the obligation to cooperate with the trade union organization in matters relating to these employees.

It can therefore be concluded that the consultation procedure should be preceded by a question asked by the employer to the trade union organization whether the employee whose contract of employment he intends to terminate is represented by the union as its member or protected employee. However, there is a consensus among legal theorists[270] and in the case-law[271] that the obligation laid down in article 30 (2^1) of the Act on Trade Unions is subsidiary but functionally dependent in relation to article 38 of the Labour Code. This means that since the procedure of consultation of the intention to terminate a contract of employment prescribed in article 38 of the Labour Code does not involve an obligation of the employer to request from a company trade union organisation the information about employees defended by such organisation. In other words, the possible non-compliance with article 30 (2^1) of the Act on Trade unions does not mean non-compliance with article 38 of the Labour Code.

Implementation of the provisions of article 38 of the Labour Code is consultative (opinion giving), which means that the company trade union organisation representing the employee is not a co-author of the employer's decision to terminate the contract of employment with the employee[272], and the consultation

[267] See *Ł. Prasołek*, Informacja o pracownikach korzystających z obrony związku zawodowego *[Information of employees defended by a trade union]*, [in:] *Z. Hajn* (ed.), Związkowe przedstawicielstwo pracowników zakładu pracy *[Representation of Workers by a Trade Union]*, Warsaw 2012, p. 520 ff.

[268] Judgment of the Supreme Court of 25 July 2003, I PK 305/2002, OSP 2004, No. 12, item 150.

[269] *K.W. Baran*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 192.

[270] *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.), Prawo pracy…, p. 193.

[271] See the judgments of the Supreme Court: of 16 March 2009, III PK 64/2008; of 11 September 2001, I PKN 624/2000, OSNP 2003, No. 16, item 377; of 23 January 2002, I PKN 809/2000, OSNP 2004, No. 2, item 31; of 22 June 2004, II PK 2/2004, Mon. Praw. 2004, No. 14, p. 630.

[272] *A. Dral*, Powszechna ochrona trwałości… *[Protection of Sustainability…]*, p. 193 and the literature referenced there. For an opposite view, see *M. Seweryński*, Wybrane problemy konstytucyjne kodyfikacji prawa pracy *[Selected constitutional problems of codification of labour law]*, [in:] *H. Szurgacz* (ed.), Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego *[Constitutional Problems of Labour Law and Social Security]*, Wrocław 2005, p. 18, where the author indicates the involvement of trade unions in the employer's decision-making process regarding dismissal of an employee.

itself is prior[273] to submitting a declaration of will to terminate the contract of employment.

Under article 38 § 2 of the Labour Code, if a company trade union organisation finds that the termination would be unjustified, it may submit to the employer the reasoned reservations within 5 days from receipt of a respective notice. However, according to the Supreme Court, these do not have to provide analysis of the causes of termination or contain broad, substantive reasoning[274]. Following consideration of the opinion of a trade union organisation as well as in the case of failure of the trade union organisation to submit its opinion within a prescribed time-limit, the employer should take a decision concerning the termination. With regard to the termination of a contract of employment without notice, article 52 § 3 of the Labour Code modifies the provisions of article 38 of the Labour Code and introduces a shorter, 3-day deadline for filing the reservations by the trade union, regarding termination of the contract of employment pursuant to article 52 or 53 of the Labour Code.

In principle, specific provisions defining a contract of employment as the appropriate act establishing an employment relationship do not define the regimes for their termination. In such case the provisions of the Labour Code should apply by reference. This leads to the conclusion that the provisions of article 38 may be transferred to the contractual employment relationships established under specific laws due to the lack of autonomous regulation on union consultation of the causes of termination of a contract of employment. At the same time, taking into account the scope of the provisions of article 38 of the Labour Code, it should be noted that the consultation obligation will be limited to employees employed under a contract of employment for an indefinite term, covered by trade union protection under the act on trade unions.

The provisions of article 38 of the Labour Code will also be applicable in the case of employment under a cooperative contract of employment because pursuant to article 190 § 1 of the cooperative law, termination of a cooperative contract of employment as well as a notice of change to wage or working conditions require cooperation with the trade union bodies, if such union operates in the cooperative. However, the union should operate within a concrete labour cooperative.

The issue of consultation of the termination of employment established by nomination is regulated autonomously by specific laws governing employment

[273] Judgment of the Supreme Court of 25 January 1977, I PRN 82/76, OSNCP 1977, No. 10, item 192.

[274] Judgment of the Supreme Court of 4 October 2000, I PKN 60/00, OSNAPiUS 2002, No. 11, item 261.

in the public sector in which nomination is the basis for the establishment of an employment relationship. The analysis of these provisions leads to the conclusion that the issue is regulated heterogeneously and requires analysis of each individual case. For example, the consultation is not required in the case of termination of employment with a nominated academic teacher (a specific substitute of the consultation is laid down in article 125 of the Act on Higher Education in the form of obtainment of an opinion of a collegial body of a university in the case of termination of employment "for other important cause"), or with a civil servant (since the general reference is not sufficient). Laws may also determine the premises which, when indicated in the statement of termination of employment, will require consultation with a trade union organization (article 20 (5a) and (5b) of the Teacher's Charter, article 13 (4) of the Act on Staff of Public Offices).

Provisions of the Labour Code governing the procedure for dismissal of an appointed employee do not include a reference to application of article 38 of the Labour Code. Moreover, as noted by the Supreme Court in its judgment of 9 September 1977[275], termination of a cooperative contract of employment as well as a notice of change to wage or working conditions require cooperation with trade union bodies, if such trade union operates in the labour cooperative.

The context of trade union consultation will be irrelevant in the case of employment relationships established by election, not only due to the lack of proper delegation but also due to the specific nature of expiration of the term of office.

3.3.2.8. The principle of special protection

When referring to the findings of the labour law theorists, it should be assumed that the protection essentially involves the introduction of restrictions regarding the notice of termination of employment, which may consist in the inadmissibility (prohibition) of termination of employment at a specific time, or termination conditional upon consent of a competent authority[276].

The cases of special protection of sustainability of an employment relationship can be divided into two groups. The one relating to the personal and family situation of the employee, and the other resulting from the performance of various functions[277].

In the group of norms which formulate the prohibitions on termination of a contract of employment by reference to the family and personal situation of an employee, the key provisions are those related to pre-retirement protection, absence from work for justified reasons and parenthood.

[275] I PRN 115/77, OSNCP 1978, No. 10, item 177.
[276] See *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.), Prawo pracy… *[Labour Law…]*, p. 203.
[277] See *A.M. Świątkowski*, Polskie prawo… *[Polish Law…]*, p. 152.

Under article 39 of the Labour Code, an employer cannot terminate a contract of employment with an employee who has not more than 4 years to reach the retirement age, if based on the period of employment such employee is entitled to pension rights upon reaching this age. Protection against dismissal due to pre-retirement age is absolute. However, it should be emphasized that the prohibition resulting from the analyzed provision applies before the retirement age has been reached. The fact that the pre-retirement age has been reached during the notice period does not impair the effectiveness of the notice of termination[278]. The function of article 39 of the Labour Code is to protect against dismissal such persons who have not yet acquired pension rights, but who, at old age, would have problems with finding a new job following the termination of the current one, and consequently would become unemployed and without social security. The concept of the "retirement age" within the meaning of article 39 of the Labour Code should be identified with the universal retirement age, resulting from the general regulations on pensions[279] but also with a reduced age, resulting from the performance of work in special conditions or in a special capacity[280], or belonging to a specific employee group[281]. Under article 40 of the Labour Code, the provisions of article 39 of the Labour Code do not apply where the employee acquires the right to pension on the ground of total incapacity for work.

Under article 41 of the Labour Code, an employer cannot give a notice of termination of a contract of employment during the employee's annual leave as well as during other excusable absence of the employee from work if the period during which the contract of employment may be terminated without notice has not yet expired. Similarly to the restriction laid down in article 39 of the Labour Code, the analyzed prohibition of termination of a contract of employment is absolute and takes effect even if certain protective circumstances prescribed by article 41 of the Labour Code occurred following the termination[282]. In this scope, the prerequisites of protection are: leave of absence and other excusable absence

[278] Judgment of the Supreme Court of 7 April 1999, I PKN 643/98, OSNP 1998, No. 11, item 326.

[279] See the provisions of the Act of 17 December 1998 on Pensions from the Social Insurance Fund *[ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych]* Journal of Laws *[Dz.U.]* of 2013, item 1440.

[280] Judgment of the Supreme Court: of 28 March 2002, I PKN 141/01, OSNP 2004, No. 5, item 86; of 11 July 2007, III PK 19/07; of 9 March 2009, I PK 180/08, OSNP 2010, No. 19–20, item 236; of 19 April 2010, II PK 311/09, OSNP 2011, No. 19–20, item 252; of 8 July 2008, I PK 309/07, OSNP 2009, No. 23–24, item 308.

[281] Judgment of the Supreme Court of 29 July 1997, I PKN 227/97, OSNAPiUS 1998, No. 11, item 326 regarding railway workers; judgment of the Supreme Court of 5 February 2004, I PK 348/03, OSNP 2004, No. 24, item 417 regarding miners' pensions.

[282] Judgment of the Supreme Court of 11 November 1986, I PRN 85/86, Sł. Prac. 1987, No. 7–8, p. 29.

from work. The legislator does not specify which type of leave falls within the material scope of article 41 of the Labour Code, therefore, based on *lege non distinguente* arguments, it should be assumed that this is any leave of absence (except the leaves which are governed by separate provisions on the protection of the employment relationship), that is holiday leave, unpaid leave, training leave, health leave, sabbatical leave or a compassionate leave[283]. There may be various causes of other excusable absence, such as for example a pre-trial detention or taking care of an ill family member. Most often it will be sick leave. By analogy, to the protection stemming from article 39 of the Labour Code, a type of a contract of employment concluded with an employee is indifferent.

The special protection of an employment relationship of pregnant women or women during maternity leave is governed by article 177 of the Labour Code. It provides that an employer cannot terminate a contract of employment during pregnancy and during maternity leave of an employer unless there are reasons justifying termination of the contract without notice through the fault of the employee and the company trade union organisation gave consent for the termination of the contract. The protection under the mentioned provision applies also to the period of parental leave by a reference to article 182^{1g} of the Labour Code, as well as to an employee – father taking care of the child during the maternity leave. "For the protection against termination of a contract of employment of a pregnant woman, it is not important when the pregnancy was demonstrated. What is important is the objective state of affairs existing at the time of termination of the contract of employment"[284]. The restriction of the possibility to terminate a contract of employment following from article 177 of the Labour Code applies not only to making a respective statement of termination but also to the occurrence of a legal effect in the form of termination of employment[285]. The protection connected with pregnancy and maternity leave is absolute even if the notice of termination is effective despite the prohibition but because of the defectiveness it cannot be challenged in the labour court[286]. The personal scope of article 177 of the Labour Code covers employees employed under a contract of employment for an indefinite term, for a fixed term (including for replacement) and for a probationary period exceeding 1 month. When it comes to fixed term contracts, the prohibition to terminate them lasts, in principle, until the lapse of time for which they were concluded. In exceptional cases, a contract of employ-

[283] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 289–290; *A.M. Świątkowski*, Kodeks pracy… *[The Labour Code…]*, p. 216–217.

[284] Judgment of the Supreme Court of 15 January 1988, I PRN 74/87, Sł. Prac. 1988, No. 5, p. 28.

[285] Judgment of the Supreme Court of 2 June 1995, I PRN 23/95, OSNAPiUS 1995, No. 22, item 276.

[286] Judgment of the Supreme Court of 10 August 2010, I PK 17/10.

ment concluded for a fixed-term (except a contract for replacement), contract for the period of performance of a specific task or contracts for a probationary period which would be terminated after the third month of pregnancy, are by operation of law extended until the date of childbirth (article 177 § 3 of the Labour Code). Article 186[1] of the Labour Code lays down a similar prohibition during child-care leave.

The mechanism of protection of sustainability of employment in the context of the functions performed is relative. It only operates during the period of performance of a specific function (except for a social labour inspector, where protection also lasts one year after the expiration of the term of office) and only if the competent authority does not agree to the termination or transformation of employment[287]. It is worth emphasizing, however, that the refusal of the competent body is binding upon the employer. It stems from the firm nature of such powers of the competent bodies. For example, this mechanism is connected with trade union protection (article 32 of Act on Trade Unions), membership in the works council (under article 17 of the Act of 7 April 2006 on Information and Consultation of Employees[288]) and a role of the social labour inspector (under article 13 of the Act of 24 June 1983 on Social Labour Inspectorate[289]).

The analyzed provisions of the Labour Code relate to contractual employment relations, therefore according to the accepted convention, their reference to non-contractual bases and a cooperative contract of employment appears to be justified.

As regards the nomination employment relationships, some of the specific laws governing employment in the public sector, such as the Act on Higher Education, lack the applicable statutory regulations. It means that in the case of priority of linguistic interpretation, the silence of the legislature can be treated as a manner of expression and the provisions governing contracts of employment and not employment relationships cannot be applied to nomination relationships without explicit statutory authorization, except the protection of the employment of pregnant women and mothers, which has a universal dimension stemming from article 71 (2) of the Constitution of the Republic of Poland[290]. However, under article 16 of the Act on the Employees of Public Agencies *(ustawa o pra-*

[287] *B. Cudowski*, Zgoda na rozwiązanie stosunku pracy z działaczem związkowym *[Consent to terminate an employment relationship with a trade union activist],* PS 1998, No. 7–8, p. 159 ff.

[288] Journal of Laws *[Dz.U.]* of 2006, No. 79, item 550, as amended.

[289] Journal of Laws *[Dz.U.]* No. 35, item 163, as amended.

[290] See *Z. Sypniewski*, Wypowiedzenie stosunku pracy z mianowania *[Termination of an employment relationship established by nomination]*, PiZS 1979, No. 4, p. 29 ff.; *J. Stelina*, Charakter prawny… *[A Legal Nature…],* p. 187. *E. Mazurczak-Jasińska*, Rozwiązanie stosunku pracy… *[Termination of an Employment…],* p. 67; *E. Mazurczak-Jasińska*, O możliwości stosowania regulacji Kodeksu pracy dotyczących szczególnej ochrony trwałości zatrudnienia w pracowniczych stosunkach służbowych

cownikach urzędów państwowych) (applicable *mutatis mutandis* in not regulated matters to the employment relationship of employees courts and prosecution service), the provisions of specific laws governing employment in the public sector do not violate the provisions on the special protection of employees in the case of termination of employment, which implies that they must be applied. Similarly, pursuant to article 71 (5) of the Act on Civil Service, termination of an employment relationship with an official for reasons specified in the act, other than liquidation of the office, cannot violate the provisions on the special protection of employees in the case of termination of employment. Considering the special protection in connection with the functions performed, it can be concluded from the *lege non distinguente* argument that the protection of sustainability of employment covering the employees mentioned in article 32 of the Act on Trade Unions, refers not only to contract employees, regardless of the type of a contract of employment, but also to employees employed on non-contractual basis. Similarly, in personal terms, in relation to an employee who is a member of a workers council, not only the type of the concluded contract of employment, but also the basis for establishing an employment relationship is irrelevant[291]. The lack of differentiation in the context of protection of the social labour inspector is confirmed by the Act on Social Labour inspection. According to article 13 (4) of this Act, the protection prescribed by this provision applies also to nominated employees. To sum up, the principles of special protection of employment relationships by nomination will need to be connected not only with the provisions of the relevant material regulations but primarily with the provisions of the relevant specific laws governing employment in the public sector.

In order to assess the application of the mechanism of special protection against termination of a nomination employment relationship, the provisions of article 72 of the Labour Code should be considered authoritative. It provides that if the removal from office occurred during a period of excusable absence from work, the notice period starts running upon expiry of that period. However, if the excusable absence exceeds the period laid down in article 53 §§ 1 and 2 of the Labour Code, the body which appointed the employee may terminate the employment relationship without notice. In the case of removal from office

[Application of the provisions of the Labour Code on special protection of sustainability of employment to the service relationships], MPP 2014, No. 7, pp. 346–347.

[291] See *M. Rycak*, Szczególna ochrona trwałości stosunku pracy wybranych niezwiązkowych przedstawicieli pracowników w polskim prawie pracy *[Special protection of sustainability of employment of the selected non-unionized representatives of workers in the Polish labour law]*, [in:] *A. Patulski, K. Walczak* (eds.), Jedność w różnorodności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu *[Unity in Diversity. Studies on Labour Law, Social Security and Social Policy. A Jubilee Book Dedicated to Professor Wojciech Muszalski]*, Warsaw 2009, p. 202 ff.

of a pregnant employee, the removing authority is obliged to offer her another job appropriate for her professional skills, while for the period equal to the notice period the employee is entitled to remuneration equal to this payable to her prior to the removal from office. If however the employee does not agree to take up another work, the employment relationship will terminate upon expiry of the period equal to the notice period which starts running from the date when she was offered another work in writing. Similar rules should apply in the case of removal from office of an employee who has not more than 2 years left to acquire the entitlement to pension from the Social Insurance Fund. The above justifies an argument about a specific regulation of the special protection in connection with the personal situation of the employee. As regards the protection connected with the functions performed, the considerations discussed above in the context of employment relations by nomination remain valid.

With respect to an employment relationship established under a cooperative contract of employment, the elements of the principle of special protection of sustainability of employment presented above will apply under article 190 (2) of the Cooperative Law, under which the provisions of the act do not exclude the application of provisions of labour law more favourable to members of the cooperative, prohibiting or limiting the termination of a contract of employment, notice of change to wage or working conditions or termination without notice.

The special protection regulations will not apply in connection with expiration of a term of office of an elected employee.

3.3.2.9. The principle of informing an employee of the right to appeal

Pursuant to article 30 § 5 of the Labour Code, the employer's statement of termination of a contract of employment with or without notice should contain information on the employee's right to appeal to a labour court. Such information should specify the right to appeal, a time-limit for filing such appeal and should name a specific labour court to which the claim against the employer should be submitted[292]. Such information is an integral part of the employer's statement of termination of employment and the employee is informed about his right to appeal, and in particular about the time-limit for filing such an appeal[293].

However, in the absence of such information, the act terminating the employment relationship will still be effective. In such case we can talk about violation of article 30 § 5 of the Labour Code and the only consequence will be that the employee will have the right to request reinstatement of the time-limit for bring-

[292] *L. Mitrus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2017 (available at Legalis Database).

[293] Judgment of the Supreme Court of 18 April 2011, III PK 56/2010.

ing an action before court[294]. Failure to inform the employee of his right to appeal may be treated as a circumstance justifying reinstatement of the time-limit under article 265 § 2 of the Labour Code[295]. Conversely, if the employer advised the employee of his rights in a letter including the statement of termination of the contract of employment, and the employee refused to accept such letter, there will be no grounds for reinstatement of the time-limit[296].

The adequacy of the above deliberations to the legal situation of a contract worker whose employment relationship is regulated by specific provisions raises no doubt, and the reference contained in these provisions includes also article 30 § 5 of the Labour Code. Considering the fact that the information on the right to appeal to the labour court against termination of employment, is in fact a question about the admissibility of court proceedings in this respect, it is reasonable to argue that the right to appeal to the labour court is independent of the basis of an employment relationship, and the obligation to inform the employee of such right, in accordance with article 30 § 5 of the Labour Code, applies to all employees.

3.3.2.10. The principle of compliance with the notice period and the date of termination

Under an individual labour law, the concept of the notice period is used to determine the time period falling between the date of making a declaration of will to terminate a contract of employment and the date of termination of the contract of employment. The date on which the contract of employment is actually dissolved is called a date of termination[297]. Because of the functional dependence between the notice period and the date of termination, those two elements of termination of an employment relationship should be viewed jointly.

When the statement of termination of an employment relationship is effectively made, the notice period starts running. Considering the function of the provisions of the Labour Code governing the notice periods, it is reasonable to accept that they take into account the interests of both parties to an employment

[294] *A.M. Świątkowski*, Kodeks pracy… *[The Labour Code…]*, p. 188; As regards reinstatement of a time-limit for filing an appeal, see: *R. Sadlik*, Znaczenie terminu do wniesienia odwołania od wypowiedzenia umowy o pracę *[The importance of the time-limit for filing an appeal against termination of a contract of employment]*, MPP 2012, No. 3, p. 132 ff.

[295] *Z. Góral*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[Labour Code…]*, p. 246.

[296] Judgment of the Supreme Court of 13 December 1996, I PKN 41/96, OSNP 1997, No. 15, item 268.

[297] *A.M. Świątkowski*, Indywidualne… *[Individual…]*, p. 483; *L. Florek*, *T. Zieliński*, Prawo pracy… *[Labour Law…]*, pp. 93–94; *L. Mitrus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy… *[Labour Code…]*, pp. 144–145.

relationship. During this period the employee can seek another job, exercise the rights which can be exercised only during the term of employment, and moreover he can prepare to change of his life situation, and the employer may seek another person who will be employed in the given job, or make the relevant organizational changes[298]. It is important that the notice period is part of the term of the employment relationship, during which the parties have all the related rights and obligations[299], in particular the employer may require the worker to perform work, and failure to do so may result in termination of employment without notice through the fault of the employee. The Supreme Court expressed the view[300] that the duration of the notice period may be treated as a "specific benefit in favour of an employee, connected with his contribution to the functioning of the workplace" or as "the entitlement of the employee connected with his contribution to the functioning of the workplace (contribution of work to the employer)".

The length of the notice periods vary depending on the type of a contract of employment and in the case of a fixed-term contract and a contract for an indefinite term – also on the length of employment with the employer concerned. Pursuant to article 34 of the Labour Code, a notice period for a contract for a probationary period is 3 days, 1 week or 3 weeks, depending on the term of the contract. Pursuant to article 36 § 1 of the Labour Code, in the case of contracts for a fixed term or for an indefinite term, the notice period will be 2 weeks, 1 month or 3 months depending on the length of employment with the employer concerned.

The laws governing employment under a contract of employment in the public sector do not provide for any specific regulations in this respect, therefore the provisions of the Labour Code will apply *mutatis mutandis*. In the absence of a separate regulation and in connection with the wording of article 69 of the Labour Code, a similar mechanism, however relating only to the length of the periods of notice of a contract for an indefinite term, will apply to employment relationships established by appointment as well as to a cooperative contract of employment within the wording of article 36 § 1 of the Labour Code, under article 199 of the Cooperative Law.

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[298] See *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.), Prawo pracy… *[Labour Law…]*, Warsaw 2013, p. 222.

[299] Judgment of the Supreme Court of 13 November 1990, I PR 352/90, OSP 1992, No. 3, item 55; see also: *L. Mitrus*, Sytuacja pracownika w okresie wypowiedzenia umowy o pracę, cz. I *[Situation of an employee during a notice period],* part I, PiZS 2010, No. 7, p. 4 ff.; *L. Mitrus*, Sytuacja pracownika w okresie wypowiedzenia umowy o pracę, cz. II, PiZS 2010, No. 8, p. 2 ff.

[300] See the reasoning of the resolution of 7 judges of the Supreme Court of 15 January 2003, III PZP 20/02, OSNP 2004, No. 1, item 4.

Employment relationships established by nomination are specific in this regard since the notice period applicable to them is 3 months, regardless of the seniority of service (article 123 (2) of the Act on Higher Education; article 71 (1) of the Act on Civil Service; article 13 (2) of the Act on Staff of Public Offices).

When it comes to determining the lapse of the period of notice of a contract of employment, there is a general consensus that in respect of periods which are a multiple of a week or month, the provisions of the Civil Code will not apply[301]. This is because according to a specific regulation laid down in article 30 § 2^1 of the Labour Code, the period of notice of a contract of employment covering a week or a month or a multiple ends on Saturday, or on the last day of the month respectively. This mechanism applies also to the contracts of employment concluded under separate laws governing employment in the public sector, unless specific laws provide otherwise. For example, article 128 of the Act on Higher Education provides that the notice period expires at the end of the semester (similar regulation is included in the Teachers' Charter).

Saturday or the last day of the month will also be the date of termination of employment relationships established by appointment and under a cooperative contract of employment, in connection with the appropriate application of respective provisions of the Labour Code.

The expiration of the period of notice of the employment relationships by nomination, where a 3-month period of notice is a rule, is indicated in public offices, or stops running on the last day of the month under the provisions of the Labour Code due to the lack of explicit provisions in the separate laws governing employment in the public sector (Act on Civil Service). However, specific laws may specify the date of termination autonomously (article 123 (2) of the Act on Higher Education, which indicates the last day of the semester, (article 23 (2) of the Teacher's Charter, which indicates the last day of a school year, the last day of the semester or the last day of the month – depending on the causes of termination).

3.3.2.11. The principle of temporal restrictions on termination of a contract of employment without notice

Pursuant to article 52 § 2 of the Labour Code, an employment relationship cannot be terminated without notice through the fault of the employee one month after the employer came to know of the circumstances justifying the termination of the contract. This applies also in the case of termination of a contract of employment without notice by an employee, by a reference to article 52 § 2

[301] *D. Dörre-Nowak*, [in:] *K.W. Baran* (ed.) Prawo pracy… *[Labour Law…]*, p. 223; it should also be noted that the provisions of the Civil Code governing expiration of time-limits will apply, under article 300 of the Labour Code, to the lapse of the 3-days' time-limit.

of the Labour Code. As noted by the Supreme Court, in the event of continuous violation of employee duties, the period laid down in article 52 § 2 starts running from the last of the events which are component parts of this behaviour[302].

Legal theorists argue that this time-limit is preclusive, which means that after its expiration a party to an employment relationship cannot terminate the employment contract with the employee due to a specific circumstance, and it is not possible for the court to reinstate the time-limit, even if it is functionally justified[303]. The causes of termination of an employment relationship under article 52 § 1 (1) of the Labour Code have no legal importance upon the lapse of the time-limit laid down in article 52 § 2 of the Labour Code[304].

In personal terms, it is the employer or a person authorized to make statements of termination of employment who should have the information on the circumstances justifying the termination[305].

The justification for the so formulated principle of termination of a contract of employment without notice is that it prevents the state of unrestricted period of keeping the employee uncertain as to whether the contract can be terminated with immediate effect or not.

3.4. Principles of liability for breach of workplace order, policies or procedures (*odpowiedzialność porządkowa*)

K.W. Baran

In the Polish labour law system, an employer may impose on an employee one of the three following penalties for breach of workplace order, policies or procedures *(kary porządkowe):*

- warning *(upomnienie),*
- reprimand *(nagana),*
- pecuniary penalty *(kara pieniężna).*

[302] Judgment of the Supreme Court of 19 December 1997, I PKN 443/97, OSNAPiUS 1998, No. 21, item 631.

[303] *K.W. Baran*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 375; see also judgment of the Supreme Court of 26 November 2002, I PKN 587/01 (available at Legalis Database).

[304] Judgment of the Supreme Court of 26 November 2002, I PKN 587/01(available at Legalis Database).

[305] Judgment of the Supreme Court of 13 April 2000, I PKN 604/99, OSNP 2001, No. 19, item 577.

The employees' liability for breach of workplace order, policies or procedures[306] is normative in such sense that a source of sanctions is not the will of the parties to an employment relationship, but statutory provisions included in the Labour Code (articles 108–113). In principle, these norms are mandatory, although it is possible to introduce regulations that are more favourable to an employee (e.g. in work rules or in collective agreements).

The system of penalties covers all employees, regardless of the basis of employment. Therefore, the penalties may be imposed not only on persons employed under a contract of employment but also those performing work under nomination, appointment or even election. A penalty for breach of workplace order, policies or procedures may be imposed by the employer also on persons employed under fixed-term contracts, temporary agency workers and tele-workers.

Under article 108 § 1 of the Labour Code, non-compliance by an employee with the established organisation and order in the work process, occupational health and safety regulations, fire regulations, as well as the accepted method of confirmation of arrival and presence at work and excusing absences from work may result in imposition by the employer of warning or reprimand. On the other hand, non-compliance by an employee with the OHS and fire safety regulations, departure from work without excuse, showing up at work intoxicated or drinking alcohol at work may also result in pecuniary penalty (article 108 § 2 of the Labour Code). The statutory catalogue of penalties is strictly defined and it is not permissible to use other types of penalties. If such a situation occurs, an employer or a person acting on his behalf could be liable to a fine of 1,000 to 30,000 PLN for offences under article 281 (4) of the Criminal Code.

The general premise of employee's liability for breach of workplace order, policies or procedures [307], next to fault [308], is the unlawfulness[309] of his actions

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[306] See a judgment of The Supreme Court of 27 March 2001, I PKN 564/99 OSNP 2001, No. 16, item 514.

See: *E. Staszewska*, Odpowiedzialność pracownicza *[Employee's liability]*, Warsaw 2013, *passim*; *M.T. Romer*, Odpowiedzialność porządkowa pracowników *[Liability of workers for breach of workplace order, policies or procedures]*, Pr. Pracy 2004, No. 9, p. 17 ff.; *Z. Góral*, Pracownicza odpowiedzialność porządkowa *[Liability of Workers for Breach of Workplace Order, Policies or Procedures]*, Łódź 1987, *passim*.

[307] See *R. Sadlik*, Odpowiedzialność materialna i porządkowa pracowników *[Employee's Financial Liability and Liability for Breach of Workplace Order, Policies or Procedures]*, Gdańsk 2008, p. 91 ff.

[308] See *W. Patulski*, O pracowniczej odpowiedzialności porządkowej *[Employee's liability for breach of workplace order, policies or procedures]*, [in:] *A. Patulski*, *K. Walczak* (eds.), Jedność w różnorodności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu *[Unity in Diversity. Studies of Labour Law, Social Security and Social Policy. A Jubilee Book Dedicated to Professor Wojciech Muszalski]*, Warsaw 2009.

[309] See *W. Sanetra*, Kilka uwag o pojęciu odpowiedzialności w prawie pracy *[Several remarks on liability under the labour law]*, PiZS 2007, No. 11, p. 6 ff.

or omissions described in article 108 of the Labour Code. On the contrary,- this means that other violations of employee's duties cannot be sanctioned by such penalties. The premises laid down in article 108 of the Labour Code cannot be interpreted extensively to include actions which are not expressly prescribed by them. Therefore, an employer must not impose penalties which are only similar to those described in article 108 § 1 and 2 of the Labour Code.

In the Polish legal system the penalties for breach of workplace order, policies or procedures may be either non-financial (relating to honour) or financial (pecuniary penalties). The latter can be imposed for one breach, and for each day of unexcused absence, it cannot be higher than one-day employee's remuneration, and the penalties cannot exceed in total the tenth part of the remuneration payable to the employee. It must be noted that an employer is not obligated to gradation of the penalties[310]. This means that he can immediately impose a penalty which is proportionate to the breach. It should be appropriately selected to play both disciplinary and educational functions. In particular, account should be taken of the degree of fault and the type of breach of employee's duties. The previous attitude of an employee to work is of secondary importance. In its judgment of 1 July 1999, I PKN 86/99[311] the Supreme Court rightly held that imposition of a reprimand is justified even in the case of a minor degree of fault.

De lege lata, accumulation of penalties for one breach is unacceptable. This applies in particular to imposition at the same time of a non-financial penalty (such as reprimand) and a pecuniary penalty.

Imposition on an employee of a penalty for breach of workplace order, policies or procedures does not preclude application of other legal consequences[312]. By this I mean termination of a contract of employment and even termination of the contract without notice if the employee's reprehensible behaviour can be classified as a serious breach of his basic duties.

In the Polish labour law system, the procedure for imposing penalties for breach of workplace order, policies or procedures is regulated by statutory provisions included in the Labour Code. However, it is possible to make it clearer and more precise in in-house documents, such as work regulations or a collective agreement, provided that it is beneficial to the employee. The time-limits which restrict imposition of the penalty by the employer are laid down in article 109 of the Labour Code, underwhich a penalty cannot be imposed upon expiration of 2 weeks from the date when the employer came to know of the breach of duty and 3 months after the breach was committed. This means that the penalty

[310] Judgment of the Supreme Court of 10 December 2012, I PKN 147/12.
[311] OSNP 200, No. 18, item 683.
[312] Judgment of the Supreme Court of 18 February 2015, I PK 171/14.

cannot be imposed upon expiration of three months after the breach was committed even if the 2 weeks from the date when the employer came to know of the breach have not yet elapsed.

The two-week period starts running only from the date when the employer (or a person acting on his behalf) has obtained specific information, both personal, i.e. which employee committed the offence, and material, i.e. what specific breach of duties was committed.

If the employee's behaviour is continuous, the two-week period is counted from the date of committing the last act, and if it is permanent – from the date when the unlawfulness ceased.

Under article 109 § 2 of the Labour Code, the penalty may be imposed on an employee only after he has been heard[313]. This means that an employee must be heard before a decision on penalty is made. The hearing should be oral, and therefore also by telephone or other telecommunication devices. However, the case-law of the Supreme Court[314] allows for a written form of explanations. If, due to absence from work, the employee cannot be heard, the two-week period does not start running, and the started period is suspended until the date when the employee appears at work. The inability to hear an employee does not produce any legal consequences in relation to the three-month period[315]. The laws in force do not require that a person who heard the employee should actually decide on the imposition of a penalty. The person entitled to impose a penalty may authorize another employee (e.g. a direct superior) to hear the employee concerned. The employer may, however, apply the penalties without first hearing the employee when the latter waived the right to give oral explanations at a specific time and place.

As a result, the penalty procedure consists of three stages:
- first: hearing the employee,
- second: a decision on imposition of the penalty,
- third: notification of the employee on imposition of the penalty.

The employer should notify the employee in writing of the penalty imposed, indicating the type of violation of employee's duties and the date of committing the violation. In addition, the employer should inform him about the right to file an opposition and the date for its submission. From the date of the notification, the employee has 7 days to file an opposition. It is a form of restriction of the right to a fair trial in the Polish legal system. Only after the opposition has been considered by the employer, the employee may refer the dispute to court.

[313] Judgment of a Regional Court in Koszalin, IV P4/12.
[314] Judgment of the Supreme Court of 16 October 1999, I PKN 114/99, OSNP 2000, 17, item 644.
[315] Judgment of the Supreme Court of 16 June 1999, I PKN 114/99.

If the employee's letter informing on the imposition of the penalty is divided into operative part and reasoning specifying why such penalty has been imposed, then the "type of breach of employee's duties" required under article 110 of the Labour Code, can only be the breach of duties specified in the reasoning which clearly constitutes the subject of the employer's complaint and the premise for applying the penalty[316].

Employee's objection submitted to the employer may be based on the alleged breach of both substantive law and breach of procedure. A specific violation of substantive law may, for example, consist in the application of a penalty not provided for in the Labour Code, or a pecuniary penalty exceeding the limits specified in article 108 § 3 of the Labour Code. On the other hand, a procedural error may consist in failure to hear the employee or failure to comply with the required written form of the notification.

The statutory time-limit of 7 days for filing an opposition is a final time-limit. Therefore, neither article 168 of the Code of Civil Procedure nor article 265 § 1 of the Labour Code can be the basis for its reinstatement. The latter provision is a specific one, therefore, according to the *exceptiones non sunt excendendae* formula, it cannot be interpreted extensively.

In the case of failure to comply with the time-limit, the employer may reject the opposition. However, he may allow the opposition filed after the deadline, if it was obviously justified by the relevant circumstances of the case, and punishing the employee would be grossly unfair.

Filing an opposition against the imposed penalty does not suspend its enforcement. In the case of a pecuniary penalty, only if the opposition against the penalty is allowed the employer must repay to the employee the equivalent of such penalty.

A decision on admission or refusal of the opposition is taken by the employer following consideration of an opinion of a company trade union organisation. Such opinion is not binding upon the employer. However, he must each time refer the matter to a company trade union organisation. Provisions of the Labour Code do not specify the time-limit in which the trade union should formulate its position[317]. In my opinion this should happen immediately, which means as soon as possible in the normal course of work of the trade union organization. In this context, an unjustified delay in the formulation of a position should be quali-

[316] Judgment of the Supreme Court of 17 February 1999, I PKN 580/98, OSNAP 2000, No. 7, item 264.

[317] The Labour Code does not specify the form in which the opinion of a trade union should be expressed, which means that it does not have to be written. It may also be expressed by e-mail, text message or telephone. However, teleological reasons, and evidentiary reasons, in particular, speak for written form according to a universal directive *verba volant, scripta manent*.

fied as abuse of rights by trade unionists, which cannot produce negative consequences for the employer. Some legal scholars argue that because of the wording of article 30 (2^1) of the Act on Trade Unions, failure to provide the relevant information by a trade union within 5 days of receiving the request exempts the employer from the obligation to cooperate with this organization[318]. The fact that no company trade union organization operates in the establishment concerned does not absolve the employer from the obligation to consider – before deciding on whether to allow the opposition or not (article 112 (1) second sentence of the Labour Code) – the opinion of an inter-company trade union organization representing the employee (article 34 of the Act of 23 May 1991 on Trade Unions, Journal of Laws [Dz.U] No. 55, item 243 as amended)[319].

Following consideration of the opinion of the company trade union organisation, the employer decides as to whether allow the employee's opposition or reject it. The employer does not have to inform the employee that his opposition was allowed. The obligation to inform exists only where the opposition is rejected[320]. In such case the employee may, within 14 days, request the labour court to annul the penalty imposed on the employee. Filing a statement of claim does not suspend enforcement of the penalty.

A claim to set aside the penalty is recognized by a labour court in a procedure laid down in articles 459–477^7 of the Code of Civil Procedure. During the proceedings, both the legality and the legitimacy of the imposed penalty may be subject to control. If the court establishes such irregularities, the penalty will be set aside. After the judgment becomes final and valid, the employer must repay to the employee the equivalent of the amount of the pecuniary penalty imposed on him.

After one year of faultless work the penalty is considered null and void. Therefore, it is a specific form of expungement. It also applies if the opposition filed by the employee is allowed or where the labour court annuls the penalty.

An important aspect relating to the rules of punishing an employee is the issue of violation of his personal rights when imposing the penalties for breach of workplace order, policies or procedures[321]. Such a situation may occur if the

[318] *M.T. Romer*, Prawo pracy. Komentarz *[The Labour Law. A Commentary]*, Warsaw 2010, p. 774.

[319] Judgment of the Supreme Court of 5 November 1998, I PKN 22/98, OSNAPiUS 1999, No. 24, item 756.

[320] The act does not have to advise on the right to appeal to the labor court.

[321] See *M. Dyczkowski*, W sprawie ochrony dóbr osobistych pracowników *[Protection of personality rights of workers]*, PiZS 2001, No. 5, p. 11 ff.; *D. Dörre-Nowak*, Naruszenie czci i godności pracownika w związku z nałożeniem kary porządkowej *[Violation of worker's honour and dignity by imposition of a penalty for breach of workplace order, policies or procedures]*, [in:] *A. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej *[Studies on Labour Law and Social Policy]*, Kraków 2003–2004, p. 209 ff.

employer, in the context of the punishment procedure, unjustly implies the employee's unethical behaviour. In such case the employee may file a claim for the protection of his personality rights. Under article 24 § 1 of the Civil Code, personality rights are violated only where an action of the other party is unlawful. The imposition of the penalty alone cannot be considered an unlawful action of the employer since article 108 of the Labour Code granted such right to the latter. Imposition of the penalty is not unlawful even where the disciplinary penalty was annulled as a result of the appeal[322]. Therefore, wrong imposition of the penalty does not mean that there has been a violation of the employee's personal rights. Only the assessment of the circumstances of the employer's decision may prove such violation.

3.5. Principles governing annual leave

J. Żołyński

3.5.1. Introduction

Historically, labour law has its roots in the civil law (from a broader perspective – in the institutions which have their origins in the Roman law)[323]. The development of the industrial relations, in particular in the second half of the 19th century, enforced some institutional developments on the grounds of employer-employee relations, which reflected the broadly understood human needs, among them the need for paid, temporary break from work. The necessity to introduce a temporary, paid break from work normatively "forced" the acceptance that the employee's rest time belongs in the private sphere of an individual and must become a value protected by the highest legal act in force in Poland. As regards the principles governing annual leave, it should be noted that in the normative sense the source of this entitlement must be first of all sought in the generally applicable laws and in the fundamental legal act governing not only the political and economic system but also the social and legal system – the Constitution of the

[322] Judgment of the Court of Appeal in Warsaw of 2 December 1999, III APa 53/99, OSA 2000, No. 7–8, item 35.

[323] See for example: *T. Zieliński*, Zarys systemu prawa pracy. Część I. Ogólna *[An Outline of the System of Labour Law. Part I. General]*, Warsaw–Kraków 1986, p. 65 ff.

Republic of Poland of 1997[324]. Under article 66 (2) of the Constitution, an employee shall have the right to statutory public holidays and to annual paid leaves and the maximum standards of working time are defined by law. Therefore, the Constitution, in axiological terms, sets out the right of an individual to rest, to family life, development of one's passions and interests or maintaining health enabling fulfilment of non-professional roles, pursued among others by the institution of the annual leave.

In the study of the principles governing annual leave, one cannot rely only on the normative aspect. Namely, it should be examined in the axiological aspect, in the sphere of the interests which should be protected by these principles, whether the protection is absolute or in some circumstances limited or even eliminated. Such opinion is justified by the fact that, in conceptual and structural terms, this right has no intrinsic and exclusive character but it belongs in a broader category that is the right to rest. It includes the standards relating to only some sphere in which an employee is released from the obligation to perform activity in a broad sense, which serves the employer's needs. However, the legislator did not distinguish the intrinsic principle of the right to the annual leave but included it in a broader principle of the right to rest. Consequently, the principle of the right to annual leave, more precisely a set of principles governing the annual leave, falls within the scope of the principle of the right to rest; they are its sub-category.

3.5.2. The general principle of the employee's right to rest

The provisions of labour law, developing the constitutional principle in the Labour Code, formulate the general principle – directive[325]. Under article 14 of the Labour Code "an employee shall have the right to rest, which is guaranteed by the provisions on working time, non-working days and annual leaves". Given the above, it is reasonable to say that the right to rest has common characteristics, i.e. article 14 of the Labour Code emphasizes the normative dependence that amounts to the employer's obligation to absolutely comply with working time

[324] The Constitution of the Republic of Poland of 2 April 1997 adopted by the National Assembly on 2 April 1997, Journal of Laws of 1997 No. 78, item 483, as amended.

[325] An extensive analysis of the above-mentioned principle was presented in the monograph by *Z. Góral*, O kodeksowym katalogu zasad indywidualnego prawa pracy *[The Labour Code Catalogue of the Principles of Individual Labour Law],* Warsaw 2011. See also: *G. Góral*, Zasada prawa do wypoczynku *[The principle of the right to rest]*, [in:] *K.W. Baran* (ed.), Zarys systemu prawa pracy. T. 1, Część ogólna prawa pracy *[An Outline of the System of Labour Law. Vol. 5. A General Part of the Labour Law]*, Warsaw 2010, p. 644 ff; *P. Prusinowski*, Komentarz do artykułu 14 *[Commentary on article 14]*, [in:] *J. Żołyński* (ed.), Kodeks Pracy. Komentarz *[The Labour Code. A Commentary]*, Gdańsk 2017; or *W. Perdeus*, Komentarz do artykułu 14 *[Commentary on article 14]*, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, Warsaw 2012.

standards applicable to a particular employee, standards of the daily and weekly rest and non-working days specified in the legislation and the standards of exercise of the annual leave entitlements by the employee. On the other hand, the employer cannot absolutely interfere in the way an employee uses his free time. It is a unidirectional norm. The employer, in the light of the public law *ius cogens* regulations, cannot modify them, based on the mutual agreement, i.e. between the employer and the employee, and they also cannot be the subject of a collective consent between trade unions and the employer (in a collective labour agreement, work rules or in any other separate agreement).

As a consequence, any entity employing workers (any entity which enjoys the employer status, regardless of its organizational form or its subordination towards another entity within any complex structures, so-called dependent employers, quasi-employers and dominant entities)[326] cannot:

- oppose performance by the employee, in such a period, of work for another employer;
- oppose performance by the employee of duties within his business activity or under civil-law contracts;
- oppose any other use by the employee of the annual leave contrary to its intended purpose i.e. when an employee undertakes actions which are not aimed at resting (e.g. participates in professional or extreme sport tournaments; marathon).

As can be seen from the above, the basic function of the right to rest is to create the conditions that enable an employee to revive both physically and mentally.

Undoubtedly, this sphere of the right to rest belongs in the category of broadly understood personality rights of an individual. The essence of the personality rights is that no third party can interfere with this sphere of any person's life. This entitlement falls within the category of freedom. The freedom is understood in such a way that it correlates only with the employee and his needs, which are in no way related to the work he performs. The legislature left it to the employee to care for the physical and mental recovery necessary to perform work. Obviously, this entitlement granted to every employee is not absolute in such sense that the period of employee's leave and in particular the period of the employee's activity during the annual leave, cannot lead to decreasing his real ability to per-

[326] The concept of "dominant" and dependent employer is derived from the concept (model) of the so-called managerial meaning of the employer, adopted in the Polish Labour Code, which is different from the "ownership" concept. Under the Polish laws, an employer means every entity, even the one without the legal personality or a natural person who has the ability to employ. When referring to the concept of the dominant and dependent employer, see for example *Z. Kubot*, Odcinkowa zdolność pracodawcza spółki dominującej w grupie kapitałowej *[Serial Employment Ability of a Parent Company in the Capital Group]*, PiZS 2014, No. 9.

form his work later, except for the natural circumstances similar to force majeure (accidents, road collision, etc.). It can be concluded that the employee's freedom as to the use of the time for rest is limited to such extent that after it ends, the employee should be able to take up work, given that the financial means to cover the sickness benefits during employee's inability to work are generally taken from the public finances.

The freedom of the employee is limited in such a way that, for example, excessive sickness leave after the annual leave entitles the employer to terminate the contract of employment with immediate effect (upon the end of the sickness benefit period, which generally amounts to 182 days).

However, it is unacceptable to impose any sanction if an employee uses his free time in such a way that it does not ensure proper rest[327]. It should also be noted that if an employee is employed with another employer during the time which should be devoted to holiday leave (or generally to rest), he should take into account that he might be evaluated as less efficient than others who actually devote this time to rest[328] and at the same time may:

– receive lower bonuses paid out by the employer or
– it may be considered a positive circumstance in the case where the employment termination procedure has been started within collective redundancies.

The Supreme Court presented a view that, in principle, the employee on annual leave is not obliged to receive e-mails (see further below). Therefore, the employer is not entitled, under the regulations in force, to impose on the employee any sanctions for using the time outside work in a way that it does not guarantee rest. It imposes obligations on the employer and grants rights (not the obligation) to the employee.

The concept of the annual leave principles, as a broadly recognized right to rest, is not understood homogenously. It exists in various forms and has many meanings resulting mainly from the notion "leave" as such and its purpose (e.g. holiday leave, unpaid leave, maternity leave, so called "compassionate leave", leave granted only to certain professions or convalescent leave regulated by the collective labour agreements for some professions). Generally, the leave of absence means the employee's entitlement enabling him not to perform work temporarily, pursuant to the regulations governing a particular type of leave. Not all types of leaves of absence will be discussed here. We will focus on two basic types of leave, regulated by the Labour Code – the annual leave *(urlop wypoczynkowy)* and the unpaid leave *(urlop bezpłatny)*.

[327] *P. Prusinowski*, Komentarz do artykułu 14… *[Commentary on article 14….]*, p. 82.
[328] *A.M. Świątkowski*, Kodeks pracy… *[The Labour Code…]*, Warsaw 2010, p. 64.

As mentioned before, the right to rest may be exercised in different ways and does not solely mean the annual leave entitlement (holiday leave). The principle of the right to rest takes, among others, the following forms:

A. Annual leave *(urlop wypoczynkowy);*
B. Non-working days. Establishing the non-working days is of crucial importance in terms of the employee's rest. In principle, the employee performs his work for 5 days a week, and Sundays and public holidays are days off under the Act of 18 January 1951 on Public Holidays[329]. It should be emphasized that work on Sundays and public holidays has a specific nature. It means that the work may be performed 5 days a week, i.e. from Monday to Friday or e.g. from Tuesday to Saturday, or from Monday to Saturday yet with Wednesday being a day off. **Saturday is not a non-working day according to law;**
C. Proper regulation of the working time, in terms of its length in a week. The working time for all the employees cannot exceed on average 8 hours a day and 40 hours in a 5-day working week in the adopted reference period not exceeding 4 months (article 129 § 1 of the Labour Code). The adoption of the notion "on average" 40 hours a week means that in some weeks of the reference period work may be performed in excess of 40 hours and in other weeks it may be less than 40 hours, however the final balance should make the "average" of 40 hours. Parties to an employment relationship may reduce the number of working hours. Such reduction may be stipulated in a contract of employment as well as in a collective agreement. The following aspects are also connected with the proper regulation of the working time:
   – statutory limit of the overtime and the conditions for overtime work;
   – breaks during work, included in the working time (e.g. breakfast break).

A separate issue is an obligation imposed on every employer to keep the records of working time, which enables monitoring the observance of the working time.

According to the above, *de facto* and *de iure,* the list contained in article 14 of the Labour Code emphasizes the normative dependence. This provision refers to the working time, days off and annual leaves and the right to rest. It refers only to an employee and his needs, which are not correlated with the performance of work. Therefore, as regards the right to rest, the physical and mental health of the employee is of crucial importance. It is also worth noting that it does not correlate with the principles laid down in article 15 of the Labour Code[330].

[329] Journal of Laws *[Dz.U.]* No. 4, item 28, as amended.

[330] *P. Prusinowski*, Komentarz do artykułu 14 *[Commentary to Article 14]*, [in:] *J. Żołyński* (ed.), Kodeks pracy. Komentarz, Gdańsk 2017, p. 82.

3.5.3. The principle of the right to annual leave

First, it should be noted that annual (holiday) leave is the basic type of leave. When referring to the leave, we should bear in mind the leave in this particular sense. The physiological condition of any individual and the character of the performed job constituted grounds for introducing it into the labour law. It appeared necessary to provide an employee with the possibility to "get away" from his job duties to a larger extent and offer him a break that will not lead to losing salary for the period of non-performance of work.

The essence of it is that this period does not affect any other events relating to employment; in this sense it is autonomous, does not upgrade or downgrade any of the entitlements of the employee. Therefore, in the light of the provisions of the Labour Code, the annual leave is an annual, continuous and paid break in performance of work, granted by law.

The principle of the right to annual leave is a general directive, which *de facto* includes several sub-rules:

1. guarantee granted by law,
2. obligatory nature of annual leave,
3. inalienability,
4. payment,
5. taking annual leave,
6. continuity,
7. periodicity,
8. equality of the annual leave entitlements,
9. proportionality,
10. compensating damages in case of cancellation of the annual leave,
11. hourly settlements,
12. prohibition to delay the use of annual leave.

3.5.3.1. The right to annual leave

The basis of the right to annual leave should be sought in the constitutional provisions. Article 66 of the Constitution of the Republic of Poland uses the term "right to annual leave" and "statutory". The terms "the right to annual leave" or "statutory leave" mean that they were adopted by the national legislature and that some legal acts function in the legal system which provide the employee with such a guarantee. The above mentioned constitutional provision was developed in article 14 of the Labour Code. Moreover, it should be noted that the Labour Code is a legal act which specifies the mutual rights and obligations of the employee and the employer. Therefore it refers to all employers and employees, i.e. persons employed under a contract of employment, appointment, elec-

tion, nomination and/or a cooperative contract of employment. Since the Labour Code specifies the rights and obligations of the parties to employment and the provisions of this legal act granted such a right to the employee, the employer is obliged to comply with this right. If the employer refuses to do so, the employee may request enforcement of the right to annual leave.

The right to annual leave is embedded in the constitutional norm. It is guaranteed not only by the provisions of the Labour Code. As regards some professions, it is normalized by separate laws governing employment of e.g. teachers[331], academic employees[332], judges[333] or prosecutors[334]. In such case special provisions apply (according to the principle *lex speciali derogat legi generali*), and the Labour Code is applied in the alternative (in matters not regulated by these provisions, under article 5 of the Labour Code). It should also be noted that because of the generally semi-imperative nature of the provisions of labour law, the right to special, additional entitlements such as the annual leave are regulated by separate sources of labour law, generally by collective agreements.

3.5.3.2. The obligation to grant annual leave

Under article 152 of the Labour Code, the annual leave entitlement is absolutely obligatory and is not subject to any directive acts of the parties to an employment relationship (unless favourable to the employee, as mentioned before). Upon accession of Poland to the European Union, the regulations adopted by this organization need to be respected. Therefore, it should be borne in mind that under article 7 (1) of the **Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time**[335]**,** Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice[336]. Therefore, under the Polish laws, the employer is obliged to grant annual leave to the employee in every calendar year, in which the employee obtained such entitlement (article 161 of the Labour Code).

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[331] Act of 26 January 1982 – Teacher's Charter *[Karta Nauczyciela],* consolidated text, Journal of Laws *[Dz.U.]* of 2017, item 1189.

[332] Act of 27 July 2005 – The Act on Higher Education *[Prawo o szkolnictwie wyższym],* consolided text, Journal of Laws *[Dz.U.]* of 2016, item 1842, as amended.

[333] Act of 27 July 2001 – The Act on the System of Ordinary Courts *[Prawo o ustroju sądów powszechnych]*, consolidated text, Journal of Laws *[Dz.U.]* of 2016, item 2062, as amended.

[334] Act of 28 January 2016 – The Act on the Public Prosecution Service *[Ustawa o prokuraturze],* Journal of Laws of 2016, item 177.

[335] Official Journal of the European Union L 1998, No. 307, item 18.

[336] In Poland the basic annual leave amounts to 20 or 26 working days (article 154 §1 of the Labour Code).

The essence of granting annual leave is that the employee obtains the entitlement to it, regardless of the basis of employment and regardless of his working time. If an employee is employed on a part-time basis, then the amount of the annual leave is calculated proportionately to the amount of the working time. The basis for calculation is the number of days of the annual leave in full-time employment (article 154 § 2 of the Labour Code). Refusal to grant annual leave to the employee or unjustified reduction of its length constitutes an offence against the employee's rights (article 282 § 1 (2) of the Labour Code).

3.5.3.3. Annual leave as an unalienable (personal) right

In the light of the Polish labour law, annual leave is a personal, unalienable right. It is only granted to a particular employee who obtained the entitlement to it. **Under no circumstances and in no way** may an employee waive or transfer this right to another employee. Theoretically, the employee may lose the entitlement to annual leave (so-called outstanding leave) but **only and exclusively** in a situation when the entitlement to it expired. However, in fact this should not occur since under article 161 of the Labour Code annual leave should be used in a particular calendar year, not later than by the end of the 3rd quarter of the following year. It must be stressed though that if an employee did not use the annual leave in a particular year and the outstanding leave arose, such an employee is not entitled to use the leave arbitrarily[337]. The conclusion is that not granting annual leave to the employee may lead to negative consequences for the employer such as fines charged by the labour inspector for an offence against employee's rights (article 282 § 1 (2) of the Labour Code).

Therefore, accumulating the annual leave by the employee, even if the employer consented to it, should not occur and as such constitutes violation of labour law. Despite the fact that the annual leave is an unalienable employee's right, in some situations the employer may decide when it must be used (these issues are discussed in section "Taking the annual leave").

3.5.3.4. Payment for the annual leave

The annual leave is paid. It means that although the employee in fact does not perform work, he is entitled to receive remuneration as if he was working. The above-mentioned regulation follows from article 172 of the Labour Code. Calculation of the amount payable is more complicated when the employee, apart from the fixed monthly salary, receives variable components of remuneration. These variable components are calculated as an average of 3 months preceding

[337] Judgment of the Supreme Court of 5 December 2000, I PKN 121/00, OSNP 2002, No. 15, item 353.

the annual leave and exceptionally the average may be calculated for a 12-month period[338].

The Labour Code does not regulate the situations the occurrence of which allows employees to receive payment for annual leave rather than the annual leave itself. It should be borne in mind though that the payment for the unused leave is **exceptional** and it is a statutory alternative payment *in lieu* of the annual leave. Under article 171 § 1 of the Labour Code, the payment for unused annual leave can be made **only** in the case of termination or expiration of a contract of employment. Therefore such payment can be made only in the situations specified in article 171 of the Labour Code. The compensation for the unused annual leave (both outstanding or the current one) is paid upon termination or expiration of any contract of employment[339].

In the legal sense, the payment *in lieu of* the unused annual leave is not of compensatory nature since the basis for its payment is not damage but the occurrence of a situation specified by law. Thus, the provisions of the Civil Code which refer to compensation for the damage will not be applicable. At this point, article 171 § 3 of the Labour Code should be mentioned. Pursuant to this provision, the employer is not obliged to make the payment *in lieu of* the annual leave in situations specified in article 171 § 1 of the Labour Code, i.e. if the parties to an employment relationship decide that the annual leave will be used within the term of the successive contract of employment concluded with the same employer directly after the previous contract has been terminated or expired.

3.5.3.5. Taking annual leave

Given the function of annual leave which is both mental and physical recovery, the annual leave entitlement of an employee should be exercised absolutely and unquestionably according to its purpose, in the form of non-working days. Thus the employee cannot be obliged to remain ready to perform work during the annual leave. The employer may not force the employee to perform work during the holiday leave as it would be contrary to the essence of the annual leave that is designed for uninterrupted rest. Nevertheless, if a manager, of his own free

[338] The method of calculation is more complicated and is regulated by the Regulation of the Minister of Labour and Social Policy of 8 January 1997 on detailed rules for granting annual leave, determination and payment of remuneration for the annual leave and financial compensation for unused annual leave *[rozporządzenie w sprawie szczegółowych zasad udzielania urlopu wypoczynkowego, ustalania i wypłacania wynagrodzenia za czas urlopu oraz ekwiwalentu pieniężnego za urlop]*, Journal of Laws No. 2, item 14, as amended.

[339] In the case of the employee's death the payment *in lieu of* the annual leave is due in equal parts to the spouse and other family members who meet the requirements to receive the survivor's benefits; a resolution of the Supreme Court of 13 May 1994, I PZP 23/94; OSNAPiUP 1994, No. 5, item 81.

will, performs duties on behalf of his employer during the annual leave as defined in article 128 § 2 (2) of the Labour Code, i.e. without any order or acceptance from the superior and without any clear necessity – it does not negate the annual leave granted by the employer (article 152 of the Labour Code)[340].

The payment *in lieu of* the unused annual leave as mentioned above **is of special nature**. However the exercise of the right to annual leave by the employee depends on coordinating it with the employer. It is generally accepted by the judicature that an employee is not entitled to independently specify the date of the annual leave. It should be noted that even in the case of temporary absence of the superiors authorized to grant annual leave to the employee, such employee cannot commence the leave without prior consent from the employer[341]. The employee is of course the decision maker as to his entitlement. However he cannot make a decision about the leave freely, without considering the employer's interest. In principle, it is the purpose of the annual leave schedule, which should include the employee's proposals and at the same time enable the employer to maintain the regular mode of work (article 163 of the Labour Code). The employer in the annual leave schedule should also take into account such employee's suggestions as: dates of the annual leave, its possible division into parts, etc. The 4-days' on-demand leave *(urlop na żądanie)* is not included in the annual leave schedule (article 163 § 1 of the Labour Code).

The purpose of preparation of the annual leave schedule by the employer is not only organizational but also legal. This schedule is a form of a mutual, written obligation of the parties to an employment relationship as to the time and date of the employee's annual leave. The arrangements set out in the schedule are in principle binding upon both parties and the employee may start annual leave at the agreed time. However, it does not mean that the employee can start it arbitrarily at the agreed time. Under article 164 § 2 of the Labour Code, the employer, due to special company needs, and if the employee's absence might lead to serious interruption of work, may postpone the scheduled leave. Thus the employee, before taking annual leave, should submit a respective request to use annual leave and should have it authorized by the employer (article 163 § 1^1 of the Labour Code). The employer is not obliged to agree upon the annual leave schedule with the company trade unions in the following situations: the company trade union organization agreed to that or there is no trade union organization in the company.

[340] Judgment of the Supreme Court of 23 March 2017, I PK 130/16, available at http://sn.pl/sites/orzecznictwo/Orzeczenia3/I PK 130–16-1.

[341] Judgment of the Supreme Court of 16 December 2008, I PK 88/08, OSNP 2010, No. 11–12, item 137.

In such a situation the annual leave schedule is discussed and agreed on by the employee and the employer.

In order to avoid the situation when an employee is on several months notice and does not perform work, the provisions of the Labour Code (article 167^1 of the Labour Code) provide that during the notice period the use of the annual leave is not dependent on the employee's consent. Therefore, the employer may during that period grant the annual leave to the employee in whole, both the current and the outstanding one. Such a leave may also be given in a situation when the employer releases the employee from the obligation to perform work[342]. Yet it cannot be given to the employee who is not able to work (e.g. who is on sick leave) even if the employee agrees to that[343].

3.5.3.6. The entitlement to the uninterrupted annual leave

The general rule[344] **regarding the use of the annual leave is that the leave is uninterrupted.** Therefore, in principle, the annual leave should be granted in whole, and can be divided only in situations prescribed by law. This follows from article 152 § 1 of the Labour Code in connection with article 162 of the Labour Code which provides that "upon employee's request, the annual leave may be divided into parts. At least one part of the annual leave should cover one period of 14 calendar days".

Provisions of the Labour Code anticipated the situations when the employee may not start annual leave within the planned period. Under article 165 of the Labour Code, if an employee cannot commence the annual leave due to reasons justifying his absence from work, and in particular because of:

- temporary incapacity for work as a result of illness;
- isolation in connection with communicable disease;
- military training or military service for a period of up to 3 months;
- maternity leave;

the employer is obliged to postpone the leave to the later period. It should also be noted that the statutory annual leave is interrupted in a situation where a female employee gives birth to a child during the annual leave. In such a case the employee uses the maternity leave and after it ends she may request the annual leave. **The request is binding upon the employer** (article 163 § 3 of the Labour Code).

[342] Judgment of the Supreme Court of 7 February 2001, I PKN 240/00, OSNP of 2002, No. 21, item 518.

[343] Judgment of the Supreme Court of 10 November 1999, I PKN 350/99, OSNP of 2001, No. 6, item 198.

[344] I intentionally omit the differentiation between the concept of "rule" and "principle" which is made, *inter alia,* by R. Dworkin, as it exceeds the framework of the article.

Under article 166 of the Labour Code, certain situations may interrupt the continuity of the annual leave. These include:
– temporary incapacity to work as a result of illness;
– isolation in connection with communicable disease;
– military training or military service for a period of up to 3 months;
– maternity leave.

In the case of occurrence of such an event, the leave is interrupted. The employee will continue it until the period for which it was granted ends. The employee may not on his own, without prior consent from the employer, prolong the annual leave for the unused period due to the above mentioned circumstances. One of the most common reasons for breaking the continuity of the annual leave is the employee's illness. Granting a part of (or even the whole) unused leave on a later date due to employee's illness applies only if the employee himself is ill. The illness of another family member does not interrupt the continuity of the annual leave. It should be noted that the basis for granting the annual leave on a later date is submission by the employee of a medical certificate. Therefore if an employee becomes ill during his annual leave and does not intend to take sick leave, such an employee has no obligation to submit this document to the employer[345].

It is worth noting that according to the case-law of the Supreme Court, the employer is not obliged to postpone the annual leave scheduled by the employee in order for him to exercise other, personal interests, e.g. to participate in a strike[346].

3.5.3.7. Equality of annual leave entitlements

A part of the special rules relating to the employee's annual leave entitlement is the equality of the annual leave entitlement. It means that employees who have the same period of employment, periods included in the occupational records and periods of education, obtain the same annual leave entitlement.

Under article 154 §1 of the Labour Code, the length of the annual leave is:
– 20 days, if the employee has been employed for less than 10 years,
– 26 days, if the employee has been employed for more than 10 years.

The periods of education which can be included in the job seniority (article 155 § 1 of the Labour Code) are as follows:
– basic vocational school or any other equivalent professional school – the period of education according to the curriculum, however not more than 3 years,

[345] Judgment of the Supreme Court of 6 February 1985, I PR 4/85, OSPiKA of 1986, No. 4, item 74.
[346] Judgment of the Supreme Court of 27 November 1997, I PKN 393/97, OSNIAPiUS of 1998, No. 17, item 511.

– secondary vocational school – the period of study according to the curriculum, however not more than 5 years,
– secondary vocational school for graduates of basic (equivalent) vocational schools – 5 years,
– general education secondary school – 4 years,
– post-secondary school – 6 years,
– college / university – 8 years.

The periods which the employer must qualify into the job seniority, that constitute the basis for calculation of the annual leave include:

1. the periods of receiving the unemployment benefits, scholarships for students during the study periods and job training;
2. the period of employment of Polish citizens abroad, if the contributions to the Labour Fund were paid;
3. the period of running one's own farm and working on the parent's or parents' in-law farm as specified in the Act of 20 July 1990 on the Inclusion of Periods of Work in an Individual Farm into Job Seniority (*ustawa o wliczaniu okresów pracy w indywidualnym gospodarstwie rolnym do pracowniczego stażu pracy)*[347];
4. the period of military service, regardless of when a person took up employment following the completion of such service;
5. the period of service in the Police, Office for State Protection *(UOP)*, Border Guard *(Straż Graniczna)*, State Fire Service *(Państwowa Straż pożarna),* professional military service;
6. the period of compensation for the shortened notice period;
7. the period of unemployment for which remuneration was granted, if the employee took up work as a result of reinstatement;
8. the period for which compensation was granted, where a contract of employment was terminated contrary to law.

The amendment of the Labour Code of 14 November 2003 changed the rules for granting annual leave. Under article 154^2 § 1 of the Labour Code, the annual leave is granted to the employee for the days which are his working days according to the working time schedule applicable to him, on an hourly basis reflecting the daily working time of this particular employee. Therefore the annual leave can be granted for Sundays and holidays if they are the working days for this particular employee.

3.5.3.8. Periodicity of annual leave

Annual leave is seasonal so one of its characteristics is periodicity. In principle, the periodicity of the annual leave means that the entitlement to it is granted

[347] Journal of Laws *[Dz.U.]* No. 54, item 310.

for every year of work at the beginning of a particular calendar year. A different situation occurs when it refers to an employee who starts his first job. The employee who takes up work for the first time in his life is granted this right **after the first month of work**. One twelfth of the annual leave the employee is entitled to is granted to him for every month of his work (article 153 of the Labour Code). It should be noted that in article 153 of the Labour Code "a month of work" is not "a calendar month". They often overlap. It happens when the employment is commenced at the beginning of a month. If the entitlement to the annual leave starts during the month, for example on 20 March, then the employee will obtain the annual leave entitlement on 19 April"[348].

It is also worth noting that the above presumption refers only to the first annual leave obtained by an employee employed for the first time. It means the period of being employed, not the actual performance of work. Therefore, the employee obtains the entitlement to his first annual leave if, for example, he took 3 monthssickness leave. The employee starting his first job will obtain the entitlement to the next annual leave on 1 January of the following calendar year, obviously if he is employed on that day (article 153 § 2 of the Labour Code). If an employee began his first job, for example, in June 2017, he will be entitled to partial annual leave of 6/12 of the full length which would be granted to him after

[348] The issue is more complicated, as there are completely opposite opinions presented. According to some of the authors, if the time of employment continues uninterruptedly for a month, then it should be classified according to article 112 of the Civil Code, i.e. from the day of commencement of work until the corresponding day the following month. If the employment was stopped, article 114 of the Civil Code will apply, i.e. the month will be classified after 30 days. According to a different opinion, article 114 of the Civil Code is an exclusive regulation of the Civil Code which should be applied when establishing the method of calculating the period indicated in article 153 § 1 of the Labour Code. Another solution is adopted in the case-law of the Supreme Court. On a number of occasions the Court expressed its views on the method of calculating the periods as to some entitlements to the annual leave, however the most unquestionable and clear opinion as to obtaining the entitlements to the annual leave was expressed in judgment of 19 December 1996 (I PKN 47/96, OSNAPiUS 1997, No. 17, item 310). It was agreed that the method of calculating the periods specified in article 112 of the Civil Code cannot be applied to the periods on which the employment rights depend, for example, the ones defined in article 153 of the Labour Code. In the reasoning the Supreme Court, referring to its previous opinions, indicated the necessity to calculate, in a manner specific for labour law, the periods related to the passing of the period of employment. They should be established while taking into account the common method of calculating the periods without reference to the rule included in the article 112 of the Civil Code. In practice it means that a month of employment passes as specified in article 153 § 1 of the Labour Code on the last day of the month if the employee started work on the first day of the calendar month or on the day in the next month which with its date precedes a day of commencing the employment, if it occurs during a calendar month (a month will pass on the 14 February if the employment started on 15 January); Study based on *A. Kosut*, Komentarz do artykułu 153, [in:] *K.W. Baran* (ed.), Kodeks pracy… *[The Labour Code…]*, p. 859, who cites the opinions of the particular authors.

a year of work. On 1 January 2018 such an employee will obtain the entitlement to the **full annual leave**.

3.5.3.9. Compensation for damages resulting from cancellation of annual leave

As mentioned above, the essence of annual leave is the protection of particular personal rights of an employee. Consequently, it is necessary to use annual leave in one part. Given the idea of the social market economy, which includes both the need to run the business activity aimed at generating profits but also to care about the employees' needs, in some circumstances the employer may require the employee who is on annual leave to perform some work. Therefore, the employer may cancel the employee's annual leave provided that circumstances occurred which require employee's presence and which were not known to the employer at the time when the annual leave started (article 167 of the Labour Code). Such circumstances which require the employee's presence at work include: sudden accumulation of work, breakdown or illness of other employee. If at the time the employee's annual leave started and the employer knew that there was a potential necessity to cancel the employee's annual leave, the premises laid down in article 167 of the Labour Code are not met and the employer cannot cancel such annual leave. Thus if the employer knew, at the time he granted annual leave, about, for example, an increased quantity of orders or the necessity to increase production, heshould postpone the scheduled leave. The employer cannot also cancel the annual leave just to hand in the notice, as such an activity is perceived contrary to the rules of social coexistence[349].

The regulations of the labour law (thus not only of the Labour Code) do not provide for any special form of cancellation. Therefore it can be done in written or oral form, by telephone or by other means of communication. Obviously, depending on the selected form of communication, it will be the evidence to prove that the information was actually conveyed. It should be indicated that it should be done in such a way as to make it possible for the employee to return from annual leave at the right time. Generally, an employee is not obliged to leave the address of his stay or a telephone number. Moreover, as indicated by the Supreme Court in its judgment of 8 March 2017[350], the employee, when taking annual leave, has no obligation to check his private or company e-mail, as it would violate his constitutional right to rest. The employee who is using annual leave is

[349] Resolution of the Supreme Court of 9 February 1967, III PZP 22/66, OSNCP of 1967, No. 6, item 11.

[350] Judgment of the Supreme Court of 8 March 2017, II PK 26/16, available at http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II PK 26–16-2.

temporarily exempted from the obligation to perform work and temporarily remains outside the sphere of the employment subordination. It is also clear that he does not keep any permanent contact on a daily basis with the employer during this time. However there is nothing to prevent inclusion by the parties of such an agreement in a contract of employment. The employee is obliged to comply with the employer's directive to cancel his annual leave. This obligation is in compliance with article 100 § 1 of the Labour Code. Employee's failure to comply with the employer's instructions may result in termination of the contract of employment for reasons specified in article 52 § 1 (1) of the Labour Code, unless the employee proves in the legal proceedings, if any, that his annual leave was cancelled in violation of the provisions of article 167 of the Labour Code.

If an employee's annual leave was cancelled, the employer bears some financial consequences of his decision. The consequences are of compensatory nature. The employer is obliged to cover the direct costs related to cancelling the employee's annual leave (article 167 of the Labour Code). Such costs include: reimbursement for the costs of travel and accommodation (costs of stay in a hotel, rehabilitation centre, private guesthouse) etc. It should also be noted that these costs do not refer only to cancelling the employee's annual leave but also they can be the costs relating to the family if the cancellation results in cancelling the leave of the family members. Moreover, if it is compensation, appropriate steps should be taken as prescribed in the provisions of the Civil Code and governing compensation for damages. Since it is reimbursement for costs related directly to the cancellation, the employee may not demand the refund of the costs of e.g. sport equipment, clothes and food purchased in connection with the annual leave or of the "moral damages" or lost income that the employee anticipated to achieve during the annual leave. It must also be emphasized that the employer is obliged to grant only this part of the leave to the employee that was cancelled. The employer has no obligation to grant the days of the annual leave which were used by the employee before he was called to return to work. The remaining leave can be used upon agreement with the employer. **However, if the employer cancelled a part of a day of employee's leave, he must grant a full day of the leave.**

3.5.3.10. The principle of proportionality

Under the provisions of Polish labour law, employee obtains the entitlement to the next annual leave with each successive calendar year, which means on 1 January (article 153 of the Labour Code). If the employment ends and the new one has been commenced in a calendar year, such an employee obtains the annual leave entitlement proportionately, pursuant to article 155^1 of the Labour Code.
A. With the same employer:

- proportionately to the time worked with this employer during the year in which the employment ended, unless the employee has already used annual leave

B. With the new employer:
   - proportionately to the period remaining till the end of the calendar year concerned, in the case of employment for an indefinite period,
   - proportionately to the period of employment in the case of employment for a fixed term (also the contract for a probationary period or for replacement) which ends at the end of the calendar year concerned.

The exercise of the right to annual leave according to the principle of proportionality results in the following:

1. Incomplete calendar month is rounded up. If the employment with a particular employer ends and employment with a new employer begins in the same calendar month, the previous employer shall round it up[351]. If during one year an employee simultaneously takes up work with another employer or with various employers, they separately calculate the length of the annual leave to which the employee is entitled.
2. In the period of employment, there might occur periods of absenteeism, which lead to proportional reduction of the length of annual leave by 1/12 for every month of the absence. The term "month" should be understood as 30 days. Under article 155^2 § 1 of the Labour Code, these periods are:
   - unpaid leave,
   - child-care leave,
   - the period of military service or its equivalents, periodical army service, rotary territorial army service or army trainings or practical army trainings,
   - pre-trial detention,
   - imprisonment,
   - unexcused absence from work.

3.5.3.11. Hourly settlement of annual leave

The statement that annual leave is settled on an hourly basis may be ambiguous as it is granted in working days, not in hours. The hourly settlement of annual leave was introduced by the Labour Code and has been in force since 1 January 2004. Its characteristics include:

First – under article 154^2 § 1 of the Labour Code, annual leave is granted on the days which are working days for a particular employee (according to the

[351] §1 (3) of a Regulation of the Minister of Labour and Social Policy of 8 January 1997 on detailed rules for granting annual leave, determination and payment of remuneration for the annual leave and financial compensation for unused annual leave, Journal of Laws *[Dz.U.]* No. 2, item 14, as amended.

schedule and timetable) so the annual leave is granted also on the days which fall on Sundays and holidays if it stems from the timetable that work was scheduled on such days.

Second – annual leave is granted in hours. One day of the annual leave equals to 8 hours of work (article 154^2 § 2 of the Labour Code). **Nevertheless, it should be clearly indicated that the basic principle for the annual leave settlement are days not hours.** Settlement of annual leave in days per hours results in a statutory formula according to which a day of the annual leave equals to 8 hours. The consequence of it is that if, for example, an employee performs work in the equivalent working time system and in the next two days his work amounts to 12 hours a day, he will receive 3 days (24 hours = 3 days) of annual leave. In the case of part-time employees, their annual leave entitlements will be calculated as follows: for example, an employee has a contract of 1/3 of the full-time contract and is entitled to 20 days of annual leave. Calculation: 1/3 x 20 days = 7 (the result is 6.6 but according to the general principle it should be always rounded up); 8 hours x 7 days = 56 hours of annual leave. The employee is entitled to 56 hours of annual leave in the calendar year concerned.

Third – the hourly settlement is used relatively in the case of statutory reduction of the employees' working time. A typical example will be work in the health care system where according to article 93 of the act of 15 April 2011 on health care services *(ustawa o działalności leczniczej)*[352] the working time of such employees cannot exceed 7.35 hours a day and on average 37.55 a week. In such a situation, for the purpose of calculation of the annual leave entitlement, the working day of such an employee amounts to 7.35 hours.

Fourth –annual leave is granted in **full** working days. The annual leave cannot be given for a part of a day. It is possible only in a situation when from the calculations it is clear that the employee has only an incomplete day off. Such a situation may happen exceptionally, e.g. when the employees work part-time (e.g. 4/5 of the full-time contract) or in a non-standard working system, e.g. in a continuous working system (art. 154^2 § 4 of the Labour Code).

3.5.3.12. Leave on demand (urlop na żądanie)

Leave on demand is a specific type of annual leave which is usually used contrary to the purpose of annual leave[353]. There are 4 days of such leave available

[352] Consolidated text, Journal of Laws *[Dz.U.]* of 2016, item 1638, as amended.

[353] *E. Chmielek-Łubińska*, Urlop na żądanie pracownika *[Leave on demand]*, MPP 2005, No. 10, p. 273; *A. Sobczyk*, Urlop na żądanie *[Leave on demand]*, PiZS 2004, No. 7, p. 12 or *A Kosut*, Urlop na żądanie pracownika *[Leave on demand]*, [in:] *Z. Góral* (ed.), Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi *[Studies on Labour Law. A Memorial Book in the Memory of Jerzy Loga]*, Łódź 2007, p. 156.

during the calendar year, yet it is calculated into the general employee's entitlement to annual leave. This leave does not constitute another annual leave entitlement; it is just an exception to the general rule of using annual leave. These 4 days do not extend the annual leave entitlement but they are separated from the whole annual leave and can be used by the employee at any time. The Supreme Court held that the leave on demand is a part of the annual leave entitlement of an employee thus it has the same legal nature as the annual leave[354]. That is why the employer may cancel the employee's leave on demand if the conditions laid down in article 167 § 1 of the Labour Code are met and the employee's presence is necessary. Unused leave on demand in a particular calendar year is not transferred to the next calendar year. Therefore, it does not increase the amount of the leave on demand above 4 days, yet the unused leave on demand becomes regular, outstanding annual leave.

The purpose of this leave is that it can be used in the case of occurrence of an obstacle that makes it impossible for an employee to appear at work. Therefore, its use is not negotiable. In the process of amendment of the Labour Code, at first it was assumed that the leave on demand is for the employee to be able to take a day off for the first day of his incapacity for work due to illness or isolation related to communicable disease lasting no longer than 6 days. There was no amendment introduced to article 165 of the Labour Code, which specifies that in the case of temporary incapacity for work due to reasons mentioned above the annual leave does not start and the employer is obliged to postpone it. In its judgment of 10 November 1999[355] the Supreme Court held that "the entirety of the legal regulation related to annual leave supports the argument that granting annual leave to the employee during his incapacity for work is unacceptable and legally ineffective. Annual leave is the only institution protecting the employee's right to rest (article 14 of the Labour Code), guaranteed in article 66 of the Constitution. The incapacity for work in every case excludes the possibility to use the annual leave according to its intended purpose. The annual leave during the period of incapacity for work cannot fulfil its functions. Therefore, granting the annual leave during such period is legally unacceptable. This prohibition is imposed on the employer and is definite, which means that it cannot be annulled by potential employee's consent". The leave on demand should be given by the employer. The expression used in article 167^2 of the Labour Code that the employer is obliged to grant such leave has the same normative meaning as this is attributed to the same expression in other provisions which refer to using the annual leave by the employee a part of which is the leave on demand. The employee cannot take leave

[354] Judgment of 16 September 2008, II PK 26/08, OSNP 2010, No. 3–4, item 36.
[355] I PKN 350/99; OSNAPiUS of 2001, No. 6, item 198.

on demand without prior authorization from the employer[356]. Therefore, the submission of the request to obtain leave on demand does not entitle the employee to use it[357]. Starting the "leave on demand" prior to employer's authorization may be considered an unjustified absence from work which is a serious violation of the basic employee's duties under article 52 § 1 (1) of the Labour Code[358]. Employer's silence means granting the leave. In practice, if an employee had to wait for the employer's consent, he might not receive it at all. In its judgment of 26 January 2005[359], the Supreme Court held that the employee's absence after requesting the leave on demand under article 167^2 of the Labour Code, to which the employer did not respond, is not a justification to terminate the contract without notice under article 52 § 1 (1) of the Labour Code. Therefore, if the employer refused to grant such a leave without giving any specific circumstances justifying his refusal, such absence should be considered excused[360]. The employer may refuse to grant such leave due to special circumstances[361], where employer's interest which deserves protection requires the presence of the employee at work at the time specified in the employee's request. These special circumstances might include, for example, a breakdown or rescue operation. The refusal to authorize the leave on demand may also result from incompatibility with the purpose of the annual leave or would aim at illegal behaviour which would be non-compliant with the rules of social coexistence or with socio-economic purpose of law. This circumstance might be requesting leave on demand in order to participate in a strike or other industrial action[362]. First – participation in a strike is contrary to the idea of annual leave, second – granting leave on demand for the period of strike is contrary to the Act on Resolution of Collective Disputes, as the participation in a strike is justifiable yet unpaid absence from work.

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[356] §1 (3) of a regulation of the Regulation of the Minister of Labour and Social Policy of 8 January 1997 on detailed rules for granting annual leave, determination and payment of remuneration for the annual leave and financial compensation for unused annual leave, Journal of Laws No. 2, item 14, as amended.

[357] Judgment of the Supreme Court of 15 November 2006, I PK 128/06, OSNP 2007, No. 23–24, item 346.

[358] Judgment of the Supreme Court of 16 September 2008, II PK 26/08.

[359] II PK 197/04, OSNP 2005, No. 17, item 271.

[360] Judgment of the Supreme Court of 7 November 2013, SNO 29/13, available at http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/SNO%2029–13.

[361] Judgment of the Supreme Court of 28 October 2009, II PK 123/09, available at https://mojepanstwo.pl/dane/sn_orzeczenia/5880,ii-pk-123-09.

[362] See *K. Serafin*, Urlop na żądanie a pracownicze formy protestu *[Leave on demand and forms of industrial action]*, [in:] *Z. Góral* (ed.), Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego *[On the Contemporary Issues of Labour Law. A Jubilee Book for Professor Henry k Lewandowski]*, Warsaw 2009, p. 207 ff.

3.5.3.13. Unpaid leave

In analyzing the principle of the annual leave entitlement, it is impossible not to refer to the issue of unpaid leave, which is closely related to the annual leave. Unpaid leave is a break in performance of job duties, during which the employment continues, yet mutual employment entitlements and obligations of both parties become suspended – the employee does not receive remuneration and the employer may not demand that the employee performs his duties. It is governed by the provisions of articles 174 – 174[1] of the Labour Code.

Unpaid leave is granted upon a **written** request submitted by the employee. The written form is obligatory, which means that the employer cannot approve the request submitted in oral form. This leave is in fact a mutual agreement of the parties to an employment relationship, as the employee's request is treated as an offer. The employer generally does not have to authorize this leave. The exceptions when the employer cannot refuse such leave include the following:

1. Child-care leave *(urlop wychowawczy)*
2. Leave granted to an employee holding a position in trade unions. A competent trade union organization may submit a request to authorize such a leave for an employee to perform trade union functions outside the company. The employer is obliged to grant such unpaid leave for the period indicated by the trade union organization[363]
3. The employer is obliged to grant such leave to a young worker (who is a student of a school for working persons) upon the latter's request during holidays but no longer than 2 months, together with the annual leave (article 205 § 4 of the Labour Code)
4. Leave granted for the period of exercising the mandate of deputy or senator[364]. If a deputy or senator who is employed, regardless of the type and the seniority of his employment, submits a request for unpaid leave, the employer must approve it for the period he holds the mandate and three months after it expires. After the unpaid leave ends, the employer is obliged to employ such person in the same or equal job position and with such a salary as this person would receive if he did not use such leave. Moreover, the period of receiving the "parliamentary" remuneration during the unpaid leave is treated as the

[363] § 1 of the Regulation of the Council of Ministers of 11 June 1996 on granting unpaid leave and other leaves of absence to employees holding elected functions in the trade unions and the scope of the employees' entitlements during the unpaid leave and periods of absence from work *[rozporządzenie Rady Ministrów w sprawie trybu udzielania urlopu bezpłatnego i zwolnień od pracy pracownikom pełniącym z wyboru funkcje w związkach zawodowych oraz zakresu uprawnień przysługujących pracownikom w czasie urlopu bezpłatnego i zwolnień od pracy*], Journal of Laws No. 71, item 336.

[364] Article 29 (1) of the Act of 9 May 1996 on the Mandate of Deputy or Senator *[ustawa o wykonywaniu mandatu posła lub senatora],* Journal of Laws *[Dz.U.]* of 2016, item 1510, as amended.

period of regular employment as such. It is also included in any employment entitlements, including those dependent on being employed in a particular profession, branch or company

5. It is granted to persons elected for the positions of aldermen (of municipality, poviat or voivodeship) if they were employed under a contract of employment in the municipal office, poviat office or voivodeship office respectively or the marshall's office where they obtained the mandate or held the managerial functions in the organizational unit of the municipality, poviat or voivodeship[365].

Unpaid leave is an employee's entitlement. This should be understood to mean that the employee does not have to agree to the unpaid leave proposed by the employer. However, approval of such leave upon employee's initiative without the employee's written request is legally ineffective[366]. Starting the unpaid leave deprives the employee of specific entitlement related to employment, since the period of the unpaid leave is not included in the seniority of service on which the employment entitlements depend (article 174 § 2 of the Labour Code). The consequences of unpaid leave include, among others, the following:

– Reduction of the annual leave
– This period is not included in the entitlement to receive the jubilee award.
– This period is not included in the entitlement to the annual awards, etc.
– This period is not included in the retirement entitlements[367].

At the same time, there is no reason why the parties should not introduce in a contract of employment or in an autonomous act of labour law (collective agreement or work rules) a provision underwhich the period of unpaid leave does not lead to deterioration of the employee's situation.

The employee using unpaid leave may have it cancelled. Such circumstances may occur only and exclusively when **both** of the following conditions are met **jointly** (article 174 § 3 of the Labour Code):

– The unpaid leave is granted for the period exceeding 3 months. In such a situation cancellation of the employee's leave may occur before the period of 3 months ends, counting from the day of starting it. In turn, any clause which provides for cancellation of the leave which is shorter than 3 months does not produce any legal consequences.

[365] Article 24b of the Act of 8 March 1990 on the Local (Municipality) Government *[ustawa o samorządzie gminnym],* Journal of Laws *[Dz.U.]* of 2016, item 446, as amended; article 24 of the Act of 5 June 1998 on the Local (Poviat) Government *[ustawa o samorządzie powiatowym]*, Journal of Laws *[Dz.U.]* 2016, item 814, as amended; article 26 of the Act of 5 June 1998 on the Local (Voivodeship) Government *[ustawa o samorządzie województwa],* Journal of Laws of 2016, item 486, as amended.

[366] Judgment of a Court of Appeal in Łódź of 15 October 1996, III AUa 34/96, OSA 1997, No. 10, item 35.

[367] Judgment of a Court of Appeal in Warsaw of 27 November 1996, III AUa 888/96, Apel.-W-Wwa 1997, No. 2, item 9.

– The parties, when setting out the terms of using such a leave, provided for the possibility to cancel the leave due to serious reasons. Parties may specify these reasons in detail at the time of granting the leave or only indicate that the cancellation may occur due to "serious reasons". Therefore, if parties did not provide for such a situation, the employer cannot cancel such leave without employee's consent even if the serious reason occurred which would justify this cancellation. It is extremely important in a situation when the employee decides to take up a different, additional employment.

Because of the dynamic development of economic life, the legislature provided for a specific form of unpaid leave. The employer may grant the unpaid leave to the employee to perform work with a different employer (article 174^1 of the Labour Code)[368]. If both employers reach an agreement as to where the employee (obviously prior to his written consent) is temporarily "hired" (it is defined as staff leasing) to work with the other employer, then the period of unpaid leave in the first company does not lead to limiting his employment entitlements. The authorization of the unpaid leave and "hiring" the employee at the different employer may be carried out not only following the employers' agreement but also at the employee's request. In such an agreement the parties (i.e. employee and employer) may specify on whose initiative the shortening of the granted leave may occur. The *ratio legis* of this mechanism is that in some situations, mainly economic ones, it may be impossible to employ the person at the current employer's (usually longer break, or limiting the production tasks or services of the employer) and it is possible to employ the person in a different enterprise. At the same time, if there is a necessity to perform job duties again with the former employer, the employee has the right to return. Unpaid leave in this form varies from the one defined in article 174 of the Labour Code in that the initiative to authorize this leave is on the employer's side. Besides, the employment with the new employer is based on a separate contract concluded with the "hired" employee. The regulations of the Labour Code do not provide for the possibility to cancel the unpaid leave to perform work with a different employer.

Summary: The unpaid leave is characterized by the following:
– It is not paid
– It is generally granted upon employee's request
– It is voluntary (both parties' consent)
– It is optional; in principle the employer does not have to agree to authorize it

[368] This issue is broadly analyzed by *J. Żołyński*, Urlop bezpłatny udzielany pracownikowi w trybie art. 174^1 kodeks pracy – aspekty praktyczne *[Unpaid leave granted to an employee under article 174^1 of the Labour Code – practical aspects]*, PiZS 2010, No. 8 and *J. Żołyński*, Komentarz do artykułu 174^1 *[Commentary on article 174^1]*, [in:] *J. Żołyński* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Gdańsk 2017.

– It involves suspension of mutual obligations of the parties to an employment relationship
– It entails sustainability of employment. A contract of employment may be terminated during the unpaid leave in the circumstances specified by the provisions of the labour law, for example article 41^1 of the Labour Code (liquidation or bankruptcy).

3.5.3.14. Expiration of annual leave entitlement

Given the function of annual leave, **it should never become expired**. Therefore it should be authorized in a calendar year during which the employee obtained the respective entitlement. If for any reason an employee did not use the annual leave, his entitlement expires 3 years from the day when he became entitled. Such an opinion was expressed by the Supreme Court which held that: "Employee's claim for payment *in lieu of* the unused leave may not be brought 3 years after it became due"[369]. The general rule expressed in article 291 § 1 of the Labour Code referring to limitation of claims arising from an employment relationship can be applied here. Therefore the employee's course of action as to claiming his right to the annual leave begins on the last day of the calendar day in which the employee obtained the entitlement to the annual leave (article 291 § 1 of the Labour Code in connection with article 161 of the Labour Code), unless the provisions of Labour Code or other normative acts provide for the obligation to grant the leave in different periods[370]. If the period for using annual leave was postponed to the 3rd quarter of the following year or the period was indicated later than the 3rd quarter, then the period of limitation begins with the moment that the annual leave was postponed to.

3.5.4. Summary

The principles governing the annual leave entitlement in axiological terms protect the employee's personal rights not only in the form of the right to rest. They also protect the personality rights such as the right to dignity, health, family life or the right to the self-development during his free time. They follow from the constitutional provisions which were further developed by the labour law and complemented by the provisions of civil law.

[369] Judgment of the Supreme Court of 21 November 1975 – legal principle, V PZP 5/75, OSNCP 1976, No. 6, item 120.

[370] Resolution of 7 judges of the Supreme Court of 20 February 1980 – legal principle, V PZP 6/79, OSNCP 1980, No. 7–8, item 131, as well as the judgment of 11 April 2001, I PKN 367/00, OSNP of 2003, No. 2, item 38.

3.6. Working time principles

A. Dral

3.6.1. Introduction – classification of the working time principles

The working time issues are strictly connected with social and economic aspects. In social terms, working time is an element of social policy and a social issue. As a social issue, it refers to the number of working hours, reduction or extension of the working hours and, consequently, free time of an employee. The working time defines the limits where an employee stays in a (not always favourable) work environment and the amount of the free time to be used for rest, family life, civic duties, cultural life. In the labour law studies it is emphasized that one of the key factors affecting the possibility to balance work and family life is the amount of working time and the working time schedule[371].

Because of the social and economic importance of the working time, it is necessary to decode from the provisions of the Labour Code, in particular provisions of chapter VI of the Code, the rules governing the key elements of the working time concept, which play not only a normative, descriptive, postulative and organising function, but also a cognitive function. The working time issues fit into the complex and controversial matters relating to the principles of labour law[372]. In the theory of labour law, a reference is made to normative principles which are in fact very general legal norms of significant importance for the regulation of social relations connected with the performance of work[373]. They have been indicated directly by the legislature or interpreted by the jurisprudence from applicable laws. Moreover, there are principles which are postulates and formulate

[371] See more in *M. Rycak*, Czas pracy a ochrona życia rodzinnego pracowników *[Working time and protection of family life of employees]*, [in:] Tendencje rozwoju indywidualnego i zbiorowego prawa pracy księga jubileuszowa profesora Grzegorza Goździewicza *[Tendensies in the Development od Individual and Collective Labour Law. A Jubilee Book for Professor Grzegorz Goździewicz]*, Toruń 2017, p. 312 ff.

[372] See *B.M. Ćwiertniak*, O aktualnym stanie rozważań nad zasadami prawa pracy w literaturze krajowej (kilka refleksji) *[Current reflections on the principles of labour law in the domestic literature]*, [in:] *M. Seweryński*, *J. Stelina* (eds.), Wolność i sprawiedliwość w zatrudnieniu *[Freedom and Fairness in Employment]*, Gdańsk 2012, p. 68 and the literature referenced there.

[373] See *S. Wronkowska*, *M. Zieliński*, *Z. Ziembiński*, Zasady Prawa. Zagadnienia podstawowe *[Principles of Law. Basic Concepts]*, Warsaw 1974; *Z. Salwa*, Podstawowe zasady prawa pracy *[The fundamental principles of labour law]*, PiP 1969, No. 12, p. 729.

leading ideas for the system of law or a branch of labour law and play a role of interpretative guidelines. These are the most important categories of normative principles[374]. A separate category of the principles of labour law are so-called descriptive principles which summarise certain legal measures or specific types of legislative mechanisms. Therefore, their role is to specify essential characteristics of a specific regulation or legal measure in a schematic way[375].

In the labour law, particular value is put on the category of fundamental principles of labour law distinguished by the legislature. They were explicitly separated in chapter II, division I of the Labour Code. According to the labour law jurisprudence, these principles, with some exceptions, are normative principles[376]. Moreover, the normative principles of labour law include the principles laid down explicitly in the Polish Constitution.

It should be noted that apart from the normative principles laid down explicitly in legal provisions, there are also normative principles derived through interpretation from applicable laws which form the branch of labour law. In terms of the subject-matter of this study, this category of principles of labour law is of particular importance. Such principles can be decoded from particular areas of labour law or mechanisms, such as from the provisions of labour law governing the working time.

One provision may be both a normative principle and a principle-postulate. The principles may also compete with each other, as is the case with a relation between the principle of the right to rest and the principle of flexible working time.

Among the fundamental principles of labour law, a principle which is of key importance in terms of the working time is the right to rest. Analysis of provisions governing the working time in the context of the principle of the right to rest allows one to distinguish significant norms, both normative and descriptive, which describe the implementation of the basic normative principle. Those principles apply primarily to the organisation of the working time[377]. The principle of the right to safe and healthy working conditions and a descriptive principle of employer's risk are also of significant importance.

In the labour law studies preceding the enactment of the Labour Code in fact no working time rules were developed apart from the 8-hour working day rule[378] and the principle-postulate to reduce the working time. Under the Labour Code,

[374] *T. Liszcz*, Prawo pracy *[Labour Law]*, Warsaw 2009, p. 75 and the literature referenced there.

[375] See *A. Sobczyk*, Zasady prawnej regulacji czasu pracy *[Principles of Legal Regulation of Working Time]*, Warsaw 2005, p. 18.

[376] See *A. Świątkowski*, Zasady prawa pracy *[The Principles of Labour Law]*, Kraków 1985, p. 12.

[377] *A. Sobczyk*, Zasady… *[Principles…]*, p. 210.

[378] *W. Jaśkiewicz*, [in:] *W. Jaśkiewicz*, *Cz. Jackowiak*, *W. Piotrowski*, Prawo pracy w zarysie *[An Outline of Labour Law]*, Warsaw 1980, p. 98.

the working time was usually recognised in terms of the principle of the right to rest, as one of the elements serving to exercise this right[379]. A turning point is a monograph entitled "*Zasady prawnej regulacji czasu pracy*" [Principles of Legal Regulation of Working Time] (2006), in which Arkadiusz Sobczyk formulated a catalogue of fundamental principles on which the concept of working time is based. According to the author, the key principles include: the right to rest, the right to safe and healthy working conditions and the principle of the employer's risk, which – even if do not refer directly to the working time – had an essential impact on development by the legislature of specific provisions governing the working time concept[380]. He further distinguished a category of specific working time rules concerning implementation of the principle of the right to rest, which were decoded from the provisions of chapter VI of the Labour Code. These rules apply primarily to the organisational sphere of the working time. The catalogue of the principles includes: the principle of an 8-hour working day, the principle of a 40-hour work week, the principle of a 5-day work week, the principle of limited admissibility of overtime work, the principle of limited admissibility of work on Sundays and public holidays, the principle of uninterrupted daily working time, the principle of calculation of the working time in a reference period, the principle of limited application of on-call time and the principle of limited flexibility of provisions governing the working time. As regards the latter principle, the author refers to the principle of flexibility in determining the working time schedules.

Moreover, an emphasis was put on the principles-postulates concerning a relation between the provisions governing the working time and the provisions of the Labour Code governing annual leave and remuneration for work. These include the principle of consistency between the provisions on the working time and the provisions on annual leave and the principle of consistency between the provisions on working time and provisions on remuneration for work[381].

It seems that the catalogue of principles proposed by Sobczyk should be supplemented with the principles which refer to part-time employment.

This study will cover only key principles of working time, specifying the essential structural elements of this concept and referring to the organisational sphere of the working time. The legal nature of these principles is varied. They include not only normative and descriptive principles, clearly set out by the legislature, which may be derived directly from the provisions on the working time, but also postulative principles.

[379] See *J. Jończyk*, Prawo pracy *[Labour Law]*, Warsaw 1992, p. 326.
[380] *A. Sobczyk*, Zasady… *[Principles…]*, pp. 210–212.
[381] *Ibidem*, p. 22.

3.6.2. Fundamental principles of labour law affecting working time

3.6.2.1. The principle of the right to rest

The principle of the right to rest is one of the fundamental principles of labour law which fulfil the protective function of labour law. It is laid down both in the Constitution and the Labour Code. Under article 66 of the Constitution of the Republic of Poland of 1997, an employee shall have the right to statutory holidays and the maximum working time standards are laid down in law. Under article 14 of the Labour Code, an employee shall have the right to rest which is ensured by the provisions governing working time, statutory holidays and annual leaves. Under constitutional and Labour Code provisions, the essence of the right to rest is that the laws governing the working time should have the same wording to ensure that the right to rest has a real value[382]. The principle of the right to rest in a broad sense ensures protection of the workforce as an important production factor. The principle of the right to rest, when applied properly, should foster technical and organisational development since it limits an extensive use of working time[383].

Undoubtedly, the essential function of the provisions establishing the principle of the right to rest is to ensure restoration by workers of physical and mental capacity to perform work. In this context, this principle is strictly connected with the principle of the right to safe and healthy working conditions, According to Liszcz, it is no coincidence that the principle of the right to rest and the principle of the right to safe and healthy working conditions are next to each other[384].

3.6.2.2. The principle of the right to safe and healthy working conditions and the working time

Undoubtedly, there is a direct and strict relationship between working time and occupational health and safety. It is directly recognized in Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[385], which in its points 4, 7, 8, 10, 11 of the recitals makes reference to safety, hygiene and health at work in relation to rest periods, night work, shift work and working conditions which may have detrimental effects on the health of workers. In the operative part of

[382] See *J. Jończyk*, Prawo pracy *[Labour Law]*, Warsaw 1984, pp. 498–499.
[383] *J. Jończyk*, Prawo pracy *[Labour Law]*, Warsaw 1992, p. 327.
[384] *T. Liszcz*, Prawo pracy… *[Labour Law…]*, p. 332.
[385] Official Journal of the European Union of 18 November 2003, L 299, p. 9.

the directive, the protection of safety and health is referred to in particular in articles 12, 13, 17 and 22.

The Constitution of the Republic of Poland of 1997 provides that everyone shall have the right to safe and healthy conditions of work which are considered close to the right to life and to respect of human dignity[386]. In the Labour Code, which extends the constitutional principle of the right to safe and healthy work conditions, the OHS issues are explicitly referred to only in article 129 § 2,which provides for the possibility to extend a working time reference period, regardless of the system, in compliance with the general principles on the protection of health and safety of workers.

A reference in the mentioned provision to the general principles concerning the protection of health and safety of workers is broad and thus vague. In the labour law jurisprudence it is considered not appropriate to ensure sufficient protection of health and safety of workers[387].

In interpreting this provision it must be assumed that the legislature wishes to create the conditions which should eliminate or reduce the risks to life and health resulting from the organisation of working time. Extensively prolonged working time reference periods and failure to adjust the working time systems and schedules to the specifics of particular production processes may result in limiting the right to rest and consequently in physical and mental fatigue of an employee which poses a serious health and accident risk to the employee.

3.6.2.3. The principle of employer's risk

The principle of employer's risk is included in the category of descriptive principles of labour law[388]. It is one of the characteristics of the employment relationship which allows distinguishing this legal relationship from other legal relationships (contractual, administrative) under which work is performed. Moreover, it defines the way in which some elements of the relation between the parties to an employment relationship were formed[389]. In view of the above argument, a question arises as to what extent this principle affects the provisions governing the relations between the parties to an employment relationship as regards working time. The analysis of the provisions on working time and remuneration for work indicates that the principle of employer's risk in connection with the

[386] *K.W. Baran* (ed.), System Prawa Pracy Tom I Część Ogólna *[The System of Labour Law. Volume I. General Part]*,Warsaw 2017, p. 247.

[387] See *K. Stefański*, Stosowanie przedłużonych okresów rozliczeniowych czasu pracy *[Extended reference periods for working time]*, PiZS 2014, No. 4, p. 15.

[388] *T. Zieliński*, Prawo pracy. Zarys systemu. Część I. Ogólna *[Labour Law. An Outline of the System. Part I. General],* Warsaw 1986, p. 209.

[389] *Ł. Pisarczyk*, Ryzyko pracodawcy *[Employer's Risk]*, Warsaw 2008, p. 27.

working time concept should be considered in two aspects. First is the financial liability of an employer for intentional or unintentional consequences of application of the provisions on working time, and primarily a so-called scheduling risk connected with the organisation of working time[390]. The second aspect relates to the impact of the mentioned principle on the interpretation of the concept of task-based working time.

As has already been mentioned, the risk connected with the organisation of working time may be considered primarily in the categories of employer's benefit to an employee for the time not worked. The essence of such benefit is that the employee is entitled to guarantee remuneration despite the fact that the employer failed to ensure work to the employee in the number of hours corresponding to this specified in the contract of employment. In such situation the employee retains the right to remuneration for the readiness to perform work. The reasons for which the employee was unable to perform work have no legal importance[391].

The mentioned scheduling risk, that is a risk of payment of benefits for the unplanned time may be described as a risk of broader category: legal or actual, or a risk of a narrower category – a normative risk. The broad understanding of the risk means an obligation to pay remuneration even if an employee did not perform work for reasons not attributable to the latter and was not even called to perform such work. Such form of risk disregards the reasons for which the employee did not perform work. When a work schedule is prepared, it is not important whether the employer did not plan the work because he did not guarantee it or the failure to plan the work is a result of his mistake.

The essence of the normative risk is the employer's responsibility for the involuntary failure to ensure work or even for a lawful exercise of rights stemming from law[392].

The risk connected with the organisation of working time can be analysed at the following levels: as a risk of involuntary additional benefits (remuneration for overtime work), risk of payment for the periods of incapacity for work (specific laws provide for an obligation to pay remuneration despite the employee's absence), the risk connected with statutory change of winter time to summer time and vice versa and a risk connected with compensation for public holidays[393].

[390] *A. Sobczyk*, Zasady… *[Principles…]*, p. 209.
[391] See *A. Świątkowski*, Zasady prawa pracy *[The Principles of Labour Law],* Warsaw 1977, p. 201.
[392] *A. Sobczyk*, Zasady… *[Principles…]*, p. 185.
[393] See more *ibidem,* pp. 185–190.

3.6.3. The principle of remaining at the employer's disposal as a working time criterion

Under the Polish labour laws, working time is the time when an employee remains at the disposal of the employer[394]. Under article 128 of the Labour Code, working time means only the time during which an employee remains at the disposal of the employer in the work establishment or in another location designated for the performance of work. Similarly, article 2 of Directive 2003/88/EC provides that working time means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties.

What is particularly important in determination whether we are dealing with working time is the understanding of the expression "remaining at the employer's disposal". Under article 128 of the Labour Code working time is not only the time during which an employee actually performs his duties but also some periods of non-performance of work during which he remains at employer's disposal in the work establishment or in another location indicated by the employer and the employer can manage such employee[395]. Consequently, the analysed phrase covers both performance of specific work and the state of readiness to perform such work which indicates a strict relation between the working time and the employment relationship structure[396]. Such understanding of the concept of remaining at the employer's disposal means that the working time includes also the time designated for breaks and other periods of non-performance of work if the possibility to have an employee at the disposal was not interrupted, for example during a downtime.

In the context of the so understood concept of "remaining at the employer's disposal", there are certain interpretation problems concerning inclusion into the working time of certain periods of time, for example the time of a business trip of an employee[397].

Traditionally, it is accepted that one of two conditions must be met for an employee to remain at the employer's disposal. First, an employee must remain at the disposal of the employer or of a person acting in the name of the employer.

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[394] See *W. Muszalski*, Zadaniowy czas pracy i aktualne problemy regulacji czasu pracy *[Task-based working time and the current problems concerning regulation of working time]*, PiZS 2001, No. 5, p. 29; *B. Bury*, Praca w godzinach nadliczbowych jako obowiązek pracownika *[Overtime Work as Employee's Obligation]*, Warsaw 2011, p. 9 ff. and the literature referenced there.

[395] *J. Pacho*, Czas pracy. Zagadnienia prawne i społeczne *[Working Time. Legal and Social Issues]*, Warsaw 1977, No. 3, p. 86.

[396] *B. Bury*, Praca w godzinach… *[Overtime Work…],* p. 9 ff.

[397] Judgment of the Supreme Court of 27 October 1981, I PR 85/81, OSPiKA 1983, No. 2, p. 43; judgment of the Supreme Court of 4 April 1979, I PRN 30/79, No. 10, item 202.

Second is performance of tasks ordered by the employer, even if there is no contact between the employee and the employer or such contact is hampered[398]. An employee remains at the disposal of the employer also when at the time designated for the performance of work he performs other job duties resulting from an employment relationship and at the employer's request. The time-frame of remaining at the disposal of the employer is defined by the provisions of the Labour Code. Remaining at the disposal of the employer is associated with the actual readiness to work[399]. The labour law studies present also a broader meaning of the readiness to perform work, i.e. readiness to work in a legal sense, which includes also the period of non-performance of work by an employee in the number of hours agreed upon in a contract of employment if this is due to the employer's failure to schedule work, either as a result of an error, intentional decision or as a result of legal restrictions caused by the employer. Such situations should be treated as a state of readiness to work and consequently as working time for which the employee should receive remuneration[400].

An employee remains at the disposal of the employer when the employee is physically present at the place of performance of work and his physical and mental state enables his performance of work. This means that if an employee arrives at work intoxicated, he cannot be considered ready to work and this means that he does not remain at the employer's disposal. Moreover, the employee's behaviour must show that he is willing to perform work. Therefore, an employee who does not show willingness (intention) to perform work does not remain at the disposal of the employee. The intention is the willingness to perform work (direct intention) which is continuous and expressed to the employer and shows the employee's eagerness to perform work[401].

In order to consider that an employee remains at the disposal of the employer, the employee must stay at the place designated by the employer which, under article 128 of the Labour Code, is a work establishment or other location indicated by the employer. A work establishment is generally taken to mean an organisational unit in which an employee has his permanent place of work (work station). Some interpretation difficulties arise in respect of the definition of "other place of work" designated for the performance of work. This stems from the

[398] *J. Wratny*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2013, p. 291.

[399] See *A. Sobczyk*, W sprawie redefinicji pojęcia gotowości do pracy *[Redefining a concept of readiness to work]*, [in:] *A. Patulski*, *K. Walczak* (eds.), Jedność w różnorodności. Studia z zakresu prawa pracy i zabezpieczenia społecznego i polityki społecznej *[Unity in Diversity. Studies on Labour Law, Social Security and Social Policy. A Jubilee Book Dedicated to Professor Wojciech Muszalski]*, Warsaw 2009, pp. 168–169.

[400] *Ibidem,* p. 169 ff.

[401] *B. Bury*, Praca w godzinach… *[Overtime Work…]*, p. 10 ff.

specifics of certain jobs, such as those of a geologist, land-surveyor or construction worker, which by their nature are performed outside the permanent place of work, alongside the so-called mobile workers, such as drivers, sales representatives[402]. The above uncertainties do not undermine the principle according to which the working time is only the time when an employee remains at the employer's disposal.

3.6.4. Selected working time principles implementing the principle of the right to rest

3.6.4.1. The principle of 8-hour working day

The history of development of the working time regulations is the history of the battle of the world of labour for meeting eight-hour working day postulate[403]. It resulted, among others, in the enactment of respective regulations included in the ILO's legislation. The most important legal act in this regard is ILO Convention No. 1, the so-called Washington Convention of 1919 which provided for 8 hours of work per day and 48 hours of work per week. It should be noted that the 8-hour working time standard has been applied to a larger extent since the first decades of the 20th century[404].

For the last thirty years, in Europe there has been a tendency to shorten the working time. However, in the recent years we have been facing an opposite process, implemented under the banner of combating crisis, namely the process of extension of working time which produces certain social consequences (such as in Great Britain or France)[405].

Poland has a long and advanced tradition of eight-hour working day. The eight-hour working day standard was introduced under a decree of the Chief of State of 23 November 1918 on 8-hour working day[406]. This standard, complemented by the 46-hour working week standard, was then adopted in the Act of

[402] See *K. Walczak*, [in:] *K.W. Baran* (ed.), Prawo pracy *[Labour Law]*, Warsaw 2009, pp. 384–385; *S. Samol*, Charakterystyka zatrudnienia pracownika mobilnego *[Characteristics of employment of a mobile employee]*, [in:] *A. Sobczyk* (ed.), Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej *[Employment Relations in the Twenty Years of the Social Market Economy]*, Warsaw 2010, p. 263.

[403] See more: *W. Szubert*, Zarys prawa pracy *[An Outline of Labour Law]*, Warsaw 1980, p. 21. On 1 May 1886, in Chicago, a demonstration addressing 8-hour working day took place. Some workers died. A celebration of this demonstration is the 1st of May (Labour Day).

[404] See more on the international regulations governing the working time in: *L. Florek*, [in:] Międzynarodowe prawo pracy *[International Labour Law],* Warsaw 1988, pp. 200–205.

[405] *M. Rycak*, Czas pracy… *[Working time…],* p. 322.

[406] Journal of Laws *[Dz.U.]* No. 17, item 42.

12 December 1919 on Working Time in Trade and Industry *(ustawa o czasie pracy w przemyśle i handlu)*[407]. These standards had functioned until the entry into force on 1 January 1975 of the Labour Code which adopted a significant part of these regulations.

It should be kept in mind that the principle of the eight-hour working day was explicitly laid down in the previous Constitution of the Polish People's Republic of 1952. Under article 59 of that Constitution, the right of the citizens to rest was implemented by statutory reduction of the working time, by introduction of the eight-hour working day and shorter working time in cases specified by law. The Constitution of the Republic of Poland of 1997 currently in force does not establish the principle of eight-hour working day but merely provides that the maximum permissible hours of work shall be specified by law. Therefore, the constitution leaves it to the legislature to determine the maximum permissible hours of work. *De lege lata,* the principle of the eight-hour working day is prescribed by the rules of ordinary law and is only a consequence of adaptation of the Polish labour law to the standards established in the ILO's and community laws. This means lowering the protection standards of the working time regulations[408].

Under article 129 § 1 of the Labour Code, the working time cannot exceed 8 hours per day, with the exceptions prescribed by articles 135–138, 143 and 144 of the Labour Code. Even if the mentioned provision establishes a number of exceptions to the eight-hour standard, it is reasonable to conclude that under the Polish labour law there applies the principle of eight-hour maximum working day or eight-hour maximum basic working time standard. Such conclusion is supported by the linguistic interpretation of the mentioned provision. The maximum working time standard prescribed in this provision is, as a rule, absolute. However, some legal scholars arguedthat because of the exceptions to the eight-hour working day principle, and in particular the very general conditions for their application (such as the "type of work" or "organisation of work") which cause difficulties in their verification, distinguishing this principle may raise certain doubts. Despite such doubts, it is reasonable to assume that if the parties to an employment relationship or applicable laws do not specify an autonomous applicable system of working time, an employee is obligated to perform work for not longer than 8 hours per day. The principle of the eight-hour working day has been confirmed also by statutory examples of reduction of the working time of certain categories of workers[409].

[407] Dz.P.P.P. of 1920, No. 2, item 7.
[408] See *T. Liszcz*, Prawo pracy… *[Labour Law…]*, p. 332.
[409] *A. Sobczyk*, Zasady… *[Principles…]*, p. 215.

3.6.4.2. The principle of the average 40-hour working week

Despite the fact that the 40-hour working week postulate was put forward by ILO and by the European Union, it has not yet been successfully introduced as a working time standard.

According to article 129 of the Labour Code, an average weekly working time is 40 hours in a reference period. The average 40-hour working week is absolute which means that it is not dependent on the work results achieved by an employee, on labour standards or the applicable working time system[410]. *De lege lata,* there is no doubt that it applies to the average and not fixed working week. Therefore, the principle of the average 40-hour working week allows for far-reaching flexibility as regards organisation of employee's working time. It shows that the working time of an employee may differ in particular weeks if in a reference period it does not exceed the 40-hour average weekly standard. However, the differentiation of working time may apply only within the limits of the reference periods. It guarantees protection of employees.

There is an exception to the principle of the average 40-hour working week which applies in the system of continuous-process work *(praca w ruchu ciągłym)*. In such case the working time may be extended up to 43 hours on average per week in a reference period not exceeding 4 weeks.

3.6.4.3. The principle of the average 5-day working week

Under article 129 of the Labour Code, a working week shall be 5 days on average, in a relevant reference period normally not exceeding 4 months. The essence of the decoded principle is that the working week in a reference period is an average week which means that during certain weeks an employee may perform work on fewer days, for example 4 days, while on other weeks he may work longer, for example for 6 days. Special attention should be given to the nature of the non-working days resulting from the average 5 days' working week. First, there is no regularity. Therefore, the non-working days may be different not only for the employees employed by particular employer but also for particular groups of employees or even individual employees employed by one and the same employer. Moreover, these days may be different during particular weeks of the reference period[411].

The principle of the average 5-day working week is supported by article 151^3 of the Labour Code, under which an employee may be assigned to work on such day only if there are reasons justifying overtime work. In consideration for the

[410] See *Ibidem*, pp. 215–216.

[411] *K. Rączka*, Praca w dni wolne *[Work on public holidays]*, [in:] *Z. Góral* (ed.), Z zagadnień współczesnego prawa pracy *[On Current Issues of Labour Law]*,Warsaw 2009, p. 304.

work on such day an employer must grant other day-off to an employee by the end of the reference period, on a date agreed upon between the employee and the employer.

3.6.4.4. The principle of the right to uninterrupted daily and weekly rest and rest during a working day

The principle of the right to daily and weekly rest was originally based on articles 3, 4 and 5 of Directive 2003/88/EC. The mentioned provisions of the directive obligate the Member States to introduce the minimum uninterrupted daily and weekly rest and rest breaks during a working day exceeding 6 hours. The minimum daily rest period should be 11 consecutive hours per 24-hour period, and the weekly rest should be 24 hours plus additional 11 hours of daily rest. If objective, technical or work organisation conditions so justify, an employer may apply a minimum rest period of 24 hours.

As a result of implementation of Directive 2003/88/EC, the daily and weekly rest was introduced into the Polish labour law. Under article 132 § 1 of the Labour Code, an employee has the right to at least 11 hours of uninterrupted rest daily. There are two exceptions to this principle. It does not apply to employees managing the establishment on behalf of the employer and in the event of a rescue operation to protect human life or health, protect property or environment or fixing failures. The mentioned categories of employees are entitled to an equivalent period of rest in a reference period. The obligation to ensure the daily rest also does not apply to employees who work in the 24-hour equivalent working time system. Moreover, it was significantly modified in the case of employees who work in partial on-call duty or in surveillance of equipment.

Separate regulations in this regard apply also to young workers. A daily rest period of a young worker covering the night time should be at least 14 consecutive hours.

Under article 133 § 1 of the Labour Code, during every week an employee shall have the right to at least 35 hours of uninterrupted rest covering at least 11 hours of uninterrupted daily rest. In the cases referred to in article 132 § 2 of the Labour Code and in the case of change of the time of work associated with the change of shift in accordance with the agreed working time schedule, the weekly uninterrupted rest period may cover less hours, however not less than 24 hours.

As a rule, the weekly rest should fall on Sunday. In exceptional situations, where work is permitted on Sunday, the weekly rest may fall on a day other than Sunday. According to the Labour Code, a different mechanism applies to young workers who were guaranteed, every week, at least 48 hours of an uninterrupted rest period which should cover Sunday.

The compulsory and uninterrupted weekly rest in fact precludes the possibility to work 7 days a week. However, in specific circumstances, it is possible to work 6 days a week provided that an appropriate working time schedule is applied[412].

The laws which set out the standards of rest indirectly define the permitted daily and weekly working time and supplement the regulations governing the working time standards[413].

The daily and weekly rest should be taken to mean a break in the performance of work with the employer concerned. Such time should be completely at the disposal of an employee which means that the employee is free to decide how to use such time. Theoretically, the time of the daily and weekly rest should be used for regeneration. However, the mentioned provisions do not obligate an employee to use such time for rest. In fact, the employee may use such time for other purposes, such as additional employment with another employer or self-employment[414]. However, in such case a question arises whether the rest actually serves physical and mental regeneration necessary to perform work. In other words, whether the objectives for which it was established have been met. It seems that when the time of rest is used for additional work it is contrary to the principles of protection of health and safety of workers.

Another question arises as to the legal nature of the obligation to ensure the daily and weekly rest to an employee. The wording of the mentioned provisions implies that the right to rest, except in cases specified by law, is an absolute right, which means that an employee cannot waive it. Moreover, the laws do not provide for the possibility to reduce or divide into parts the daily and weekly rest, even upon employee's consent. However, if an employer fails to ensure the daily and weekly rest, an employee is not entitled to monetary compensation[415].

The obligation to grant the daily and weekly rest is also correlated with the possibility to work overtime. In practice, application of article 132 § 1 of the Labour Code means that, apart from the permitted exceptions, an employee cannot perform work, including overtime work or stand-by duty, for a period longer than 13 hours per day. This is particularly important in the case of overtime work in the equivalent working time systems[416]. As already mentioned, article 132 § 2 of the Labour Code provides for certain exceptions to the principle of ensuring the daily and weekly rest. However, these exceptions do not mean than

[412] *A. Sobczyk*, Zasady… *[Principles…]*, p. 234.
[413] *J. Wratny*, Kodeks… *[Code…]*, pp. 298–299.
[414] *Ibidem*, p. 299.
[415] Judgment of the Supreme Court of 3 September 2009, III PK 33/09, OSNP 2012, No. 9–10, item 120.
[416] *A. Sobczyk*, Zasady… *[Principles…]*, pp. 228–229.

an employee is completely deprived of his right to rest. In the case of daily rest, the time of rest should be balanced. In the case of weekly rest, it may be reduced to 24 hours.

3.6.4.5. The principle of limited admissibility of overtime work

Under article 151 § 1 of the Labour Code, overtime work means work performed beyond the standard working hours of an employee as well as beyond the extended daily working hours stemming from the system and work schedule applicable to the employee concerned. Therefore, it is work performed by an employee who is physically and mentally tired by the performed work and therefore such work requires more effort. Performance of work beyond the acceptable working time standards poses a risk of excessive body strain by reduction of the time of daily rest to the statutory minimum and it further poses risks to health and safety of workers[417]. Because of the employee's right to rest, the purpose of which is, among others, to recover physically and mentally, the overtime work is acceptable in exceptional situations[418].

Under article 151 § 1 of the Labour Code, assignment of overtime work to an employee is permitted only in two situations: in the event of rescue operation to protect human life or health, protect property or environment or fixing failures or in the case of special needs of the employer. The list of these situations is exhaustive and in fact means a "prohibition" of overtime employment in the situations other than these prescribed by law. The catalogue of these situations cannot be extended by the social partners in a collective agreement, collective arrangement or internal rules or by the parties in an act under which an employment relationship is established.

In the view of the above, the essence of the analysed principle is restriction of the possibility to employ workers beyond the daily working time to specific situations prescribed by law.

The conditions of admissibility of overtime work listed in article 151 § 1 of the Labour Code are of various nature. The condition referring to rescue operation to protect human life or health, protect property or environment or fixing failures is more specific so it can be better identified in practice. The second condition, the "special needs of the employer", which is an imprecise expression, leaves it to the employer to assess whether there are any needs justifying assignment of overtime work. It should be emphasized that the latter condition does not allow creating

[417] See *Z. Masternak*, [in:] *H. Szurgacz* (ed.), Prawo pracy. Zarys wykładu *[Labour Law. An Outline]*, Warsaw 2005, pp. 231–232; *K. Stefański*, [in:] *K. Walczak*, *M. Wojewódka* (eds.), Prawo pracy dla sędziów i pełnomocników *[Labour Law for Judges and Attorneys]*, Warsaw 2017, p. 472.

[418] See *M. Masternak*, [in:] *H. Szurgacz* (ed.). Prawo pracy… *[Labour Law…]*, p. 232.

by an employer a regular system of overtime work, in particular where his needs in this regard result from wrong organisation of work. In deciding whether the special needs of the employer arose, account should be taken of their exceptional, extraordinary nature, difficult to predict[419].

Another restriction confirming the analysed principle is the statutory maximum limit of 150 overtime hours which can be worked by an employee in a calendar year. However, there is a possible deviation from this rule. This limit can be increased in a collective agreement or in internal rules or in a contract of employment if the employer is not subject to the collective agreement or is not obligated to issue internal rules. In such case, working time, including overtime, cannot exceed 48 hours per week in a relevant reference period. It should be noted that the recent changes concerning the obligation to issue internal work regulations increase the role of a contract of employment in this regard[420].

An employer cannot assign overtime work in the case of special needs of the employer to employees employed in jobs where the maximum admissible concentrations and intensities for agents harmful to health are exceeded.

Moreover, the laws prohibit overtime employment of certain categories of employees and impose on employers an obligation of additional payments amounting to 50% and 100% of an hourly rate[421].

3.6.4.6. The principle of limited admissibility of work on Sundays and public holidays

The restrictions concerning employment on Sundays and on public holidays are provided for by laws of some of the European countries[422]. Similarly, the Polish legislature prohibits, in principle, work on Sunday and on public holidays. The right to the statutory days off which mean Sundays and public holidays stems directly from article 66 (2) of the Constitution of the Republic of Poland. Under article 151^9 § 1 of the Labour Code, public holidays are Sundays and non-working days referred to in the provisions on public holidays. Work on Sunday and public holiday means work performed between 6.00 a.m. on one day and 6.00. a.m. on the next day, unless other time is specified by the employer concerned. On the other hand, public holidays were specified in the Act of 18 January 1951

[419] *Ibidem.*

[420] See article 104 of the Labour Code as amended by the Act of 16 December 2016 on the Amendment of Certain Acts Aimed at Improvement of the Environment for Entrepreneurs *[ustawa o zmianie niektórych ustaw w celu poprawy otoczenia przedsiębiorców]*, Journal of Laws *[Dz.U.]* of 2016, item 2255.

[421] *M. Święcicki*, Prawo pracy… *[Labour Law…]*, p. 486–487.

[422] See more: *A. Sobczyk*, Zasady… *[Principles…]*, pp. 226–238. For example Germany, Italy, the Netherlands, Switzerland.

on Public Holidays *(ustawa o dniach wolnych od pracy)*[423]. The statutory catalogue of public holidays which are non-working days is exhaustive. Public holidays should be considered non-working days within the meaning of article 151^9 § 1 of the Labour Code[424]. Moreover, under a separate act of 17 May 1989 on the relationship between the State and the Catholic Church in the Republic of Poland *(ustawa o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej)*[425] a list was prepared including other religious holidays during which an employer must grant to an employee, upon request of the latter, a day off in return for another day to be worked off by the employee in a manner agreed upon with the employer.

As already mentioned, work on Sundays and on public holidays is generally prohibited. However, this prohibition is relative[426]. Under article 151^{10} of the Labour Code, work on Sundays and public holidays is permitted in the situations listed in this provision. Generally speaking, these include situations when work on such days is necessary because of extraordinary circumstances (rescue operation, protection of human life and health, protection of property, fixing failures), specific type of work, work organisation specifics, work branch specifics[427]. The prohibition of work on Sundays and public holidays is complemented by an obligation to compensate work on such day with another day off during a week and an absolute prohibition to work for more than three Sundays in a row. Under article 151^{11} of the Labour Code, an employer is obliged to ensure another day off to an employee performing work on Sundays and public holidays. In exchange for work on Sunday – within a period of 6 calendar days preceding or following that Sunday, and in exchange for work on a public holiday – within the reference period. Moreover, as already mentioned, the employee should have at least every fourth Sunday off. This does not apply to employees hired for weekend work.

Specific principles relate to performance of work on Sundays and public holidays in sales outlets. In this case the legislature introduced a general prohibition of work on public holidays. The principle applies also where the public holiday falls on Sunday. However, work on Sundays is permitted in sales outlets for the performance of work necessary for the social utility and populations' daily needs.

[423] Journal of Laws *[Dz.U.]* of 1951, No. 4, item 28, as amended.

[424] Judgment of the Supreme Court of 29 January 2008, I PK 196/07, OSNP 2009, Nos. 7–8, item 89.

[425] Journal of Laws *[Dz.U.]* No. 29, item 154, as amended.

[426] *J. Wratny*, Kodeks cywilny… *[The Civil Code…]*, p. 335.

[427] *K. Rączka*, Praca w dni… *[Work on public…]*, p. 305.

3.6.5. The principle of limited flexibility of laws governing the working time

A permanent trend going from fixed to flexible organisation of working time has begun in Poland in the 1990s and continues today. As a result of this process, all systems of working time prescribed by the Code are essentially flexible[428]. According to labour law academic studies, the term "flexibility" of working time should be understood to mean the possibility to apply various working time systems, and in particular a possibility to vary working time schedules within days, weeks, months or even a year. In essence, the flexible working time consists in extension or reduction, within the statutory limits, of the working time, so that it corresponds with the needs of the employee and the employer[429].

Provisions governing the general working time norms and standards, including the working time systems and schedules imply that we are dealing with a "limited flexibility" which justifies formulation of the principle of limited flexibility of the provisions on working time. This principle is a consequence of a compromise between the protective function and organisational function of labour law. It should be assumed that the working time provisions have a protective function in terms of the right to rest and protection of health and safety of workers that justifies the opinion according to which the flexibility of the working time laws is for that reason limited. The essence of this principle is that the accepted combinations of working time and a reference period, and therefore the types of working time systems and schedules are subject to statutory regulation[430]. At the same time there exist limits within which the working time may be defined in the particular systems and schedules. The laws specify the parameters with a maximum upper limit. These parameters include the maximum duration of the reference period, the maximum number of working hours, the principle of the minimum daily and weekly rest. The parameters are regulated by unilateral mandatory provisions. It means that they cannot be exceeded to the detriment of employees[431].

However, on the other hand, legal regulations ensure a certain level of flexibility since they allow balancing the working time in the reference periods, within particular systems and schedules, and therefore they allow differentiating the working hours on particular days and during particular weeks in a reference pe-

[428] *A. Chobot*, Czas pracy w znowelizowanym kodeksie pracy *[Working time in the amended Labour code]*, Poznań 1998, p. 38. *A. Chobot*, Uelastycznienie form gospodarowania czasem pracy w znowelizowanym kodeksie pracy *[Flexible management of working time in the amended Labour Code]*, RPEiS 1996, No. 3, p. 17 ff.

[429] *A. Chobot*, Czas pracy,… *[Working time…]*, p. 17.

[430] *A. Sobczyk*, Zasady… *[Principles…]*, p. 259.

[431] *Ibidem.*

riod. This stems from the maximum daily standard which is 8 working hours per day, 40 working hours per week on average and the average 5-day work week. This applies also to the basic working time.

The presented criteria are the basis for distinguishing, under the Labour Code, the following working time systems and schedules: the basic working time *(podstawowy czas pracy)*, intermittent working time system *(system przerywanego czasu pracy)*, equivalent working time system *(system równoważnego czasu pracy)*, continuous-process work system *(system pracy w ruchu ciągłym)*, weekend work system, task-based working time system *(system zadaniowego czasu pracy)* and a shortened work week system.

In terms of flexibility of working time, separate attention should be given to regulations concerning work start times and flexible working hours *(ruchomy czas pracy)*. Under article 140^1 of the Labour Code, the working time schedule may provide for different times of commencement of work on the days which according to this schedule are working days for the employees concerned. The working time schedule may provide for a period of time during which an employee should decide on the time of commencement of work on the day which according to the schedule is a working day for the employee concerned. It should be emphasized that performance of work in accordance with these working time schedules cannot violate employee's right to daily and weekly rest. However, within these schedules a repeated performance of work on the same day does not constitute overtime work.

A separate category of flexibility is set out in laws governing individual working time schedules which may be agreed in every working time system applicable to an employee.

It should be assumed that the process of making the laws on the working time more flexible is a continuous process because of such determinants as: globalization of life, changing living and management conditions, changes in the consumer market, needs of employers associated with the development of new technologies and methods of organisation of work, necessity to improve effectiveness of work, freedom of workers and the need for individualisation of working time in relation to family life[432].

The working time systems and schedules set out in the Labour Code indicate specific models of use of the working time by the employer. In terms of flexibility, it is important to specify the conditions for the permissibility of applying particular models and the scope of possible changes in specific parameters characteristic of the system concerned, such as reference periods, maximum standards. It should also be noted that the scope of flexibility of working time is defined also

[432] *A. Chobot*, Czas pracy… *[Working time…]*, p. 13.

by the limits of possible modifications of the Labour Code regulations by autonomous laws, in particular internal company regulations governing the working time. This applies both to the procedures and their acceptable contents[433].

However, in the context of the previous findings certain doubts arise as to the very broadly expressed, "elastic" conditions for introduction of particular working time systems, such as the "type of work", "organisation of work", "place of work". On the one hand they extend the scope of flexibility, but on the other hand they can encourage abuse of law by the employers.

3.6.6. The principle of consistency between the provisions on working time and the provisions on annual leave

A postulative principle of consistency (coherence) of the provisions on working time and the provisions governing annual leave is a consequence of overlap between the working time concept and the annual leave concept which jointly implement the principle of the right to rest[434]. The basis for the mentioned principle is article 66 (2) of the Polish Constitution, which makes a reference to statutory holidays, annual paid leave and maximum permissible hours of work specified by law as the elements of the right to rest. Similarly, article 14 of the Labour Code mentions annual leave, days off and working time as the institutions which jointly guarantee the worker's right to rest. The essence of this principle is the need to harmonize these provisions so as to ensure conflict-free functioning of these institutions.

It should be noted that the relationship between the provisions on working time and the provisions governing annual leaves is visible at two levels: a general level of joint fulfilment of the normative principle of the right to rest and a level of specific regulations which to a large extent are technical. Because of the universal nature of the right to rest, disharmony between the laws governing the two concepts becomes not only a source of controversy among the legal theorists, but also causes far-reaching problems associated with their practical application and negative assessment by the social partners and employees.

Close relations between the working time and the annual leave are a consequence of, among others, amendment of the provisions of the Labour Code on annual leave in 2003. A result of this amendment was introduction of a mechanism which converts annual leave days into working hours. The postulate of uniformity of the provisions governing both of these institutions is supported primarily by the relationship between the annual leave and a working time schedule,

[433] *A. Sobczyk*, Zasady… *[Principles…]*, p. 260.
[434] See *T. Liszcz*, Prawo pracy… *[Labour Law…]*, p. 90.

the need for a common definition of identical or similar concepts and the obligations relating to keeping personnel files.

As already mentioned, one of the main manifestations of the principle of consistency (coherence) is a relation between annual leave and the working time schedule. Of special importance is article 154^2 of the Labour Code, under which annual leave is granted for the days which are working days of the employee in accordance with his work schedule, in the number of hours corresponding to the daily working time of the employee on a given day. This mechanism means that the annual leave runs not in reference to calendar days but to the actual working time schedule applicable to the employee concerned. Consequently, the leave is granted for Sunday or a public holiday if these are working days for the employee concerned, according to his working time schedule, and it is not granted for the working days which are non-working days for the employee according to his schedule in compliance with the principle of the average 5-days work week or balancing of the working time in the equivalent working time system. The relationship between the working time schedule and annual leave refers also to the number of working hours planned for a working day concerned. For the purposes of the conversion, one day of annual leave corresponds to 8 working hours, unless an employee is subject to a lower daily working time standard.

A close relationship, confirming the mentioned principle, can also be seen between such concepts as "working day" within the meaning of the provisions on working time and "day of leave" within the meaning of the provisions on annual leave which was not defined in more detail by the legislature[435].

3.6.7. The principle of consistency between the provisions on working time and remuneration

The provisions on working time are closely linked to the provisions governing the principles of remuneration for work. This relation is especially visible in the case of time-based or mixed system of remuneration for work and it concerns in particular the employer's risk associated with employment of employees. The essence of that risk is the employer's obligation to provide benefits to the employee despite non-performance of work by the employee who is nevertheless at the employer's disposal to perform work.

On the basis of the analysis of the provisions on working time and on remuneration for work, there are grounds to consider that the relationships between those provisions are strict and multi-dimensional. For example, a reference should be made to the links in such areas as: remuneration and working time

[435] *A. Sobczyk*, Zasady… *[Principles…]*, p. 313.

schedule, remuneration and compensation of overtime work with days off, additional pay and a lump-sum remuneration for overtime work, additional pay for work at night, additional pay for work on a public holiday or on Sundays which were not compensated with a day off, remuneration for the time of non-performance of work if the laws so provide, remuneration for a stand-by duty and remuneration for the time of a break in an intermittent working time system[436].

A strict relationship between the working time and remuneration allows one to formulate a postulative principle of necessary consistency between the provisions on working time and the provisions on remuneration. First, it should be emphasized that the working time, as an extensive measure of employee's obligation is usually identified with the amount of work which, in turns, directly affects the amount of the remuneration for work payable to the employee. For that reason, the regulations governing remuneration for work and working time should be consistent and harmonious. The lack of consistency in the provisions governing both of these institutions may cause problems with functional and social interpretation of the provisions on remuneration[437].

The necessary consistency of the mentioned provisions stems also from the fact that certain concepts relating to remuneration were defined in the provisions of section VI of the Labour Code on the working time. On the other hand, the provisions of articles 80 and 81 of the Labour Code included in section III of the Labour Code governing remuneration for work, which establish the employer's risk, refer also to the working time.

3.6.8. The principle of participation of the social partners in organisation of working time

A primary source of the principle of participation of workers in the organisation of working time is Directive No. 2003/88/EC which attaches a considerable importance to the social partners as regards introduction of derogations from the standards of organisation of working time laid down in articles 3, 4, 5, 8 and 16 of the Directive, i.e. daily and weekly rest, work at night and reference periods. Article 18 of the Directive provides that derogations may be made from articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level. The community legis-

[436] This is discussed in detail by *A. Sobczyk*, Zasady… *[Principles…]*, p. 326 ff.
[437] *Ibidem*, p. 326.

lature considered participation of the social partners in establishing derogations to be an essential guarantee of protection of employees.

A question arises whether provisions of chapter VI of the Labour Code give grounds for decoding the principle of participation of workers in organisation of working time.

First, it should be emphasized that according to the Labour Code, the working time systems and schedules and the adopted reference periods are set out in collective agreements or internal working rules. Setting out an organisation of working time in an announcement is possible if the employer is not covered by a collective agreement or not obligated to issue internal working rules. According to the labour law jurisprudence, an announcement is considered a unilateral, formalized act of a general management of an employer[438].

Therefore, under the Labour Code, there is a specific "reference" to collective agreements, and alternatively to working rules as being appropriate for regulation of matters relating to working time[439]. And collective agreements best reflect the essence of this principle since they cannot be adopted without consent of the social partners. Some legal scholars argue that because of the characteristics of internal rules (easy to adopt, automatic influence on the employment relationship), the rules are more appropriate to determine the working time systems and schedules as well as other elements of organisation of working time[440].

Extension of a reference period in accordance with article 129 § 2 of the Labour Code as well as working time schedules which allow different times of commencement of the working time (article 140^1 of the Labour Code) should be agreed upon in a collective agreement or in an agreement with company trade union organisations. If it is not possible to agree upon the contents of the agreement with all trade union organisations, an employer should agree upon such contents with trade union organisations which are considered representative within the meaning of article 241^{25a} of the Labour Code or in an agreement concluded with representatives of workers appointed in accordance with a procedure adopted by the employer – if there are no trade union organisations in the establishment concerned. An employer must submit a copy of the agreement on extension of a working time reference period to a competent labour inspector. However, there are certain exceptions to the principle of application of working

[438] See *A. Dubownik*, Regulamin pracy po nowelizacji. Sytuacja prawna pracodawców niezobowiązanych do ustalenia regulaminu pracy *[Work rules after the amendment. Legal situation of employers not obligated to adopt the work rules]*, PiZS 2004, No. 3, p. 8 ff.

[439] See *J. Wratny*, [in:] Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A Commentary]*, Warsaw 2009, p. 154.

[440] See *K. Rączka*, Ustalenie systemów i rozkładów czasu pracy na gruncie kodeksu pracy *[Working time systems and schedules under the Labour Code]*, PiZS 2004, No. 4, p. 32.

time systems and schedules introduced by autonomous acts. The "flexible working hours" may be applied also upon a written request of an employee, irrespective of whether application of such schedules was accepted in a collective agreement or other arrangement. The working time systems laid down in articles 143 and 144 of the Labour Code are applied to an individual employee under a contract of employment.

Also other provisions of the Labour Code support the idea of distinguishing this principle. The system of intermittent working time may be introduced in a collective agreement or in an agreement with a company trade union organisation, and if there is no such organisation – in an agreement with employees' representatives elected in a procedure adopted in the employer's establishment. There is an exception relating to an employer who is a natural person and conducts business in agriculture and farming, with no trade union organisation acting in his establishment. In such case the system can be applied under a contract of employment.

A collective agreement or internal rules, and in exceptional cases also a contract of employment, if the employer is not covered by a collective agreement or internal rules, may be the basis for determining the number of overtime hours in a calendar year, which is different from the standard limit of 150 hours. Similarly, lunch breaks can be introduced under a collective agreement or internal rules. In exceptional cases, if the employer is not subject to a collective agreement or is not obligated to set out the internal work rules, it will be a contract of employment.

Attention should also be given to article 151^7 of the Labour Code, under which a list of jobs that are particularly dangerous or involve a considerable physical or intellectual effort, which may be performed at night for not more than 8 hours in 24 hours, shall be set out by an employer in an agreement with a company trade union organisation, and if there is no such organisation at the employer's – with representatives of employees selected in accordance with the procedure adopted by the employer concerned.

The mentioned regulations of section VI of the Labour Code governing the working time allow concluding that under the provisions of that section there are grounds for distinguishing the principle of participation of the social partners in determining the organisation of working time.

3.6.9. Principles relating to part-time employment

3.6.9.1. The principle of relative freedom of choice of working hours by an employee

A far-reaching freedom of choice by an employee of his working hours to be fully in compliance with his needs and preferences is considered a method of protection against negative consequences of part-time employment[441].

The regulations relating to this issue and deriving from the principle of the freedom of contract were included in Directive 97/81/EC concerning the part-time work. The directive provides that an employer should give consideration to requests by workers to transfer from full-time to part-time work or from part-time to full-time if such opportunity arises. In order to facilitate the transfer between the full-time and part-time work, the directive provides for an obligation of the employer to inform the employees of the availability of part-time and full-time positions in the establishment. The availability of part-time work should apply also to skilled and managerial positions.

Under the Polish labour laws the issue is regulated, as a result of implementation of Directive 97/81/EC, by article 29^2 § 2 of the Labour Code, under which an employee may request a change of the working time specified in a contract of employment and an employer must, "as far as possible", accept such request. Moreover, under article 94^2 of the Labour Code, an employer shall inform employees, in accordance with the practices adopted in the establishment, of the full-time and part-time employment opportunities.

Using the expression "as far as possible" means that the employee's request is relatively binding upon the employer. Acceptance of the request depends on the possibilities of the employer who decides on the employment policy applicable in the establishment.

This conclusion can be drawn from a grammatical interpretation of the expression included in article 53 § 5 of the Labour Code, which was a subject of the Supreme Court's resolution of of 10 September 1976[442]. According to the Supreme Court, the expression "as far as possible" that is similar to the expression used in article 29^2 § 2 of the Labour Code means an obligation of the employer

[441] *J. Wratny*, Z problematyki prawnej zatrudnienia w niepełnym wymiarze czasu pracy *[Legal aspects of part-time employment]*, [in:] *A. Kosut*, *W. Perdus* (eds.), Przemiany prawa pracy. Od kodyfikacji do współczesności, Księga jubileuszowa w siedemdziesięciolecie urodzin Profesor Teresy Liszcz *[Changes to Labour Law. From a Codification to Contemporary Times. A Jubilee Book for the 70th Birthday of Professor Teresa Liszcz]*, Lublin 2015, p. 295.

[442] I PZP 48/76, OSNCP 1977, No. 4, item 65.

to accept the employee's request only if there exist objective possibilities to comply with such a request.

A relative, which means weak, character of the mentioned right does not exclude employee's claim for setting out the terms and conditions of an employment relationship in compliance with employee's request[443]. This refers in particular to a situation where the employer informs the employees of the possibility of full-time or part-time employment.

3.6.9.2. Pro rata temporis principle and part-time employment

Article 29^2 § 1 of the Labour Code sets out a principle of proportionality of remuneration and other benefits (*pro rata temporis)* to the working time. The purpose of this provision is to prevent discrimination, in a broad sense, of employees employed on a part-time basis. The prohibition of discrimination means prohibition to derogate, to the detriment of the employees, from the principle of proportionality of work-related benefits to the working time. The assessment whether the *pro rata temporis* principle was infringed or not should be made taking into account a model to which a situation concerned should be compared. In the case of employees employed on a part-time basis, the model should be an employee who performs identical or similar work, employed on a full-time basis and what is being compared are the wage and working conditions. There are two elements in the definition of the model: the concept of an employee employed on a part-time basis and characteristics of performance of work (identical or similar work, and first of all the type of work). A part-time employee is an employee employed below the standards laid down in article 129 § 1 of the Labour Code, that is 8 hours per day and 40 hours on average per week. In other words, part-time employment means that an employee must, in compliance with the nature of an employment relationship, perform work with due care and this obligation expires after the employment relationship ends. The amount of work assigned to the employee should be proportionate to the working hours. In its judgment of 4 April 2014[444] the Supreme Court held that forcing an employee employed on a part-time basis to permanently perform full-time work is an abuse of rights and justifies employee's request to transform his contract of employment into a full-time contract of employment. A significant and controversial problem is

[443] *Ibidem*, p. 296 and the literature referenced there.

[444] I PK 249/13, available at http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?ItemSID=14925-57a0abe2-a73c-441d-9691-b79a0c36be5c&ListName=Orzeczenia3&DataWDniu=2014–04-04.

the issue of principles of remuneration of employees employed outside of normal working hours[445].

3.6.10. Summary

To sum up, it should be emphasized that undoubtedly the working time concept was established taking into account specific fundamental principles of labour law, such as the principle of the right to rest, the principle of the right to safe working conditions and the principle of employer's risk. Analysis of provisions of section VI of the Labour Code leads to the conclusion that the mentioned fundamental principles are complied with through normative mechanisms which can also be considered fundamental principles, however relating only to provisions on the working time[446]. The normative mechanisms which are considered principles of working time constitute a framework for the working time concept with the specific norms functioning around it and often governing some technical issues. Some of these regulations can be considered non-fundamental normative principles[447]. However, a large group of the mentioned principles, in particular those relating to organisation of working time, includes descriptive principles. The principles included in this group perform primarily the functions relating to description and classification of labour law, its organisation and a cognitive function. The principles of coherence first of all play the role of interpretation guidelines and have a postulative function by indicating the direction for harmonization of laws on working time with the laws regulating annual leave and remuneration for work. To some extent the role of the principles of labour law should also be assigned to the general normative regulations which refer to part-time employment.

[445] See more *J. Wratny*, Z problematyki prawnej… *[Legal aspects…]*, pp. 293–295.

[446] See *A. Sobczyk*, Zasady… *[Principles…],* p. 20.

[447] See *M. Piekarski*, Podstawowe zasady prawa pracy *[The fundamental principles of labour law]*, Annales Uniwersitatis M. Curie-Skłodowskiej, Lublin 1977, p. 38.

3.7. Financial liability of employees

J. Piątkowski

3.7.1. Introduction

In social science the term "liability" (Polish *odpowiedzialność)* may have ambiguous meaning ("x is liable/responsible for something", "x is held liable", etc.). In principle, "liability" is referred to certain behaviour "of a negative value", associated with fault (bearing the liability) and sanction (holding someone liable). In such sense, there is no liability other than the "negative" one[448].

The employee's liability under labour law is a broad-ranging and multidimensional issue[449]. It is one of the pillars of the labour law system. A specific area is a financial liability which exists next to liability for breach of workplace order, policies or procedures, disciplinary liability as well as liability for infringement of employee's rights. All these types of liability are directly related to employment relationship but they differ in purpose. The main purpose of the majority of them is protection of legitimate interests of employers (financial liability, liability for breach of workplace order, policies or procedures and disciplinary liability), while the liability for infringement of employee's rights serves to protect the rights of employees and other persons[450]. The financial liability is different from the other types of employee's liability in that it depends on whether damage has been caused to the employer[451].

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[448] *J. Piątkowski*, Aksjologiczne i normatywne podstawy prawa stosunku pracy *[Axiological and Normative Foundations of an Employment Relationship Law]*, Toruń 2013, p. 515. See *T. Zieliński*, Prawo pracy. Zarys systemu. Część II. Prawo stosunku pracy *[The Labour Law. An Outline of the System. Part II. Employment Relationship]*, Warsaw – Kraków 1986, pp. 317–318.

[449] See in particular *W. Sanetra*, Odpowiedzialność według prawa pracy. Pojęcie, zakres, dyferencjacja *[Liability under Labour Law. The Concept, Scope and Differentiation]*, Wrocław 1991; *W. Sanetra*, Odpowiedzialność pracownika i jej przesłanki w kodeksie pracy *[Employee's liability and its preconditions in the Labour Code]*, RPEiS 1977, No. 4, p. 89 ff. and O pojęciu i zakresie odpowiedzialności pracowniczej *[The concept and the scope of employee's liability]*, [in:] *W. Sanetra* (ed.), Odpowiedzialność pracownicza *[Employee's Liability]*, Materials for the 11th Winter Labour Law School, Karpacz 1984, Wrocław 1984.

[450] As regards the latter type of liability, there is a narrow area of functioning of non-employee employment relationships to which the liability for infringement of employee's rights applies in connection with (among others) article 304 § 1 and 2 and article 283 of the Labour Code.

[451] In its judgment of 27 July 2011 (II PK 22/11, available at Legalis Database), the Supreme Court of Poland held that in order to bring an action under article 114 of the Labour Code, an employer must prove the damage sustained.

In a broader context, the financial liability which is of interest to the jurisprudence, legal studies[452] and practice, is a type of sanction in a form of negative consequences suffered by the infringer[453]. In this sense, the analysed liability exists in the labour law next to other sanctions, such as for example: termination of a contract of employment[454], non-renewal of a contract of employment concluded for a fixed term, suspension of promotion or denial of a bonus. There is no direct interdependence between the financial liability and other sanctions. Therefore, accumulation of sanctions is legally acceptable. Basically, the problem of graduation of sanctions does not exist.

The legal basis of employee's financial liability is the Labour Code which entered into force in 1975. However, the rules governing such liability were developed much earlier, in a period when a contract of employment was a civil law construct[455]. At that time, an employee was liable, formally in full, for the damage caused to an employer under provisions of the civil law (governing liability of a debtor for non-performance or improper performance of an obligation or provisions on delictual liability)[456]. Such severe liability did not correspond with the nature of employment relationships. It did not take into account the differences between a labour-law obligation and a civil-law obligation. It has been emphasized in the legal studies that sanctions in the form of unrealistically high compensation blunted the preventive and penal function of the civil liability and depreciated the value of legal instruments[457]. For that reason, the case-law of the

[452] See in particular *W. Patulski*, Odpowiedzialność materialna pracowników *[Financial Liability of Employees]*, Gdańsk 1999; *W. Patulski*, Pracownicza odpowiedzialność odszkodowawcza *[Employee's Liability for Damage]*, Warsaw 1976; *G. Bieniek*, Odpowiedzialność materialna *[Financial Liability]*, Warsaw 1991; *G. Bieniek*, Odpowiedzialność materialna pracowników w praktyce *[Financial Liability of Employees in Practice]*, Warsaw 1988; *E. Staszewska*, Odpowiedzialność pracownicza *[Employee's Liability]*, Warsaw 2013; *E. Łętowska*, Miarkowanie odszkodowania za szkodę wyrządzoną przez pracownika *[Reduction of compensation for damage caused by an employee]*, PiP 1965, No. 8–9; *M. Rafacz-Krzyżanowska*, Odpowiedzialność majątkowa pracownika *[Financial liability of employees]*, PUG 1967, No. 7; *T. Zieliński,* Odpowiedzialność deliktowa pracownika według Kodeksu pracy *[Liability of an employee in delict under the Labour Code]*, PiP 1975, vol. 6.

[453] According to *A. Stelmachowski*,Wstęp do teorii prawa cywilnego *[An Introduction to the Theory of Civil Law]*, Warsaw 1984, p. 309, liability in a broader sense is an obligation seen from the side of sanctions applicable in the case of failure to comply with such obligation. According to the author, it does not exclude other meanings of the term "liability", depending on the context in which it is used.

[454] Termination of employment is seen in the category of sanction also by *A. Stelmachowski*, Wstęp do teorii… *[An Introduction to Theory…]*, p. 336 ff.

[455] See more in *S. Garlicki*, *M. Piekarski*, *A. Stelmachowski*, Odpowiedzialność cywilna za niedobory *[Civil Liability For Shortages]*, Warsaw 1970; *M. Rafacz-Krzyżanowska*, Odpowiedzialność pracownika wobec zakładu pracy *[Employee's Liability to an Employing Establishment]*, Warsaw 1969.

[456] See more in: *Z. Radwański*, [in:] System prawa cywilnego, t. III, cz. 1, Prawo zobowiązań – część ogólna *[The System of Civil Law, Volume III, Part 1. The Law of Obligations]*, Wrocław 1981, p. 794 ff.

[457] *A. Stelmachowski*, Wstęp do teorii… *[An Introduction to Theory…]*, p. 343.

Supreme Court of Poland has gradually developed, since the 1950s[458], through interpretation and with the use of principles of labour law[459], a number of principles distinguishing between an employee's liability for damage caused to the principal and liability under civil law[460]. This applied in particular to limitation of civil liability for damage caused through unintentional misconduct (except for liability for the entrusted property), application of a rule according to which an employee was not liable for damage connected with operational risks of the employing establishment[461] and alleviation of the apportionment of the burden of proof by replacing the requirement to prove the circumstances for which the employee was not liable with a requirement to substantiate such circumstances (*prima facie* evidence), reversing the burden of proof to the creditor[462]. In its resolution of 13 May 1965[463], the Supreme Court (seven judges) held that an employee cannot be subject to full civil liability (article 361 § 2 of the Civil Code), because of the principle of limited liability of an employee developed by the judiciary. This meant that the compensatory function, which is of key importance for the civil financial liability, was replaced in the employee's liability with an educational and preventive function[464] which today could be called a function developing the employee attitude. Undoubtedly, the laws governing the financial liability of an employee currently in force still play a penal and preventive role. Over time, to emphasize differences in employee's liability for the damage caused

[458] *Ibidem*, p. 342.

[459] Resolution of 7 judges of the Supreme Court of 13 May 1965. (Zb. Urz. (Official Records) 1966, item 88), adopted following the entry into force of the Civil Code and referring to article XII of the provisions implementing the Civil Code.

[460] See *Cz. Jackowiak*, [in:] *W. Jaśkiewicz*, *Cz. Jackowiak*, *W. Piotrowski*, Prawo pracy w zarysie *[An Outline of Labour Law]*, Warsaw 1985, p. 279; *A. Ochanowicz*, Odpowiedzialność cywilna pracownika w świetle najnowszego orzecznictwa Sądu Najwyższego *[Civil liability of an employee in the latest case-law of the Supreme Court of Poland]*, PiP of 1956, No. 5–6, p. 910. See also: *B. Wagner*, [in:] *K.W. Baran* (ed.), Kodeks pracy 2011. Komentarz *[The Labour Code 2011. A Commentary]*, Warsaw 2011, p. 653. According to the author, the Labour Code adopted the pre-Code acquis of the legal writings and case-law which results in the minor interest of the contemporary literature in this issue.

[461] See *A. Krajewski*, [in:] *G. Bieniek*, *J. Brol*, *A. Krajewski*, *W. Masewicz*, *J. Szczerski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 1977, p. 411 and a resolution of the Supreme Court of 13 May 1965, III PO 40/60, OSNCP 1966, No. 6, item 83 referenced there.

[462] See more in *L. Florek*, Ograniczona odpowiedzialność materialna pracownika za szkodę wyrządzoną zakładowi pracy *[A limited liability of an employee for damage caused to the employer]*, PUG 1975, No. 3.

[463] III PO 40/64, OSN CP of 1966, No. 6, item 88. See a commentary of T. Zieliński on this resolution, OSPiKA of 1966, vol. 10, item 211.

[464] This is emphasized in the case-law of the Supreme Court of Poland (and more specifically in the guidelines of the judiciary and judicial practice regarding the financial liability of an employee) and in the legal studies (*Cz. Jackowiak*, [in:] *W. Jaśkiewicz*, *Cz. Jackowiak*, *W. Piotrowski*, Prawo pracy w zarysie *[An Outline of Labour Law]*, Warsaw 1985, pp. 281–282).

by him, the previous material liability was called financial liability[465]. A specific feature of such liability is that, unlike the civil liability, it is solely compensatory.

A significant impact on the application of the provisions on financial liability has been exerted by the guidelines of justice and judicial practice on the financial liability of employees, as formulated by the Labour and Social Security Chamber of the Supreme Court in its resolution of 29 December 1975[466].

The financial liability of an employee (articles 114–127 of the Labour Code) is associated with the depletion of the employer's assets as a consequence of the employee's reprehensible behaviour. The grounds for such liability are different from those laid down in the Civil Code. In particular, the civil-law division into contractual liability and delictual liability has been waived, which consequently eliminated the source of conflicts resulting from the concurrence of grounds for liability. The new regulation was intended to protect the social property, which was strongly exposed in the Constitution of 1952 and to secure the legitimate interests of employees[467]. In principle, it was also one of the important measures to counteract the negative social attitudes and to stimulate employees' concern for improvement of quality of industrial products and services. It was also expected to contribute to combating negligence and wastage[468] as part of the employee's duty to have regard for the welfare of the work establishment (ex article 12 of the Labour Code). The regulations regarding the employee's financial liability currently in force are primarily aimed at supporting the protection of the employer's property (in connection with the employee's obligation to have regard for the employer's welfare)[469] and protection of the employee's legitimate interests.

3.7.2. The principle of universal nature of employee's liability

The universal nature of employee's financial liability has different dimensions. On the one hand, it applies to employees irrespective of the type of work performed, their function, the basis of employment, place of work, and regardless of

[465] See *Cz. Jackowiak*, [in:] *W. Jaśkiewicz*, *Cz. Jackowiak*, *W. Piotrowski*, Prawo pracy w zarysie *[An Outline of Labour Law]*, Warsaw 1985, p. 279.

[466] The Polish Monitor [*M.P.*] of 1976, No. 10, item 51.

[467] See more in *T. Duraj*, Problem materialnej odpowiedzialności pracowników zajmujących najwyższe stanowiska kierownicze w organizacjach gospodarczych *[Financial liability of employees in top managerial positions in business organisations]*, MPP 2011, No. 5.

[468] See *A. Krajewski*, [in:] *G. Bieniek*, *J. Brol*, *A. Krajewski*, *W. Masewicz*, *J. Szczerski*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 1977, p. 410.

[469] See *L. Florek*, Prawo pracy *[Labour Law]*, Warsaw 2017, p. 220.

whether the employer is a natural person or an organizational unit[470]. This characteristic of the financial liability is connected with its place in the Labour Code. The applicability of this act testifies to the uniformity of labour law as an independent branch of law[471].

On the other hand, the universal character of the financial liability is evidenced by the fact that all employees are subject to it, regardless of their assignment to one of the two models of employment, i.e. the universal model (regulated by the Labour Code and other generally applicable laws) or separate models (to which the separate laws governing employment in the public sector (so-called *pragmatyki*) apply. The legislature did not see the need to introduce specific rules of financial liability in relation to employees covered by special regulations. The introduction of the same rules of liability in the separate laws governing employment of specific categories of public sector employees as in the Labour Code would be incompatible with the principles of legislative technique. The tendency to harmonize the legal situation of the majority of employees and the need to diversify the status of individual groups of employees are not mutually exclusive but they complement each other, which can be seen in particular in the context of the application of the Labour Code to the employment relationships covered by the specific laws governing employment in the public sector. The dualistic model of employment is a manifestation of the labour law differentiation[472] which can be described as "external differentiation" (between specific laws).

As regards the employment relationships regulated by specific laws, the provisions of the Labour Code apply to them directly, without the possibility of any modification (article 5 of the Labour Code)[473]. It means that the provisions on the financial liability of employees cannot be modified for the purposes of liability for damage caused by an employee whose employment is subject to the separate *laws (pragmatyki)*. Reference to the Labour Code is one of the techniques of formation of a legal text, or more precisely – its organisation, shortening and simplification. It should also be noted that the provision of article 5 of the Labour Code is purely a reference and therefore it does not establish any rights (claims)[474]. A substantive

[470] Resolution of the Supreme Court of 5 December 1977, IV PR 287/77, PiZS 1979, No. 9, item 79.

[471] More: *A. Dral*, Uniformizm prawa pracy *[Uniformity of labour law]*, [in:] *K.W. Baran* (ed.), System prawa pracy. Tom I. Część ogólna *[A System of Labour Law. Volume I. A General Part]*, Warsaw 2017, p. 552 ff.

[472] See *U. Jackowiak*, [in:] *U. Jackowiak* (ed.), *M. Piankowski*, *J. Stelina*, *W. Uziak*, *A. Wypych-Żywicka*, *M. Zieleniecki*, Kodeks pracy z komentarzem *[The Labour Code with a Commentary]*, Gdańsk 2004, a commentary on article 5 of the Labour Code.

[473] See *K. Kolasiński*, Prawo pracy i zabezpieczenia społecznego *[Labour Law and Social Security Law],* Toruń 1999, p. 56.

[474] Judgment of the Supreme Court of 9 July 2008, I PK 14/08.

basis of a personal right is a specific provision of the Labour Code (e.g. regarding financial liability), which can be applied in the alternative in the case concerned.

A dominant view in the judicature is that article 5 of the Labour Code cannot be misused by its application to the categories of persons other than those covered by the specific laws governing employment in the public sector, including those who are not employees. The universal character of the financial liability has its clear limits. It does not cover persons who work for the employer on a basis different than an employment relationship, in particular under civil law contracts. This also means that the current expansion of labour law in the area of non-employee employment does not cover non-employee legal relations connected with damage, with one exception. A liability of a homeworker for the damage in the entrusted property is governed by the general principles laid down in the provisions of articles 114–127 of the Labour Code[475]. The financial liability regime does not apply to employees who cause harm to a third party (including to other employees) not in connection with the performance of their professional duties, but only on the occasion of their performance. Polish legal scholars emphasize that the provisions of Labour Code do not cover liability for damage caused by an employee, which is a consequence of the employee's violation of general obligations imposed on every citizen irrespective of any contractual relationship between the offender and the harmed person. An employee is liable for such damage under article 415 of the Civil Code, not as a party to the employment relationship or a debtor in a contractual relationship, but as the offender who committed a civil wrong (delict). It is emphasized that this kind of liability is not an employment-related liability, but a civil liability – with all its consequences[476].

The provisions of Labour Code governing the financial liability do not refer to liability for damage to the extent that the employer or other party contributed to the occurrence or increase of the damage. An employee is not liable for the risk connected with the employer's activity, and in particular he is not liable for the damage caused in connection with acting within the limits of acceptable risk (article 117 of the Labour Code).

Further, the said liability does not apply to the situation in which the employee is "himself affected" by the negative consequences of a particular behaviour, or when the financial sanctions stem from a legal act other than the Labour Code[477].

[475] This is stipulated in § 30 of the Regulation of the Council of Ministers of 31 December 1975 on the employee rights of persons performing home-based work *(rozporządzenie Rady Ministrów z dnia 31 grudnia 1975 w sprawie uprawnień pracowniczych osób wykonujących pracę nakładczą)*, Journal of Laws *[Dz.U.]* of 1976, No. 3, item 19. The act was issued under article 303 § 1 of the Labour Code.

[476] See in particular *L. Florek*, Prawo pracy, 19th ed., p. 222.

[477] *T. Zieliński*, Prawo pracy. Zarys systemu… *[Labour Law. An Outline…]*, p. 318.

3.7.3. The principle of differentiation of financial liability by types

There are two basic types of financial liability:

- liability for damage caused to the employer in the property which was not entrusted to the employee (articles 114–122 of the Labour Code); it is also called liability according to general principles;
- liability for property entrusted subject to the obligatory return or settlement (articles 124–127 of the Labour Code).

Legal scholars agree that the legal regulation of financial liability is to some extent of a general nature. This is because it refers to both of the above-mentioned types of liability. This refers to exclusion of liability in the case of contribution of an employer or a third party to the occurrence of the damage or taking actions within the limits of risk, the possibility of reducing compensation by way of settlement or a court ruling, as well as liability for intentional fault[478].

It is also possible to distinguish a third type of financial liability, i.e. employer's liability for damage caused by an employee to third parties. The Polish legal scholars sometimes distinguish another basic type of financial liability, i.e. liability for damage caused by intentional fault (article 122 of the Labour Code)[479]. However, such liability basically falls within a category of liability for the property which was not entrusted to the employee, which means financial liability in accordance with the general principles. Some legal theorists contend that the acts specified in the above-mentioned provision (seizure of the employer's property or other intentional damage) constitute a specific type of delict, outside the employment relationship, committed on the occasion of that relationship[480]. Sometimes it is argued that under the financial liability regime, unlawful acts committed by an employee are such acts causing damage which at the same time violate general obligations[481]. Some of the authors indicate that if an employee causes damage as a result of violation of obligations not covered by the employment relationship (acting on the occasion of performance of employee duties), it constitutes delict in civil law or criminal law. Liability for such acts is not labour law based liabil-

[478] *L. Florek*, Prawo pracy, 19th ed., pp. 307–308.

[479] *Cz. Jackowiak*, [in:] *W. Jaśkiewicz*, *Cz. Jackowiak*, *W. Piotrowski*, Prawo pracy… *[Labour Law…]*, p. 281.

[480] *J. Jończyk*, Odpowiedzialność materialna pracowników *[Financial liability of employees]*, Państwo i Prawo 1975, vol. 1, p. 15 ff.; see more in: A. Bryłka, Pojęcie deliktu pracowniczego *[A concept of employee's delict]*, Państwo i Prawo 1981, vol. 3, p. 70 ff.

[481] *T. Zieliński,* Odpowiedzialność deliktowa pracownika według Kodeksu pracy *[Liability of an employee in delict under the Labour Code]*, Państwo i Prawo 1975, vol. 37.

ity[482]. In such a situation, there is a problem of concurrence of labour law based liability with delictual liability, which entails negative legal consequences of acts consisting in the violation of the employee's contractual obligation as well as the general obligation[483].

Liability for the entrusted property exists where the following property was entrusted to an employee subject to the obligatory return or settlement of accounts:

- money, securities or valuables;
- tools and instruments or similar items, as well as protective work wear or personal protective equipment;
- other property entrusted to an employee subject to obligatory return or settlement.

Liability for the entrusted property is conditional upon proper entrustment of the property to the employee in the circumstances and under conditions that enable its return or settlement. In particular, it means that the employee should participate in determining the quantity and quality of the property entrusted to him. A condition necessary for the proper entrustment of property is the actual and not only formal entrustment. It is assumed that the mere statement of an employee about the acceptance of financial liability, without entrusting the property by inventory, is not equal to entrusting property and is not sufficient to accept the employee's liability for the damage caused[484]. The employee is responsible for property not only when it has been entrusted to him correctly by the employer but also when he has direct supervision over it[485]. The condition of joint financial liability of employees for the entrusted property is that the persons financially liable must be able to participate in carrying out the inventory and submit remarks connected with such inventory[486]. In the case of serious failures of the employer in this respect, the employee will be liable in accordance with the general principles if, of course, the conditions for such liability are met. An employee may be released from liability if he demonstrates that the damage was caused by reasons beyond his control (article 124 § 3 of the Labour Code). In the case-law[487] and legal writings[488] it is accepted that the term "demonstrates" as used in the men-

[482] *L. Florek*, Prawo pracy, 19th edition, p. 222.

[483] *Ibidem*, p. 216

[484] Resolution of the Supreme Court of 16 May 1975, I PR 117/75, *G. Bieniek*, Odpowiedzialność materialna pracowników w praktyce *[Financial liability of employees in practice],* Warsaw 1988, p. 113.

[485] Judgment of the Supreme Court of 3 December 2013, I PK 140/113 (available at Legalis Database).

[486] Judgment of the Supreme Court of 7 June 1977, IV PZ24/77 (available at Legalis Database).

[487] Resolution of 7 judges of the Supreme Court of 30 May 1975, V PZP 3/75 (OSNCP 1975, No. 4, item 143).

[488] See *K. Kolasiński*, Prawo pracy i zabezpieczenia… *[Labour Law and Social…]*, p. 248.

tioned provisions means "proves". The possibility to demonstrate that the damage occurred due to reasons beyond the employee's control, means indicating such circumstances which could have caused the damage. The obligation to demonstrate such circumstances means that the employee should substantiate that the damage could have occurred due to reasons beyond his control. The employer must prove that the property was properly entrusted and the employee failed to settle the accounts in respect of it. The obligation to prove the fact of non-settlement by the employee means that the employer must demonstrate the amount of the damage[489].

The above provision, which allows an employee to be released from liability for the entrusted property, applies also to liability borne by a larger number of employees to whom the property was jointly entrusted under the conditions specified in articles 124 and 125 of the Labour Code. However, the employee responsible for the property entrusted under the joint liability regime, regardless of the extent of the employer's contribution to the damage, cannot be fully released from liability for shortages on the basis of article 124 § 3 of the Labour Code, if specific negligence was found in his work, which caused the shortages[490].

If the property was entrusted to several employees jointly, subject to mandatory settlement, the employees may conclude with an employer an agreement on joint financial liability (article 125 of the Labour Code). Such agreement should be made in writing in order to be valid[491]. The establishment of the joint financial liability is conditional upon entrustment of property jointly to all employees who will be subject to such liability – on the basis of an inventory carried out with their participation or with the participation of persons indicated by the latter and giving them the possibility to comment on the course and the results of the inventory. Apart from the rights mentioned above, an employee who is subject to an agreement on joint financial liability is also authorized to inspect the accounts of the employer to the extent applicable to settlement of the entrusted property and to participate in reception and delivery of the property. Entrustment of the property should be confirmed in a document.

Under article 125 of the Labour Code, under the agreement on financial liability an employee is obligated to settle accounts in respect of the property entrusted to him rather than to return it to the employer. In its decision of 9 October 2013 the Supreme Court held that the term "settlement" as used in this provision should refer to certain figures. Therefore, an employee should settle

[489] Judgment of a Court of Appeal in Łódź of 28 June 2013, III APa 13/13.

[490] Judgment of the Supreme Court of 20 October 1998, I PKN 387/98, OSNAP 1999, No. 23, item 742.

[491] An agreement which was not concluded in writing is invalid. See a resolution of 7 judges of the Supreme Court of 18 April 1988, I PZP 28/97, OSNC 1988, No. 12, item 165.

accounts in respect of the property specified in figures[492]. A return or settlement of the entrusted property consists in returning the property in the condition in which it was entrusted (taking into account natural depletion or ordinary wear and tear, etc.) or return of money obtained from sale or in proving that the property was handed over to an authorized person. In its judgment of 2 December 1997 the Supreme Court held that settlement of accounts in respect of the entrusted property should be assessed in relation to specific regulation of employee's duties. A proof of settlement of the entrusted property may be an accepted confirmation of receipt of goods by a third party, in any form, if it proves that the property was handed over by the employee and gives rise to employer's claim against the person to whom the property was handed over[493].

An employee who returned the property or settled the accounts is liable in the case of return of damaged or destroyed property in accordance with general principles laid down in article 114 et seq. of the Labour Code unless an intentional fault can be attributed to him[494].

In the case of acquisition of a part of an undertaking (for example a store) by another employer together with employees who were bound by an agreement on joint financial liability, the acquiring employer is not obliged to conclude with these employees a new written agreement on the joint liability unless such agreement was previously terminated by the employees or the employer[495].

The scope and the detailed rules of application of article 125 of the Labour Code as well as the procedure for joint entrustment of property are laid down in the Regulation of the Council of Ministers of 4 October 1974 on the joint financial liability of employees for the entrusted property *(rozporządzenie Rady Ministrów z dnia 4 października 1974 w sprawie wspólnej odpowiedzialności materialnej pracowników za powierzone mienie)*[496]. The provisions of this regulation apply in the case of joint entrustment of property, subject to settlement, in an establishment or a designated part of such establishment where sale, production or provision of services takes place or where the property is kept which is entrusted and separately settled. Every change of the persons covered by such agreement requires conclusion of a new agreement. An employee may terminate an agreement on the joint financial liability upon 14-days' written notice or withdraw from such

[492] I PK 106/13 (available at Legalis Database).

[493] I PKN 411/97 (available at Legalis Database).

[494] Judgment of the Supreme Court of 22 February 1975, I PR 189/74, OSNCP 1975, No. 9, item 139 and a resolution of the Supreme Court of 18 December 1976, I PZP 6/76, OSNCP 1977, No. 5–6, item 84.

[495] Resolution of the Supreme Court of 15 May 1992, I PZP 28/92, PiZS 1992, No. 8, item 56.

[496] Consolidated text, Journal of Laws *[Dz.U.]* of 1996, No. 143, item 663. Provisions of the regulation do not apply to employees who are financially liable for the entrusted property according to the principle of limited financial liability of employees for the entrusted property under separate laws.

agreement. The right of withdrawal from the agreement on joint financial liability is also granted in every case to an employer.

The employees who are jointly liable for the property must not only "protect" it in a strict sense. Their obligations include also ensuring that the work entrusted to them is performed in compliance with the laws aimed at securing all assets of their employer. Therefore, they must not only draw attention of the co-responsible colleagues to the way they perform their duties or to counteract inappropriate actions, but also inform superiors about noticed irregularities and weaknesses in the work of their colleagues which might clearly harm the interests of the company and lead to shortages. Failure to comply with this obligation, which proves contribution to the damage, excludes the possibility of full exculpation of a jointly liable employee and does not release him from liability within the limits specified in the agreement. This view was expressed by the Supreme Court in its judgment of 4 November 1969[497].

The third type of financial liability, i.e. employer's liability for damage caused by an employee to third parties[498], is a type of indirect liability of an employee related to recourse liability. Under article 120 of the Labour Code, if an employee causes damage to a third party in the performance of his duties, the obligation to compensate for such damage rests solely with the employer. The employee is liable to the employer who repaired the damage caused to a third party, in accordance with the provisions laid down in the Labour Code. For the employer who has paid the compensation for the perpetrator of the damage (article 120 of the Labour Code), the moment when he suffered damage is the moment when his assets were reduced by the amount paid to the creditor. The date on which the employer is harmed is the date on which he performs the obligation to pay the compensation[499].

As regards the scope of employee's liability under article 120 § 2 of the Labour Code, it does not matter that after the damage has been caused, a change of the employer occurred in accordance with article 23^1 of the Labour Code[500]. An employer is under no obligation to compensate a third party for the damage caused by the employee if the damage was caused only on the occasion of employment at the establishment, that is not in the course of performance of tasks assigned to the employee. Intentional damage does not automatically determine that the damage was caused on the occasion of performance of employee duties; the deliberate act

[497] I PR 350/68 (available at Legalis Database).

[498] More in *J. Skoczyński*, Odpowiedzialność za szkodę wyrządzoną przez pracownika osobie trzeciej przy wykonywaniu obowiązków pracowniczych *[Liability for damage caused to a third party by an employee in the course of performance of his duties]*, PiZS 1998, No. 11.

[499] Judgment of the Supreme Court of 28 June 2005 referred to above.

[500] Judgment of the Supreme Court of 2 December 2004, I PK 71/04, OSNP 2005, No. 19, item 301.

of the perpetrator may be only an indication that the damage has not occurred in circumstances covered by the provisions of article 120 § 1 of the Labour Code.

The scale of the protective labour law proves that there are possible situations in which the amount of the compensation awarded to the employer under article 119 § 1 of the Labour Code is significantly small as compared with the compensation he paid to the aggrieved party under article 120 of the Labour Code.

In its resolution of 8 November 2016 the Supreme Court (Civil Chamber)[501] provided specific assessment of article 120 of the Labour Code. It held that the special principles of Labour Code regarding employees' liability for damage caused to a third party in the performance of professional duties remain valid, in principle without modification, despite systemic changes and the related changes in the status and economic strength of employers and very diverse legal forms of the current employment. It also pointed out that the mechanisms adopted in the Labour Code, in particular in article 120, were considered to protect the employee from adverse consequences of the performance of work for the employer. The employer benefits to the greatest extent from the activities of the persons employed, so he should also participate in their failures. Therefore, the adopted mechanism is justified in social, economic and axiological terms[502]. Following this logic, the Supreme Court also encourages employees to show initiative, lowering the level of fear of the consequences of causing possible damage, and at the same time secures remuneration for work against excessive burdens and severe civil liability rules. On the other hand, the Supreme Court notes that article 120 of the Labour Code improves the position of the harmed party by creating a higher certainty as to receiving full compensation for the damage sustained from the employer who is usually an economically stronger entity. The Court also pointed out that the arguments cited above remain of significant importance, even though the entrepreneurs, while employing workers, try to use legal forms which provide for weaker protection of the employed persons, and in many instances their financial potential is not very high.

3.7.4. Conditions of financial liability and the apportionment of the burden of proof

An employee who caused damage to the employer must remedy it, if four conditions are jointly met:

[501] III CZP 67/16 (available at Legalis Database).

[502] Judgment of the Supreme Court of 10 September 2009, V CSK 85/09, OSNC-ZD 2010, No. 2, item 63.

1) The employee fails to perform his duties or performs them improperly (unlawfulness)
2) Fault can be attributed to the employee
3) En employer sustained damage
4) There is a causal link between the culpable unlawfulness and the damage

Re: 1) Unlawfulness. Violation of duties (unlawfulness) occurs when an employee acts contrary to his duty or if he does not take action, even if he should do so[503]. The unlawfulness covers also the activity of an employee contrary to the rules of social coexistence. The financial liability covers only the damages that were caused by violation of obligations, but not any obligations but employee's professional duties. For example, a wilful use of a company car by an the employee – driver, for his own purposes, after completing his work task, in compliance with work instructions specifying the purpose, manner and time of using the car, does not constitute performance of employee's duties and goes beyond the binding employment relationship. The employee is liable for any damage to the employer resulting from such conduct under the civil law[504]. In its judgment of 5 May 1999[505], the Supreme Court held that the employee's obligation to remedy the damage arises in the event of failure to fulfil any of his duties, not only the basic duties.

A plant manager is obliged to take care of the plant's property and is not released from this obligation by the fact that according to the organization chart this obligation rests with another employee who has not actually been employed. In such a situation the plant manager should temporarily apply such organizational solution so that specific persons can be obligated to settle accounts in respect of individual assets, and in any case to explain where these assets are located or what happened to them[506].

The lawful excuses include: first – acting within the limits of acceptable risk (article 117 § 2 of the Labour Code *in fine*), if the employee acts in the employer's interest and in accordance with the principles of knowledge and life experience,

[503] Resolution of 7 judges of the Supreme Court of 12 June 1976, III CZP 5/76, OSNC 1977, No. 4, item 61.

Judgment of the Court of Appeal in Kraków of 12 May 2015, III APa 24/14 (available at Legalis Database). In its judgment of 14 May 2013 (I PK 5/13 (available at Legalis Database), the Supreme Court held that inaccurate bookkeeping is undoubtedly a violation of the duties of the employee employed as the chief accountant. In its judgment of 17 February 2014 (I PK 253/03, available at Legalis Database) the Supreme Court held that informing the employee of the consequences of a serious breach of duty cannot be considered a punishable threat.

[504] Judgment of the Supreme Court of 28 May 1976, IV PR 49/76, OSPiKA 1979, No. 1, item 46.

[505] I PKN 680/98 (available at Legalis Database).

[506] Judgment of the Supreme Court of 5 December 1977, IV PR 287/77 (available at Legalis Database).

and the anticipated benefits of such action objectively outweigh the damage that may be caused to the employer; second – acting in the necessary defence, i.e. repelling a direct and illegitimate attempt on the good of the establishment or own good (article 423 of the Civil Code) and acting in the state of so-called higher necessity (article 424 of the Civil Code in connection with article 300 of the Labour Code)[507]. Acting in the state of higher necessity takes place when an employee or other persons are in imminent danger from things or animals which belong to the employer. If, in order to avert this danger, the perpetrator destroys or damages this thing or kills or hurts the animal, he is not liable for the damage caused. An employee will also be excused in the case of inability to fulfil the obligations due to the fault of the employer who did not ensure the appropriate technical or organizational conditions as well as exclusion of the obligation due to the physical inability to perform the activities (e.g. when an employee faints) or where the instructions given by the superior are in contradiction with the law or the principles of social coexistence[508]. Another example of lawful excuse is where an employee acts under employer's instructions[509].

The scope of professional duties of an employee includes not only the activities falling within the responsibilities resulting from the position held (function performed) or taken under an official instruction, but also activities that go beyond the employee's obligations laid down in the contract of employment but are undertaken in the interest and for the benefit of the employer[510].

Re 2) Fault of an employee In the employment relations fault of an employee is a condition *sine qua non* of any legal liability of the latter[511]. It is a consequence of recognition of the moral principle according to which a human being should not bear the negative consequences of events which are not connected with his activity[512]. This also means that an employee cannot be held liable for the conse-

[507] See *T. Zieliński*, Prawo pracy. Zarys systemu… *[Labour Law. An Outline…]*, pp. 338–339. In its judgment of 8 October 1981, the Supreme Court indicated that an employee who, acting in the interest of the employing establishment, sacrifices an asset of lower value to save an asset of greater value, is not liable for the destruction of the asset of the lower value (IV PR 301/81,OSNC 1982, No. 2–3, item 43).

[508] See *W. Uziak*, Komentarz do art. 114 Kodeksu pracy *[A commentary on article 114 of the Labour Code]*, [in:] *U. Jackowiak* (ed.), *M. Piankowski*, *J. Stelina*, *W. Uziak*, *A. Wypych-Żywicka*, *M. Zieleniecki*, Kodeks pracy z… *[The Labour Code with a…]*.

[509] See *K. Jaśkowski*, Komentarz do art. 114 kodeksu pracy *[A commentary on article 114 of the Labour Code]*, [in:] *K. Jaśkowski*, *E. Maniewska*, Kodeks pracy… *[The Labour Code…]*.

[510] Judgment of the Supreme Court of 19 April 1979, IV PZP 1/79, OSN 1980, No. 4.

[511] In its judgment of 26 January 2006 (II PK 191/04, available at Legalis Database) the Supreme Court held that the condition of employee's liability for breach of the non-compete clause during the term of the employment relationship (article 101^1 § 2 of the Labour Code) is that the employee, through his own fault, causes damage to the employer which is a normal consequence of breach of the non-compete clause (articles 114 and 115 of the Labour Code).

[512] *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, p. 323.

quences alone. Therefore this liability cannot be strict (risk-based) liability. There is a consensus among the legal scholars that employee's liability based on fault means that the employee cannot be liable for someone else's fault; he can be held liable only for his own fault[513].

The fault can only be attributed to a person whose mental functions are not impaired, who has the ability to recognize the meaning and effects of his actions, acts consciously and is sane[514]. Any faults in the process of conscious or free decision-making by an employee must be taken into account in establishing his fault[515].

Fault cannot be attributed to a minor of up to 13 years of age (with whom an employment relationship cannot be effectively concluded; pursuant to article 426 of the Civil Code a minor under 13 years of age is not liable for the damage caused) or to persons who are not sane because of their mental or physical condition (article 425 § 1 of the Civil Code, in connection with article 300 of the Labour Code). A person who for any reason (for example as a result of a mental illness, mental retardation, or a transient mental disorder or very strong emotions or severe bodily exhaustion or physical impairment, e.g. blindness or deafness) is in a state that excludes conscious or free decision and expression of will, is not liable for the damage caused when in this condition. However, a person who suffered from mental distress caused in result of intoxicating beverages or other similar substances, is obliged to remedy the damage (and therefore the fault condition is met), unless the state of distress was triggered without his fault (e.g. when an intoxicating substance was added to the food served to the employee, without his knowledge, and in such condition the employee caused the damage to the employer).

Of special importance for the understanding of the concept of "fault" in Polish law is the Supreme Court resolution of 1975 establishing guidelines for the administration of justice and judicial practice regarding the financial liability of employees. In principle, fault is understood as a negatively perceived act of will of the perpetrator. It involves a negative assessment of the employee's decision-making process or of the act of will of the employee who caused the damage; this assessment concerns the mental attitude of the employee to the consequences of his behaviour, i.e. the damage, and not the attitude to his duties[516]. Fault can

[513] *Ibidem*, p. 323.

[514] See *T. Nycz*, [in:] *K.W. Baran*, *E. Chmielek-Łubińska*, *L. Mikrus*, *T. Nycz*, *A. Sobczyk*, *B. Wagner*, *M. Wandzel*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Gdańsk 2004, p. 455.

[515] Judgment of the Supreme Court of 22 October 1975, V PRN 4/75, OSNCP 1976, No. 5, item 90.

[516] See *W. Uziak*, Komentarz do art. 114 kodeksu pracy, [in:] *U. Jackowiak* (ed.), *M. Piankowski*, *J. Stelina*, *W. Uziak*, *A. Wypych-Żywicka*, *M. Zieleniecki*, Kodeks pracy z komentarzem *[The Labour Code with a Commentary]*.

be attributed to the employee if he was able to predict that his behaviour would cause damage; in the assessment of the possibility of its prediction, not only external but also subjective circumstances are taken into account[517]. This approach is more similar to the construction adopted in the criminal law rather than in the civil law [518].

Employee's fault may take the form of an intentional act (intentional fault), when a person wishes to deliberately cause damage, and thus acts to cause such an effect, e.g. destroys a machine on which he works (direct intent, *dolus directus*), or does not want the damage to occur but predicts the possibility of such occurrence and agrees to that; for example, does not secure perishable goods (conditional intent, *dolus eventualis*)[519]. It is therefore an intentional act the effect of which is covered by the intent of the perpetrator, i.e. the employee. The mere intentional non-performance or improper performance of employee duties is not sufficient to qualify the employee's actions as deliberate harm to the employer within the meaning of article 122 of the Labour Code[520], in particular where the circumstances of the case show that the perpetrator did not want to cause the damage. In order to establish the intent to cause damage, there must be an action undertaken the effect of which is also covered by the intent of the perpetrator. The effect, that is the damage, must also be covered by the direct intent or at least *dolus eventualis*[521] of the perpetrator. In its judgment of 22 August 2013[522] the Supreme Court held that disclosure of unsold products as a result of the inventory did not mean that a head of the production department deliberately had failed to comply with his duties and should be held financially liable for the resulting damage (article 114 et seq. of the Labour Code).

The second type of fault – unintentional action (unintentional fault) means: first – recklessness, i.e. such behaviour where the employee predicts the possibility to cause damage, but unjustly supposes that he will avoid it, or second – where such a possibility is not foreseen, although he should and he could have predicted the damage (negligence, sometimes called carelessness). The negligence, depending on the extent of failure to act with due care, may vary from minor to gross[523]. Gross negligence is manifested by the employee showing total disregard for the

[517] *K. Kolasiński*, Prawo pracy i zabezpieczenia… *[Labour Law and Social…]*, p. 246.

[518] See more in *W. Sanetra*, Wina w odpowiedzialności pracowniczej *[Fault and Employee's Liability]*, Wrocław 1975; *W. Sanetra*, Odpowiedzialność według… *[Liability under…]*.

[519] Judgment of the Court of Appeal in Kraków of 12 May 2015, III APa 24/14 (available at Legalis Database).

[520] *T. Zieliński*, Prawo pracy. Zarys systemu… *[Labour Law. An Outline…]*, p. 336.

[521] Judgment of the Court of Appeal in Kraków of 12 May 2015.

[522] II PK 339/12 (available at Legalis Database).

[523] See *W. Sanetra*, [in:] *J. Iwulski*, *W. Sanetra*, Kodeks pracy. Tekst ujednolicony. Komentarz *[The Labour Code. Consolidated Text. A Commentary]*, Warsaw 1996, p. 325.

consequences of his actions when the type of duties performed or the position held require particular care and diligence in the undertaken activities[524].

Re. 3) Damage. In order to be able to file a claim under article 114 of the Labour Code[525], an employer must necessarily demonstrate the damage sustained. Although the Labour Code uses the term "damage", it does not define it. Generally, it can be said that damage is a difference in the employer's assets before and after an employee's reprehensible behaviour; it occurred against the employer's will.Depending on the circumstances of the case, the notion of damage may also embrace profits lost by the employer[526]. Damage which occurred as a result of the ordinary wear and tear of a particular thing or as a result of natural depletion of things, the weight or number of which is unavoidably reduced due to their natural characteristics, is not damage within the meaning of the provisions on the employee's financial liability. The elements of damage include: the actual loss and lost profits. Damage is always based on the type of employee's fault. It is broadly understood in the case of liability for intentional fault, where it includes all its constituent elements and is narrowly understood in the case of unintentional fault. In the latter case, the damage covers only the actual losses of the employer (e.g. the value of the destroyed part of the machine), and does not include lost profits (that the employer did not gain due to the machine shutdown).

Such regulation protects employees who act unintentionally from liability. Otherwise they would have to incur serious financial losses and bear enormous costs (price) of various machines, devices, etc. However, in the case of entrustment of property subject to return or settlement, the employer is entitled to claim compensation for shortages not only at the value of raw materials which were not settled by the employee, but also at the amount of lost benefits connected with the proper use of the raw materials by putting them into production[527]. Also an employee who was entrusted with cinema tickets subject to settlement of accounts in respect of them, is liable in the amount of the purchase price of those tickets

[524] Judgment of 11 September 2001, I PKN 634/00, OSNP 2003, No. 16, item 381.

[525] Judgment of the Supreme Court of 27 July 2011, II PK 22/11 (available at Legalis Database). See: *W. Sanetra*, Szkoda i związek przyczynowy w orzecznictwie z zakresu odpowiedzialności materialnej pracownika *[Damage and the causal link in the case-law regarding financial liability of an employee]*, PiZS 2000, No. 1.

[526] In its judgment of 12 June 2014 (III APa 5/14, available at Legalis Database) the Court of Appeal in Lublin held that in the light of article 115 of the Labour Code, the actual damage means the reduction of the employer's existing assets and is the difference between the state of the assets before and after the damage occurred. So it is the actual damage to the employer's assets.

[527] Judgment of the Supreme Court of 9 January 1960, CR 28/59, OSPiKA 1960, No. 7–8, item 204, which seems still valid under the laws in force.

for damage caused by failure to settle accounts, unless he proves that they have not been used as entry tickets[528].

Employee's liability based on individual fault excludes his liability for damage to the extent that the employer or another person contributed to the damage or to increasing to damage (article 117 § 1 of the Labour Code).

Re: 4) Causal link. This prerequisite limits the employee's liability to the ordinary consequences of his culpable and unlawful act or omission (article 115 of the Labour Code), similar to the mechanism adopted in the civil law (article 361 § 1 of the Civil Code)[529]. The employee is liable only for damages which are directly within his control. Any increased consequences of his actions or omissions, i.e. further effects which go beyond his direct control, do not fall within the adequate causal link[530]. A circumstance excluding the employee's liability in this respect is the contribution of the employer or another person to the damage or to increase of the damage (article 117 § 1 of the Labour Code). There was a convincing view expressed in the legal writings that the causal link is characteristic of an objective bond existing between the examined events: employee's behaviour – property damage, and indicates why the damage is the basis for attribution of liability to a specific person. Verification to what extent the unlawful conduct of an employee is a condition *sine qua non* for the considered effect (damage) is carried out by a test: whether removal of the tested cause (behaviour of an employee) from the chain of events reveals an objective possibility of avoiding the effect. The positive answer proves the existence of such a link[531].

In its judgment of 10 December 1975, the Supreme Court held that in order to attribute fault to an employee in managerial position, in the form of lack of supervision over the work of subordinate employees, it is necessary to demonstrate what specific obligations the employee had failed to perform and the causal link between these failures and the damage. Such a causal link exists, among others, when such an employee, in the normal course of affairs, in performing the duties

[528] Resolution of the Supreme Court of 27 January 1977, IV PZP 7/76, OSNCP 1977, No. 9, item 159.

[529] See *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, p. 340. See *W. Sanetra*, Szkoda i związek przyczynowy w orzecznictwie z zakresu odpowiedzialności materialnej pracownika *[Damage and the causal link in the case-law regarding financial liability of an employee]*, PiZS 2000, No. 1, item 26.

[530] In its judgment of 8 May 2014 (II Ca, 1084/13, available at Legalis Database) the Regional Court in Lublin found that because of the fact that the behaviour of the defendant doctor was unintentional and in the absence of an adequate causal link between his behaviour and the damage on the part of the plaintiff, the liability to compensate for the damage sustained by the plaintiff can only be attributed to the Independent Public Health Care Institution, under article 430 of the Civil Code in connection with article 120 § 1 of the Labour Code.

[531] *K. Jaskowski*, Komentarz do art. 114 kodeksu pracy, [in:] *U. Jackowiak* (ed.), *M. Piankowski*, *J. Stelina*, *W. Uziak*, *A. Wypych-Żywicka*, *M. Zieleniecki*, Kodeks pracy… *[The Labour Code…]*.

of supervision and control, could prevent the occurrence or increase of the damage[532]. However, in its judgment of 3 December 2013, the Supreme Court took the view that the employer's failure to prepare operating instructions applicable in the event of failure of computer system does not justify the application of article 124 § 3 of the Labour Code to the financially liable employee, because it is outside the causal link with the damage caused, since the basic duties of such an employee include physical protection of money at his disposal and under his care in a cash register room[533].

The employer must prove the circumstances justifying the employee's liability and the amount of the damage caused (article 116 of the Labour Code). The mentioned provision does not require that the circumstances mentioned in it should be proven with documents. The circumstances justifying the employee's liability and the amount of damage sustained can be proven by any evidence the credibility and probative value of which is assessed by the court according to its own conviction, based on a comprehensive consideration of the collected evidence (article 233 § 1 of the Code of Civil Procedure)[534].

The apportionment of the burden of proof regarding the premises of employee's liability for the damage depends on the type of financial liability. In its judgment of 16 January 2014[535] the Regional Court in Gliwice found that there was a clear difference between claiming compensation for damage (in line with general principles) and the compensation for liability for the entrusted property. In the former case, the employer bears the burden of proving the damage, the fault of the employee and the unlawfulness of his action and the causal link between the damage and the employee's behaviour, which follows directly from the provisions of article 116 of the Labour Code in connection with article 14 of the Labour Code. In the latter case, the employer should only prove the proper entrustment of property, damage in the form of damage to the property or failure to settle accounts in respect of it and the amount of the damage. One of the principles of financial liability is that as regards the entrusted property, the legislature presumes fault of the employee, giving him the opportunity to free himself from such presumption, if he proves that the damage was caused by the reasons beyond his control, and in particular as a result of employer's failure to ensure the conditions enabling protection of the entrusted property (article 124 § 3 of the Labour Code). Therefore, in the case of damage to the entrusted property, the rules of proving the premises are liberalised in favour of the employer.

[532] IV PR 240/75 (available at Legalis Database).
[533] I PK140/13, Mon. Praw. 2014, No. 6, p. 282.
[534] Judgment of the Supreme Court of 23 June 2009, III PK 15/09 (available at Legalis Database).
[535] VIII Pa 140/13 (available at Legalis Database).

Derogations from the principles of liability of employees for the entrusted property were introduced in the Regulation of the Council of Ministers of 10 October 1975 on the financial liability of employees for the damage to the entrusted property[536] *(rozporządzenie Rady Ministrów z dnia 10 października 1975 w sprawie warunków odpowiedzialności materialnej pracowników za szkodę w powierzonym mieniu)*. In the establishments (trade, services, catering)[537] which apply the rules following from this regulation, the employer is obliged to demonstrate all the premises of liability, and therefore also the employee's fault, pursuant to article 116 of the Labour Code. In such case an employee is held liable, upon previous notification of the employee in writing of the existence of grounds justifying his liability and following the inventory, however not later than within a month from the occurrence of such conditions. Similarly, the employer may apply the principles of financial liability laid down in articles 114–116 and 118 of the Labour Code also in relation to other employees, employed, for example, in warehouses where there is no separate room for handover of goods (dispatch room) and in which the reloading system is not automatic and does not use measuring and control devices.

3.7.5. The principle of limited amount of the compensation

The type of fault directly affects the principles of financial liability, and in particular the amount of damages sought from the employee. On the other hand, such liability is not affected (in terms of the amount of compensation) by the degree of intentional fault, unlike the degrees of unintentional fault[538]. However, one should agree that the compensatory liability measured by the degrees of unintentional fault should not be overestimated because the relation between the degree of fault and the amount of damage is not proportional[539].

The employee's liability for damage caused to the employer is always a full liability, even when the amount of the damage is extremely high and the employee's fault is minor. Regardless of the amount of the damage caused, it is the employee, the perpetrator of the damage, who is liable for it, either directly or by recourse

[536] Consolidated text of 1996, No. 143, item 662.

[537] This applies, among others, to warehouses with separated rooms for handover of goods as well as self-service shops and self-service stands (departments) in department stores, in which cash collection is carried out in separate cash rooms with the use of cash registers.

[538] See *W. Sanetra*, O dyferencjacji i stopniowaniu winy pracownika *[Differentiation and degree of employee's fault]*, PiP 1978, No. 2, item 113 ff., as well as *L. Dzikiewicz*, O pojęciu winy i jej trzech odmianach *[The concept and types of fault]*, PiP 1977, No. 1, item 96 ff.

[539] See *T. Zieliński*, p. 337 and a study of M. Sośniak referenced there.

(article 120 of the Labour Code). So understood, the liability is a concept broader than the compensation alone. In certain situations, these concepts do not coincide. Under article 119 § 1 of the Labour Code concerning damage to property other than the entrusted property, caused by unintentional act, the compensation due to the employer from the employee is set according to the amount of the damage, however it cannot exceed the amount of 3-month remuneration of the employee as at the date of occurrence of the damage[540]. This also proves that the provision above applies to damage exceeding the amount of the employee's 3-month remuneration and that in a situation where the amount of the damage is lower the liability for damage is full.

The amount of the remuneration for the purposes of determination of the amount of compensation for damage caused by an employee to an employer (article 119 of the PC) is calculated in accordance with the rules applicable to determining the compensation for unused holidays, without taking into account the changes in the terms of remuneration or the amount of components of remuneration introduced after the day when the damage was caused[541].

If an employee has caused damage by several separate acts (joint damage), he bears a separate liability for the consequences of each of these events (argument VI to article 114 of the guidelines of the Supreme Court of Poland of 1975[542]). Each of these events is a separate damage and constitutes a separate claim. In its decision of 11 April 2003[543] the Supreme Court formulated the principle that employers are entitled to such a number of compensation claims as was the number of acts committed by the employee. If the damage is caused by several employees, each of them is liable for the part of the damage, according to his contribution and the degree of fault. If determination of the degree of fault and contribution

[540] Judgment of the Supreme Court of 28 June 2005, III PK 45/05 (available at Legalis Database). Already before the amendment of the labour law, the case-law accepted that the compensation limited to the amount of the employee's 3-month salary was determined on the basis of his earnings as at the date of the damage, according to the rules applicable to determination of compensation for unused holidays (see resolution of 7 judges of the Supreme Court of 27 June 1975, V PZP 4/75, OSNCP 1976, No. 1, item 2).

[541] See: § 3 of the Regulation of the Minister of Labour and Social Policy of 29 May 1996 concerning the method of determination of remuneration for periods of inactivity on the part of the worker and remuneration on which compensation, severance payment, compensatory allowance and other benefits specified in the Labour Code are calculated *[rozporządzenie Ministra Pracy i Polityki Socjalnej z dnia 29 maja 1996 w sprawie sposobu ustalania wynagrodzenia w okresie niewykonywania pracy oraz wynagrodzenia stanowiącego podstawę obliczania odszkodowań, odpraw, dodatków wyrównawczych do wynagrodzenia oraz innych należności przewidzianych w Kodeksie pracy]* Journal of Laws *[Dz.U.]* of 2017, item 927.

[542] Judgment of the Supreme Court of 23 June 2009, III PK 15/09 (available at Legalis Database).

[543] I PK 549/02 (available at Legalis Database).

of particular employees is not possible, they shall be liable in equal parts (article 118 of the Labour Code).

In the event of an unintentional fault, the employee is only liable for actual loss (article 115 of the Labour Code). The employer bears a risk of depletion of his assets by lost profits[544]. If an employee deliberately caused damage to the property which has not been entrusted to him, he is obliged to repair it in full (article 361 § 2 of the Civil Code in connection with article 300 of the Labour Code), including all components of the damage. So he will be liable for the actual losses suffered by the employing establishment and for the lost profits that the employer did not gain as a result of the offender's behaviour. Such liability cannot be mitigated in any respect, e.g. no settlement agreement can be concluded between the parties to the employment relationship regarding reduction of the amount of the compensation, unless it is the will of the employer – the owner of the establishment. Intentional fault can be proven by factual presumption (article 231 of the Code of the Civil Procedure). According to this provision, the court may regard as established the facts relevant for the resolution of a case, if such a conclusion can be derived from other established facts[545].

As regards the liability for property entrusted subject to the obligatory return or settlement, the employee is liable for the damage at the full amount. Employees who bear joint financial liability are liable in the parts specified in the agreement. However, if it is established that the shortage was caused in whole or in part by some of the employees, then only those employees are liable (article 124 § 2 of the Labour Code) for the entire shortage or its respective part, which does not exclude their liability for the rest of the shortage jointly with other employees under the joint liability regime. The joint financial liability does not exclude individual liability for the property entrusted to the person concerned[546].

The principle of liability for damage at the full amount is absolute in relation to money, securities or valuables, tools and instruments as well as protective and work clothing or personal protective equipment. Exceptions apply to other entrusted property. The already mentioned regulation of the Council of Ministers of 10 October 1975, provides that the amount of compensation for damage to the

[544] Judgment of the Supreme Court of 6 November 2012, III PK 1/12 (available at Legalis Database).

[545] In the judgment of 6 November 2012 above, the Supreme Court held that according to the findings not challenged by the defendant, he participated in the loading of all pallets onto the car, and their small number and large dimensions of each of them did not create any difficulty to accurately count them. The defendant could rebut that presumption by demonstrating that there were circumstances which made it difficult or impossible for him to properly perform his duties or which resulted from a defective organization of work during loading, which however he failed to do.

[546] Resolution of the Supreme Court of 2 December 1977, I PZP 7/77, OSNCP 1978, No. 5–6, item 89.

entrusted property payable by the employee liable under articles 124 § 2 and 125 of the Labour Code is reduced (therefore it is an obligation to reduce compensation), however, in accordance with the rules and within the limits provided for in that act. This applies to a situation where it is difficult to exercise supervision over property, and in particular when the property is located in rooms accessible by other persons or in warehouses, shops and service outlets where the work lasts longer than one shift or in which the number of staff is at least 5 persons. When the damage to the entrusted property was caused in other circumstances, the compensation may in exceptional cases be reduced if it is justified due to the rules of social coexistence. Until recently, in such a situation, the employer could reduce the compensation payable by the employee to the employee's 6 to 12 months' salary, and in exceptional cases, if the employee worked faultlessly for the last 3 years before the damage was incurred, the compensation could be reduced to 3–6 months' salary.

The reduction of compensation is determined depending on the extent to which supervision over property is hampered, type of negligence, size of damage, degree of fault, professional experience, previous performance, as well as the family and financial situation of the employee. The amount of the reduced compensation is determined by the employer after hearing the employee and consulting the company trade union organisation.

The damage can be repaired under a settlement agreement between the employee and the employer. In such case the amount of the compensation may be reduced taking into account all the circumstances, in particular the degree of fault of the employee and his attitude to his job duties (article 121 § 1 of the Labour Code). The same circumstances are taken into account by the labour court, which both in the judgment and in the case of settlement concluded before the court, may reduce the amount of compensation for the damage suffered by the employer (article 121 § 2 of the Labour Code). Reduction of the compensation applies to liability on general terms (also within the limits set out in article 119 of the Labour Code)[547] and compensation for the entrusted property (article 127 of the Labour Code).

The legislature did not specify the limits of the admissible settlement agreement. This means that the amount of compensation resulting from the settlement agreement can be even symbolic. If an employer can refrain from seeking damages, he will be able to determine this amount at his own discretion. This ap-

[547] In its judgment of 20 May 1975 (I PR 342/74, available at Legalis Database) the Supreme Court held that a limitation of the employee's liability for damages provided for in article 119 § 1 of the Labour Code does not exclude further reduction of the compensation within the limits and in the situation specified in article 121 § 2 of the Labour Code.

plies also to reduction of the compensation by the labour court under article 121 § 2 of the Labour Code. There was a view presented in the case-law that a court may reduce the compensation only when all the circumstances indicate that the degree of fault of the employee is minor and that he had a proper attitude to the property entrusted to him[548].

The Labour Code includes a regulation referring to the enforcement of an out-of-court settlement agreement. Such an agreement under which the employee undertakes to voluntarily remedy the damage caused to the employer, is a writ of execution within the meaning of article 777 § 1 (3) of the Code of Civil Procedure. Therefore, the settlement agreement as a juridical act is subject to all the provisions on the effectiveness of declarations of will, and thus the general provisions governing the methods of conclusion of contracts apply to it. Having regard to the above, the Szczecin Court of Appeals in its judgment of 26 June 2013 presented a standpoint that in the settlement agreement, as in any other agreement, parties concluding such agreement must be clearly indicated and there can be no doubt as to who is the party to the agreement[549]. Pursuant to article 121^1, if the employee fails to comply with the settlement agreement, such agreement is enforced in accordance with the provisions of the Code of Civil Procedure Code, after receiving an enforceability clause from the court (§ 1)[550]. The labour court will refuse to attach the enforceability clause if it determines that it is contrary to the law or rules of social coexistence (§ 2). In such a situation, the settlement agreement has only evidentiary value within the meaning of article 245 of the Code of Civil Procedure[551].

The relevant provisions of the Civil Code will apply to such settlement agreement. This is because the Labour Code does not include any detailed regulation in this respect. This means, among others, that the settlement agreement should be made in writing for evidentiary purposes.

3.7.6. The principle of judicial enforcement of claims by the employer

The possibility to enforce claims against the employee before a court is a guarantee of protection of employer's rights. Disputes before labour courts estab-

[548] Judgment of the Supreme Court of 12 March 1976, IV PR 205/75 (available at Legalis Database), and a judgment of 8 December 1976, IV PR 285/76 (available at Legalis Database).

[549] III APz 5/13 (available at Legalis Database).

[550] The clause is issued by the court of general jurisdiction for the debtor (article 781 § 2 of the Code of Civil Procedure), i.e. a district court at the place of residence of the employee.

[551] See *K. Walczak* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]* (available at Legalis Database), a commentary on article 121^1 of the Labour Code.

lished within the framework of the courts of general jurisdiction of various levels, are resolved on the basis of the provisions of civil procedure, in separate proceedings[552]. The scope of application of these provisions covers claims of both employees and employers. Court proceedings are not necessary if the employer obtains compensation as a result of concluding a settlement agreement with the employee, and also if the employee agrees to deduct the sum corresponding to the amount of the compensation from his remuneration. The employer may also waive the compensation, keeping in mind that the employer is not formally obliged to trigger such liability of the employee, but only entitled to do so[553]. However, this last circumstance should be seen in a broader context, taking into account the possibility that a person who performs acts in labour law on behalf of the employer may be liable for damage caused to his employer in this way. Therefore, it is not fully convincing that the enforcement of financial liability depends on the will of the employer[554].

Under article 291 § 2 of the Labour Code, employer's claims for compensation for damage caused by the employee as a result of non-performance or improper performance of duties shall be time-barred one year from the date on which the employer came to know of the damage caused by the employee, however not later than 3 years after the damage was caused[555]. The employer's knowledge of the damage and of the person causing it is necessary for the one-year period to start[556]. This means that the limitation period for claims arising out of the employment relationship runs from the date on which the specific claim became enforceable and not from another day, e.g. from the day of occurrence of damage[557]. The date on which the employer came to know of the "damage" within the mean-

[552] See more in *K.W. Baran*, Procesowe prawo pracy *[Procedural Labour Law]*, Kraków 2003; *K.W. Baran*, Sądowy wymiar sprawiedliwości w sprawach z zakresu prawa pracy *[Jurisdiction in Labour Law Matters]*, Warsaw 1996; *K.W. Baran*, Kompetencje sądów pracy *[Jurisdiction of labour courts]*, [in:] *K.W. Baran* (ed.), Procesowe prawo pracy. Wzory pism *[Procedural Labour Law. Template Pleadings]*, Warsaw 2013, p. 82 ff.

[553] Under the laws in force at the end of the 20th century, the employer could formally refrain from seeking compensation and impose on the employee a penalty for breach of workplace order, policies or procedures, when the amount of damage did not exceed the lowest salary of social workers or the degree of fault of the employee was minor. The condition of such waiver was the employee's consent (formerly article 119 § 2 of the Labour Code).

[554] Such opinion was presented by *L. Florek*, Prawo pracy… *[Labour Law…]*, p. 221.

[555] In its decision of 10 June 2013 (II PK 44/13, available at Legalis Database) the Supreme Court held that as regards the obligation to remedy the damage caused unintentionally by the employee to the employer as a result of non-performance or improper performance of employee duties (article 114 et seq. of the Labour Code), which would consist in failure of the employee to settle an amount transferred to his account by the employer's contractor for invoices issued by him, such claims would be subject to a one-year limitation period provided for in article 291 § 2 of the Labour Code.

[556] Judgment of 5 February 1991 (I PR 429/90).

[557] Decision of the Supreme Court of 22 August 2012, I PK 88/12, available at Legalis Database.

ing of article 291 § 2 of the Labour Code caused by the employee is the date on which the employer received information about the facts from which it can and should be reasonably concluded that the damage is the result of a culpable act or omission of the employee, and not the date on which such a conclusion was actually drawn by the employer from the mentioned facts or on which another person presented such conclusion to the employer[558].

The provisions of article 291 § 2 of the Labour Code apply to an employee who acted unintentionally. If the employee caused the damage intentionally, the provisions of the Civil Code are applicable to the limitation of claims for compensation (article 442^1 § 1). In such situation, a claim for compensation for damage caused by delict is time-barred upon expiration of 3 years from the date when the injured party came (or should have come) to know of the damage and of the person obligated to make such damage good. However, such time-limit cannot exceed 10 years from the date of the event causing the damage[559]. A claim established by a valid decision of an authority appointed to settle disputes, as well as the claim established by a settlement agreement concluded in accordance with the procedure set out in the Code before such authority, is time-barred after the expiry of 10 years from the day when the judgment became final or settlement was concluded (article 291 § 5 of the Labour Code).

The court does not take into account the limitation of claims on its own motion, but only at the request of the employee[560]. Limitation periods cannot be shortened or extended by a juridical act. In its decision of 13 March 2013 the Supreme Court held that a defence of limitation may be considered as violating the rules of social coexistence in situations justified by exceptional circumstances[561]. However, even a justified long delay in pursuing claims should not lead to rejecting the limitation period defence[562].

The limitation of claims arising out of employment is regulated comprehensively in the Labour Code. Therefore, there is no need to refer to the provisions of the Civil Code, except in a situation specified in article 291 § 3 of the Labour Code[563].

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[558] Judgment of the Supreme Court of 26 September 1978, IV PR 198/78, available at Legalis database.

[559] Article 442^1 § 1 as amended by an act of 21 April 2017 (Journal of Laws *[Dz.U.]* of 2017, item 1132), which entered into force on 27 June 2017.

[560] Resolutions of the Supreme Court of: 6 March 1998 (III ZP 50/97) and 10 May 2000 (III ZP 13/00).

[561] I PK 305/12 (available at Legalis Database). See also a judgment of the Supreme Court of 18 August 2010, II PK 11/10, available at Legalis Database.

[562] Judgment of the Supreme Court of 7 January 1981, IV PR 411/80 (available at Legalis Database).

[563] Decision of the Supreme Court of 10 June 2013, II PK 44/13 (available at Legalis Database).

3.8. Principles of employer's liability

D. Dörre-Kolasa

3.8.1. Introduction

The principles of employer's liability for various events are a complex issue. In each chapter of this publication, references can be found to the employer's liability for various events towards certain parties – private or public, individual or collective. This chapter will discuss in detail the principles of employer's liability for events whose common characteristics may be the protection of personality rights of an entitled party. The group of entitled parties goes beyond the framework of the employment relationship, because it includes not only employees, but also persons applying for a job or, under certain conditions, family members of the former employee.

3.8.2. The principle of employer's liability for violation of the principle of equal treatment of employees

Under article 18^{3d} of the Labour Code, a person in relation to whom the employer violated the principle of equal treatment in employment shall have the right to compensation amounting to not less than the minimum remuneration determined under separate laws. Accordingly, a party entitled to compensation is a "person" against whom the employer violated the principle of equal treatment in employment. The personal scope of its application goes beyond the framework of an employment relationship and includes also a candidate for employment and a former employee. Contrary to the literal wording of article 18^{3d} of the Labour Code, the right to compensation is granted not so much because of violation of the principle of equal treatment but rather because of discrimination[564]. There are two concepts used in the Labour Code: the obligation of equal treatment and the prohibition of discrimination. It might appear at first sight that interchangeable application of these concepts is more than justified since their conceptual scope is identical. However, the difference between them was seen both by the case-law and jurisprudence of labour law[565].

[564] *P. Korus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Ccommentary]*, Warsaw 2017, p. 81.

[565] See more in *A. Sobczyk*, Prawo pracy w świetle Konstytucji RP. Tom II. Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka *[The Right to Work in the Light*

In its judgment of 18 August 2009 the Supreme Court of Poland held that the normative distinction of discrimination as a qualified form of unequal treatment serves to counteract the most reprehensible and socially harmful manifestations of unequal treatment. According to the Supreme Court, this justifies implementation of special legal mechanisms which are designed to combat the inequalities such as direct and indirect discrimination (article 18^{3a} § 4 of the Labour Code), encouraging to unequal treatment on the above-mentioned grounds (article 18^{3a} § 5 (1) in connection with article 18^{3a} § 2 of the Labour Code), harassment (article 18^{3a} § 5 (2) and § 6 of the Labour Code), specific apportionment of the burden of proof in the discrimination matters (article 18^{3b} § 1 of the Labour Code) and other. As a result, the provisions of Labour Code relating to discrimination do not apply in cases of unequal treatment not caused by reason considered to be the basis for the discrimination[566].

The element that distinguishes discrimination from unequal treatment is the legally unjustified worse treatment of an individual or group of persons on the basis of a statutory criterion. If an employee, despite fulfilling equal obligations, is treated unequally on the grounds set out in article 18^{3a} of the Labour Code, then there is a case of discrimination.

If, however, the inequality is not dictated by the criteria prohibited by this provision, then one can only speak of violating the principle of equal rights (equal treatment) of employees, which is laid down in article 11^2 of the Labour Code, and not violation of the prohibition of discrimination expressed in article 11^3 of the Labour Code. Violation of the principle of equal rights expressed in article 11^2 of the Labour Code (and therefore inequality not caused by reason deemed to be the grounds of discrimination) does not result in liability of the employer under article 18^{3d} of the Labour Code. This provision (article 18^{3d} of the Labour Code) refers to the prohibition of non-discrimination in any manner, directly or indirectly, on grounds specified in article 18^{3a} § 1 of the Labour Code[567].

According to a literal interpretation of article 18^{3d} of the Labour Code, compensation is payable only where the principle of equal treatment in employment was violated by the employer. Undoubtedly, according to teleological interpretation, this provision will apply where a person committing legally prohibited actions is a person acting on behalf of an employer being an organisational unit. It seems that there are no grounds to consider that this provision will apply if the

of the Constitution of the Republic of Poland. Volume II. Selected Problems and Labour Law Constructs and the Constitutional Human Rights and Freedoms], pp. 112–124.

[566] I PK 28/09.

[567] Judgment of the Court of Appeal in Poznań of 18 April 2013, III APa 21/12.

violation of the prohibition of discrimination occurs as a result of the behaviour of other persons, on the occasion of performance of their duties[568].

What needs to be addressed separately is the issue of the principles of employer's liability in the event of harassment (article 18^{3a} § 5 (2) of the Labour Code), or sexual harassment in the workplace (article 18^{3a} § 6 of the Labour Code). The employer will then be liable also for the behaviour of third parties. The principle on which the employer's liability will be based in these cases will be non-performance or improper performance of the obligation to counteract discrimination (article 94 2b of the Labour Code).

It should be noted that in both cases, as a rule, there is no obligation to create a comparative model or need to prove the intention of violating dignity and creating a hostile atmosphere. What is analyzed is the "purpose or effect" of this activity – in an objective sense. Subjective feelings of an employee that his personal dignity has been violated have no legal validity until they are objectively confirmed[569]. An employee who is subjected to harassment or sexual harassment in the workplace is objectively in a worse situation than employees whose work environment is free from such behaviour. If, in relation to sexual harassment, the legislature clearly determined that it constitutes discrimination on grounds of sex, then non-sexual harassment – to constitute discrimination within the meaning of article 18^{3a} §2 of the Labour Code – should be based on one of the grounds specified in § 1 of this article, which lists such criteria as: age, disability, race, religion, nationality, political beliefs, trade union membership, ethnical origin, creed, sexual orientation, as well as employment for a definite or indefinite period, or full or part time employment.

As regards the conditions of liability, basically the following facts should occur: damage – understood as harm to the legally protected rights and interests of the harmed party, the fact with which the law connects liability of the party obligated to remedy it, i.e. violation of the principle of equal treatment in employment and adequate causal link. The compensation provided for in article 18^{3d} of the Labour Code has a special character. This provision does not associate the compensation with material damage, as it serves a sanction for breach of a public-law obligation.

Regarding the legal character of the principles of liability for damage, as in each of the cases analyzed in this chapter, in the absence of explicit normative arguments, it is necessary to consider whether (and if so, to what extent) the provisions of the Civil Code may apply to the employer's liability. Moreover, if the an-

[568] *P. Korus*, [in:] *A. Sobczyk* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2017, p. 82.

[569] Judgment of the Court of Appeal in Wrocław of 31 January 2017, III APa 33/16.

swer is yes, it is necessary to consider whether the principles of **delictual liability** (articles 415 et seq. of the Civil Code) or **contractual liability** (articles 471 et seq. of the Civil Code) will apply to the employer or whether it is a *sui generis* liability that is a combination of these liability regimes.

When analyzing a developed judicial case-law and the argumentation presented in it and in the legal writings, a view which should be supported is that the legal character of this liability is similar to delictual liability. Therefore, this regime should complement the issues not regulated in the labour law or should provide the rules of interpretation characteristic of this regime and developed over the years.

As was already mentioned above, it seems fully justified to use the interpretation developed over the years by the case-law and jurisprudence. This is justified, for example, taking into account the nature of discriminatory activities prohibited by the Labour Code. The compensation referred to in article 18^{3d} of the Labour Code first of all is supposed to compensate for the personal injury and in this respect it is **specific redress** *(zadośćuczynienie)* **for the harm suffered due to discrimination.**

As regards the amount of compensation due from the employer, this provision does not specify the rules for determining compensation beyond its minimum amount "lower than the minimum remuneration for work, determined on the basis of separate laws". Its purpose is not to remedy the damage suffered by an employee as a result of violation of equal treatment in employment. The provision above cannot be the basis for compensation for damage suffered by an employee as a result of unequal treatment. With this, the compensation has characteristics of a sanction for violation of the principle of equal treatment. The wording "compensation in the amount not lower than" without specifying the upper limit, assumes differentiation in the amount of compensation depending on the circumstances of the specific case. Circumstances which affect the amount of compensation provided for in article 18^{3d} of the Labour Code, include the type and intensity of discriminatory activities, all the more so since it concerns non-material damage[570].

The compensation stipulated in article 18^{3d} of the Labour Code should be **effective, proportionate and dissuasive**. Compensation should, therefore, remedy the damage suffered by the employee. There should be an appropriate proportion between compensation and breach by the employer of the obligation to treat employees equally, and compensation should be preventive. When determining its amount, account should be taken of the circumstances concerning both parties to an employment relationship, especially in the case of compensation intend-

[570] Judgment of the Court of Appeal in Wrocław of 31 January 2017, III APa 33/16.

ed to compensate for the non-material damage suffered by the employee. Compensation for discrimination – both within the meaning of Community law and article 18^{3d} of the Labour Code – may relate to financial loss and non-material damage (harm)[571].

For practical reasons, an important issue, which has not been fully regulated, is **limitation of claims** as referred to in article 18^{3d} of the Labour Code. The compensation claims of an employee for breach of the principle of equal treatment in employment by the employer (article 18^{3d} of the Labour Code) are undoubtedly claims arising out of an employment relationship the limitation of which is regulated in article 291 § 1 of the Labour Code[572]. This provision – like article 120 § 1 first sentence of the Civil Code – indicates that the beginning of the period of limitation is "the day on which a claim became due and payable". From this point of view, both provisions governing the beginning of the limitation period are identical and there is no need to refer, in cases concerning claims arising from an employment relationship, to article 120 § 1 first sentence of the Civil Code.

However, the Labour Code does not regulate the fundamental issue, namely the maturity of the claim. As regards maturity, the Civil Code sets two standards – an objective standard (article 120 § 1 second sentence of the Civil Code, article 455 of the Civil Code) and a subjective standard (article 442^1 § 1 of the Civil Code). The objective standard objectifies the moment of maturity of the claim, by reference to *a tempore facti* concept. It applies in particular to all contractual obligations. The subjective standard applies to maturity of compensation claims arising from delict. Therefore, article 442^1 § 1 of the Civil Code sets out two general rules specifying the period of limitation of claims for compensation for damage caused by an unlawful act: upon expiration of 3 years from the date when the injured person came to know of the damage caused and of the person responsible for making the damage good (*a tempore scientiae* time-limit), however, such a time-limit cannot exceed 10 years from the date occurrence of the event causing the damage (*a tempore facti* time-limit). The enforceability of employee's claim for compensation for damage caused by the employer as a result of violation of the principle of equal treatment in employment may be determined according to the standard applicable to delictual liability. The specific nature of the employment relationship allows for subjective specification of the moment of enforceability of the claim. A decisive factor is the moment when the employee came to know of the damage. Extensive case-law regarding liability for personal

[571] Judgment of the Court of Appeal in Wrocław of 31 January 2017, III APa 33/16.

[572] However, this is not so obvious when it comes to a candidate for employment who has never had an employment relationship with the employer. It seems, however, that since the claim is regulated in the Labour Code, the issue of limitation of claims should have a uniform interpretation.

injury determines what should be the date on which the injured party learned about the damage[573].

3.8.3. The principle of employer's liability for infringement of the obligation to prevent workplace mobbing

3.8.3.1. Introduction

Under article 94^3 §1 of the Labour Code, an employer shall prevent workplace mobbing. According to article 94^3 § 2, mobbing means actions or behaviour relating to an employee or directed against an employee, consisting in persistent and long-lasting harassment or intimidation of the employee resulting in his low professional self-esteem, causing or aiming at his humiliation or ridicule, isolation or elimination from a group of co-workers.

Duration of the behaviour regarded as mobbing should be assessed jointly with their persistence, which is understood as a significant increase of ill will of the harasser. Persistence means long-lasting, repeated and inevitable (from the point of view of the victim) behaviour that is onerous and continuous. On the other hand, *nękanie* (harassment) referred to in article 94^3 § 2 of the Polish Labour Code, in accordance with the natural meaning of the word, means distress, disturbance of someone, bothering someone, as well as constant tormenting, disturbance or teasing someone (causing pain)[574].

Therefore, according to the statutory definition, workplace mobbing consists in hostile and unethical behaviour that is systematically directed by one or more persons, mainly against one person who becomes helpless and vulnerable as a result of mobbing, remaining in this position through continuous mobbing activities. The harasser's behaviour must be blameworthy, unjustifiable under moral norms or the principles of social coexistence. This can be characteristic also of other behaviour which is not considered unlawful within the meaning of other rules of conduct and which consists in the exercise of rights in relation to subordinates or co-workers, e.g. by applying a penalty for breach of workplace order, policies and procedures *(kara porządkowa)* or giving instructions[575]. As defined in article 94^2 § 2 of the Labour Code, mobbing does not require that harassment or intimidation of an employee should be an exceptional behaviour that differs

[573] Decision of the Supreme Court of 20 May 2014, I PZP 1/14, OSNP 2015, No. 11, item 150.
[574] Judgment of the Supreme Court of 20 October 2016, I PK 243/15.
[575] Judgment of the Supreme Court of 22 April 2015, II PK 166/14.

significantly from normal behaviour in a given workplace[576]. The Supreme Court explicitly held that mobbing may occur in the case of unintentional behaviour of the harasser (no intention). This view was repeated by the Supreme Court in the judgment of 16 March 2010[577], in which the Court held that in order to establish that the mobbing within the meaning of article 94^3 § 2 of the Labour Code occurred, it is not required to show a deliberate intention to cause health disorder in an employee who is the victim of the prohibited behaviour of the harasser.

The sense of the regulation that obligates an employer to counteract mobbing is broader than the obligation to abstain from such behaviour. The employer is obliged to counteract the occurrence of this phenomenon, regardless of who commits an action or omission evaluated negatively by the legislature. It can be an employer who is a natural person, persons acting on behalf of the employer referred to in article 3^1 of the Labour Code, an employee or a group of employees, but also non-employees. In order to determine the limits of the employer's obligation to prevent mobbing it is not so important who commits mobbing. It is important whether the position of the perpetrator to the employee may produce consequences such as humiliating or ridiculing an employee, isolating him or eliminating from the team. To recognize that a specific behaviour is mobbing, it is not necessary to establish that harasser's action was aimed at achieving a goal (intention), or effect. It is enough for an employee to be an object of influence which, according to an objective measure, can be assessed as causing one of the effects specified in article 94^3 § 2 of the Labour Code.

However, it should be clearly stated that article 94^3 of the Labour Code does not specify the basis of legal liability of the harasser, but imposes a statutory obligation on the employer to counteract the occurrence of a qualified form of infringement of personal rights, which is mobbing, and defines the legal consequences of non-counteraction.

In order to properly comply with the statutory obligation to counteract mobbing, it is not sufficient to take action in the case of occurrence of mobbing, but also – as emphasized by the Supreme Court – preventive actions must be undertaken, which should be real and effective[578]. The obligation in question consists in active preventive actions so that mobbing does not occur. The obligation to counteract mobbing is based on duty of care. The employer should therefore counteract mobbing, in particular by training employees, informing about the dangers and consequences of mobbing, or by applying procedures that will ena-

[576] Judgment of the Supreme Court of 17 January 2007, I PK 176/06, OSNP 2008, No. 5–6, item 58; judgment of 7 May 2009, III UK 2/09, OSNP 2011, No. 17–18, item 230.

[577] I PK 203/09, OSNP 2011, No. 17–18, item 230 with a commentary of H. Szewczyk, GSP-Prz. Orz. 2011, No. 2, pp. 179 –186.

[578] Judgment of the Supreme Court of 21 April 2015, II PK 149/14.

ble disclosure and cessation of such action. If in the proceedings concerning employer's liability for mobbing the employer proves that he took genuine actions to counteract mobbing and it is possible to objectively confirm the potential effectiveness of such actions, then the employer may be absolved from liability[579].

To sum up – the direct impact on the scope of employer's liability for mobbing will be whether he fulfilled the obligation to counteract mobbing and if yes, how he did it.

De lege lata, the Labour Code does not regulate the principles of employer's liability for not counteracting when mobbing did not occur, as well as when mobbing did occur but did not cause employee's health disorder or an employee in connection with mobbing did not terminate the contract of employment. Neither does the Labour Code regulate the case in which the employee was not a victim of mobbing but experienced the employer's permanent passivity towards mobbing directed to another person and as a consequence the employee suffered health damage caused by permanent stress. In such case, not regulated by the labour law, the provisions of the Civil Code may apply (article 300 of the Labour Code).

An employee may have **a claim for compensation** for mobbing under article 94^3 § 4 and § 5 of the Labour Code only if the employee terminates the contract of employment as a consequence of mobbing. Employee's right to terminate a contract pursuant to article 94^3 § 4 of the Labour Code may be exercised only in the situation where the mobbing occurred, and the employer did not counteract it or counteracted it insufficiently. So if the employer has provided for an effective protection mechanism, the employee must use it in the first place. The compensation referred to in article 94^3 § 4 of the Labour Code is a sanction of a compulsory nature, separate from damage, for not opposing the mobbing. It does not exclude the right to claim compensation in accordance with the general principles[580]. However, to claim compensation, it is not necessary that mobbing was the only cause of termination. The condition of termination of the contract of employment "a result of mobbing" should be referred to the most significant cause of termination as seen by the employee. Therefore, an employee can claim compensation from the former employer even if the employee indicated also other (other than mobbing), less important causes for terminating the employment relationship with the employer[581].

[579] Judgment of Supreme Court of 3 August 2011, I PK 35/11, OSNP 2012, No. 19–20, item 238.

[580] See more in *A. Sobczyk*, Mobbing a przeciwdziałanie mobbingowi, dyskryminacja a przeciwdziałanie dyskryminacji *[Workplace mobbing and preventing workplace mobbing, discrimination and preventing discrimination in employment],* MPP 2015, No. 4.

[581] Judgment of the Supreme Court of 6 February 2009, I PK 147/08, OSNP 2010, No. 17–18, item 209 with a commentary of *L. Mitrus*, OSP 2011, No. 10, item 102.

It is worth noting that an employee may claim compensation from a former employer – under article 94^3 § 4 of the Labour Code – for mobbing, also when he terminated the employment relationship at the time of employment with a new employer, after the transfer of an undertaking to that employer under article 23^1 of the Labour Code. The former and the new employer are jointly and severally liable (article 23^1§ 2 of the Labour Code).

The employee may terminate the employment contract upon notice (article 30 § 1 (2) of the Labour Code) or without notice, if the employer's behaviour can be classified as a serious breach of duties towards the employee (article 55 § 1^1 of the Labour Code)[582]. In both cases employee's statement of termination of the contract of employment without notice should be made in writing and should specify mobbing as the reason justifying the termination of the contract. As for the termination of the contract of employment under article 55 § 1^1 of the Labour Code – it should also take effect within one month from the occurrence of circumstances justifying such termination of the contract of employment (article 55 § 2 in connection with article 52 § 2 of the Labour Code). Because of the fact that mobbing is a continuous behaviour, it should be counted from the last of the events which constitute such behaviour, which the employer did not counteract, though he could and should have done it[583]. The employee is entitled to compensation on the basis of article 94^3 § 4 of the Labour Code, when he certified in writing that he was a victim of the workplace mobbing and for this reason he terminated the contract of employment, and when mobbing actually occurred.

3.8.3.2. Financial redress for non-material damage

Article 94^3 § 3 of the Labour Code regulates in a specific way the employer's liability for the harm caused to the employee, namely health disorder caused by mobbing. In the case of claim, raised by the victim of mobbing, for award of an appropriate sum as financial redress for the harm suffered pursuant to article 94^3 § 3 of the Labour Code, the victim must prove the consequences of mobbing, that is health disorder, however it must be health disorder in medical terms (determined by doctors treating the injured employee or by court-appointed doctors in the course of court proceedings). In this case, the subjective feeling of the person or demonstration of only the consequences in the mental sphere of the victim,

[582] Judgment of the Supreme Court of 7 December 2006, I PK 123/06, OSNP 2008, No. 1–2, item 14.

[583] Judgment of the Supreme Court of 8 August 2006, I PK 54/06, OSNP 2007, No. 15–16, item 219.

such as sadness, depression, regrets and other negative emotions, are not sufficient to award redress under article 94^3 § 3 of the Labour Code[584].

Although the legal basis for the award of an adequate sum of money as financial redress to an employee who suffered from health disorder caused by mobbing are not the provisions of the Civil Code, still in determining the appropriate sums as the redress, the labour courts are guided by the principles and criteria developed in the case-law of the civil courts[585].

As regards the conditions for employer's liability towards an employee under article 94^3 § 3 of the Labour Code, the occurrence of both mobbing and health disorder on the part of the employee remaining in an adequate causal link is not sufficient. According to article 94^3 §1 of the Labour Code, an employer shall prevent workplace mobbing. This provision together with article 11^1 of the Labour Code as well as article 94 (10) of the Labour Code, imposes on the employer specific obligations which serve to protect the personality right of an employee, namely his dignity. Such obligations include in particular care for such atmosphere in the workplace, in which the personality rights of employees will be respected, both by the employer himself (persons acting on his behalf) and other employees. To comply with this obligation, an employer must foster the development of the rules of social coexistence in the workplace and enforce them. The spectrum of activities that the employer will undertake for this purpose, also aimed at counteracting mobbing, remains at his discretion. It is the employer who knows what actions will be most effective, both in the area of prevention and restriction when unacceptable behaviour occurs. Therefore, any blank solutions, not connected with effective educational activity, will not be adequate.

The obligation to pay an appropriate sum of money rests with the employer in connection with violation of the obligation to prevent mobbing in the workplace, irrespective of whether the employee who suffered from health disorder was harassed by the employer (person performing acts in labour law on behalf of the employer) or by another employee. Liability for the actions of other persons results from the employer's breach of the obligation to prevent mobbing (article 94^3 § 1 of the Labour Code).

A proper interpretation of the provisions of Labour Code which constitute the basis for employer's liability for the consequences of mobbing, namely the employee's health disorder, should take into account the purpose which is to completely eliminate mobbing from the workplace. The functions of this regulation

[584] Judgment of the Supreme Court of 7 May 2009, III PK 2/09, OSNP 2011, No. 1–2, item 5.

[585] Judgment of the Supreme Court of 29 March 2007, II PK 228/06, OSNP 2008, No. 9–10, item 126 and OSP 2010, No. 6, item 68 with a commentary of *M. Skąpski*, *G. Jędrejek*, Sąd w sprawach mobbingowych *[Court in workplace mobbing matters]*, Przegląd Sądowy 2010, No. 5, p. 33, *E. Maniewska*, Z orzecznictwa Sądu Najwyższego *[Case-law of the Supreme Court of Poland]*, PiZS 2010, No. 12, p. 37.

should be assessed from this perspective. It seems reasonable that the liability for mobbing should in the first place be assigned a repressive function in relation to the employer responsible for counteracting mobbing. In addition, it seems to be reasonable to assign it also a preventive and educational function (in relation to the employer and all employees).

The nature of the claim, which pursuant to article 94^3 § 3 of the Labour Code can be raised by an employee, that is financial redress for non-material harm, suggests that this regulation has also compensatory function.

According to civil law theorists, in the case of redress awarded on the basis of the provisions of the Civil Code, in particular article 445 § 1 of the Civil Code, the compensatory function of the benefit has priority. Two other functions of redress for non-material damage that may affect its amount, namely the preventive/educational function and the repressive function cannot dominate or overtake the compensatory function. The basic function of the monetary redress for non-material damage related to harm to health is the compensatory function. It tends to mitigate physical and mental suffering. This function aims to alleviate the negative emotions of the injured party by allowing him to enjoy certain material assets. However, the fact that the analyzed regulation is included in the Labour Code seems to be decisive for the modification of the above-mentioned civil law interpretation of the function of financial redress for health disorder. It is also important that the definition of mobbing includes such terms as humiliation, ridiculing an employee, or his elimination from the team of co-workers which inherently refer to the employer's obligation to respect the dignity of the employee and defend him against social exclusion.

3.8.3.3. The amount of redress

The deliberations on the function of employer's liability regulated in article 94^3 § 3 of the Labour Code are not only of theoretical importance. They should be taken into account when determining the amount due to the employee. It should be higher the higher is the scale and weight of failures and omissions in fulfilling the statutory obligation on the part of the employer. What is more, the economic "burden" of the awarded amount will stimulate changes in the functioning of the employer, and as a consequence will have a positive effect on the effective prevention of mobbing in the future.

The term "appropriate sum" used in article 94^3 § 3 of the Labour Code, which an employee may demand in the case of health disorder is a vague term. When determining the amount of the redress, it should be kept in mind that article 94^3 § 3 of the Labour Code protects a particularly valuable interest, which is health, therefore award by the court of too low amounts of redress in cases when a per-

son suffered severe health disorder would lead to unwanted depreciation of this interest. According to the Supreme Court's judgment of 3 February 2000[586], in evaluating the "appropriate sum" account should be taken of all circumstances of the case in question which influence the scope of the harm done. Therefore, redress should be comprehensive and include both physical suffering (pain and other ailments), and mental suffering (negative feelings experienced in connection with physical suffering or the consequences of bodily injury or health impairment) already experienced, their duration and those that will probably occur in the future, and therefore forecasts for the future. In its judgment of 22 January 2015[587], the Supreme Court accepted that redress for non-material damage is payable by the employer in one amount for a specific health impairment caused by mobbing. The culpable failure on the part of the harasser's superior to prevent mobbing that influences or contributes to the revealed health impairment caused by mobbing should be assessed as an event increasing the feeling of harm of an employee who is the mobbing victim, which needs to be compensated by awarding one adequate monetary redress (article 94^3 § 3 of the Labour Code).

3.8.3.4. The burden of proof

Therefore, there should be no doubt that the employee bears the burden of proof that mobbing occurred. On the other hand, it should be examined in more detail whether the employee must prove the employer's lack of counteraction. If it is established that the obligation of the employer to prevent mobbing is the obligation of result, then the mere occurrence of mobbing would mean failure to comply with such obligation. It seems, however, that when carrying out a comprehensive analysis of the rules of employer's liability in the case concerned, such an interpretation could be incompatible with the previously accepted broad understanding of counteraction and should rather be considered an obligation to act diligently. In order to avoid liability, the employer should, therefore, show that he has correctly fulfilled his obligation, proving that he has taken adequate, efficient and effective preventive actions. If he proves that he effectively counteracted mobbing, which nevertheless occurred, he will not be liable for it. In particular, for example, an employer should not be held liable if, despite the creation of preventive tools, the victim of mobbing did not use them, therefore not giving the employer the opportunity to prevent the mobbing. Then it will be of key importance to assess whether the tools created by the employer were of such type that the victim had the opportunity to use them without fear and was aware of how to do it.

[586] I CKN 969/98.
[587] III PK 65/14.

3.8.3.5. Civil-law claims

The Labour Code specifically regulates only some of the legal consequences of mobbing, namely the health disorder, as well as compensation to an employee who terminated a contract of employment because of mobbing. However, this does not exhaust the catalogue of claims that can be raised by an employee in connection with mobbing, in accordance with the principles laid down in the Civil Code. The catalogue of these claims is based on the qualification of mobbing as a delict (offense against the law), the essence of which always consists in violating the personality rights of an employee such as dignity, reputation and health.

Under the current state of law it can be accepted that an employee can raise his civil-law claims designed to protect such rights and interests (article 24 § 1 and 2 of the Civil Code). First, these are non-material claims (to abandon the action threatening the personal interests, and in case of a violation – to take the actions necessary to remove its effects), however it is also possible to raise material claims (under article 24 § 1 third sentence of the Civil Code and article 24 § 2 of the Civil Code, which provides that the aggrieved party whose personal rights were violated can demand compensation and redress in accordance with the provisions of the Civil Code on delicts).

According to a prevailing standpoint of the judiciary, expressed, for example, in its judgment of the Supreme Court of 2 October 2009[588], the codification of mobbing did not limit the legal possibilities for the harmed or injured party to claim material and non-material damages under the provisions of the Civil Code regarding in particular the protection of personal rights.

The bases of liability laid down in the Civil Code may be applied in particular in cases of mobbing which did not lead to impairment of employee's health or in the situation when the personality rights of the employee, referred to in article 11^1 of the Labour Code in connection with article 23 and 24 of the Civil Code and article 300 of the Labour Code, were violated and it did not exhaust the statutory characteristics of mobbing.

A detailed discussion of the entire catalogue of civil law claims would significantly exceed the scope of this study. However, the indication of these legal consequences is necessary for the sake of comprehensiveness.

In its judgment of 8 August 2017[589] the Supreme Court pointed out that the scope of claims that can be raised by an employee against an employer in connection with mobbing, derived **directly from the provisions of civil law**, is broad. These are the following claims:

[588] II PK 105/09 (OSNP 2011, No. 9–19, item 125).
[589] I PK 206/16.

1) to determine that mobbing takes or has taken place, giving rise to liability for damages on the part of the harasser (article 189 of the Code of Civil Procedure);
2) to refrain from violating employee's personality rights in connection with mobbing (article 11^1 of the Labour Code and article 24 § 1 second sentence of the Civil Code);
3) to perform the activities necessary to remedy the consequences of violation of personality rights, in particular by submitting an appropriate statement, in an appropriate form (article 24 § 1 second sentence of the Civil Code);
4) for financial redress for the harm suffered as a result of violation of personality rights or for payment of an appropriate sum for the indicated social purpose (article 24 § 1 third sentence of the Civil Code and article 448 of the Civil Code);
5) to compensate for the material damage caused by violation of personality rights (article 24 § 2 of the Civil Code and article 415 et seq. of the Civil Code);
6) to repair the damage caused by health disorder caused by mobbing, for example, medical costs (article 444 of the Civil Code).

3.8.4. Employer's liability for accidents at work and occupational diseases

Under the Labour Code, the scope of the employer's liability for damages towards an employee who sustained an accident at work, cover only personal items lost and damaged in connection with this event and items necessary to perform work, except for loss of or damage to motor vehicles and monetary values.

As regards the personal effects, these are defined in the doctrine as the items to be used solely by their holder, which are not given away to other persons and which were acquired for that purpose by the harmed person (such as glasses). Currently, one may wonder whether this may apply, for example, to a mobile phone. The necessity requirement refers only to the items necessary to perform work. A necessary item is an item without which the work cannot be done. Therefore, these are not items that merely facilitate or accelerate performance of work by the employee.

In its resolution of 14 December 1978 the Supreme Court held that compensation for property lost or damaged in connection with an accident at work does not include money. The Court held that banknotes are not personal effects of an employee[590]. This view was expressed in article 237^1 § 2 of the Labour Code, which clearly provides that it does not apply when motor vehicles and cash values have been damaged or lost. It should be noted that, for example, a bicycle is

[590] III PZP 2/78, SP 1978, No. 6, p. 32.

not a motor vehicle. A motor vehicle within the meaning of the Act of 20 June 1997 – Law on Road Traffic *(Prawo o ruchu drogowym)* (Journal of Laws [Dz.U.] of 2016, item 1137) is a motor vehicle the design of which enables driving faster than 25km/h; this does not apply to an agricultural tractor. In the absence of an autonomous definition in the labour law, it should be considered that article 237^1 § 2 of the Labour Code uses the term "motor vehicle" in that sense.

The employer's liability for damages pursuant to article 237^1 § 2 of the Labour Code is a strict (risk-based) liability. The employer is liable for damage to the property of an employee, which includes personal belongings and objects necessary to perform work, only on the grounds that it occurred in connection with an accident at work. Classification of an event causing damage as an accident at work of an employee is independent of the fault of the employer. It does not preclude the classification of an event causing damage as an accident at work, even if it occurred as a result of force majeure or the employee's exclusive fault. The employer is liable for property damage connected with an accident at work even in those cases where the liability of the social insurance institution for personal injury is excluded. The employer may be liable also for damage to the employee's property, not covered by article 237^1 § 2 of the Labour Code, under the provisions of the Civil Code. The provisions of article 237^1 § 2 of the Labour Code do not cover in particular the cases of loss of or damage to personal effects and objects necessary to perform work by employees who sustained other types of accidents, e.g. accidents on their way to or from work, as well as accidents in specific circumstances. The same applies to accidents equated with accidents at work in terms of insurance liability. A situation which also falls outside the scope of the provisions of article 237^1 § 2 of the Labour Code is where the personal items and objects necessary to perform work were damaged in connection with an accident at the work sustained by another person. In all these cases, the employer's liability for damages will be based only on the principles provided for in the Civil Code.

Under article 237^1 of the Labour Code, an employee who sustained an accident at work is entitled to social insurance benefits specified in separate laws (§1). As mentioned above, Article 237^1 § 2 of the Labour Code regulates the liability of the employer for loss of or damage to certain objects in connection with the accident.

However, for many years now, there has been a discussion among the labour law theorists regarding not only the basis or legal nature of this liability, but also the question whether any claims in the event of accidents at work can be raised under the provisions of the Civil Code. Supporters of the idea of comprehensive regulation of the issue of compensation for personal injuries in insurance regula-

tions[591] indicate that the firm wording of article 237[1] of the Labour Code introduces only the exception which is regulated in § 2 and all other claims are covered by the insurance risk. The employer, as a party fully responsible for payment of premiums in various amounts, depending on the level of risk in the workplace, should not incur additional financial losses if the risk covered by the insurance materializes. Moreover, the argument against the supplementary liability of employers indicates both purely economic and systemic issues. Attention is drawn to the lack of balance between the interests of both parties and ensuring full satisfaction of claims only on the part of the employee, without any protection of the employer. Especially in the case of small and medium-sized employers who are already burdened with accident insurance contributions, the accompanying risk of additional civil liability for damages could even affect their further business[592]. This view could be accepted provided that the insurance system was such that it would aim at full, unlimited compensation for personal injury.

It is worth noting that the Act of 30 October 2002 on Social Insurance for Accidents at Work and Occupational Diseases *(ustawa o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych)*[593] (to which article 237[1] of the Labour Code refers) establishes the system of social insurance benefits which constitute the primary method of compensation for personal injuries caused to an employee as a result of accidental events as well as occupational diseases, not only by means of an exhaustive catalogue of benefits, but also mostly with lump sum benefits. It is also important that by adopting the 2002 Act the legislature did not decide to introduce in it a provision similar to article 40 of the Accidents Act of 1975[594] previously in force (valid until 1 January 1990), according to which the benefits specified in the act constitute the satisfaction of any and all claims for health disorder or death as a result of an accident at work or occupational disease in relation to establishments listed in the act. If the intention of the legislature was that the employees should only be entitled to claim compensation for personal injuries under an insurance regime, then such regulation would be included in the new act.

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[591] For example *K. Ślebzak*, Uzupełniająca odpowiedzialność cywilnoprawna pracodawcy za wypadki przy pracy *[A supplementary liability of an employer for accidents at work]*, PiZS 2009, No. 11, p. 2 ff.

[592] It was emphasized by *M. Gersdorf*, Uzupełniająca odpowiedzialność cywilnoprawna pracodawcy za wypadki przy pracy *[A supplementary civil-law liability of an employer for accidents at work]*, PiZS 2003, No. 6, p. 9–10.

[593] Journal of Laws *[Dz.U.]* of 2015, item 1242, as amended.

[594] Act of 12 June 1975 on Benefits in Respect of Accidents at Work and Occupational Diseases *[ustawa z dnia 12 czerwca 1975 o świadczeniach z tytułu wypadków przy pracy i chorób zawodowych]*, (Journal of Laws *[Dz.U.]* of 1983, No. 30, item 144).

According to a view prevailing among in the jurisprudence[595] and case-law, the provisions of the Accidents Act do not preclude the injured employee or family members of the deceased employee from claiming the so-called supplementary employer's liability based on the Civil Code for personal injuries resulting from an accident or occupational disease. The employer is liable also for the so-called work-related diseases that have not been considered occupational diseases. The employer's civil-law liability for an accident at work is completely separate from liability incurred by the Social Insurance Institution *(ZUS)* by virtue of the Accidents Act.

The rules and scope of this liability are different – in contrast to the liability of the pension body. The civil liability of the employer is not limited in any way and its scope is determined by the amount of damage suffered by the employee. At the same time, there is a relatively more stringent regime for seeking supplementary claims for damages under the Civil Code. In court proceedings conducted to determine the employer's civil liability, any automatism is excluded. The amount of possible benefits awarded by the court should be adjusted to the specific circumstances and the amount of the harm suffered by a specific employee. The assessment of the size of the damage suffered by the employee as a result of an accident at work or occupational disease, as a rule, will be affected by the social security benefits previously obtained by the employee.

However, even if the civil law supplementary claims are accepted, it is not a solution to all interpretation problems which are of great practical importance.

It should be noted that it is not undisputable whether this liability should be considered liability in contract or in delict. Providing employees with safe and healthy working conditions is one of the basic duties of the employer (articles 15, 94 (4) of the Labour Code). However, the resulting obligations of the employer are not unlimited. In the case concerning compensation for the consequences of an accident at work, initiated by an employee against the employer, all conditions of liability in tort must be determined and proven (demonstrated). The burden of proof lies with an employee (article 6 of the Civil Code). The employer must protect life and health of workers by ensuring safe and healthy working conditions, and in particular must organize work in such a manner as to ensure such condi-

[595] See in particular *J. Jończyk*, Odpowiedzialność odszkodowawcza w prawie pracy *[Liability for damage in labour law]*, PiP 1964, vol. 5–6, pp. 746–759, *J. Jończyk*, Ubezpieczenie wypadkowe, PiP 2003, volume 6, p. 3 ff.; *W. Sanetra*, Nowa filozofia wypadkowa *[New accident philosophy]*, Przegląd Ubezpieczeń Społecznych i Zdrowotnych 2002, No. 11, p. 2; *Ł. Pisarczyk*, Ryzyko pracodawcy… *[Employer's risk…]*, p. 345. *E. Maniewska*, Jeszcze o odpowiedzialności cywilnoprawnej pracodawcy za wypadki przy pracy *[Civil-law liability of an employer for accidents at work]*, PiZS No. 12, pp. 20–23; *T. Wyka*, Komentarz do art. 237 [1] k.p. oraz 207 k.p *[Commentary on article 237[1] of the Labour Code and article 207 of the Labour Code]*, [in:] *K.W. Baran* (ed.), Kodeks pracy…. *[The Labour Code…]*, Warsaw 2016.

tions (article 207 § 2 (1) of the Labour Code). Avoiding risks to health and life associated with a specific job depends to a large extent on the knowledge about the existence of such risks and knowledge of how to avoid them. Therefore, the employer is also obliged to familiarize employees with the provisions and principles of occupational health and safety related to their work (article 237^4 § 1 of the Labour Code), as well as to issue detailed instructions regarding health and safety at work (article 237^4 § 2 of the Labour Code). The employer's obligation is not only to familiarize the employee with general regulations and principles of occupational health and safety, but also to pay attention to specific hazards occurring at the workstation where the employee will perform his duties. This applies to typical threats, in any case foreseeable, and not specific, exceptional risks that may occur in non-typical situations. Undoubtedly, there is a whole range of public-law obligations imposed on the employer, which are a consequence of conclusion of a contract of employment, and thus constitute employer's obligation towards the employee.

If the employer's civil liability is based on the provisions on delictual liability, the employer cannot leave room for uncertainty as to the conditions of liability, i.e. whether it is based on fault, risk or equity.

It seems that at present the case-law is somewhat unreflective and, in many matters, too broadly refers to the principle of risk stemming from article 435 of the Civil Code, also in those cases in which the enterprise itself is driven by the natural forces, but there was no causal link between the accident as such and the operation of the enterprise. For example, in its judgment of 21 March 2001[596] the Supreme Court found that it is possible to hold the employer liable under article 435 of the Civil Code for the damage if an employee got infected by tuberculosis by a person with whom he lived and worked.

In its judgment of 11 December 1979[597] the Supreme Court provided for the possibility to attribute strict liability (on a risk basis) to Dolnośląska Dyrekcja Okręgowa Kolei Państwowych *(Lower Silesian Directorate of State Railways)* (article 435 of the Civil Code) for an incident in which a train ran over a hand of the plaintiff who was under the influence of neuroleptics and alcohol and lost consciousness in the immediate vicinity of railway tracks.

There are many more examples. Hence it seems very important to renew the academic discussion which could possibly result in the legislative interference with the regulations in force in a manner that is clear enough to eliminate the risk of abuse of article 435 of the Civil Code in situations where it should not be taken into account at all.

[596] Judgment of Supreme Court of 21 March 2001, I PKN 319/00.
[597] Judgment of the Supreme Court of 11 December 1979, II CR 448/79.

It should also be noted that the Supreme Court in its judgment of 24 November 2016[598] supported the application of article 435 of the Civil Code to the employee's claims arising from occupational disease and stated that if the employee's occupational disease is in connection with the operation of the enterprise driven by natural forces (more precisely – in connection with the professional exposure existing at the employer's running the enterprise driven by natural forces), there are no arguments excluding the employer's liability on such legal basis (i.e. on a risk basis). In the same judgment the Supreme Court provided a questionable explanation regarding the applicability of article 453 of the Civil Code, stating that while determining the scope of application of article 435 § 1 of the Civil Code, three elements should be taken into account: the degree of danger from the devices used, the degree of complexity in the processing of elemental energy into work and the general level of technology. The force of nature used as a source of energy should be the driving force of the enterprise as a whole. Therefore, it is not enough to use natural forces only for supporting activities. In other words, the mere use in the enterprise of single machines equipped with engines/motors (e.g. electric, diesel) is not yet the basis for the application of article 435 § 1 of the Civil Code. According to the Supreme Court, in order to assess whether an entity running business may be held liable for damage on a risk basis under article 435 § 1 of the Civil Code, it is necessary to disregard the circumstances of the specific event causing the damage and refer to the scope of the operations of the defendant's business. Article 435 § 1 of the Civil Code does not refer to an enterprise that only uses the movement of devices set in motion with the help of natural forces to perform some portion of the tasks, but to an enterprise that is driven as a whole by natural forces. The damage caused by the "operation of an enterprise" *(ruch przedsiębiorstwa)* occurs both when the damage is a direct consequence of the use of natural forces and remains in a relevant causal link with the risk arising from the use of these forces, as well as when it is only related to the operation of an enterprise as a whole. The operation of the enterprise in terms of article 435 § 1 of the Civil Code means every activity of this enterprise, and not only the one which is directly linked to the natural forces and which is a consequence of natural forces. Damage resulting from the enterprise operations may also be caused by sewage, gas, dust, exhaust gases, etc. released by its devices. An operator running the enterprise on its own account (e.g. an industrial plant) is liable – pursuant to article 435 § 1 of the Civil Code – for damage caused by the emission of poisonous substances also when their concentration does not exceed the norms defined by law. In this context it should also be assessed whether the occupational disease in the form of malignant lung cancer is (may be) related to the release of

[598] Judgment of the Supreme Court of 24 November 2016, I PK 260/15.

harmful substances such as asbestos (asbestos dust, the particles of which are deposited in lungs), hexavalent chromium and polycyclic aromatic hydrocarbons.

In the reasoning of its judgment of 24 November 2016, the Supreme Court also stated that article 435 of the Civil Code refers to damage caused by the enterprise operations "to anyone". Therefore, there can be no doubt that on this legal basis the employer may be liable to the employee who suffered "personal injury" as a result of an occupational disease resulting from exposure to harmful agents existing in the work environment during employment with this employer, if the damage was caused "by the operation of the enterprise" of the employer.

The "occupational exposure" within the meaning of article 235^1 of the Labour Code may, in the opinion of the Supreme Court, also consist in exposure to harmful agents existing in the work environment in an enterprise driven by natural forces. Consequently, if the employee's occupational disease is in connection with the operation of the enterprise driven by natural forces (more precisely – in connection with the occupational exposure existing at the employer's running the enterprise driven by natural forces), there are no arguments excluding the employer's liability on such legal basis (i.e. on a risk basis). According to the arguments presented in the reasoning, in my opinion the Court provided for excessive scope of application of article 435 of the Civil Code. According to the Supreme Court, it is sufficient to determine whether the employer is running (or was running at the time of employment of an employee) an enterprise driven by natural forces and whether the plaintiff's damage (an occupational disease) was related to the operation of the enterprise (whether the injury of the person in the form of occupational disease was caused by company operations).

According to the above, it seems that the Supreme Court identifies any "link" between the disease and the operations of the enterprise with the situation in which the injury in the form of an occupational disease "was caused by the operation of the enterprise". In my opinion, these situations are not identical and because of the fact that the liability regime under article 435 of the Civil Code is more stringent, the interpretation should not be extensive.

In the judgment concerned, the Supreme Court also presented an opinion on how the term "driven" by natural forces should be understood. For the application of article 435 § 1 of the Civil Code it is not sufficient for the enterprise to directly use the elemental natural forces (electricity, gas, steam, liquid fuels, etc.), because nowadays it is difficult to find an establishment that does not use electricity, liquid fuels or thermal energy, originating from natural forces, but it is about processes involving the transformation of elemental energy into work or other forms of energy, which requires the use of machines and other processing devices. Despite the fact that the judgment was passed in a completely different socio-economic reality, the Supreme Court referred to the still valid standpoint expressed

in the judgment of 12 July 1977[599], according to which, when determining the scope of application of article 435 § 1 of the Civil Code, three elements should be taken into account: the degree of danger from the devices used, the degree of complexity in the processing of elemental energy into work and the general level of technology. The force of nature used as a source of energy should be the driving force of the enterprise as a whole. Therefore, it is not enough to use the natural forces only for supporting activities. In other words, the mere use in the enterprise of single machines equipped with engines/motors (e.g. electric, diesel) is not yet the basis for the application of article 435 § 1 of the Civil Code[600].

Article 435 § 1 of the Civil Code does not refer to an enterprise that only uses the movement of equipment set in motion with the use of natural forces to perform some portion of the tasks, but to an enterprise that is driven as a whole by natural forces[601]. The force of nature used should be the driving force of the enterprise as a whole, so that its existence and work depend on the use of natural forces, without which it would not achieve the purpose for which it was established[602]. In the cases which do not involve activation of high elemental forces, there is no particular danger that would be the basis for the introduction of risk-based liability[603]. Therefore, article 435 § 1 of the Civil Code applies only to those enterprises whose existence and work at a given time and place depend on the

[599] IV CR 216/77, OSNCP 1978, No. 4, item 73.

[600] According to the case-law of the Supreme Court, an enterprise driven by natural forces is: a mine (the judgment of the Supreme Court of 10 May 1962, III CR 941/61, OSNCP 1963, No. 10, item 226, with a commentary by *A. Agopszowicz*, OSPiKA 1964, No. 4, item 86), a gas distribution plant (a judgment of the Supreme Court of 24 May 1961, III CR 962/60, OSPiKA 1962, No. 4, item 111, with a commentary of *J. Pietrzykowski*, NP 1963, No. 7–8, p. 870), a national machinery center (a judgment of the Supreme Court of 18 December 1961, IV CR 328/61, OSPiKA 1963, item 101, with a commentary of *A. Szpunar*, NP 1962, No. 11, p. 1521 with a commentary of *J. Pietrzykowski*, NP 1963, No. 7–8, p. 867), a modern construction company (a judgment of the Supreme Court of 1 December 1962, I CR 460/62, OSPiKA 1964, No. 4, item 88, with a commentary of *A. Szpunar*), a transport company using mechanical means of transport (a judgment of the Supreme Court of 27 November 1985, II CR 399/85), an undertaking which uses aircrafts for agro-technical operations (see judgments of the Supreme Court of 11 January 1990, I CR 1377/89, OSNCP 1991, No. 2–3, item 32, with a commentary of *M. Nesterowicz*, OSP 1991, No. 1, item 3 and of 4 September 2009, III CSK 14/09, Palestra 2009, No. 11–12, p. 275, with a commentary of *A. Konnert*), in certain situations, a modern farm (a judgment of the Supreme Court of 15 February 2008, I CSK 376/07, OSNC-ZD 2008, No. D, item 117).

[601] *G. Bieniek*, [in:] *J. Gudowski* (ed.), Kodeks Cywilny. Komentarz. Księga trzecia. Zobowiązania *[The Civil Code. A Commentary. Part Three. Obligations]*, Warszawa 2013, arguments on article 435.

[602] Judgment of the Supreme Court of 1 December 1962, I CR 460/62, OSPiKA 1964, No. 4, item 88 with a commentary of *A. Szpunar*.

[603] Judgment of the Supreme Court of 21 August 1987, II CR 222/87, OSNCP 1989, No. 1, item 17, with a commentary of *J. Skoczylas*, OSPiKA 1988, No. 7–8, item 174 and *W.J. Katner*, OSPiKA 1989, No. 7–12, item 145.

use of natural forces and which without using these forces would not achieve the purpose for which they were established[604].

However, it must be strongly emphasized that the damage must be caused by the "operation of an enterprise". Unfortunately, the prevailing view interprets the concept of "operation of an enterprise" very broadly. Consequently, the damage caused by the "operation of an enterprise" occurs both when the damage is a direct consequence of the use of natural forces and remains in a relevant causal link with the risk arising from the use of these forces, as well as when it is only related to the operation of an enterprise as a whole. Enterprise operations, in terms of article 435 § 1 of the Civil Code, means every activity of this enterprise, and not only the one which is directly linked to the natural forces and which is a consequence of the natural forces.

In its decision of 11 May 2010[605], the Supreme Court assumed that the concept of "operation of an enterprise" also included organizational and management activities typical of every employer. Enterprise operations, in terms of article 435 § 1 of the Civil Code, means every activity of this enterprise, and not only the one which is directly linked to the natural forces and which is a consequence of the natural forces. The damage caused by the "operation of an enterprise" occurs both when the damage is a direct consequence of the use of natural forces and remains in a relevant causal link with the risk arising from the use of these forces, as well as when it is only related to the operation of an enterprise as a whole[606]. It seems that such case-law departs from the essence of the problem, which is the increasing risk to life, health and safety not in every enterprise but in the enterprise strictly defined in the provisions of article 435 of the Civil Code.

The provisions of article 435 § 1 of the Civil Code introduce the so-called extended and, at the same time, more stringent liability of enterprises driven by the natural forces (steam, gas, electricity, liquid fuels, etc.), based on the principle of risk. However, this liability exists provided that the damage remains in a normal causal link with the operation of the enterprise. There is no presumption that damage occurs in connection with the operation of the enterprise and this circumstance should be demonstrated in the litigation, however the burden of proof of this fact (article 6 of the Civil Code) lies with the person who derives legal consequences from this fact, namely with the injured plaintiff[607].

In my opinion, the possible application of a stricter liability regime, i.e. risk-based – article 435 of the Civil Code – should be limited to those cases in which the damage is caused by the operation of the enterprise or plant, unless the dam-

[604] Judgment of the Supreme Court of 18 September 2002, III CKN 1334/00.
[605] II PZP 4/2010, OSNP 2011, No. 21–22, item 275.
[606] Judgment of the Supreme Court of 5 January 2001, V CKN 190/00.
[607] See for example a judgment of the Supreme Court of 12 March 2009, V CSK 352/08.

age occurred as a result of force majeure or solely through the fault of the injured party or third party for whom the operator of the enterprise or plant driven by natural forces is not responsible.

According to article 435 § 1 of the Civil Code, a person who runs on his own account an enterprise or a plant driven by natural forces (steam, gas, electricity, liquid fuels, etc.) is liable for any personal or property damage caused by the operation of the enterprise or the plant unless the damage is due to force majeure or solely to a fault on the part of the aggrieved party or a third party for whom he is not responsible.

According to § 2 of that article, the above provision applies accordingly to enterprises or plants manufacturing or handling explosives. The increased risk posed by the operation of such enterprises to their environment constitutes a circumstance that justifies stronger protection of the injured party in seeking damages. Liability for damages under article 435 § 1 of the Civil Code arises regardless of the fault (in a subjective sense) of the operator running the enterprise or plant as well as regardless of whether the entrepreneur has committed illegal behaviour or acted with due diligence.

In its judgment of 7 January 2010[608] the Supreme Court explicitly held that the employer can only be liable for the normal consequences of the act or omission, which can be attributed to him and not to third parties for which he is not responsible (the management of the supermarket is not responsible for customer behaviour). The employer's liability in delict in the event of an accident at work sustained by the employee is a subsidiary liability in relation to the liability of the insurance institution, which is liable if the conditions (prerequisites) laid down in the act on accidents at work are met. An employee can pursue supplementary claims against an employer in respect of an accident at work, based on the provisions of civil law (article 415, 444 and 445 of the Civil Code). An employee bringing such an action, cannot rely in the court proceedings only on the mere fact of the accident at work confirmed by a post-accident report, but must prove all the premises for civil liability for damages.

In the case of delict these include: 1) employer's liability in delict, in particular based on the principle of fault (article 415 of the Civil Code), 2) damage sustained (resulting from harm to health – article 361 § 2 in connection with article 444 and 445 of the Civil Code), 3) a causal link between the accident at work and the occurrence of damage (article 361 § 1 of the Civil Code).

The employer's fault-based liability for the consequences of an accident at work depends on the employee demonstrating in the course of the process that in specific factual circumstances the work was organized incorrectly, which in

[608] II PK 132/09.

turn led to the accident or that the actual real risks were not recognized by the employer, therefore the employee did not have any knowledge about them, or the threats actually identified were not eliminated by the employer, which put the employee at risk of injury.

Moreover, in its judgment of 9 July 2015[609] the Supreme Court held that article 444 § 2 of the Civil Code may be a legal basis for an independent claim. What is more, it is also possible for the employee to claim compensation and redress from the employer for the damage and harm caused by an unlawful act even when the events causing the damage cannot be classified as an accident at work or occupational disease[610].

When raising a supplementary claim, an employee cannot rely in legal proceedings only on the sole fact of an accident at work or an occupational disease which have been confirmed by relevant documents, but is obliged to demonstrate all legal premises for the civil liability for damages, namely:

1) employer's liability in delict;
2) damage sustained (for example a harm to health);
3) a causal link between the accident at work and the occurrence of damage and the extent of the damage which affects the amount of the compensation due[611].

Therefore, the employee may pursue supplementary claims against the employer in respect of occupational diseases or accidents at work, based on civil law provisions (including articles 444 and 445 of the Civil Code) before the proceedings before the Social Insurance Institution for one-off compensation have been exhausted[612].

Due to the flat-rate nature of social insurance benefits, their amount may, however, be counted towards the amounts claimed by the entitled party on a civil law basis. According to the Supreme Court, in principle, there is no reason to reduce the compensation due to the aggrieved party (article 445 § 1 of the Civil Code) by a one-off compensation payment received from social insurance, if it has been used to cover costs resulting from injury, which caused reduction of the compensation (article 444 § 1 of the Civil Code), then reduced by the amount corresponding to the degree of contribution of the injured party to the damage (article 362 of the Civil Code)[613]. The compensation from the social insurance received by the injured person (one-off compensation) should be taken into account when assessing the amount of supplementary benefits, because it serves to

[609] I PK 243/14.

[610] Judgment of the Supreme Court of 19 March 2008, I PK 256/07, OSNP 2009, No. 15–16, item 192.

[611] Judgment of the Supreme Court of 5 July 2005, I PK 293/04.

[612] Judgment of the Supreme Court of 7 April 2011, I PK 244/10, OSNP 2012, No. 11 –12, item 135.

[613] I PK 253/04, OSNP 2006, No. 5–6, item 73.

cover the costs and expenses caused by the accident, and also compensates for the harm suffered. First of all, the one-off compensation must be taken into account when determining the amount of compensation when it was intended to cover the costs resulting from the accident. This can have a form of deduction of the received one-off compensation from the amount of the damage suffered. Therefore according to article 444 § 1 first sentence of the Civil Code, it is necessary to determine "all costs arising from bodily injury (health disorder)" and assess to what extent they have been satisfied by the one-off compensation. Next, the degree of contribution of the injured person should be taken into account, reducing "according to circumstances" (article 362 of the Civil Code) the amount of compensation. According to the circumstances, i.e. within the range (percentage, fraction) in which the victim contributed to the damage. This method of determining compensation is well established in the Supreme Court's case-law[614].

In its judgment of 7 June 1976[615] the Supreme Court held that compensation payable under civil law is calculated – in a situation where benefits related to an accident at work were paid, and the injured party contributed to the damage – in such a manner that the compensation calculated according to civil law is reduced by the sums paid under the regulations on accidents at work, and the amount corresponding to the degree of contribution of the injured to the damage is deducted from the amount so determined[616].

The social insurance benefit received by the injured should also be taken into account when assessing the amount of redress *(zadośćuczynienie)*[617]. However, it should not be taken into account if the one-off compensation paid out of the social insurance was fully used to cover the costs resulting from injury (covering the loss), and thus fully taken into account when reducing the compensation due. In any case, in this situation, receiving a one-off compensation payment should have very little effect on the assessment of the amount of the "relevant sum" due on account of the redress[618].

If as a result of an accident at work or an occupational disease the aggrieved party dies, the employer may be obliged to cover the medical costs and the costs

[614] A reasoning of judgment of the Supreme Court of 22 October 2005, I PK 253/04, OSNP 2006, No. 5–6, item 73.

[615] IV CR 147/76, OSNCP 1977, No. 5–6, item 89. See also a commentary of *A. Szpunar* on a judgment of the Supreme Court of 7 June 1976, PiP 1978, No. 3, p. 178.

[616] See in particular a resolution of joined Chambers: Civil Chamber and Chamber of Labour and Social Insurance of the Supreme Court of 14 December 1962, III PO 5/62, OSNCP 1964, No. 4, item 65 and a judgment of 26 June 1963, III PR 17/63, OSNCP 1964, No. 6, item 118.

[617] Judgment of 27 August 1969, I PR 224/69, OSNCP 1970, No. 6, item 111.

[618] Reasoning of judgment of the Supreme Court of Poland of 22 October 2005, I PK 253/04, OSNP 2006, No. 5–6, item 73.

of funeral to the person who incurred such costs, under article 446 § 1 of the Civil Code.

A person towards whom the deceased had a statutory maintenance obligation may demand from the employer an annuity calculated in accordance with the aggrieved party's needs and the earning and financial possibilities the deceased would have had throughout the likely duration of the maintenance obligation. This annuity may be claimed by other persons related to the deceased to whom the latter voluntarily and permanently provided means of subsistence if it follows from the circumstances that the principles of social coexistence so require (article 446 § 2 of the Civil Code). The court may also award appropriate compensation to the closest members of the family of the deceased person if as a result of his death their living standard has deteriorated significantly (article 446 § 3 and § 4 of the Civil Code).

The complexity of this issue, as well as the persistent heterogeneity of opinions of both the jurisprudence and the case-law, undoubtedly generate the need to review again the views presented in this area and to conduct a thorough and comprehensive analysis of the principles of employer's liability for damage to the employee.

3.9. Principles of protection of parenthood

J. Czerniak-Swędzioł

3.9.1. Introduction

Family is the smallest and at the same time the most important unit in the society, a community of people united, in principle, by a bond of kinship, in which children are born and brought up and knowledge, values and feelings are transferred to them[619]. The quality of the society is dependent on the quality and durability of the family as an important social factor in the integration and strengthening of natural social bonds[620]. Its specific role is that it is a natural and

[619] *T. Liszcz,* Aksjologiczne podstawy prawa pracy *[Axiological foundations of labour law]*, [in:] *K.W. Baran* (ed.), System prawa pracy. Tom I. Część ogólna *[A System of Labour Law. Volume I. A General Part]*, Warsaw 2017, p. 317.

[620] See *T. Smyczyński*, Rodzina w świetle prawa i polityki społecznej *[Family in the light of law and social policy]*, Poznań 1990, p. 262, *A. Mączyński*, Konstytucyjne podstawy prawa rodzinnego *[Constitutional foundations of family law]*, [in:] *P. Kardas*, *T. Sroka*, *W. Wróbel* (eds.), Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla *[The State of Law and Penal Law. A Jubilee Book for Profesor Andrzej Zoll],* Warsaw 2012, p. 765.

irreplaceable environment for the birth and development of a human being, in which both the child and the adult satisfy their basic needs[621]. Family is a lasting phenomenon, though it is subject to evolution. Its natural character results from that it is the only social group that develops not only through the admission of new members from outside, but also through internal development, namely having children[622].

In the Polish law there is no universal definition of family, although under the provisions of the Family and Guardianship Code *(Kodeks rodzinny i opiekuńczy)*[623], a definition of the so-called small (nuclear) family has been created[624]. Family is created by marriage – article 23 of the Family and Guardianship Code – and it includes spouses, as well as their children, biological or adopted for as long as they are minors and also adult children, if they are unable to meet their own needs and the parents are obliged to pay maintenance – article 27 of the Family and Guardianship Code. However, many legal provisions, define the concept of family more broadly than the Code, by including other relatives and family members (so-called large family)[625]. Family performs many functions. The applicable laws aim at protecting both these functions and the family itself. This protection is guaranteed by many branches of law, therefore it is very appropriate to talk about the family as a social institution in an interdisciplinary approach[626].

In the Polish legal system, family is not treated as a separate subject of rights and obligations, because the legal regulations usually[627] define a precise circle of persons and regulate specific obligations or rights of persons related to their belonging to the family. In contrast, the social teaching of the Catholic Church, treats the family as a separate subject of rights and obligations. The family is more than just each individual person. It is a community of parents and children, and often also many generations and that is why its subjectivity demands its own

[621] *B.M. Kałdon*, Rodzina jako instytucja społeczna w ujęciu interdyscyplinarnym *[Family as a social institution – an interdisciplinary approach]*, Forum Pedagogiczne UKSW 2011, No. 1, p. 230.

[622] See *T. Smyczyński*, Prawo rodzinne i opiekuńcze *[Family and Guardianship Law]*, Warsaw 2005, *passim*.

[623] Act of 25 February 1964, Family and Guardianship Code (Journal of Laws *[Dz.U.]* of 2015, item 2082, as amended).

[624] *J. Ignatowicz*, *M. Nazar*, Prawo rodzinne *[Family Law]*, Warsaw 2005, p. 22 ff.

[625] *T. Liszcz*, Aksjologiczne podstawy… *[Axiological foundations…]*, p. 318; see article 6 (14) of the Act of 12 March 2004 on the Social Assistance *[ustawa o pomocy społecznej]* (Journal of Laws *[Dz.U.]* of 2017, item 1769), where a family is defined as related or unrelated persons, who are in a real relationship and reside together in a common household.

[626] *B.M. Kałdon*, Rodzina jako… *[A Family as…]*, p. 238.

[627] An exception is article 8 (1)(3) of the Act on Social Assistance (Journal of Laws *[Dz.U.]* of 2017, item 1769), according to which an entity entitled to social assistance is a family (the so-called dysfunctional family), and not its particular members.

specific rights[628]. Families have the right to expect the public authorities to introduce adequate, non-discriminatory family policies in legal, economic, social and financial matters[629]. The social teaching of the Catholic Church also draws attention to the competition that exists between two closely related, mutually dependent, and most important for the majority of people spheres of life, namely work and family life. As Pope John Paul II wrote[630], work is the basis for development of family life, which is the natural right and calling of a human being. These two values – work and family – must properly connect with each other and build on each other. Work is somehow a condition for starting a family, because the family needs means of subsistence, which are normally obtained through work. Therefore, the contemporary labour law must guarantee to employees a certain level of rights connected with parenthood. This is justified by social considerations (demographic winter, inefficiency of the pension system) and international and European standards which must be complied with by the Polish state, and the constitutional principles of protection of parenthood, as well as the achievement of a specific level of civilization development[631]. Section VIII of the Labour Code regulating the issue of rights related to parenthood is one of the most dynamically changing in the last decade, following the trends in the development of modern labour law. These regulations meet social expectations, such as: equality of men and women in employment, work-life balance[632] or family policy. It is an extremely complex matter, bringing together many important problems of the contemporary labour law, which has significantly gone beyond the framework of the protection of women's work. In 2001 the Polish legislature emphasized the new meaning and wording of the regulations as well as the personal scope of

[628] A letter of Pope John Paul II to families, Poznań 1994, p. 65; see also: *Z. Radwański*, Kodeks cywilny a prawo regulujące zagadnienia rodziny *[The Civil Code and the laws regulating family matters]*, [in:] Problemy współczesnego prawa cywilnego *[Problems of the Contemporary Civil Law]*, a scientific conference, Popowo, June 1982, Warsaw 1982, p. 333 ff.

[629] Charter of the Rights of the Family issued in 1983 on behalf of the Synod of Bishops, Reprint 7, L'Osservatore Romano No. 10 – Polish version – October 1983, available at http://www.srk.opoka.org.pl/srk/srk_pliki/karta.htm (accessed on 9 August 2018).

[630] Point 10 of the Encyclical Laborem Exercens of John Paul II, available at https://opoka.org.pl/biblioteka/W/WP/jan_pawel_ii/encykliki/laborem.html (accessed on 9 August 2018).

[631] *M. Latos-Miłkowska*, Przemiany stosunku pracy związane z rodzicielstwem *[Transformations of an employment relationship connected with parenthood],* [in:] *L. Florek*, *Ł. Pisarczyk* (eds.) Współczesne problemy prawa pracy i ubezpieczeń społecznych *[The Contemporary Problems of Labour and Social Insurance Law]*, Warsaw 2011, p. 221 ff.

[632] See *Ł. Pisarczyk*, Sprawozdanie z XIX Światowego Kongresu Międzynarodowego Stowarzyszenia Prawa Pracy i Zabezpieczenia Społecznego *[Report of the XIX World Congress of the International Society for Labour and Social Security Law]*, PiZS of 2010, No. 2, p. 16.

guaranteed protection by changing the name of Section VII of the Labour Code from "Protection of women's work" to 'Employees' rights related to parenthood".

3.9.2. International law regarding the protection of parenthood and its impact on national legislation

The obligation of the state to protect family life and to effectively protect mothers is clearly indicated in the international laws[633]. Notwithstanding the above, clearly emphasized is the necessity of collaborative actions of both the state and an employing entity aimed at ensuring protection of an employee during pregnancy and guaranteeing employment of an employee returning from maternity leave in the same or equivalent position with the current salary[634], as well as protection of the employee's family as a basic unit in the society[635].

The right of a family to social, legal and economic protection is provided for by the European Social Charter[636] ratified by Poland, although the protection provided for in this act is definitely weaker than this guaranteed by Polish law. According to article 8 of the ESC, it should be considered unlawful for an employer to give a woman notice of dismissal during the period of her absence from work because of maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period. The Polish legislature is definitely more restrictive and does not allow the termination of the contract in any case, except for the termination of the contract in accordance with article 52 of the Labour Code. On the other hand, according to article 16 ESC, with a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

The absolute protection of female workers is provided for by article 8 of the European Social Charter (Revised),[637] according to which "with a view to ensur-

[633] See *B. Rostworowska*, *S. Rostworowski*, Rodzina w konstytucjach i dokumentach międzynarodowych *[Family in the National Constitutions and International Documents]*, Warsaw 1994.

[634] Article 8 (2) of the ILO Convention No. 183 concerning the revision of the Maternity Protection Convention (Revised) of 1952.

[635] Articles 16 (3) and 25 of the UN Universal Declaration of Human Rights of 10 December 1948, available at http://libr.sejm.gov.pl/tek01/txt/onz/1948.html.

[636] The European Social Charter of 18 October 1961 (Journal of Laws *[Dz.U.]* of 1999, No. 8, item 67).

[637] The European Social Charter (Revised), Strasbourg, 3 May 1996, ESC (Revised) was not ratified by Poland, available at http://www.nzzk.nw.pl/pdf/eu_karta_spol.pdf. (last accessed 17 August 2018).

ing the effective exercise of the right of employed women to the protection of maternity, the Parties undertake to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period".

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children – article 10 ICESCR[638].

The Charter of Fundamental Rights of the European Union[639] (article 33) explicitly connects family and professional life and provides that family shall enjoy legal, economic and social protection to reconcile the family and professional life. Everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child. This provision is much narrower than the Polish regulation, not to mention the questionable legal value of this document resulting, *inter alia*, from the restrictions for Poland set out in the Polish-British protocol[640].

Protection of work of women is regulated in article 11 of the Convention on the elimination of all forms of discrimination against women adopted by the UN Assembly on 18 December 1979,[641] according to which the prohibition of discrimination consists also in ensuring the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. The Convention obligates the States Parties to take appropriate measures to prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.

However, the acts of international law which have had the strongest impact on the Polish regulations and which were a specific prototype are the Conventions of the International Labour Organization. The first to mention is the ILO Convention No. 183 concerning the revision of the Maternity Protection Convention (Revised) of 1952[642]. Article 8 of this Convention which significantly modified

[638] International Covenant on Economic, Social and Cultural Rights open for signature in New York on 19 December 1966 (Journal of Laws *[Dz.U.]* of 1977, No. 38, item 169), https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3&chapter=4&clang=_en (accessed on 17 August 2018).

[639] The Charter of Fundamental Rights of the European Union, available at https://bip.ms.gov.pl/Data/Files/_public/bip/prawa_czlowieka/onz/karta.pdf. (accessed on 17 August 2018).

[640] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, Warsaw 2013, p. 201.

[641] Journal of Laws *[Dz.U.]* 1982, No. 10, item 71.

[642] ILO Convention No. 183, Polish version, available at http://www.mop.pl/doc/html/konwencje/k183.html (accessed on 9 August 2018).

the protection granted under the ILO Convention No. 103[643] concerning Maternity Protection (revised 1952), imposed on the national legislation an obligation to enact laws on unlawful termination by an employer of the employment with a woman during her pregnancy or absence on maternity leave or during a period following her return to work, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing rests on the employer. A broader scope of protection if prescribed by the ILO Recommendation No. 95 of 1952 concerning maternity protection[644], however its legal value is not of such importance. The proposed solutions included in the above-mentioned Recommendation in fact correspond with the current Polish protective regulation, however the Recommendation provides for the protection starting from the day the employer is informed of the pregnancy (the weaker aspect of the protection), but at the same time extends the protection beyond the period of maternity leave (the stronger aspect of the protection). Termination of a contract is permissible in cases of severe misconduct of a woman, cessation of business by the enterprise in which she was employed or expiration of her contract of employment. In the light of these provisions, the Polish concept of the automatic extension of a fixed-term contract until the date of childbirth is unjustified. The ILO regulations do not support this concept, not even indirectly. Among the ILO Conventions which relate to the protection of parenthood, an act which should also be mentioned is the Convention No. 156 of 1981 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities[645]. The Convention indicates protection of maternity through the prohibition of discrimination and provides that family responsibilities shall not, as such, constitute a valid reason for termination of employment – article 8 of the Convention.

The analysis of the above-mentioned ILO Conventions leads to the conclusion that international law has never expected States Parties to interfere in the duration of fixed-term contracts and that international regulations protect women's employment against dismissal for reasons related to parenthood, not because of the fact of maternity alone[646].

[643] Article 6 of the ILO Convention No. 103 concerning Maternity Protection (Revised 1952) provided that while a woman is absent from work on maternity leave, it shall not be lawful for her employer to give her notice of dismissal during such absence, or to give her notice of dismissal at such a time that the notice would expire during such absence, Polish version available at http://www.mop.pl/doc/html/konwencje/k103.html (accessed on 16 August 2018).

[644] Available at http://www.mop.pl/doc/html/zalecenia/z095.html. (accessed on 16 August 2018).

[645] The Convention entered into force on 11 August 1983, available at http://www.mop.pl/doc/html/konwencje/k156.html. (accessed on 16 August 2018).

[646] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 199.

The current Polish labour laws are supported – as far as the EU law is concerned – by the provisions of the Council Directive 92/85/ EEC[647]. Article 10 of this Directive provides that Member States shall take the necessary measures to prohibit the dismissal of pregnant workers, during the period from the beginning of their pregnancy to the end of the maternity leave, save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice. This regulation, developed by the jurisprudence[648], is the most developed regulation of international law as regards the aspect of protection of maternity (parenthood).

3.9.3. The constitutional principles of protection of parenthood

The concept of family is not defined in the Constitution of the Republic of Poland[649], although it appears in its provisions (articles 18, 71, 47) and there are such expressions as: family life, parental care, parental rights. Undoubtedly the term "family" is directly related to the expression "give birth", which justifies the use of this name for the group created as a result of birth, and therefore including parents and their child or children[650]. In the light of the Constitution of the Republic of Poland, it should be recognized that the family is a social group whose membership is acquired by birth or establishing a family relationship on a different legal basis. As explained by the Constitutional Tribunal[651], a family is a complex social reality that is the sum of relations that connect first of all parents and children. It should be emphasized that the introduction of the concept of family in the maternity and parenthood regulations and directly before the provisions regulating the protection of mother and child suggests unequivocally that the family is connected with marriage and its existence presupposes the existence of children[652]. Thus, the relationship preferred by the legislature, which enjoys

[647] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Official Journal of the European Union L 348 of 28.11.1992, p. 1).

[648] Judgment of the ECJ of 11 October 2007, C-460/06 in Nadine Paquay v. Societe d'architectes Hoet + Minne SPRL (Official Journal of the European Union C of 2007, No. 297, item 16/1), as well as a judgment of the ECJ of 4 October 2001, C-438/99 in Maria Luisa Jimenez Melgar v. Ayuntamiento de Los Barrios.

[649] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws *[Dz.U.]* item 483, as amended.

[650] Judgment of the Constitutional Tribunal of 12 April 2011, K 62/08, OTK-A 2011, No. 3, item 22.

[651] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[652] *W. Borysiak*, [in:] *M. Safjan*, *L. Bosek* (eds.), Konstytucja RP. Tom I. Komentarz do art. 1–86 *[The Constitution of the Republic of Poland. Volume I. A Commentary on Articles 1–86]*, Warsaw 2016, p. 487.

protection, is a marriage relationship. However, article 71 (1) of the Constitution guarantees protection also to de facto unions in which children are brought up, although these relationships are not marriages[653]. It should also be borne in mind that because of the changing contemporary model of family as a marriage relationship between a woman and a man having children, the concept of family life evolves and is dynamic. The concept of family should be treated in broader categories by reference to interpersonal relations resulting from marital bonds, kinship, affinity or adoption[654]. A person who does not have a spouse or children can still be in other family relationships, including with parents, siblings or distant relatives, and therefore it cannot be considered that such a person has no family life. Under article 47 of the Polish Constitution, everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life. However, the scope of family life is subject to much stronger protection than the private life, and article 47 of the Constitution should be read in the context of article 18 of the Constitution[655].

The Constitution of the Republic of Poland does not define the concept of maternity, which is connected with the concept of mother and means the relationship that exists between the child and his mother from the beginning of pregnancy, through the postpartum period, to the death of one of them[656]. The scope of this concept falls within the concept of parenthood, which was not defined in the Constitution either. The model of protection of maternity provided for in article 18 of the Constitution is compliant with the common understanding of the concept of maternity that also covers the period of pregnancy of a woman. The analyzed article provides for the care and protection of the Republic of Poland over the four values indicated in it and is the only provision in which the concepts of care and protection are mentioned jointly, and thus cannot be treated as synonyms[657]. According to article 18 of the Constitution of the Republic of Poland, protection of family, maternity and parenthood – as elements of the social and legal order – is a social obligation. The obligation, not only to protect but also to care for the indicated values, is imposed on the public authority (public bodies, public institutions, local government units) and this does not apply only to bodies exercising legislative power, but also to law-making bodies. This constitutional

[653] See the reasoning of a judgment of the Constitutional Tribunal of 16 July 2007, SK 61/06, OTK-A 2011, No. 7, item 77.

[654] *M. Rycak*, Czas pracy… *[Working time…]*, pp. 307–308.

[655] Judgment of the Constitutional Tribunal of 26 November 2013, P 33/12, OTK-A 2011, No. 8, item 123.

[656] Judgment of the Constitutional Tribunal mentioned in footnote No. 35.

[657] *W. Borysiak*, [in:] *M. Safjan*, *L. Bosek* (eds.), Konstytucja RP. Tom I. Komentarz do art. 1–86 *[The Constitution of the Republic of Poland. Volume I. A Commentary on Articles 1–86]*, Warsaw 2016, p. 493.

principle is supplemented with the provisions of Article 71 of the Constitution (included in the chapter devoted to the freedoms, rights and obligations of man and citizen) and guarantees the legal protection of maternity. According to this provision, in its social and economic policy the state takes into account the welfare of the family, and the mother before and after the birth of the child has the right to special assistance from public authorities, to the extent specified by law. The provisions of article 71 (1) first sentence are a direct expression of the principle of the state's care and protection over family, which was expressed in article 18 of the Constitution. Article 71 (2) of the Constitution specifies the systemic principle of protection of maternity[658].

3.9.4. Implementation of the principles of protection of parenthood in the provisions of the Labour Code

The last amendments to the Labour Code[659] have significantly extended the employees' rights related to parenthood, and thus also the role of the employer in their implementation has been substantially modified. Changes proposed by the legislature and the introduction of new institutions which guarantee to the parents-employees the life-work balance should be considered justified, but unfortunately not all solutions have coped with reality. In the legal writings of the subject[660], it is emphasized that the employee who is the sole provider (who provides for at least one member of the family with his own salary) does not benefit from increased protection against termination of employment. Also when the legitimacy of termination by the employer of a contract of employment concluded for an indefinite period is assessed by a court, the family situation of the employee, and in particular whether he is the sole provider, is of no great importance. On the other hand, on the assumption that the employee fulfilled his duties faultlessly, it

[658] See *S. Stecko*, Konstytucyjna zasada ochrony macierzyństwa i rodzicielstwa oraz wynikające z niej uprawnienia kobiet-pracownic w związku z urodzeniem dziecka *[The constitutional principle of protection of maternity and parenthood and the resulting rights of women workers connected with birth of a child],* PPP 2017, No. 5, pp. 59–68.

[659] See the: Act of 16 November 2006 on the Amendment of the Labour Code and the Act on Social Security Cash Benefits in Respect of Illness and Maternity *[ustawa o zmianie ustawy Kodeks pracy oraz ustawy o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa]* (Journal of Laws *[Dz.U.]* No. 221, item 1615), Act of 24 September 2010 on the Amendment of the Labour Code and Certain Other Acts *[ustawa o zmianie ustawy Kodeks pracy oraz niektórych innych ustaw]* (Journal of Laws *[Dz.U.]*, No. 224, item 1459), Act of 18 May 2013 on the Amendment of the Labour Code and Certain Other Acts (Journal of Laws *[Dz.U.]* of 2013, item 675), Act of 24 July 2015 on the Amendment of the Labour Code and Certain Other Acts (Journal of Laws [*Dz.U.* of 2015, item 1268).

[660] *T. Liszcz*, Aksjologiczne podstawy… *[Axiological foundation…]*, p. 322.

may serve as justification for declaring the termination contrary to the principles of social coexistence (article 8 of the Labour Code and article 58 § 1 of the Civil Code in connection with article 300 of the Labour Code)[661].

Parenthood is protected also by protection of family life of an employee. Family life is, after all, one of the most important elements of every person's private life and means the opportunity to engage in all activities that give a sense of fulfilment, to create, maintain and care for bonds and relationships with persons close to the employee and relatives living in one household[662]. Numerous empirical studies indicate that the quality of family life of every employee, as well as its procreative decisions are undoubtedly influenced by working conditions such as working time and its distribution, labour intensity, remuneration, atmosphere at work or the risk of unemployment[663]. Therefore, through appropriate labour law regulations, it is possible to significantly contribute to increasing the level of protection of the employee's family life and to increasing the level of employee's satisfaction with the life-work balance[664]. According to Rycak[665], the family life of an employee should be protected primarily by the provisions regulating working time, including its length, distribution, overtime work, on-call time, and daily and weekly rest periods. As regards the provisions of the Labour Code currently in force, worth indicating is article 142 of the Labour Code, which allows adjusting the working time schedule to the family life of an employee, who can apply to the employer to set an individual working time schedule within the working time system covering the employee. On the other hand, pursuant to article 140^1 of the Labour Code, employers may apply flexible working time, which is undoubtedly very helpful in balancing the work and family life. The family life is protected also by provisions regulating telework, principles of remunerating employees, including provisions on fair remuneration, regulations governing parental leave and holidays, provisions granting special protection to pregnant women, nursing women, provisions which guarantee employment to an employee returning

[661] *T. Liszcz*, Aksjologiczne podstawy… *[Axiological foundation…]*, p. 323.

[662] See *B. Kalinowska*, Równowaga między życiem zawodowym a rodzinnym w perspektywie makroekonomicznej *[Work-life balance in microeconomic scale]*, [in:] *C. Sadowska-Snarska* (ed.), Równowaga praca – życie – rodzina *[Work-Life balance]*, Białystok 2008, p. 84.

[663] See *P. Radkiewicz*, *M. Widerszal-Bazyl*, Analiza psychometrycznych właściwości polskiej wersji do pomiaru konfliktu praca – rodzina *[The Polish Version of the Scale Measuring Work-Family Conflict: Analysis of Psychometric Characteristics]*, Studia Psychologiczne 2011, vol. 49, No. 2, pp. 5–17; *A. Durasiewicz*, Rola flexicurity w godzeniu życia zawodowego z rodzinnym *[The role of flexicurity in work-life balance],* Wrocławskie Studia Politologiczne 2013, No. 15, p. 26, quoted after *M. Rycak*, Czas pracy… *[Working time…]*, p. 312.

[664] *M. Rycak*, Czas pracy… *[Working time…]*, p. 316.

[665] *Ibidem.*

to work after parental leave, or the provisions enabling the use of paid leave connected with taking care of a child.

However, a major drawback of the existing regulations aimed at protection of maternity, family and parenthood is that these general principles of social policy are implemented only by the employing entity, which causes a visible disturbance in the fulfilment of the state's constitutional obligations towards the citizens[666]. The legislature shifted the burdens related to the protection of parenthood to the employer, and therefore burdened him with wage risk, although these burdens could also be largely borne by the society, for example through appropriate insurance systems, i.e. as provided for in international laws. Departure from individual employer's wage risk exposure is the principle expressed in article 6 (8) of the ILO Convention No. 183[667], which provides for the creation of compulsory social insurance or public funds intended for this purpose. The employer was generally relieved from the wage risk related to parental rights practically in all Member States of the European Community[668].

3.9.4.1. Protection of a pregnant woman under the Labour Code

The cornerstone of maternity protection is, first of all, the specific protection of stability of employment related to pregnancy and parenthood, which is fully implemented by article 177 of the Labour Code. According to this provision, the prohibition of termination applies to all types of contracts of employment, except a contract for a probationary period not exceeding one month[669].

The fulfilment of the protective function by the employer does not only mean that the employer cannot terminate a contract of employment in the period in which the woman is pregnant. If a woman becomes pregnant during the notice period, the notice of termination given previously by the employer becomes invalid and the employer is obliged to reinstate such employee. In both cases, the employer complies with an extremely important social principle, which is the protection of maternity expressed in the Constitution. The model of protection of an employee-parent adopted by the Polish legislature raises considerable doubts among the labour law theorists[670], given the fact that the employer remains responsible for its fulfilment. The legislature does not take into account

[666] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…],* p. 211.

[667] Available at http://www.mop.pl/doc/html/konwencje/k183.html.

[668] See *Ł. Pisarczyk*, Ryzyko pracodawcy… *[Employer's risk…]*, p. 256.

[669] Some Polish legal scholars argue that protection should be provided regardless of the length of the actual employment, see *T. Liszcz*, Ochrona pracy kobiet i pracowników wychowujących dzieci – propozycje zmian *[Protection of work of women and employees raising children – proposals for changes],* PiZS 1989, vol. 1, pp. 22–28.

[670] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, pp. 202–203.

at all whether a particular employer can afford to comply with this obligation. An employer is obliged to incur specific costs related to employing a pregnant woman, in fact without the possibility of her dismissal and without the possibility of reducing her remuneration. This applies not only in a situation where the employer may not have a job for such a woman (lack of demand for such work), but also where such work simply becomes less efficient. The regulations provide for an absolute obligation to transfer a pregnant employee to other work or to release her, for the time required, from the obligation to perform work, regardless of the organizational difficulties and costs associated with this for the employer. The primary purpose of the transfer is to avoid a situation where the employer is obliged, for social reasons, to pay remuneration for work, without mutual consideration. However, the payment of the remuneration cannot be changed, even when the work in the new position is less valuable. In such case the reduced remuneration is compensated by an appropriate compensatory allowance, which is not remuneration, but a social benefit[671]. The efficiency of work in the new position cannot have a negative impact on the amount of the compensatory allowance due to the pregnant employee. This is because of the need to safeguard the social interest by guaranteeing appropriate health conditions to the mother and conditions for proper development to the child[672]. Also in the case of garden leave, a pregnant employee, despite retaining the right to the current remuneration, in fact does not receive remuneration but a relevant benefit corresponding to the amount of the remuneration. Due to the lack of reciprocity in the payment of this benefit, it performs – like the allowance – a social function imposed on the employer, without distinguishing its amount understood as the economic power[673].

A similar model of protection of parenthood, i.e. an obligation imposed exclusively on the employer, applies in the case of extension, by law, of a contract of employment of definite duration with a pregnant woman until the day of childbirth. The concept of the legislature seems to be right and deserving approval, because the direct protection of the woman's economic interest and the indirect protection of the child come to the fore. However, the legislature while imposing on the employer an obligation to re-employ, forgets to maintain the right proportions in the implementation of social goals, does not care about the employer's interests and does not pay attention to the fact that the fixed-term employment

[671] *A. Sobczyk*, Komentarz do Kodeksu pracy, Warszawa 2016 *[Commentary to Labour Code]*, p. 720.

[672] Judgments of the Supreme Court: of 5 May 1976, I PRN 32/76; of 5 May 1976, I PRN 27/76, OSP 1977, No. 6, item 101.

[673] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 721.

could have a mainly economic value for the employer[674]. In the case of a contract for a probationary period, its prolongation until childbirth distorts the nature and purpose of such contract. There are different views presented by the labour law theorists as to whether a woman should be protected at all[675] during the probationary period[676]. It seems that protection of employment expressed in article 177 § 3 of the Labour Code should be maintained, but with the difference that the obligation to provide for such a woman until the date of childbirth should be transferred to the state[677]. As of 1 June 2017, the legislature made changes in the protection of the sustainability of employment of a temporary worker[678]. These changes also create a social employment model affecting the employer.

3.9.4.2. Protection of an employee-parent under the Labour Code

The employer remains obligated to provide work (entrust work, admit to work) to the employee-parent returning to work after the leave connected with parental rights in accordance with articles 183^2 and 186 (4) of the Labour Code.

[674] See *J. Czerniak-Swędzioł*, Zakres uprawnień związanych z rodzicielstwem w przypadku zatrudnienia na podstawie terminowej umowy o pracę *[The scope of rights related to parenthood in the case of employment based on a fixed-term contract of employment]*, [in:] *M. Mędrala* (ed.), Terminowe umowy o pracę *[Fixed-term Contracts of mployment],* Warszawa 2017, p. 135 ff.; see also *J. Czerniak-Swędzioł*, Uwagi de lege lata i de lege ferenda w przedmiocie umowy o pracę na zastępstwo *[Remarks de lege lata and de lege ferenda in the subject of the contract of employment for replacement]*, [in:] *A.M. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2015, pp. 300–303; *S. Koczur*, Szczególna ochrona pracownicy w ciąży zatrudnionej na podstawie terminowej umowy o pracę a ochrona kobiety w ciąży zatrudnionej na zastępstwo *[Special protection of a pregnant woman employed under a fixed-term contract and a protection of pregnant woman employed for replacement]*, [in:] *J. Czerniak-Swędzioł* (ed.), Uprawnienia pracowników związane z rodzicielstwem w świetle przepisów prawa pracy i ubezpieczeń społecznych *[Parental Entitlements from a Labour Law and Social Security Perspective]*, Warsaw 2016, pp. 38–64.

[675] See *T. Liszcz*, Ochrona pracy kobiet i pracowników wychowujących dzieci – propozycje zmian, PiZS 1989, vol. 1, pp. 22–28. According to the author, a pregnant woman should be protected regardless of the period of the actual employment.

[676] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 197; in the opinion of this author, since the probationary period can prove the unsuitability of the employee to work, then the employers' obligation to employ creates the employment structure exclusively of a social nature.

[677] See *J. Czerniak-Swędzioł*, Zakres uprawnień związanych z rodzicielstwem w przypadku zatrudnienia na podstawie terminowej umowy o pracę, [in:] *M. Mędrala* (ed.), Terminowe umowy o pracę, Warszawa 2017, p. 135 ff.; see also *J. Czerniak-Swędzioł*, Uwagi de lege lata i de lege ferenda w przedmiocie umowy o pracę na zastępstwo, [in:] *A.M. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2015, pp. 300–303, where the author criticizes the exclusion of the protection guaranteed by article 177 § 3 of the Labour Code in relation to a pregnant woman employed for replacement.

[678] Act of 9 July 2003 on Employment of Temporary Agency Workers *[ustawa o zatrudnianiu pracowników tymczasowych]* (Journal of Laws *[Dz.U.]* of 2016, item 360); article 13 (3) amended by article 1 (8)(b) of the Act of 7 April 2017 (Journal of Laws *[Dz.U.]* of 2017, item 962) Amending the Act on Employment of Temporary Agency Workers as of 1 June 2017.

This is an expression of other regulations of the Labour Code, which are generally intended to be guarantees[679]. The legislature, while protecting the stability of employment, authorizes the employer to take an independent, autonomous decision and unilaterally change the terms of the contract of employment with no need to give the notice of change to wage or working conditions[680] because of the need to have regard for the welfare of the employee-parent[681]. According to the view expressed by the Supreme Court[682], strongly criticized by legal theorists[683], admission to work is an absolute obligation of the employer, but it does not mean that the contract of employment cannot be terminated after the employee returns from parental leave. The presented argument makes no sense, because the assumption that articles 183^2 and 186 (4) of the Labour Code apply only to allow a parent employee to work and then dismiss him should be treated as completely wrong. Ensuring employment to an employee-parent to protect his rights should not be limited to ensuring any work and should not be at the expense of total restriction of economic freedom of the employer.

3.9.4.3. Leave related to parenthood as one of the forms of implementation of the principle of protection of parenthood

There is no doubt that the provisions on leaves of absence related to parenthood are one of the key tools of the family policy of the state[684]. As far as the types of leave related to parenthood are concerned, there are five types of such leave, i.e. maternity leave *(urlop macierzyński)* – article 180 of the Labour Code, parental

[679] Protection of an employee returning to work is the subject of many studies; see, for example, *J. Czerniak-Swędzioł*, Uwagi de lege lata i de lege ferenda w przedmiocie umowy o pracę na zastępstwo, [in:] *K.W. Baran* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2017, No. 2, pp. 89–102, as well as *P. Sołtys*, Problematyka prawna obniżenia wymiaru etatu przez pracownika-rodzica wychowującego dziecko *[Legal issues relating to reduction of working hours of an employee-parent raising a child],* [in:] *A.M. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2014, p. 85 ff.

[680] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 207.

[681] Judgment of the Supreme Court of 1 October 1984, I PRN 129/84, OSNCP 1985, No. 7, item 93.

[682] See the reasoning of a resolution of the Supreme Court of 30 December 1985, III PZP 50/85, OSNCP 1986, No. 7–8, item 118.

[683] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…]*, p. 208; *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 752.

[684] *M. Latos-Miłkowska*, Przemiany stosunku pracy związane z rodzicielstwem, [in:] *L. Florek*, *Ł. Pisarczyk* (eds.) Współczesne problemy prawa pracy i ubezpieczeń społecznych, XVIII Meeting of Chairs and Departments of Labour and Social Insurance Law, Warsaw 26–28 May 2011, Warsaw 2011, p. 223; *L. Mitrus*, Wątpliwości wokół urlopu rodzicielskiego *[Doubts concerning parental leave]*, [in:] Prawo pracy. Refleksje i poszukiwania. Księga Jubileuszowa Profesora Jerzego Wratnego *[Labour Law. Reflections and Academic Quests]*, Warsaw 2013, p. 355; *B. Godlewska-Bujok*, Uprawnienia związane z rodzicielstwem – nowa odsłona *[Rights related to parenthood – a new perspective]*, PiZS 2015, No. 9, p. 21.

leave *(urlop rodzicielski)* – articles 182 (1a) et seq. of the Labour Code, paternity leave *(urlop ojcowski)* – article 182[3] of the Labour Code, leave related to adoption of a child *(urlop z tytułu przysposobienia dziecka)* (leave on the terms similar to maternity leave or adoption leave[685]) – article 183 of the Labour Code and child-care leave *(urlop wychowawczy)* – article 186 of the Labour Code. Each of them plays a completely different role and serves different purposes. The maternity leave is intended primarily for the mother of a child, although after the last amendment to the Labour Code such rights can be exercised also by an employee-father raising a child and an employee-other member of the immediate family[686]. Maternity leave is meant to serve: mother's preparation for childbirth – article 180 § 2 of the Labour Code, recovery after the childbirth, to enable direct care of the child in the first weeks of his life and to establish emotional and mental bond with the child. Taking care of a child and establishing bonds are goals that are increasingly fulfilled also by paternity leave[687]. However, the time intended solely for taking care of the child and a guarantee of creating proper conditions for development of the child is the child-care leave. On the other hand, it is very close to parental leave and this is in line with the European standards[688]. When determining the group of leaves granted to employees-parents, they should be called simply leave of absence entitlements related to parenthood (leaves related to parenthood) and not simply parental leaves[689]. This may be misleading due to

[685] *Ł. Pisarczyk*, Uprawnienia rodziców adopcyjnych w prawie pracy *[Rights of adoptive parents in the labour law]*, [in:] *J. Czerniak-Swędzioł* (ed.), Uprawnienia pracowników związane z rodzicielstwem w świetle przepisów prawa pracy i ubezpieczeń społecznych, Warsaw 2016, p. 109.

[686] *M. Latos-Miłkowska*, Zakres podmiotowy urlopów związanych z rodzicielstwem *[The personal scope of leaves of absence related to parenthood]*, [in:] Tendencje rozwojowe indywidualnego i zbiorowego prawa pracy. Księga Jubileuszowa Profesora Grzegorza Goździewicza *[Development Tendencies of Individual and Collective Labour Law. A Jubilee Book of Professor Grzegorz Goździewicz]*, Toruń 2017, p. 323.

[687] See *K. Serafin*, Uprawnienia rodzicielskie pracownika – ojca po nowelizacji Kodeksu pracy *[Parental entitlements of an employee-father after the amendment of the Labour Code]*, [in:] *J. Czerniak-Swędzioł* (ed.), Uprawnienia pracowników związane z rodzicielstwem w świetle przepisów prawa pracy i ubezpieczeń społecznych *[Employees' rights related to parenthood in the light of labor law and social security regulations]*, Warsaw 2016, p. 157 ff.

[688] See *L. Mitrus*, Wątpliwości wokół… *[Doubts concerning…]*, p. 358; the author pointed out that the EU parental leave within the meaning of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Official Journal of the EU L 68 of 18 March 2010) should be identified with the Polish child-care leave; similar opinion: *J. Czerniak-Swędzioł*, Ewolucja urlopu rodzicielskiego *[The evolution of parental leave]*, [in:] *K.W. Baran* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 2016, p. 51 ff.

[689] *J. Czerniak-Swędzioł*, Ewolucja… *[Evolution…]*, p. 49 ff.

the independent institution of parental leave[690]. On the other hand, such a precise distinction in terms of naming will help avoid doubts as to terminology and interpretation.

In accordance with the requirements laid down in the implementing regulation of 2015[691] to article 186 (8a) of the Labour Code, an employee should submit an appropriate request to obtain one of the leaves of absence related to parenthood. The employer must grant such a request, with such modification that in the event of exercise of the right to maternity leave, following the childbirth, the leave is granted not upon request but by virtue of law as of the date of childbirth (article 180 § 3 of the Labour Code). Since the employer is obliged to grant the requests submitted by eligible employees-parents, the employee cannot start such leave without the consent of the employer. However, taking into account the values protected, it can be assumed that lack of response from the employer should mean that he consented to it[692]. Therefore, if the employee-parent has kept the required deadline and the request is complete, the employer cannot refuse to grant one of the leave entitlements, even if the leave could affect his economic interest. According to Sobczyk[693], the right to leave is a personality right, and the employer must in this regard be guided primarily by the constitutional value which is family protection. The protection of those values that stand behind the concept of leaves of absence related to parenthood definitely stands above the economic values of the employer and his economic freedom.

Implementation of the employee's right to protect family by granting leave prescribed in the Code and related to parenthood has some administrative characteristics[694]. These types of leave are "granted" by the employer and are not "taken" by the employee. The employer conducts regular (administrative) proceedings initiated at the request of an authorized employee (written form / duly in advance), and applies an individual act to the applicant. Moreover, the employer must decide which of the entitled persons can be granted the leave in the situation concerned and therefore examine the documentation of the other entitled person, which the applicant must submit. He must also examine the length of the leave and the possibility of dividing it into parts. Thus, due to the favourability

[690] See *M. Wujczyk*, Urlop rodzicielski – nowa instytucja ochrony rodzicielstwa *[Parental leave: a new institution of parenthood protection]*, Polityka Społeczna 2014, No. 2, p. 21.

[691] Regulation of the Minister of Family, Labour and Social Policy of 8 December 2015 on the requests submitted by employees in connection with parenthood and documents attached to such requests *[Rozporządzenie Ministra Rodziny, Pracy i Polityki Społecznej z 8.12.2015 w sprawie wniosków dotyczących uprawnień pracowników związanych z rodzicielstwem oraz dokumentów dołączanych do takich wniosków]* (Journal of Laws *[Dz.U.]* of 2015, item 2243).

[692] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 724.

[693] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 740.

[694] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 739.

towards the employee-parent and clear rules of conduct established for the employer, the application of the relevant provisions of the Code of Administrative Procedure[695] seems necessary.

The right to parental leave is also implemented in other forms determining the legal situation of the employee-parent and affecting the implementation of the principle of protection of parenthood. This applies in particular to institutions that eliminate all barriers to employees – parents combining work with the role of a parent.

This applies in particular to institutions that eliminate all barriers to employees-parents combining work with the role of a parent[696]. Increasing the flexibility of leave related to parenthood and allowing better adjustment of the leave formula to the individual employee's needs, was one of the objectives of the amendment to the Labour Code[697], which – according to legal theorists – was achieved[698].

An employee who uses parental leave has the right to give up this leave at any time upon consent of the employer and return to work. However, it is not so much the right to resign but only the right to submit an application to shorten the leave or part of it[699]. On the other hand, the employer's freedom not to grant such application submitted by the employee-parent is limited by the fundamental principle of the right to work expressed in article 10 of the Labour Code and therefore any possible refusal by the employer should be objectively justified. This is also the case when the employer refuses to agree to combining work with parental leave at the previous employer's (article 182 (1e) of the Labour Code). Legal theorists express the view[700] that an unfounded refusal to employ justifies a claim for compensation for breach of freedom of work as a personality right of the employee-parent and violation of his right to childcare.

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[695] Act of 14 June 1960, the Code of Administrative Procedure *[Kodeks postępowania administracyjnego]* (Journal of Laws *[Dz.U.]* of 2017, item 1257).

[696] See *U. Torbus*, Zmiany w zakresie uprawnień rodzicielskich ułatwiających łączenie obowiązków zawodowych z opieką nad dzieckiem *[*Changes in the scope of parental rights facilitating the combination of professional duties and child custody*]*, [in:] *J. Czerniak-Swędzioł* (ed.), Uprawnienia pracowników związane z rodzicielstwem w świetle przepisów prawa pracy i ubezpieczeń społecznych *[Employees' rights related to parenthood in the light of labor law and social security regulations]*, Warsaw 2016, p. 199 ff.

[697] See the justification to the government bill amending the Labour Code and other acts, Sejm print no. 1310, of 29 April 2013, available at http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=1310 (accessed on 5 January 2018).

[698] *B. Godlewska-Bujok*, Uprawnienia związane… *[Rights related…]*, p. 18.

[699] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 740.

[700] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 741.

3.9.4.4. Employer's obligations in respect of change of the organization of work in connection with the compliance with the principle of parenthood protection

To protect the life and health of an employee, family and maternity, the employer must also make changes in the organization of the employee's work process and adapt the work to his needs accordingly. Therefore, the employer is also under a high wage risk. This is another manifestation of the employing entity's commitment to achieving important social goals. There is no doubt that it would not be possible to achieve them without the employer's participation. It applies especially to the interruption of the work process while maintaining the legal relationship between the parties[701]. Employer's obligations related to the need to change the organization of the employee's work process can be divided into two groups, that is those related to the adjustment of working conditions for a pregnant woman and a nursing woman, as well as those relating to the modification of the current working conditions due to the employee's role as a parent.

According to the provisions of the Labour Code, an employer, if he knows that an employee is pregnant or nursing, cannot allow such an employee to perform prohibited work listed in the Implementing Regulation to article 176 of the Labour Code on the list of jobs that are burdensome, dangerous or harmful to health of pregnant or breastfeeding women[702]. However, the employer has the right to conclude a contract of employment with a pregnant or breastfeeding worker, even if the contract will relate to work prohibited to this group of women. It seems, however, that in some cases an employer has the right to refuse to employ a pregnant / nursing woman if the employer knows about the condition of this employee, and the costs he would have to incur in connection with provision of other work or dismissal would be significant, and the refusal does not constitute discrimination[703]. It should also be noted that article 176 of the Labour Code mentions prohibition of performance of work, while in article 178 of the Labour Code (overtime and night work of pregnant employees and an employee caring for a child up to 4 years of age) and in article 178^1 of the Labour Code (night work during pregnancy) the legislature uses the term impossibility of employment. Performance of work is an obligation on the part of the employee, while the obligation to employ rests with the employer. Therefore, the ban on work is related to women during pregnancy or breastfeeding. And the norm ad-

[701] See *Ł. Pisarczyk*, Ryzyko pracodawcy… *[Employer's Risk…]*, p. 257.

[702] Regulation of the Council of Ministers of 3 April 2017 (Journal of Laws *[Dz.U.]* of 2017, item 796).

[703] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 711.

dressed to the employer is article 179 of the Labour Code prohibiting the admission of pregnant or breastfeeding employees to work[704].

3.9.4.5. Interest of a child as a value protected by the provisions of Labour Code

The protection of needs of employee's family includes primarily the protection of the child's needs[705]. The needs of the employee's family are the subject of indirect protection in the context of the risk of social exclusion[706]. Where the provisions of the Labour Code protect the stability of employment of a employee-parent, where employers are obligated to adjust the organization of working time to a employee-parent, and finally where the employer complies with the requests for leave of absence, the child's economic interests are also protected.

The party obligated to perform organizational duties aimed at adjustment of the employee-parent's working time to the child's needs is first of all the employer[707]. The applicable provisions of labour law to a large extent take into account the social interests and the life and health of the child. Worth noting are articles 178 § 2 and 148 (3) of the Labour Code regulating, among others, overtime and night employment of an employee-parent taking care of a child up to four years of age, article 187 of the Labour Code referring to paid breaks at work connected with breastfeeding, or article 188 of the Labour Code concerning the leave of absence for the so-called taking care of a healthy child.

Maternity leave, in its current form, pursues two objectives: the absolute protection of the mother's health and the right of the child to parental care or care by another family member[708]. It also fulfils two basic functions, which in some cases may be implemented in parallel. In the period exceeding 8 weeks after childbirth, maternity leave serves mainly to protect the right of the child to be taken care of by the parents. In the period of 8 weeks after the childbirth, it performs those functions in parallel. In the antenatal period, the protected value is foetus and the

[704] *A. Sobczyk*, Komentarz… *[A Commentary…]*, p. 716.

[705] See: *M. Latos-Miłkowska*, Godzenie pracy zawodowej z życiem rodzinnym w przepisach o czasie pracy *[Work and family life balance according to working time regulations],* PiZS 2008, vol. 7, p. 8.

[706] *A. Sobczyk*, Prawo pracy w świetle… *[Labour Law in the Light…],* Warsaw 2013, pp. 228–229.

[707] The guarantee of the protection of employee's time for family life is also fulfilled by the state in cases where the state is the only decision-maker. See: *L. Mitrus*, Sytuacja rodzin pracowników migrujących *[Situation of families of migrant workers],* [in:] *A.M. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej *[Studies on Labour Law and Social Policy]*, Kraków 1999/2000, p. 315 ff.

[708] *A. Sobczyk*, Prawo dziecka do opieki rodziców jako uzasadnienie dla urlopu i zasiłku macierzyńskiego *[The child's right to parental care as justification for maternity leave and benefits]*, PiZS No. 9, 2015, p. 11 ff.

safety of pregnancy as well as mother's health[709]. It can therefore be concluded that maternity leave is the emanation of the child's right to special care in the first period after birth. This is particularly visible in the fact that the employer is not obliged to grant this leave, but also he has no legal possibility to refuse it[710]. Maternity leave starts, by law, on the day of childbirth, unless it has been used in the six-week period before childbirth, as permitted by the provisions of the Labour Code (article 180 § 2 of the Labour Code). This is the only leave related to parenthood, which will start even against the will of the employee concerned. Thus, the Labour Code guarantees that the child, at a given time after birth, should be taken care of by any of the parents, preferably a mother, which means a guarantee of effective child care[711]. According to the wording of article 180 § 12 of the Labour Code, in the event of death of the employee (the insured mother of the child) during maternity leave (maternity allowance) the employee-father raising the child or employee-other member of the immediate family has the right to a portion of the maternity leave falling after the death of the employee-mother (the insured).

The interests of the child are protected in the Labour Code and this can be seen in the regulations that impose – in some circumstances – on a pregnant woman and – always – on the mother of a newborn child the obligation to stop working to protect her health, but above all to comply with the child's right to protection of health and care. Thus, the mother cannot exercise her freedom to work, and the employer must bear the consequences of non-performance of work. The effectiveness of protection is strengthened by the right to public financial assistance in the form of maternity allowance[712] which is not a part of maternity leave, but is parallel to the maternity leave[713]. The applicable laws clearly distinguish between the legal situation of the child depending on the employment and insurance status of the mother on the day of childbirth. It seems that in this case the legislature completely ignores the fact that the status of the mother as

[709] *Ibidem.*

[710] *A. Sobczyk*, Prawo dziecka… *[The child's right…]*, p. 13.

[711] *Ibidem*; according to the author, the effective care means the obligation of the employee-parent to stop working, to provide material means to focus on effective care as well as stability of employment of the employee-parent.

[712] See *R. Babińska-Górecka*, Ewolucja funkcji zasiłku macierzyńskiego – uwagi na tle ostatnich zmian przesłanek nabycia prawa do zasiłku macierzyńskiego dla ubezpieczonego ojca dziecka *[The evolution of the function of maternity allowance – remarks on the recent changes in the conditions for the acquisition of the right to a maternity allowance for the child's insured father]* PiZS 2015, No. 11, p. 9 ff., see also *L. Mitrus*, Prawo do zasiłku macierzyńskiego w świetle nowelizacji kodeksu pracy i ustawy zasiłkowej (analiza zmian i postulaty de lege ferenda) *[The right to the maternity benefit in the light of the amendments to the Labour Code and the Law on Sickness Benefits (the analysis of the changes and de lege ferenda ideas]*, [in:] *J. Czerniak-Swędzioł* (ed.), Uprawnienia pracowników związane z rodzicielstwem w świetle przepisów prawa pracy i ubezpieczeń społecznych, Warsaw 2016, p. 86 ff.

[713] *A. Sobczyk*, Prawo dziecka… *[The Child's Right…]*, p. 14.

a worker or insured does not depend solely on her will, but on the availability of work. Thus it is the child who bears the consequences of non-fulfilment by the state of its constitutional obligation to ensure access to work. The above analysis leads to the conclusion that a child of a woman employed on a basis other than the employment relationship is treated by the state in a manner inconsistent with the constitutional principle of equality before the law[714]. A mother who is not a worker on the day of birth is not entitled to maternity leave, and if she is not covered by social insurance, she also has no right to maternity allowance. Maternity allowance is not due on account of the birth of a child, but on account of direct care over the child by a guardian (usually a mother), who loses the opportunity to earn a living. The legislature noticed some gaps in the implementation of the principle of the child's right to care introduced in article 180 § 17 of the Labour Code. Therefore, it introduced a mechanism according to which if a mother takes up employment of not less than half the normal working time, the right to maternity leave will be vested in the employee-father raising the child. If, however, the mother does not take up employment, and even if she does not receive the maternity allowance, she may be in direct custody of the child and no statutory guarantees are needed.

3.9.5. Final remarks

There is no doubt that the protection of parenthood is one of the most important elements of Polish legislation, which, at the time of the demographic crisis, is of major importance. Labour law regulations implement this protection through prohibitions on employment of women in jobs of a specific type, the need to adjust working conditions to a pregnant woman, special protection of the employment relationship, leaves of absence and any exemptions from the obligation to provide work enabling personal care for a child. At the same time, protection of parenthood is implemented by social security provisions that provide for various cash benefits to compensate the employee for loss of remuneration due to termination of work after childbirth and other financial guarantees for families raising children.

As far as the employees' rights related to parenthood are concerned, in the recent years the labour law has undergone very significant changes. At the same time, it should be kept in mind that labour law is one of those areas of law, on the basis of which the constitutional principle of protection and care for the family is implemented.

[714] *Ibidem.*

3.10. Occupational safety and health principles

J. Żołyński

3.10.1. Introduction

In axiological terms, the protected values being human health and life are immeasurable, therefore priceless. They are an expression of human dignity. Dignity is undeniable, limitless and non-transferable and state authorities are obliged to respect and protect it[715]. Everyone is granted it and it is not gradable[716].

It is a foundation on which human and civic freedoms and rights should be based. The right to dignity is the fundamental moral right; an ethical rule, covering the values which are considered superior to other values, and which are derived from natural law. It is the affirmation of a personal dignity – respect for the autonomy of a human being. Dignity is a personality right. Therefore, in normative terms, it is subject to legal regulations and constitutes the basis for various material claims (e.g. claim for compensation or reimbursement) and non-material claims (e.g. demanding an apology).

Health and safety at work are fundamental civic rights. Therefore this sphere is regulated not only by labour law but it has also become a constitutional value, which is explicitly expressed in the Constitution of the Republic Poland[717]. Article 24 provides that the state shall exercise supervision over the conditions of work and according to article 66 (1) everyone shall have the right to safe and healthy conditions of work[718]. Consequently, the obligation to protect life and

[715] *K. Działocha*, Idee przewodnie wolności i praw jednostki w procesie uchwalania Konstytucji RP *[The idea of the rights and freedoms of an individual in the process of enactment of the Constitution of the Republic of Poland]*, [in:] *M. Jabłoński* (ed.), Wolność i prawa jednostki w Konstytucji RP, V. 1. Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP, Warsaw 2010, p. 12.

[716] *W. Jedlecka*, Obywatelstwo krajowe i UE – kwestia ochrony wolności i praw podstawowych *[National and EU citizenship – protection of fundamental rights and freedoms]*, [in:] *A. Bator*, *M. Jabłoński*, *M. Maciejewski*, *K. Wojtowicz* (eds.), Współczesne koncepcje ochrony wolności i praw podstawowych, Wrocław 2013, pp. 167–168.

[717] According to the previous constitution, the citizens had the right to protection of health or assistance in the event of disease or incapacity for work. Though this formula did not refer explicitly to the employees, this right applied to this group of citizens, *Z. Góral*, Podstawowe zasady prawa pracy *[The fundamental principles of labour law]*, [in:] *K.W. Baran* (ed.), Zarys systemu prawa pracy, Warsaw 2011, p. 653.

[718] *M. Wujczyk*, Wybrane prawa pracownicze w Konstytucji RP – ocena art. 65 i art. 66 Konstytucji w dekadę jej uchwalenia *[Selected employees' rights in the Constitution of the Republic of Poland – assessment of articles 65 and 66 of the Constitution]*, [in:] *K. Górka*, *T. Litwin* (eds.), Konstytucja Rzecz-

health has become a manifestation of protection of human dignity in general. It is explicitly emphasized in the Polish law under the so-called protective function of labour law. The protective function of labour law means that the purpose of legal regulations, both public law[719] and private law regulations, is to transform them into physical agreements concluded between trade unions and employers.

An example of the protective function is the principle laid down in article 15 of the Labour Code, under which an employer is obligated to provide employees, unconditionally and absolutely, with safe and healthy working conditions[720]. However, as noted in the literature, this imperative is "limited" by admissibility, to some extent, of work in specific, health-threatening conditions.

However, this risk is compensated with allowances for work in difficult environment, e.g.: reduced working hours or additional holiday leave (paid leave for hazardous work) or with additional breaks included in the working times and thus paid[721]. Moreover, specific situations relating to force majeure are also involved, which require sacrificing a private interest for the interest of a higher category: sacrificing life and health of an individual to protect life and health of often a large group of people (society). These situations include rescue operations, eliminating any serious breakdowns which pose risk to life and health (breakdowns in chemical plants) or in the case of natural disaster. This principle materializes in various individual and general labour law regulations. Because of its **subjective scope,** it refers to all types of employers[722]. However, there is some differentiation within the subjective scope, e.g. as regards the establishment of the OSH service (Chapter X of the Labour Code – OSH service). As regards the **objective scope**, it should be interpreted in **a broader extension**[723]. The justification is to be found in the provisions of article 15 of the Labour Code. However, under article 304 § 3 of the Labour Code, which refers to article 207 § 2 of the Labour Code, certain obligations were imposed on the employers in relation to employees not employed under a contract of employment. The obligations laid down in

pospolitej Polskiej. Próba oceny i podsumowania z perspektywy dziesięciolecia stosowania, Kraków 2008, pp. 130 –131.

[719] Currently the administrative aspect of labour law is broadly presented by *A. Sobczyk* in monographs: Wolność i władza [*Freedom and Power*], Warsaw 2015 and, Państwo zakładów pracy, Warsaw 2017.

[720] This principle has existed since enactment of the Labour Code. The only difference as compared to the former version is that the former edition referred to company and now a reference is made to the employer, *Z. Góral*, O kodeksowym katalogu… *[Labour Code Catalogue…]*, p. 191.

[721] *Z. Góral*, O kodeksowym katalogu… *[Labour Code Catalogue…]*, p. 193 and 194; *K. Rączka*, [in:] *M. Gersdorf, K. Rączka, M. Raczkowski*, Kodeks pracy… *[The Labour Code…]*, p. 70.

[722] *Z. Góral*, O kodeksowym katalogu…*[Labour Code Catalogue…]*, p. 193.

[723] Such opinion can be inferred from the case-law of the Supreme Court, e.g. from the judgment of 19 December 1980, I PR 87/80.

article 207 § 2 of the Labour Code apply accordingly to entrepreneurs who are not employers, but who organize work which is performed by natural persons under civil-law contracts as well as by self-employed persons. It means that the employer is obliged to ensure safety both to the employee and a person not employed under a contract of employment, and not only to allow performance of duties based on generally applicable OSH regulations. In this respect, it should also be noted that reaching this purpose seems impossible unless the employer shows specific comprehensive approach in the field of OSH[724] since not only labour law and social security law, but also constitutional, civil law and criminal law regulations are at stake.

3.10.2. Principles under individual labour law

Article 15 of the Labour Code provides that the employer shall provide employees with safe and healthy working conditions". This principle should be analyzed in the context of the whole Chapter X of the Labour Code titled OSH – Occupational Safety and Health). Therefore, the legislature imposed on the employer certain obligations which need to be complied with to consider work safe. These include *sui generis* obligations of administrative nature, public and private *ius cogens* norms, the non-observance of which is subject to administrative sanctions – fine charged by an appropriate authority supervising the work conditions. They include in particular general obligations addressed to the employer, aimed at protection of life and health of employees, as well as the obligations relating exclusively to individual sphere. Therefore the employer's duty is not only to familiarize an employee with the general OSH regulations, but also to draw the employee's attention to the potential hazards that might occur in the workplace. By this I mean typical risks, at least easy to predict and not any special, extraordinary risks that might occur in unusual circumstances.

Under article 207 § 1 of the Labour Code the employer must provide safe and healthy conditions. The scope of employer's liability under this provision is broad. The employer is liable not only for the occurrences which can be attributable to him but he also bears the risk of other situations such as accidents at work or occupational diseases. According to article 207 of the Labour Code, the employer must:

– organize work in such a manner as to ensure safe and healthy working conditions;
– ensure that OSH regulations are complied with in the workplace;

[724] Judgment of the Supreme Court of 27 January 2011, II PK 175/10.

– react to the needs connected with ensuring safe and healthy working conditions and adjust the means to improve the existing level of protection of life and health of employees,
– develop a comprehensive policy aimed at prevention of accidents at work and occupational diseases, taking into account technical issues, organization of work, working conditions, social relations and the influence of workplace factors;
– within the adopted preventive measures, take into account the protection of young workers, pregnant or breastfeeding workers and workers with disabilities;
– ensure compliance with orders and decisions issued by the bodies supervising working conditions;
– ensure compliance with recommendations issued by the social labour inspector.

It is of significant importance that employees cannot be charged with any costs of actions undertaken by the employer in respect of occupational safety and health matters.

Consequently, the employer must inform his employees of the risks to life and health existing in the workplace, associated with particular positions and with performance of particular work, including of the procedures to be followed in the case of any breakdowns or other situations posing risk to life and health (article 207^1 of the Labour Code). This information obligation is dynamic; the employer must act in the case where conditions of work of an employee concerned have changed. This obligation is also aimed at preventing negative, unwanted occurrences affecting employees' life or health.

To ensure employees' safety, the employer must not allow an employee to perform his duties without pre-employment medical examination (according to article 229 § 6 of the Labour Code the pre-employment medical examination is performed at the employer's cost). Furthermore, he must inform the employee about the potential risks associated with the work performed (articles 226 and 229 § 1 of the Labour Code). Article 210 of the Labour Code is of special importance as it ensures protection of employees against dangerous working conditions. According to this provision the employee has the right **to refrain from working** in the following circumstances:

1. The working conditions do not correspond with the OSH regulations and pose actual risk to life and health of employees or any third parties. The risk should be risk to life and health of an employee or any third party. Therefore, existence of any risk to employee's property does not entitle him to stop working. In the case of any such break from work, the employee retains the right to remuneration.

2. The performance of work requires special physical and mental condition of the employee and his condition does not ensure safe performance of work and poses risk to any third party. Employee's condition may be the result of e.g. stress or mental or physical burnout.

It should be noted that an employee cannot arbitrarily refrain from working. It means that the employer must be informed in advance, unless circumstances make it impossible (sudden fire or rock cracking in a mine). In its judgment of 9 May 2001[725] the Supreme Court held that an employee may refrain from working if the OSH regulations are violated, provided that the employee has informed his superior. However in its judgment of 19 January 2000[726] the Supreme Court held that an employee may refrain from working in the room where he performs his duties only if the conditions do not correspond with OSH regulations or pose a direct risk to the employee's life or health.

In the context of article 210 of the Labour Code, two questions arise:

First – is an employee obliged to refrain from working or is it only his right; and

Second – can frequent refraining from working produce certain consequences to the employee?

The answer to these questions will depend on a particular individual situation of an employee. Without going into detailed discussion regarding the restrictions, refraining from working if the work is dangerous is not only the right but also the employee's obligation as it might pose risk also to third parties. However, frequent refraining from working in the case of risk to life and health, cannot produce any negative consequences to the employee. Certain doubts may arise only when the risk actually did not occur. In such case, when the employee interpreted the situation wrong, yet acted in good faith (so-called "excusable error") his behaviour will be subject to the provisions of article 210 § 1 and 2 of the Labour Code. On the other hand, frequent refraining from working caused by physical and mental condition might constitute grounds for termination of a contract of employment by the employer. Before refraining from working, the employee should consider whether he has any means available to reduce or eliminate his incapacity. Frequent absences from work due to illness or other incapacity may disorganize the employer's operations.

The right to refrain from working in the case of risk or employee's physical or mental condition is not reserved to employees whose obligation is to save human lives and property – employees of the in-company fire brigades, security staff, medical personnel, mine rescuers, etc.

[725] I PKN 619/99, OSNAP 2001, No. 20, item 610.
[726] I PKN 488/99, OSNAP 2001, No. 11, item 375.

Polish OSH regulations respect the provisions of EU directives. According to EU directives governing occupational health and safety, the personal protective equipment should be used when it is impossible to avoid or sufficiently limit the risk with the use of means of collective security, changes in technology or organisation of work. In such situations the employer must provide employees with such equipment and inform them about the risks when such equipment must be used. The employer's obligations are correlated with the employees' duties. So they should use the personal protective equipment according to its intended use, inform the employer about dangerous situations and cooperate with him to perform work safely.

When analyzing the provisions of article 15 of the Labour Code, a reference should be made to article 94 (1), (2a), (2b) and (4b) of the Labour Code. Under article 94 (1), an employer must **inform the employees who commence work about the scope of their duties, working methods in their job positions and of their basic entitlements.** The obligation imposed on the employer is of public and legal nature so the employer cannot avoid or modify it contrary to this provision. This regulation is *ius cogens* and it serves to:

– allow the employees to perform their duties in a manner required by the employer, provided that safe and healthy conditions are ensured;
– inform the employees of their entitlements in a particular job position. These are the information obligations, which allow the employee to evaluate completely his actual and legal situation.

The obligation to inform the employees of the scope of their duties and the manner in which they should perform their work is practically a one-off obligation to be complied with upon commencement of work. It is worth noting that this provision uses the expression "familiarize". Consequently, the employer is obliged to instruct the employee again, thus to familiarize the employee with the assigned tasks and working method each time when the scope of duties changes. It is particularly important that the employer should inform the employee of any changes in the manner of performance of tasks in a particular position. Non-compliance with the obligation to inform the employee of the scope of his duties results in the negative assessment and thus influences the range and potential amount of the employer's financial liability for any accident caused by such employee (to the employee or any third party)[727].

This provision does not specify in detail what information should be provided by the employer to comply with article 94 (1) of the Labour Code. Each situation must be assessed individually. The scope and the level of detail of the informa-

[727] *M. Wujczyk*, Komentarz do artykułu 94 *[A commentary on article 94]*, [in:] *J. Żołdyński* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Gdańsk 2016, p. 693 ff.

tion, reference to the work performed should correspond with the nature and the level of its complexity as well as with the employee's education and professional and personal experience. Therefore the less complicated the work, the easier and more general the information procedure[728]. Moreover, it should be pointed out that the obligation to inform means that the employer should provide such information so as to guarantee that the employee will perform all his duties in compliance with technical standards, OSH rules as well as respective internal rules in force. This provision is not violated if obvious information, such as the necessity to appear at work or to switch off a machine after the completion of work, was not provided[729]. The provision in question does not specify the formal aspect of the compliance with the obligation stipulated in article 94 (1) of the Labour Code. Therefore, it can be assumed that any form is acceptable, **both written and oral**. For evidentiary purposes the written form is preferred. In the event of litigation, it will be easier for the employer to demonstrate that the obligation has been complied with (article 6 of the Civil Code). Moreover, the employer may obligate the employee to confirm with his signature that he read carefully the respective documents including the list of duties and working method. In such case no doubts will arise as to the scope of the information communicated to the employee. From the practical point of view, it is also possible that **the scope of employee's duties** can be presented to him in written form (which might be an annex to a contract of employment). It is advantageous for both the employer who specifies the tasks assigned to the employee only once, and for the employee who immediately receives the information on all his duties[730].

It is worth remembering that tasks specified in the written scope of duties must not go beyond the type of work described in the contract of employment. The employee will have the right to refuse to perform any activity which has not been agreed upon in the contract. Any provision of the contract which stipulates employee's obligation to perform other tasks assigned by the employer does not entitle the employer to freely assign tasks to his employees. It is in fact a confirmation of the employer's entitlement to assign tasks, provided that they are in compliance with law or a contract of employment and refer to work agreed upon by both parties. **A refusal to accept and sign the scope of duties according to**

[728] Judgment of the Supreme Court of 7 January 1998, I PKN 457/97, OSNAPiUS 1998, No. 22, item 653.

[729] *D. Dörre-Kolasa*, [in:] *A. Sobczyk* (ed.), Kodeks Pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2014, p. 429.

[730] See *Z. Kubot*, Znaczenie zakresu czynności pracownika *[The scope of employees' duties]*, PiZS 1998, No. 12.

the contract of employment may constitute grounds for termination of the contract[731].

If the employer provides the information in writing, it may be included either in a separate document or be an element of a contract of employment (one of its provisions or an annex to the contract).

In formal and legal terms, it is more advantageous for the employer to draw up a separate document. In such case the employer may unilaterally change the scope of duties presented to the employee. Such change does not constitute a substantial change of the contract of employment which would otherwise require a notice of change to wage or working conditions *(wypowiedzenie zmieniające)* (article 42 § 1–3 of the Labour Code).

Obviously, such a situation occurs if the tasks assigned to an employee do not exceed the scope of duties attached to his function[732]. However, if the employer included the scope of duties in the contract, it can be unilaterally amended only by the mentioned notice of change to wage or working conditions.

Despite the fact that the employee is informed of his scope of duties, he must observe instructions from his superiors, however such instructions:

- must refer to the scope of the work agreed upon between the parties;
- must not be contrary to Labour Code regulations;
- must fall within the scope of possible temporary assignment to different work (for example under 42 § 4 of the Labour Code);
- must not pose any risk to the employees or any third parties[733].

3.10.3. The restrictive possibility to give the employee instructions

Failure to inform the employee of the scope of his duties or the working method may produce negative consequences to the employer. The employer will not be entitled to impose a penalty on the employee (for breach of workplace order, policies or procedures: warning or reprimand) or to hold the employee liable in case he does not perform the duty of which he has not been informed (termination of a contract upon notice or with immediate effect). Improper performance of duties by the employee or non-compliance with the procedures cannot produce any consequences, unless the employer proves that the employee knew the proce-

[731] Judgment of the Supreme Court of 3 April 1997, I PKN 77/97, OSNAPiUS 1998, No. 3, item 75.

[732] Judgment of the Supreme Court of 7 November 1974, I PR 332/74, OSNCP 1975, No. 6, item 103.

[733] Judgment of the Supreme Court of 11 May 2006, I PK 191/05, OSNP 2007, No. 9–10, item 128 and judgment of the Supreme Court of 7 January 1998, I PKN 405/97, OSNP 1998, No. 22, item 651.

dure. Nevertheless, non-provision of information does not exempt the employee from the obligation to perform the tasks conscientiously and with due care. This stems from his obligation to take good care of the interests of the employer (article 100 § 2 (4) of the Labour Code).

In case of any doubts as to the scope of duties, the employee should refrain from working and ask for clarification. According to the case-law, compliance with the obligation laid down in article 94 (1) of the Labour Code can be verified in court proceedings by requesting information essential for the employee's situation[734].

Ensuring safety and health at work means also systematic OSH trainings of employees (article 94 § 4 of the Labour Code) and education to increase the professional qualifications and upgrade skills[735]. Undoubtedly, the necessity to provide healthy and safe working conditions is dynamic. Changes in the OSH make it necessary to update knowledge through seasonal trainings of employees[736] (article 237^3 § 2 of the Labour Code in connection with § 14 of a regulation of the Minister of Economy and Labour)[737]. The employer should seek to improve the standards applicable in his company on an ongoing basis and adjust them to the current situation. This obligation should be considered particularly important, which is confirmed by various OSH regulations[738]. Such trainings cannot be one-off trainings or be organized only occasionally, e.g. when hiring an employee, but should be regular. The employer has a statutory obligation to conduct not only introductory but also regular trainings (article 237^3 of the Labour Code).

The principle of safe and healthy working conditions is also expressed in article 94 (2a) of the Labour Code, which imposes on the employer **an obligation to organize work in such a manner so as to make is less arduous, in particular when it is monotonous and has an established pace.** The employer may not violate this obligation. In particular, he must create the working environment that it is focused on minimizing the existing arduousness, both mental and physical, as well as in the sphere of workplace ergonomics. The legislature considered the

[734] Judgment of the Supreme Court of 16 September 1999, I PKN 331/99, OSNAPiUS 2001, No. 9, item 314.

[735] See *M. Rylski*, Podnoszenie kwalifikacji zawodowych przez pracowników na gruncie kodeksu pracy – teorie modelu legislacyjnego i ich konsekwencje prawne *[Employee upskilling under the Labour Code – legislative model theories and their legal consequences]*, Part I and II, PiZS 2015, No. 1 and 2.

[736] *E. Maniewska*, Obowiązki informacyjne pracodawcy wobec pracownika w umownym stosunku pracy [*Information Obligations of an Employer in a Contractual Employment Relationship],* Warsaw 2013, p. 97.

[737] Regulation of the Minister of Ministry of Economy and Labor of 27 July 2004 on the occupational health and safety trainings, Journal of Laws *[Dz.U.]* No. 180, item 1860.

[738] *T. Wyka*, Generalny obowiązek pracodawcy ochrony życia i zdrowia pracowników *[Employer's obligation to protect life and health of employees],* PiZS 1999, No. 6, p. 21.

performance of work that is monotonous and of the same pace as particularly strenuous, thus violating the principle of occupational health and safety.

To counteract such performance of work, additional, obligatory breaks from work are implemented (e.g. in the case of computer work). Moreover, this obligation does not only mean compliance with the provisions of general laws. The employer should also undertake such steps which ease the performance of the most arduous work (including monotonous one). The actions undertaken by the employer should be adjusted to a particular situation. For example, they can be as follows: introduction of an additional break, assigning the monotonous activities to several employees, introduction of special ergonomic facilities at the workstations which are considered arduous. The protection instruments may also include introduction of additional, obligatory trainings in handling the monotonous work organized during working hours (with retaining the right to remuneration).

A separate issue relating to protection of work is discrimination which is defined in article 94 (2b). Employment of a particular employee in the conditions incompatible with the principle of safe and healthy working conditions, and at the same time employing others in the safe conditions constitutes discrimination. The prohibition of discrimination and obligation of equal treatment is not only a legal norm – stemming from the national law (including the Labour Code and the Constitution of the Republic Poland) and from the European law, but it is also a moral principle. Discrimination is inevitably connected with violation of dignity of any person while respecting this dignity is not only a directive rooted in law (article 30 of the Constitution), but it is also an ethical obligation[739]. The obligation to counteract discrimination in employment is an element of a prohibition of discrimination in labour relations governed by articles 11^3 and 18^{3a} –18^{3d} of the Labour Code. The mentioned regulations prohibit differentiation by the employer based on unacceptable criteria, and article 94 (2b) of the Labour Code additionally imposes on him an obligation to prevent discrimination in the recruitment procedure. The phrase "in employment" means: during the recruitment process, during the term of an employment relationship as well as when the employer decides to end the employment (terminate the contract). Thus, this obligation should be extended to the relations between the employer and the candidates for employment.

When analyzing the principle of safe and healthy working conditions, a reference should be made not only to the "physical" sphere of the work performed but also to the mental aspects of an individual. Apart from the prohibition of discrimination mentioned above, the manifestation of the principle of safe and healthy working conditions is also the obligation imposed on the employer to prevent

[739] Judgment of the Supreme Court of 11 April 2006, I PK 169/05, OSNP 2007, No. 7–8, item 93.

mobbing, (article 94 § 1 of the Labour Code). It can be stated that the legislature *de iure* does not prohibit mobbing but orders to prevent it. A definition of mobbing formulated in article 94^3 § 2 of the Labour Code describes the behaviour (actions and omissions) which refer to the employee or are directed against the employee. This provision does not specify the person who might commit mobbing. It focuses only on the behaviour forbidden by law. Therefore the employer himself as well as the managers managing the company on behalf of the employer or employee's superiors and other co-workers might be the harassers. Given the employer's obligation to create safe and healthy working conditions, he should undertake the preventive steps not to allow mobbing by any third parties or by persons employed at his premises on a basis other than a regular contract of employment. The consequences of mobbing include low professional self-esteem of an employee causing or aiming at his humiliation or ridicule, isolation or elimination from a group of co-workers. The assessment whether these actions aimed at or could lead to or led to lowered professional self-esteem, humiliation, ridicule or isolation or exclusion from the team of co-workers must be based on the objective criteria. In practice, mobbing might be manifested e.g. in ridiculing, limiting one's opportunity to express his opinion, in continuously interrupting his speech, shouting, permanent criticism and reprimanding mainly in front of a larger audience, humiliating, threatening, avoiding conversations, not allowing to speak, informally banning the conversations with the harassed employee, disabling his communication with others as well as assigning work far below his qualifications or work which is derogatory to the employee, moving the employee away from responsible and complicated tasks, overloading with work, or on the contrary in not assigning any tasks or taking them away.

One of the manifestations of this principle is the employer's **obligation to take due care of the employee's property. The employee's responsibility is limited to the items "connected with work"**[740]**.** It is recognized that the employer is responsible for the items which are necessary for the employee to perform work and possession of which at work is commonly acceptable (e.g. a watch, wedding ring, a telephone)[741].

The above principle cannot be analyzed only in terms of the obligations imposed on the employer. In fact it reflects also the obligations of the employees,

[740] *M. Świderska-Iwicka*, Odpowiedzialność cywilna zakładu pracy za rzeczy pracownika *[Civil-law liability of a work establishment for employee's property]*, PS 1996, No. 7–8, p. 58.

[741] *M. Gersdorf*, [in:] *M. Gersdorf, K. Rączka, M. Raczkowski*, Kodeks Pracy… *[The Labour Code…]*, p. 542; *M. Wujczyk*, Komentarz do art. 94 *[Commentary to art. 94]*, [in:] *J. Żołdyński* (ed.), Kodeks pracy. Komentarz *[Labour Code. A Commentary]*, p. 703.

in particular those in managerial positions[742]. Under article 211 of the Labour Code, the basic employee's duty is to comply with the OSH rules and regulations. In particular an employee must:

1. participate in OSH trainings and the instruction procedures and to take the required examinations;
2. perform work in compliance with OSH rules and regulations and comply with respective instructions and guidelines from his superior;
3. take good care of the proper condition of machines, devices, tools and equipment and of the workplace order;
4. use the collective protective equipment, as well as personal protective equipment and working clothes and footwear in accordance with their intended use;
5. undergo preliminary, periodic and control medical examination as well as other recommended medical examinations and comply with doctor's instructions;
6. immediately inform the superior of any identified accident at work or of any life-threatening or health-threatening incident, warn the co-workers and other persons present within the hazardous area about such incidents;
7. cooperate with the employer and superiors in fulfilling the OSH obligations.

Under article 212 of the Labour Code, persons in managerial positions who manage the employees are obliged, to:

– organize the workstations in compliance with OSH rules and regulations;
– take care of the good condition of the personal protective equipment and its use in accordance with the intended use;
– organize, prepare and manage work, while ensuring protection of employees against accidents at work, occupational diseases and other work-related diseases;
– require observance by the employees of the OSH rules and regulations;
– ensure that employees comply with medical instructions obtained from the company doctor.

In individual labour law, the general principle obligating the employer to ensure safe and healthy working conditions is laid down in such regulations of the Labour Code as those relating to performance of work by women and young workers. As regards women, specific regulations introduce a list of jobs which are arduous, dangerous or harmful to health of a pregnant or breastfeeding woman. The list is divided into 8 groups[743]:

[742] *M. Piekarski*, Podstawowe zasady prawa pracy *[The fundamental principles of labour law]*, Annales Universitatis Mariae Curie Sklodowska, Vol. XXIV 2, Lublin 1977, p. 46.

[743] Regulation of the Council of Ministers of 3 April 2017 on the list of jobs that are burdensome, dangerous or harmful to health of pregnant or breastfeeding women, Journal of Laws *[Dz.U.]*, item 796.

1. work connected with extreme physical effort, including physically carrying of heavy objects,
2. work in the cold, hot or changeable microclimate,
3. work involving exposure to noise and vibrations,
4. work involving exposure to electromagnetic field of the frequency from 0 Hz up to 300 GHz and to ionizing radiation,
5. work in the increased or decreased pressure,
6. work involving exposure to harmful biological agents,
7. work involving exposure to harmful chemical agents,
8. work which might cause serious physical or mental injuries.

The protection of women and those taking care of small children includes prohibitions of performance of work which are either absolute or relative.

A. Absolute prohibition

- Pregnant women must not be employed overtime, during night shifts or posted to work away from the permanent place of work as well as in the system of intermittent working time (article 178 § 1 of the Labour Code).
- The working time of pregnant women amounts to 8 hours.

B. Relative prohibition

- A woman who takes care of a child under the age of 4 cannot, without her agreement, be employed: during night shifts, overtime and cannot be posted to work away from her permanent place of work (article 178 § 2 of the Labour Code).

The protection of women includes also the right to use annual leave after the end of the maternity leave. This entitlement is absolute. The employer is obliged to grant such leave upon the employee's request[744].

As regards young workers, in relation to a very young and inexperienced person, the legislature introduced, among others, the following conditions:

- such person may be employed only to obtain a job training;
- such person has a reduced working time:
  A. The working time of a young worker under the age of 16 cannot exceed 6 hours per day (article 202 § 1 of the Labour Code).
  B. The working time of a young worker above the age of 16 cannot exceed 8 hours per day (article 202 § 1 of the Labour Code).
  C. He cannot work overtime or during night shifts (article 203 § 1 of the Labour Code).
  D. He cannot be employed in jobs prohibited to young workers (article 204 § 1 of the Labour Code).

[744] Judgment of the Supreme Court of 9 March 2011, II PK 240/10, OSNP 2012, No. 9–10, item 113.

It should be noted that this principle is laid down also in the legal act governing accidents at work and occupational diseases[745], common protection of work in the form of the National Labour Inspectorate[746] or the bodies of the so-called technical supervisory unit. Specific regulations governing special professions such as e.g. miners also should also be mentioned[747].

3.10.4. The dimension of the principle in the collective labour law

The principle of occupational safety and health is of significant importance not only in the direct relations between employees and employers (in the individual labour law). It is now becoming more and more visible in the sphere of collective labour law. Under the Polish labour law, it refers to several aspects:

First: The obligation to ensure observance of the OSH standards in every workplace is one of the areas of activity of trade unions. Article 26 (3) and (4) of the Trade Unions Act[748] clearly provides that the scope of activities of a trade union includes in particular: monitoring the observance of the labour law regulations inside a company, in particular the OSH rules and regulations and managing the activities of the social labour inspectorate and cooperation with the National Labour Inspectorate. The issues such as fire protection or hazards in the workplace (dangerous, harmful and arduous conditions) are included in the area relating to compliance with the labour law regulations. It can be concluded that all the aspects relating to the proper functioning of the employer, in terms of standards regulated by the labour law, can be the subject to inspection. This refers not only to legislative regulations but also to implementing regulations or regulations resulting from agreements concluded between an employer and trade unions (collective agreement, labour regulation, etc.). The task of the union organizations is to monitor correctness of the employment procedure and performance of work by the employees in specific conditions (posing risk to employee's life and health), the correctness of calculating the salaries, payment of salaries, respecting the employees' social entitlements as well as compliance with

[745] Act of 30 October 2002 on Social Insurance for Accidents at Work and Occupational Diseases *[ustawa o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych],* Journal of Laws *[Dz.U.]* of 2015, item 1242, as amended.

[746] Act of 13 April 2007 on the National Labor Inspectorate (consolidated text, Journal of Laws *[Dz.U.]* of 2017, item 786, as amended).

[747] Act of 9 June 2011, Geological and Mining law (consolidated text, Journal of Laws *[Dz.U.]* of 2016, item 1131, as amended.

[748] The Trade Unions Act of 29 May 1991 (consolidated text, Journal of Laws *[Dz.U.]* of 2015, item 1881.

regulations governing leaves of absence (not only annual leaves but also other types of leave) and mainly the regulations governing observance of the working time (overtime, night shifts). The company union organizations may control independently or jointly (under an agreement concluded between the trade union organizations who appointed a joint committee) the following areas of the employer's operation:

- access to healthcare,
- fire protection,
- technical condition of rooms and buildings where work is performed,
- working order of the machinery,
- provision of personal protective equipment as well as meals and drinks to employees,
- operation of the measuring devices used to monitor the work environment,
- the level of protection of employees against dangerous or harmful materials,
- the condition of safety devices,
- conducting appropriate training or instruction procedures for employees.

Under the Trade Unions Act on, managing the activities of the social labour inspectorate is a special kind of competence. A detailed definition is laid down in article 2 of the Act of 24 June 1983 on the Social Labour Inspectorate[749], which provides that the inspectorate represents the interests of all the employees employed in the company and is run by trade union organizations.

The influence of trade unions on the activity of the social labour inspectorate stems from article 5 of the Act on the Social Labour Inspectorate. Only a member of a trade union who does not hold any managerial position may become a social labour inspector. He is elected by employees in a procedure specified in the regulation adopted by the in-company trade union organizations. Moreover, according to article 17 of the Act on the Social Labour Inspectorate, national trade union organizations may define the guidelines for the activities of the social labour inspectorate.

As regards monitoring of OSH rules and regulations by trade unions – this entitlement means that a trade union may demand from the employer the information about risks to life and health existing in the workplace. **This entitlement should be discussed only with reference to article 29 of the Trade Unions Act.** It means that based on the received information, a trade union may suspect that there is a health or life threatening situation in the company. The organization may request the employer to perform a specific test. The legislature used the term "suspicion". It means that the trade union may receive the information about this fact from any accessible source. Obviously, not every piece of information

[749] Journal of Laws *[Dz.U.]* No. 35, item 163, as amended.

received by the trade union leads to running tests by the employer. Such an obligation arises only when the information is reliable, i.e. objective and therefore qualified for verification. **The costs of the tests are covered in full by the employer.** The act does not introduce any requirements as to the form of request submitted by a trade union, therefore it may be very general (though related to specific issue), as well as it may include suggestions regarding the type of tests which should be conducted (epidemiological, technical, construction, chemical, biological, relating to radiation or sanitary hazards). Moreover, a trade union may suggest obtainment of an expert opinion. It does not have to be a research or scientific centre.

According to the principle of rationalization of costs and the freedom of business activity, it may be any enterprise or a natural person having the appropriate knowledge, recognition or scientific or practical authority. After the tests have been carried out, the employer has a statutory obligation to inform the company trade union organization about the tests results. Unfortunately, the laws do not specify when the employer should do that. Therefore it should be considered that the employer should do that immediately after he receives the adequate results, expert opinions, analyses, etc. Moreover, if the tests identified the existence of hazards threatening health or life of the employees, the employer should undertake any possible steps to eliminate such hazards. The information about the method and dates when the actions are to be undertaken should be conveyed by the employer to the company trade union organization.

The employer may declare that the request from the trade union is unjustifiable. In such situation, he can decide to reject the request for conducting the tests. The rejection should be substantiated. The lack of the employer's consent to run the tests is subject to verification by the National Labour Inspectorate. The employer opposing the tests may address a competent labour inspector to check whether they are purposeful or their scope is correct. Article 29 of the Trade Unions Act provides explicitly that running tests contrary to the opinion of the labour inspector **exempts** the employer from bearing the costs of such tests.

Second: Non-compliance by the employer with the OSH obligations imposed by law constitutes grounds for initiating a collective dispute. Safety and protection of work fall within the scope of working conditions. They refer to various aspects of work, such as technical and organizational, profit-making, sanitary, social aspects, etc. The term is used in several labour law regulations (e.g. art. 42 of the Labour Code). It should also be noted that "working conditions" are not defined in the Polish labour law, however according to the jurisprudence the working conditions include such elements which lead to employees' safety. For example:

1) work environment (work performed in special conditions and in special character),

2) work organization (of course not all the aspects, such as for example the aspect of work schedule, may raise doubts),
3) OSH and fire-safety conditions (e.g. the working conditions taking into account health and life threatening situations due to the existence of seriously harmful agents and materials used during the work process),
4) company equipment (influencing the conditions of work),
6) access to healthcare,
7) access to the means of transport,
8) technical devices.

Third: Compliance by the employer with the OSH obligations has also a so-called information dimension. It means that in the light of the provisions of the Act of 7 April 2006 on Information and Consultation of Employees[750], a workers' council can be appointed. Under article 13 of this Act, an employer shall consult with the workers' council all the actions he undertakes which might lead to substantial changes in the organization of work, including the scope of safety and health at work. Therefore, if the changes in the level of employment, work organization, technological cycle or environmental protection might influence the situation related to safety of work, the employer must consult such changes with the council. The subject of the information procedure is the permanent change, important from the employer's point of view.

Fourth: If the OSH conditions result in such a situation that it is necessary to reduce employment (i.e. collective redundancies), which might be a consequence of introduction of new, safer technologies, machinery or devices, the employer has the obligation to follow a specified procedure of making such redundancies. Under the provisions of the Act of 13 March 2003 on the Collective Redundancies[751], the employer while reducing employment must follow a specific procedure. It depends on whether there is a trade union in the establishment concerned. It means:

1. If the trade union operates in the establishment, the employer must inform such an organization about the causes, number of employees to be made redundant, the dates of such redundancies, method of selection of employees to be made redundant, etc. Then, no later than 20 days from the date of informing the trade unions, the trade unions and the employer should conclude an agreement. The agreement specifies the course of action with reference to

[750] Journal of Laws *[Dz.U.]* No. 79, item 550, as amended.

[751] Act of 13 March 2003 on the Specific Rules of Termination of Employment for Reasons Not Attributable to Employees *[ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników]*, Journal of Laws *[Dz.U.]* No. 90, item 844, as amended.

the redundancies. In case the agreement has not been concluded, the employer issues the regulation on redundancies.

2. If there are no trade unions in the establishment, the intention to conduct redundancies and the regulation is consulted with an appointed employees' representative[752].

Breach of the above-mentioned procedure constitutes a breach of laws governing termination of contracts of employment and can be grounds for reinstatement of an employee[753].

Fifth*:* The principle of protection of employee's health and life based on the collective labour law has also a social dimension. It is an element of the company dialogue on the work safety[754].

3.10.5. The consequences of violating the principle with reference to other branches of law

The tasks of the OSH services and the employees themselves ensure that the regulations governing protection of health and life of employees are observed. Still, the supervision tasks are performed by "internal" employer's units, namely the social labour inspectors and trade unions. The external supervision is performed by specialized, independent bodies, namely the inspector of the National Labour Inspectorate or due to the specifics of the employer's activity, the inspectors of the Regional or Higher Mining Agency.

The OSH standards constitute a complicated and mutually connected system in which the public and legal obligations of the employer are subject to particular sanctions[755] regulated by public law and civil law.

3.10.5.1. Administrative liability

The administrative liability stems from the Labour Code and from other legal regulations (from "standard" legal acts on social labour inspectorate, National Labour Inspectorate and also from e.g. the Act of 23 May 1991 on Work on Merchant Ships[756]).

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[752] As regards the method of selection the labour representatives see *J. Żołyński*, Pracodawca a związki zawodowe. Wybrane problemy zbiorowego prawa pracy *[Employer and Trade Union. Selected Problems of Collective Labour Law],* Warsaw 2011, pp. 111– 112 and 158–161.

[753] Act of 23 November 1991, I PR 452/90, PiZS 19991, No. 5, p. 64.

[754] The issue is analyzed by *P. Pettke*, Kilka uwag o dialogu społecznym w przedmiocie BHP *[A few remarks on the social dialogue regarding occupational health and safety]*, [in:] *J. Stelina* (ed.), Zakładowy dialog społeczny *[Enterprise Social Dialogue]*, Gdańsk 2014.

[755] *A.M. Świątkowski*, Kodeks pracy… *[The Labour Code…]*, p. 65.

[756] Consolidated text, Journal of Laws *[Dz.U.]* of 2014, item 430.

This liability refers to **offences.** The Labour Code introduces a wide spectrum of the employer's liability for offences against employee's rights. These are situations when the employer:

1. Under article 281 of the Labour Code:
   - concludes a civil law contract in circumstances when under article 22 § 1 of the Labour Code a regular contract of employment should be concluded;
   - does not inform a competent regional labour inspectorate, either in writing or by electronic means, within a period of 5 days, about concluding a contract of employment referred to in article 25^1 § 4 (4) of the Labour Code, indicating the reasons for concluding such a contract;
   - does not confirm in writing the conclusion of a contract before the employee is allowed to commence work;
   - gives a notice of dismissal or terminates contract without notice in gross violation of the provisions of labour law;
   - imposes on employees penalties other than those indicated in the provisions of labour law governing employees' disciplinary liability;
   - violates the provisions governing working time or employees' entitlements relating to parenthood and employment of young workers;
   - does not keep the employment documentation and employees' personnel files;
   - keeps the employment documentation and employees' personnel files in the conditions in which they can me damaged or destroyed.
2. Under article 282 of the Labour Code:
   - does not pay to employees or entitled family members of employees the remuneration for work or other financial benefits on time, groundlessly reduces the amount of the remuneration or benefits or makes unjustifiable deductions;
   - does not grant to an employee an annual leave or groundlessly reduces the amount of such leave;
   - does not issue to an employee a certificate of employment.
3. Pursuant to article 283 of the Labour Code, persons responsible for the safety and health at work issues or those managing employees, may be held liable if they do not observe the respective regulations. For breach of the provisions of this article it is sufficient not to observe OSH rules and regulations, which mean non-legal regulations stemming from the professional techniques and experience. It does not matter whether or not such behaviour led to health and life threatening situations or to material damage. Another type of offence is where the employer, contrary to his obligations, fails to assure that the construction or modernization of the facility or any of its parts, which is intended for working premises, is made based on the designs complying with

the health and safety requirements and approved by qualified surveyors. An offence which is subject to a fine is equipping the workstations with machines and other devices which do not meet the requirements for assessing the compliance. The same refers to the employers who, contrary to their obligation, provide the employees with personal protective equipment which does not meet the requirements for assessing the compliance.

If the employer – contrary to his obligation – uses the technological materials and processes without prior establishing their harmfulness to employees' health and without undertaking appropriate preventive steps, or, contrary to his obligation, use the chemical substances and preparations without visible marking enabling their identification, or, contrary to his obligation, uses the chemical substances and preparations which do not have safety data sheets or the packaging protecting against their harmful operation, fire or explosion, commits an offence against employee's rights. Moreover, the provisions of the Labour Code stipulate that an employer commits the offence where, contrary to his obligation, he does not inform the competent labour inspector, prosecutor or other competent authority about the fatal, serious or group accident at work or about any other work-related accidents if it caused the above mentioned consequences, provided that it can be considered an accident at work. An offence is committed also in the case of failure to report an occupational disease or presentation the false evidence or documents relating to such accidents or diseases. The labour law regulations indicate that failure to comply within a prescribed time-limit with instructions from a labour inspector also constitutes an offence. An offence is committed also where the employer hinders the activities of the National Labour Inspectorate, in particular when he makes it impossible to conduct the inspection of the premises or does not provide necessary information.

Fines are imposed by the national bodies supervising the working conditions. If the labour inspector finds that the penalty is not sufficient for the offender and it will not result in actions aimed at observance of the OSH standards, he may submit a motion to the court to enforce the penalty. The amount of penalty is determined by the court or a competent unit of the National Labour Inspectorate within the fine proceedings. Fine amounts from 1000 PLN up to 30,000 PLN, however the highest fine imposed by the National Labour Inspectorate cannot exceed 2000 PLN. In the case of offences against the employees' rights, the labour inspector acts as a public prosecutor. Special form of the employer's administrative liability stems from the Act on the Protection of Personal Data[757]. The administrative sanctions imposed on the employer are laid down in article 18 (1)

[757] Act of 29 August 1997 on the Protection of Personal Data, Journal of Laws *[Dz.U.]* of 2016, item 922.

of the Act. According to this provision, General Data Protection Inspector *ex officio* or upon request of the involved party, orders the administrator (so in this case the employer) to comply with law, and in particular to: correct errors, complete, update, rectify, disclose or not to disclose the personal data; use the additional firewalls to protect the collected personal data; withdraw from transferring the personal data to third country or to other subjects; delete the personal data. Moreover, based on the inspection, the data protection inspector (article 17 (2)) may demand initiation of disciplinary proceedings or other proceedings specified by law, against persons responsible for the errors and may demand information, within a prescribed time-limit, on the results of the proceedings and undertaken steps.

According to the case-law of the Polish Supreme Court, gross violation of this rule constitutes negligence which justifies employers' liability based on fault[758]. In the company where risks occur which threaten employees' life and health, the employer is obliged to thoroughly and conscientiously prevent them. It means that ensuring safety must be more than just respecting the applicable regulations. The situation when the technical, technological and organizational norms are not included and the science and technology is ignored constitutes violation even when such norms and scientific findings have not yet been reflected in the laws in force[759]. Not only the threats to employee's life and health but also his mental state is of significant importance[760]. Therefore, a breach of this obligation may constitute a prohibited act and may be perceived as violation of provisions of a contract of employment relating to ensuring safe and healthy conditions (article 207 § 2 of the Labour Code)[761] and which is an offence against employees' rights. Moreover if the above-mentioned obligation is not fulfilled, the employee has the right to:

- refrain from performing work (article 210 § 1 of the Labour Code);
- leave the place of work (article 210 § 2 of the Labour Code);
- terminate the contract without a notice period (article 55 § 1^1 of the Labour Code).

[758] Judgment of the Supreme Court of 14 September 2000, II UKN 207/00, OSNAPiUS 2002, No. 8, item 191.

[759] *Z. Góral*, O kodeksowym katalogu… *[Labour Code Catalogue…]*, p. 193 and *T. Wyka*, Ochrona zdrowia i życia pracowników *[Protection of life and health of employees],* pp. 233–249.

[760] *A. Witosz*, Obowiązek zapewnienia bezpiecznych i higienicznych warunków pracy *[The obligation to ensure safe and healthy conditions at work]*, [in:] *T. Zieliński* (ed.), Z problematyki prawa pracy i polityki socjalnej, Katowice 1980, p. 123.

[761] Judgment of the Supreme Court of 27 January 2011, II PK 175/10, OSNP 2012, No. 7–8, item 88.

3.10.5.2. Criminal liability

Employer's criminal liability for violating the OSH regulations has a special dimension. It is not regulated by the Labour Code but by the Criminal Code[762] (articles 218–221 of the Criminal Code and in several other additional articles, *inter alia,* articles 225 § 2 and 270 of the Criminal Code). The employees' rights with respect to labour law and social insurance are the subject of protection. The scope of protection is broad and refers mainly to the employee-employer relation including the catalogue of such basic employees' rights which are: life, property, dignity or freedom. The employee's entitlements stemming from the contract of employment include the right to perform work in proper and safe conditions. Therefore, only threatening human life or health is subject to criminal sanctions (article 220 of the Criminal Code). It may be the result of non-compliance with OSH standards by a person responsible for this area of company operations and therefore exposing employees to direct risk of death or serious bodily injury. In particular article 221 of the Criminal Code should be kept in mind. It introduces a criminal sanction for failure to report an accident at work or occupational disease of the person performing work. Moreover, the employer who hinders performance of the duties by a person authorized to conduct the inspection or his assistant, is subject to criminal charges. In this regard, the employer is also liable for falsifying or changing a document in order to accept it as an original one or to use it as an original one.

3.10.5.3. Civil liability

Violation of the principle in question produces measurable financial consequences for the employer. It means the obligation to pay a so-called compensatory benefit, compensatory retirement benefit, reimbursement or compensation. To simplify the issue, such a situation occurs when an employee sustained an accident at work or suffered from an occupational disease and as a consequence became completely or considerably unable to work. In such case, the employee should pursue his claims on the basis of the Act of 30 October 2002 on the Social Insurance on Account of Accidents at Work and Occupational Diseases[763]. Next, his claim, if not satisfied completely based on these regulations, might be pursued under provisions of the Civil Code under article 444 § 2 of the Civil Code (according to the general rules laid down in article 300 of the Labour Code), where such claim becomes complementary benefit, also referred to as compensatory benefit. The essence of the compensatory benefit is to compensate each time

[762] Act of 6 June 1997 – Criminal Code, Journal of Laws *[Dz.U.]* of 2016, item 1137, as amended.
[763] Consolidated text, Journal of Laws *[Dz.U.]* of 2015, item 1242, as amended.

for the income lost by the employee who, due to the accident at work or occupational disease, became the "ZUS *[Social Insurance Institution]* pensioner", and the social security paid by the insurer does not cover his lost income, which he was receiving as an employee. The compensatory benefit is dynamic so its aim is to compensate for the employee's income that he could possibly receive any time, if he did not sustain the accident or did not suffer from the occupational disease. Obviously, the compensation is hypothetical (approximate). It also refers to situations where the employee obtained the pension rights and receives the old-age pension. In such a situation the employer should pay the "compensatory benefit", which will amount to the difference between the real pension and the hypothetical one, which the employer could have received if the accident or occupational disease had not occurred. The employer's liability is not absolute in this sense that the employee should do everything to reduce the risk of the damage. It means mainly that the employee is obliged to show the initiative to find work or other sources of income[764]. It does not mean that the employee should take up any job. It cannot be work which e.g. damages his health. On the other hand, he cannot refuse to take up a job that has been offered to him only due to the fact that he has qualifications higher than those required in the offered position. The claim for benefit is subject to a 3-year limitation period counted from the day when the injured person came to know of the damage and of the person responsible for remedying it. However, in each case the claim is subject to a 10-year limitation period counted from the day of occurrence of the damage or accident so the maximum period of limitation is 10 years from the moment of the accident (article 442^1 of the Civil Code). The basis for awarding the compensatory benefit (art. 444 §2 of the Civil Code), if the accident at work did not cause complete incapacity for work but only limited the ability to perform work by an employee, is the amount of the expected salary reduced by the salary which the employer is able to obtain with the limited ability to work, regardless of his current situation on the labour market[765].

Apart from the compensatory benefit, the employee is entitled to claim:

– *Compensation.* It means compensation for losses (costs) that the employee covered in connection with the accident at work or the occupational disease (medical treatment, surgeries, rehabilitation, purchase of medicines, doctor's appointments, dressing materials, transport to medical centres, etc.).

[764] Judgment of the Supreme Court of 9 February 1967, II PR 20/67, Nowe Prawo 1968, No. 1, p. 124.

[765] Judgment of the Supreme Court of 5 September 2001, II UKN 534/00, OSNP 2003, No. 11, item 274.

– *Redress*. Redress is a special type of "compensation" for damage since contrary to *strict* compensation, it does not cover each time the actual damage but is a lump sum for the damage. It refers to compensating non-measurable damages, so-called moral losses and the suffering being the consequence of an accident or the occupational disease (suffering from staying at the hospital and rehabilitation, lowering of one's self-esteem due to body deformation caused by the occupational disease or the accident, limiting the physical and mental fitness, problems in family life, intimate problems, etc.).

3.10.6. Summary

In the axiological aspects, the principles of occupational health and safety are aimed at protection of an invaluable good which is employees' lives and health. In the general concept they also serve the common good which is maintaining the healthy society so they prevent spending the public finances on paying out sickness benefits and social insurance benefits. Their purpose is to eliminate or limit the phenomena disadvantageous for both physical and mental health of an employee. In the normative sense, they are semi-imperative, which means that the parties to an employment relationship, in the sphere of the employee's safety, can make certain exceptions to public and legal regulations solely when they are advantageous for an employee[766].

[766] Similar opinion was presented by *T. Nycz*, Prawo do bezpiecznych i higienicznych warunków pracy (Wybrane zagadnienia) *[The right to safe and healthy conditions at work (selected issues)]*, [in:] *A. Świątkowski* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Kraków 1999/2000.

Chapter 4. Principles of Collective Labour Law

K.W. Baran

4.1. The principle of freedom of association in the labour relations

4.1.1. Introduction

The essence of the principle of freedom of association is the freedom to form, operate and dissolve organisations which unite workers and employers[1]. It has its axiological roots in the natural law since it makes a reference to an inherent human dignity. Consequently, it is inalienable and inviolable[2] and the legislature defines only its foundations, limits and guarantees.

The freedom of association, because of its universal dimension, is a foundation of the public freedom in labour relations. From a theoretical point of view, it is highly important to differentiate it from the right to organise. In the legal writ-

[1] See *C.W. Jenks*, Human Rights and International Labour Standards, London-New York 1961, p. 49 ff.; *J.M. Servais*, Freedom of Association and the Inviolability of Trade Union Premises and Communications, ILR 1980, vol. 119, p. 217; *A.J. Douyat*, The ILO's Freedom of Association Standards and Machinery. A Summing Up, ILR 1982, vol. 121, No. 3, p. 287 ff.; *A. Michalska*, Międzynarodowa ochrona wolności związkowej *[International protection of a freedom of association]*, RPEiS 1982, vol. 1, p. 85 ff.; *G. Goździewicz*, Podstawowe zasady zbiorowego prawa pracy *[The fundamental principles of collective labour law]*, [in:] *G. Goździewicz* (ed.), Zbiorowe prawo pracy w społecznej gospodarce rynkowej *[Collective Labour Law in the Social Market Economy]*, Toruń 2000, p. 55 ff., *M. Tomaszewska*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V. Zbiorowe prawo pracy *[Labour Law System, vol. V. Collective Labour Law]*, Warsaw 2014, p. 223 ff.; *Z. Grygiel-Kaleta*, Wolność zrzeszania się w związkach zawodowych *[Freedom of Association in Trade Unions]*, Warsaw 2015, p. 15 ff.

[2] See *T. Zieliński*, Prawo pracy. Zarys systemu, Cześć III. Ochrona pracy. Prawo sporów pracy. Prawo administracji pracy. Prawo ruchu zawodowego *[Labour Law. An Outline of the System. Part III. Protection of Labour Law. Collective Disputes. Labour Administration. Labour Movement]*, Warsaw-Kraków 1986, p. 305.

ings[3] these concepts are often equated. In my opinion such an approach is not justified since the right to organise should be understood to include only the rights granted to trade unions and employers' organisations under an act. The freedom of association, because of its original character, refers to any and all freedoms regarding formation and operation of the organisations which unite employees and employers in the labour relations. Adoption of an opposite view might suggest that an employer's will of[4] is the basis for the operations of trade unions and employers' organisations. As a consequence, it could be assumed that the public authorities may easily define the scope of organisation and functioning of such organisations, and more importantly, freely restrict or limit such organisations; such ideology is underpinning the regulation of the rules of the organisations uniting employees and employers of totalitarian states. An example of such situation are demands[5] put forward by the Polish Coast workers on strike in August 1980, demanding that the right of association in the free trade unions be decreed. Its essence lay in the widespread idea that independent trade unions should be "anchored"[6] in the legal system and this because of the administrative and political restrictions applied by the totalitarian regime in the area of the freedom of association[7]. The state must neither prohibit nor order the employees or the employers to form or join organisations representing their vocational interests.

There are two contrasting principles of the freedom of association in the Polish labour law legislation – a monistic and pluralistic principle. Supporters of the former[8] treat the freedom of association uniformly as a set of rights and privileges, while the supporters of the latter[9] identify various categories of freedom. In my opinion, opting for any of the two presented concepts is of no substantive im-

[3] See *E. Attwoll*, The Right to be a Member of a Trade Union, [in:] *T. Campbell*, *D. Goldberg*, *S. McLean*, *T. Mullen* (eds.), Human Rights: From Rhetoric to Reality, Oxford 1986, p. 224.

[4] See *A.M. Świątkowski*, Uprawnienia, wolności, przywileje, obowiązki i immunitety w prawie związkowym *[Rights, freedoms, obligations and immunities in trade union law]*, SI 1992, vol. 23, pp. 157 and 159.

[5] A postulate to form trade unions, free from the tutelage of party authorities, was among the demands formulated by the Polish Coast workers on strike in August 1980.

[6] *A.M. Świątkowski*, Uprawnienia, wolności, przywileje… *[Rights, freedoms, obligations…]*, p. 160.

[7] See *T. Zieliński*, Nowy ład pracy. Rzeczywistość i wizja przyszłości *[The new labour order. Reality and vision of the future]*, [in:] *M. Matey* (ed.), Nowy ład pracy w Polsce i w Europie *[The New Work Labour in Poland and in Europe]*, Warsaw 1997, pp. 13–15; *J. Wratny*, Ewolucja zbiorowego prawa pracy w Polsce w latach 1980–1991 *[Evolution of the collective labour law in Poland in 1980–1991]*, Studia i Materiały Instytutu Pracy i Spraw Socjalnych 1991, vol. 16, p. 9 ff.

[8] See *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, pp. 276–278; *A.M. Świątkowski*, Zasady prawa pracy *[Principles of Labour Law]*, Warsaw 1997.

[9] See *J. Jończyk*, Prawo pracy *[Labour Law]*, Warsaw 1995, p. 170; *W. Sanetra*, Wolności związkowe w świetle nowej ustawy o związkach zawodowych *[Freedom of association in the light of the new act on trade unions]*, Prz. Sąd. 1991, No. 5–6, p. 3, footnote 1; *T. Liszcz*, Prawo pracy *[Labour Law]*, Gdańsk 1996, pp. 69–72; *Z. Salwa*, Prawo pracy i ubezpieczeń społecznych *[Labour and Social Insurance Law]*,

portance since it does not affect the form and scope of the freedom of functioning of trade unions and employers' organisations in the labour relations. I prefer a heterogeneous approach under which I assume the freedom of association consists of two fundamental freedoms – the freedom to organize and the freedom of workers' organisations and employers' organisations to act in the labour relations. The latter category is guaranteed by independence and self-governance. In my opinion the freedom of association alone, not guaranteed by the self-governance and independence of the organisations, does not allow for fulfilment of their mission in the industrial relations. Workers and employers do not join their organisations only to obtain a member status but they expect specific actions to be taken to represent and protect their rights and interests. By nature, such actions will not be effective if the organisations appear to be non-autonomous, and in particular susceptible to the influence of public authorities or other parties active in the social area. Therefore, in this study I will provide a comprehensive presentation of the freedom of association, with necessary distinctions.

Article 12 of the Constitution of the Republic of Poland guarantees a freedom to form and operate trade unions and other voluntary associations. The above general directive is rendered precise in article 59 of the Constitution[10]. The above provision is among those governing economic, social and cultural freedoms and rights. Such solution clearly refers to the legal mechanisms laid down in the provisions of international law. By this I mean in particular article 22 of ICCPR and article 11 of the ECHR. Consequently, in the constitutional terms, the "political factor" of the freedom of association should be viewed as the possibility of employees or employers to collectively influence the form and the functioning of social and economic relations in a broad sense through their empowerment in relations with public authorities and public administration. It is worth emphasizing that in no event such "political factor" of the freedom of association in a democratic state can be a pretext for the trade unions or employers' organisations to take over the roles and tasks of political parties[11].

The freedom of formation and operation of trade unions is recognised in article 12 of the Constitution of the Republic of Poland as one of the fundamental characteristics of the political system of the Republic of Poland. Unfortunately, the said provision does not mention employers' organisations which – in my

Warsaw 1995, pp. 280–281, 289–290; *G. Goździewicz*, Podstawowe zasady zbiorowego prawa pracy *[The Fundamental Principles of Collective Labour Law]*, p. 55 ff.

[10] See *W. Sanetra*, Prawa (wolności) pracownicze w Konstytucji *[Workers' rights (freedoms) in the Constitution]*, PiZS 1997, No. 11, p. 2 ff.; *L. Florek*, Konstytucyjne gwarancje uprawnień pracowniczych *[Constitutional Guarantees of Workers' Rights]*, PiP 1997, vol. 11–12, p. 195.

[11] See in particular, *W. Sanetra*, Prawa (wolności) pracownicze… *[Employees' Rights (freedoms)…]*, p. 7.

opinion – heavily undermines the directive of equality of the parties in labour relations. This means a continuance of a disgraceful tradition of discrimination of employers' organisations[12] in the Polish legislative system. Obviously, on the basis of a functional interpretation of article 12 of the Constitution of the Republic of Poland, it may be assumed that the freedom of formation and operation refers also to employers' organisations as they can be classified in the group of entities called "other voluntary associations" however this definition seems unsatisfactory.

In the light of the above deliberations on the constitutional status of the freedom of association, it is worth noting that article 59 of the Constitution of the Republic of Poland guarantees the freedom of association in trade unions, social and vocational organisations of individual farmers and in employers' organisations. This means that the government authorities and public administration cannot arbitrarily impose any restrictions on such freedom or deprive trade unions and employers' organisations of their rights provided for in article 59 (2) and (3) of the Polish Constitution[13]. In this context it seems reasonable to argue that the normative level of protection of workers and employers is satisfactory. It should be kept in mind that the importance of this type of protection in the labour relations is diminishing in as much as the state is withdrawing from the management of the economy. On the other hand, as regards both trade unions and employers' organisations, there is an increasing danger of mutual interference. Unfortunately, the constitutional provisions do not regulate it directly. Therefore, in my opinion, the constitutional solution of the problem cannot be considered a model solution.

The deliberations on the freedom of association cannot be detached from the general assumptions and principles laid down in the Constitution. In particular, attention should be given to article 20 of the Constitution, under which a social market economy, based on the freedom of economic activity, private ownership and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland. I have no doubt that the market nature of the economic system has significantly determined the form of the freedom of association. A broad scope of the freedom of association in trade unions and employers' organisations provided for in article 59 of the Constitution of the Republic of Poland and reinforcement of this freedom with the right to bargain collectively, to strike and to protest, undoubtedly means departure in

[12] The examples of the worse status of employers' organisations in terms of coalition rights are presented by *Z. Hajn*, Status prawny organizacji pracodawców *[Status of the employers' organization]*, Warszawa 1999, pp. 5 and 6.

[13] See *Ż. Grygiel-Kaleta*, Wolność zrzeszania się w związkach.. *[Freedom of association in…]*, p. 102 ff.; *Z. Hajn*, Zbiorowe prawo pracy. Zarys systemu, Warszawa 2003, p. 41 ff.

the collective labour relations from the state interventionism characteristic of the previous era towards dialogue and partnership.

4.1.2. Freedom of coalition of working people

In the Polish legislative system the freedom of association has two basic dimensions: the freedom (right)[14] to form trade unions and employers' organisations and the freedom to join such associations[15]. Under the laws in force, the above distinction is of practical importance only in relation to working people since the Act of 23 May 1991 on Employers' Organisations[16] does not differentiate the status of employers in this respect. Article 2 of the Act on Employers' Organisations makes a clear distinction between the working people who are entitled to form and join trade unions and those who are entitled only to join the already existing organisations. In this context, an argument that the former enjoy the full freedom of coalition and the latter – only a limited one, seems fully justified.[17] Employers always have a full freedom of coalition.

The Trade Unions Act of 23 May 1991[18] defines a trade union in its article 1 in personal terms, as an organisation uniting the "working people". This concept, taken from ideological sphere, is undoubtedly broader than the concept of an "employee"[19]. Its scope extends also to other categories of persons who perform socially useful work. The personal dimension of the freedom of association

[14] See in particular: *W. Sanetra*, Prawa (wolności) pracownicze… *[Employees' Rights (freedoms)…]*, p. 2 ff.; *M. Grzybowski*, *A.M. Świątkowski*, Wolność związków zawodowych *[Freedom of trade unions]*, [in:] *A.M. Świątkowski* (ed.), Kompetencje związków zawodowych *[Powers of Trade Unions]*, Kraków 1984, *passim*.

[15] See *W. Masewicz*, Nowe prawo o związkach zawodowych *[New trade union laws]*, PiZS 1991, No. 10, p. 3.

[16] Consolidated text, Journal of Laws *[Dz.U.]* of 2015, item 2029.

[17] *T. Liszcz*, Prawo pracy *[Labour Law]*, Gdańsk 1996, pp. 71–72; *G. Goździewicz*, Podstawowe zasady zbiorowego prawa pracy *[The fundamental principles of collective labour law]*, p. 55 ff.; For a different view, see *W. Masewicz*, Ustawa o związkach zawodowych i ustawa o rozwiązywaniu sporów zbiorowych *[Act on Trade Unions and Act on Resolution of Collective Disputes]*, Warsaw 1998, pp. 17–18.

[18] Consolidated text, Journal of Laws *[Dz.U.]* of 2015, item 1881.

[19] See *M. Seweryński*, Problemy statusu prawnego związków zawodowych *[Legal status of trade unions]*, [in:] *G. Goździewicz* (ed.), Zbiorowe prawo pracy w społecznej gospodarce rynkowej *[Collective Labour Law in the Social Market Economy]*, Toruń 2000, p. 1100 ff., *Z. Hajn*, Prawo zrzeszania się w związkach zawodowych – prawo pracowników czy ludzi pracy *[The right of association in trade unions – the right of employees or the right of the working people]*, [in:] *A. Wypych-Żywicka*, *M. Tomaszewska*, *J. Stelina* (eds.), Zbiorowe prawo pracy w XXI wieku *[Collective Labour Law in the 21st Century]* Międzynarodowa Konferencja Naukowa z okazji trzydziestej rocznicy pozostania NSZZ „Solidarność" *[International Conference for the 30th Anniversary of Solidarity Trade Union]*, Gdańsk 2010, p. 175 ff.; *A.M. Świątkowski*, Konstytucyjna koncepcja pracownika *[A constitutional concept of an employee]*, MPP 2016, No. 1, p. 11.

in the Polish legal system is defined in article 4 of the Trade Unions Act. *De lege lata*, apart from employees within the meaning of the Labour Code, it covers also members of farming cooperatives, persons employed under an agency contract or persons in alternative military service[20]. It is worth noting that the scope of the freedom of association was questioned in the case-law of the Constitutional Tribunal[21] which considered the restrictions of the freedom to form and join trade unions by persons in paid labour who were not listed in article 2 (1), (2) and (5) of the Trade Unions Act as being contrary to article 59 (1) in connection with article 12 of the Constitution of the Republic of Poland. Therefore, a possibility was created to extend the right of coalition to the working people functioning in the employment relations in a broad sense. I am thinking mainly of persons who perform work under civil-law contracts (such as service contract) as well as self-employed[22]. Such postulates have already been formulated in the past by the Polish labour law scholars[23].

Under the Polish legislative system, freedom of coalition, being limited to the right to join an existing union organisation, is granted to pensioners, unemployed and contractors. The latter may join a trade union only in the establishment where they concluded a home-based work contract *(umowa o pracę nakładczą)*. On the other hand, unemployed persons can join a trade union organisation only if the charter of such organisation provides for such possibility[24]. Both of these categories of limitations exist mainly in the functional context.

Limitations of the freedom of coalition apply also in the case of persons employed in the public service in a broad sense. The basis is provisions of article 1 (2) of the ILO Convention No. 151[25], which apply to high-level employees whose

[20] See *M. Tomaszewska*, [in:] System prawa pracy, t. V… *[A System of Labour Law, Volume V…]*, p. 281 ff. *Ż. Grygiel-Kaleta*, Wolność zrzeszania się w związkach… *[Freedom of Association in…]*, p. 141 ff.

[21] Judgment of the Constitutional Tribunal of 2 June 2015, K 1/13, OTK-A 2015, No. 6, item 80.

[22] See *K. Walczak*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. VII *[A System of Labour Law, Volume VII]*, Zatrudnienie niepracownicze *[Non-employee employment]*, Warsaw 2015, p. 306 ff.

[23] See *K.W. Baran*, O zakresie podmiotowym zbiorowego prawa pracy – de lege lata i de lege ferenda *[A personal scope of collective labour law – de lege lata and de lege ferenda]*, [in:] *B.M. Ćwiertniak* (ed.), Aktualne zagadnienia prawa pracy i polityki socjalnej (Zbiór studiów) *[Current Labour Law and Social Policy (A Collection of Studies)]*, vol. 1, Sosnowiec 2012, p. 218 ff. and the literature referenced there.

[24] See *K.W. Baran*, Komentarz do ustaw o związkach zawodowych, o organizacjach pracodawców, o rozwiązywaniu sporów zbiorowych, o zwolnieniach grupowych *[Commentary on the legal acts on trade unions, on employers' organisations, on resolution of collective disputes, on collective redundancies]*, Gdańsk 2004, p. 22 ff.

[25] ILO Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service adopted in Geneva on 27 June 1978, Journal of Laws *[Dz.U.]* of 1994, No. 22, item 78. See: *G. Goździewicz*, Wpływ instytucji zbiorowego prawa pracy na status prawny pracowników służby cywilnej i samorządu terytorialnego *[Impact of the*

functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature. In the Polish legislative system, the limitations of the freedom of coalition are twofold and consist either in prohibition of membership in a trade union[26] or acceptance of membership only in certain trade unions specified in separate laws governing employment of specific categories of public sector employees *(pragmatyki)*. The former category includes persons holding high-level public positions which require independence and impartiality, such as judges, state security officers and professional soldiers. The latter category includes officers of paramilitary formations who can unite, with some exceptions, only in "industry" union organisations[27]. However, it is worth noting that persons who have an employee status, employed in the broadly understood public administration, enjoy an unlimited freedom of coalition, regardless of whether they are employed in the government administration, local special administration or justice system. According to the applicable legislation, because of the high level of professional autonomy, the right to form and join trade unions is not granted to: craftsmen, taxi drivers, attorneys and students. However, the fact remains that in the Polish legislative system the scope of the freedom of coalition at the personal level refers not only to employees but also to other categories of employed persons., in order to ensure a broad and authentic representation of the world of labour in the post-transformation market economy, it is fully justified to extend the freedom of association to all categories of persons in gainful employment, also those employed under civil-law contracts and self-employed[28]. Such a mechanism is a foundation of the qualitative model of pluralism in the trade union movement.

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collective labour law mechanisms on the legal status of employees of civil service and local and regional authorities], [in:] *W. Sanetra* (ed.), Stosunki pracy w służbie cywilnej i samorządzie terytorialnym *[Employment Relationships in the Civil Service and Local and Regional Authorities]*, Białystok 2001, p. 42 ff.

[26] See *J. Skoczyński*, Reprezentacja praw i interesów pracowników służby publicznej *[Representation of workers' rights and interests in the civil service]* [in:] *G. Goździewicz* (ed.), Reprezentacja praw i interesów pracowniczych *[Representation of Workers' Rights and Interests]*, Toruń 2001, p. 261 ff.

[27] See *M Sękara*, Wolność koalicji funkcjonariuszy służb zmilitaryzowanych w świetle prawa polskiego i międzynarodowego *[Freedom of coalition of officers of military forces under Polish and international law]*, St.Pr.PiPSp. 2003–2004, p. 269 ff.; See: *Ż. Grygiel-Kaleta*, Wolność zrzeszania się w związkach… *[Freedom of Association in…]*, p. 167 ff.; *M. Tomaszewska*, [in:] System prawa pracy, vol. V…, *[System of Labour Law, vol. 5…]*, p. 287 ff.

[28] See, for example, a draft amendment to the Trade Unions Act presented on 22 March 2016 by the Ministry of Family, Labour and Social Policy. See also: *K.W. Baran*, Refleksje o zakresie prawa koalicji w projekcie nowelizacji ustawy o związkach zawodowych *[Reflections on the scope of the right of coalition in the draft amendment to the Trade Unions Act]*, MPP 2016, No. 6, p. 286 ff.

4.1.3. Freedom of coalition of employers

Article 59 (1) of the Constitution of the Republic of Poland guarantees a freedom of coalition not only in trade unions, but also in employers' organisations[29]. This is modelled on the international legislation which provides for symmetric regulations for both of the parties. In pursuance of the constitutional directive, article 1 of the Act on Employers' Organisations *(ustawa o organizacjach pracodawców)* establishes a right of the employers to form and join such organisations. Based on the *lege non distinquente* argument, it should be assumed that this right is granted to all employers, irrespective of the form of property and the employment numbers.

As regards the freedom of association of employers, a distinction must be made between the freedom of association and an individual right of an employer concerned to join a particular organisation[30]. The above distinction is justified by the fact that joining a specific employers' organisation may be restricted by various sectoral or territorial criteria. Such restrictions must be justified by the objectives of the organisation and cannot arise from intended discrimination.

The freedom to form the employers' organisations is granted to natural persons or organisational units employing employees. *De lege lata*, all[31] employing entities may be united in employers' organisations with no restrictions, regardless of whether they have legal personality or not. However, a question arises whether single establishments forming a part of a multi-employer undertaking can exercise the freedom of coalition. There is no doubt that they enjoy a certain degree of autonomy under the labour laws in force[32]. However, in order to be granted the right to form and join employers' organisations they must be legally, financially and functionally independent. Otherwise, there would be a conflict between the

[29] See in particular *M. Taniewska-Peszko*, Organizacje pracowników i organizacje pracodawców w aktualnym ustawodawstwie (charakterystyka aktów, podstawowe podobieństwa i różnice przyjętych rozwiązań prawnych) *[Workers' organisations and employers' organisations under the current legislation (characteristics of legal acts, similarities and differences in adopted mechanisms)]*, PPiPS 1992, Vol. 10; *A. Sobczyk*, Prawne aspekty funkcjonowania organizacji pracodawców *[Legal aspects of functioning of employers' organisations]*, St.Pr.PiPSp 1994, p. 256 ff.; *M. Tomaszewska*, [in:] System prawa pracy, t. V… *[System of Labour Law, vol. V…]*, p. 253 ff. and the literature referenced there.

[30] See *I. Boruta*, *Z. Góral*, *Z. Hajn*, Komentarz do ustaw o związkach zawodowych, organizacjach pracodawców, zbiorowych sporach pracy *[Commentary to Trade Union Act, Employers' Organization Act, Collective Labour Law Disputes Act]*, Łódź 1992, p. 61.

[31] See *L. Florek*, Zgodność przepisów prawa pracy z Konstytucją *[Compliance of labour laws with the Constitution]*, PiZS 1997, No. 11, p. 8; *Z. Hajn*, Zbiorowe prawo pracy. Zarys… *[The Collective Labour Law. An Outline…]*, p. 93 ff.

[32] See a critical view of *K. Kolasiński*, Prawo pracy znowelizowane *[Amended Labour Law]*, Toruń 1996, p. 84 ff.; *M. Gersdorf*, Jeszcze w sprawie sporu o pojęcie pracodawcy *[A dispute over the concept of an employer]*, PiZS 1997, No. 2, p. 35.

concept of legal personality under the labour law and under the civil law since the rights of internal establishments stem from the statutes and internal rules of the undertakings. The situation is different in subsidiaries of international corporations and holdings if they enjoy an appropriate level of organisational autonomy and legal separation[33]. The freedom of coalition is also not an issue as regards the so-called worker-owned companies *(spółki pracownicze)*[34]. Certain conflicts may arise only at the economic level, since at the normative level the worker-owned company – an independent legal entity and an organisational unit – is considered an employer.

Under article 1 of the Act on Employers' Organisations, members of the organisation may also be natural persons who employ workers. This normative measure correlates with article 59 (1) of the Constitution of the Republic of Poland, which does not differentiate between the employers in terms of the type of their business.

There is also the issue of a legal capacity of the natural person as an employer. A question arises whether only a person with full capacity to perform juridical acts may be a member of employers' organization. I agree with the view that the laws in force do not provide for any restrictions as regards persons with limited capacity or no capacity to perform acts in law. Therefore, it can be argued that the Polish legislation does not provide for any significant restrictions, material or personal, on the freedom of coalition of employers.

4.1.4. Negative freedom of association

Negative freedom of association is a freedom of an employee or an employer not to join or not to benefit from help of trade unions or employers' organizations[35]. In personal terms, this applies to both of these organizations[36]. Its essence is always an absence of an obligation to unite in the unions, regardless of wheth-

[33] See *Z. Hajn*, Status prawny organizacji… *[Legal status of…]*, p. 125.

[34] *Z. Kubot*, Problem pracodawcy w spółkach pracowniczych *[Employer in worker-owned businesses]*, PiZS 1992, No. 5–6, p. 17 ff.

[35] Because of the fact that the negative freedom of association has practical importance only in relation to employees, I will further focus on this category.

[36] See *T. Zieliński*, Podstawy rozwoju prawa pracy *[The foundations of development of labour law]*, ZNUJ, Prace Prawnicze 1988, vol. 120, pp. 53–54; *J. Stelina*, Związkowa ochrona indywidualnych praw pracowników niezrzeszonych w związkach zawodowych *[Trade union protection of individual rights of employees not associated in trade unions]*, PiZS 1994, No. 6, p. 60; *Z. Hajn*, Związkowa reprezentacja praw i interesów pracowniczych a zasada negatywnej wolności związkowej *[Representation of workers' rights and interests by trade unions and the negative freedom of association]* [in:] *G. Goździewicz* (ed.), Reprezentacja praw i interesów pracowniczych *[Representing the Rights and Interest of Employees]*, Toruń 2001, p. 63 ff.

er such freedom is derived from statutory provisions or provisions of collective agreements. In the industrial relations such obligation, in relation to employees, may be either organizational (for example a closed shop, pre-entry closed shop, union shop clause), financial (for example obligating a non-unionized employee to pay contributions to a trade union), social (for example when payment of an unemployment allowance is dependent on trade union membership).

In axiological terms, the negative freedom of association ("freedom from") is based on the idea of voluntary association in trade unions or employers' organizations. At a normative level, it has its basis in article 20 (2) of the Universal Declaration of Human Rights, under which no one may be compelled to belong to an association. There is no doubt that trade unions and employers' organisations are considered such associations. Also article 11 of the Community Charter of the Fundamental Social Rights of Workers provides that every worker shall have the freedom to join or not to join professional organisations or trade unions without any personal or occupational damage being thereby suffered by him. Similar interpretation applies to article 5 of the European Social Charter[37].

In the Polish labour law system, the normative guarantees of respecting that freedom are established also in article 3 of the Trade Unions Act. In the material scope it refers to all factors determining the performance of work. This applies also to termination of an employment relationship. A termination of a contract of employment with an employee for the sole reason that he did not join a trade union should be considered a serious breach of the negative freedom of association. From a normative point of view, a membership or non-membership in a trade union should be considered indifferent.

Mutatis mutandis, the above mechanisms apply also to employers. In particular, what should be emphasized is the prohibition of any discrimination by public authorities on grounds of non-membership in an employers' organisation.

4.1.5. Freedom of activity of employees' organisations and employers' organisations

The essence of the freedom of activity of employees' and employers' organisations is their freedom to conduct statutory activity in the labour relations. It has two basic dimensions: organisational and functional. As regards the former: for employees, fundamentally important is the possibility to conduct an open un-

[37] See *A.M. Świątkowski*, Karta Praw Społecznych… *[Charter of Social Rights…]*, p. 281 ff.; *H. Kristensen*, The European Committee of Social Rights and Its Case Law On the Negative Freedom of Association, [in:] *L. Mitrus* (ed.), Studia z zakresu prawa pracy i polityki społecznej, Liber Amicorum prof. dr habil. Andrzej Marian Świątkowski, St.Pr.PiPSp. 2009, p. 227 ff.

ion activity. Imposition on the members of such organization of any restrictions preventing the free union activity is unacceptable. As regards the organisational dimension, the self-governance and independence of employees' and employers' organisations is of key importance[38].

The self-governance of trade unions and employers' organisations means that they can independently define their objectives and rules of their operation. It has two fundamental dimensions: normative and programme dimension and operational and functional dimension. The former means that such organisation is free to independently set out its objectives and programme, and the latter means that it may set out its internal organisation structures, rules and methods of operation.

The key aspect of the self-governance of trade unions and employers' organisations is the freedom to set out the objectives and tasks. Specification of those elements in the programme of an organisation is decisive for its status in the industrial relations. The economic, social and political objectives defined in the programme give guidance for the pursuit of future activity. In view of the applicable standards, the objectives and tasks of both trade unions and employers' organisations are similar. In both cases they refer primarily to the protection of rights and representation of interests of their members. In this regard, particularly important are statutes (charters)[39] which, apart from the formal[40] regulations, set out the rules of functioning of the organisation concerned[41].

An autonomous formation of an image of a trade union or an employers' organization refers to procedures and rules of conduct[42]. Their purpose is to specify in detail the organisational and structural matters not regulated by law or by a charter. In practice, this usually means specification of the rules and methods of functioning of particular bodies in the organisation. Self-governance of trade unions and employers' organisations means independent determination of the status of their members. This applies in particular to[43]: acquisition and loss of membership, rules of election of the authorities of the organisation, rights and obligations of members, participation in collective labour actions.

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[38] See *A.M. Świątkowski*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V. Zbiorowe prawo pracy, Warsaw 2014, p. 299 ff. and the literature referenced there.

[39] See *K.W. Baran*, Komentarz do ustaw o związkach… *[Commentary on the legal acts on trade unions…]*, p. 51 ff. *J. Szmit*, Charakter prawny statutu związku zawodowego *[A Legal Status of a Trade Union Charter]*, Warsaw 2014, passim and the literature referenced there.

[40] See: *W. Masewicz*, Ustawa o związkach zawodowych. Ustawa o rozwiązywaniu sporów zbiorowych *[The Trade Unions Act. Act on Resolution of Collective Disputes]*, Warsaw 1998, p. 29 ff.

[41] See in particular *J. Szmit*, Charakter prawny statutu… *[A Legal Status of…]*, p. 116 ff.

[42] See also *A.M. Świątkowski*, Organizacje reprezentujące interesy zawodowe *[Organisations representing professional interests]*, St.Pr.PiPSp. 1994, p. 227.

[43] See *J. Szmit*, Charakter prawny statutu… *[A Legal Status of…]*, p. 120 ff.

As regards the first aspect of the self-governance mentioned above, it is of key importance whether the statute (charter) of an organisation may limit the personal scope of the freedom of association provided by law[44]. In practice, this is particularly visible as regards trade unions[45]. I represent the view that introduction of statutory restrictions is acceptable provided that they are not intended to discriminate, in particular on the ground of sex, age, race, religious beliefs and political opinions. This view is supported by article 3 of ILO Convention No. 87.

Another important aspect of the self-governance of employees' and employers' organisations are mechanisms of appointment of the governing bodies of such organisations. There are two main principles: the principle of electiveness and the principle of tenure. As regards the former, the currently applicable mechanisms differ significantly between trade unions and employers' organisations. In the case of trade unions, a principle applies according to which one member of an organisation has one vote. The situation is different in employers' organisations where many times the economic status of a member of the organisation determines the number of votes of such member. It includes such factors as the amount of contribution, a number of employed workers or the volume of the payroll fund[46].

Employees' and employers' organisations have the right to establish and join federations and confederations and any such organisation, federation or confederation has the right to affiliate with international organisations of workers and employers. On the basis of the above provisions, legal theorists[47] argued that the organisations themselves should freely define the scope of activity of particular associations, both in terms of territory and sector. The national laws cannot restrict the self-governance by determining which majority of members of an organisation (ordinary or qualified) may take a decision to access a specified federation or confederation or what should be the number of trade unions in order that they can establish a federation or confederation.

As part of the freedom to independently set out the objectives and rules of operation, both the trade unions and employers' organisations may associate in international organisations of employees and employers. A decision of a statutory body of a trade union or employers' organisation on the formation or join-

[44] See *K.W. Baran*, Komentarz do ustaw o związkach… *[Commentary on the legal acts on trade unions…]*, p. 22 ff.

[45] See in particular *G. Bieniek*, *J. Brol*, *Z. Salwa*, Prawo związkowe z komentarzem *[Trade Union Law with a Commentary]*, Warsaw 1992, p. 53 ff.

[46] See *Z. Hajn*, Status prawny organizacji… *[Legal status of…]*, pp. 227–228.

[47] See in particular *A.M Świątkowski*, Swoboda podejmowania akcji zbiorowych a prawa obywatelskie, ekonomiczne i socjalne regulowane prawem pracy *[Freedom to undertake collective actions and civil, economic and social rights governed by labour law]*, St.Pr.PiPSp. 1995, p. 146 ff.

ing the international structures does not require acceptance by public authorities, including the government. Those organisations are entitled to have international relations[48]. Therefore, in the light of article 2 (2) of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms – the practices[49] (characteristic mainly of totalitarian states) which involve preventing entry to or departure from a country by trade unions activists (for example, the refusal to issue a passport or visa), are unacceptable.

Trade union organisations and employers' organisations should actively participate in the work of international structures. For that reason they are entitled – respecting the applicable national laws – to receive or transfer funds or material resources.

The self-governance of employee's organisations and employers' organisations is self-management of their own funds and assets and the right to conduct business activity. This refers also to any other activity in the labour relations, both individual and collective (such as collective bargaining, industrial actions or strikes).

In conclusion, it should be emphasized that the self-governance of the employees' organisations and employers' organisations is relative in that they can independently take decisions and conduct their activity only within the limits of the applicable law. The principle of legality in labour relations is explicitly established in article 8 (1) of the ILO Convention No. 87, according to which in exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised groups, shall respect the law of the land. However, it must be kept in mind that the national legislation should not violate trade unions' freedoms and their guarantees. Article 59 (4) of the Constitution of the Republic of Poland corresponds with the above. It provides that the scope of freedom of association in trade unions and in employers' organizations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party[50].

The independence of trade unions and employers' organisations means that the organisations which unite employees or employers are not subordinated, in the fulfilment of their objectives and statutory tasks, to other parties and are

[48] See *A.M. Świątkowski*, [in:] System prawa pracy, t. V… *[System of Labour Law, vol. 5…]*, p. 341 ff. See: *K.W. Baran*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A Commentary]*, Warsaw 2016, p. 64.

[49] Journal of Laws *[Dz.U.]* of 1995, No. 36, item 175.

[50] See more in *L. Florek*, Rola umów międzynarodowych.. *[The Role of International Agreements…]*; p. 89 ff.

therefore free from any interference or supervision of the latter[51]. This abstract definition is clarified both in the international laws and national legislation.

Under article 3 (2) of the ILO[52] Convention No. 87, the public authorities shall refrain from any interference which would restrict or impede the free activity of organisations uniting workers or employers. On the other hand, article 2 (1) of ILO Convention No. 98 provides that workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

These mechanisms were incorporated into the national legislation. Article 1 (2) of the Trade Unions Act provides that a trade union is independent in its statutory activity from the employers, government administration and local government and from other organisations[53]. Similar regulation was adopted in respect of employers' organisations in article 3 of the Act on Employers' Organisations[54]. Article 4 of the Act on Employers' Organisations provides that employers' associations, their federations and confederations, cannot take actions aimed at restriction of employees' right of association and actions aimed at controlling the employees' unions. Under the national legislation this provision is a concretisation of a directive included in article 2 (1) of ILO Convention No. 98. However, it should be noted with regret that no similar provision was included in the Trade Unions Act. It should be kept in mind that the mentioned provision of the ILO Convention is formulated on a reciprocity basis and therefore the prohibition of interference in the affairs of the other party applies also to trade unions.

As regards the independence[55], it should also be emphasised that trade unions and employers' organisations may enjoy their autonomy only within their statutory activity. This applies to the activities aimed at fulfilment of tasks relating to protection of rights and interests in labour relations. Therefore, their business activity is not autonomous and in such case a trade union is in this respect treated

[51] See also *W. Widera*, Związek zawodowy jako niezależny podmiot w stosunkach przemysłowych. Redefinicja „niezależności" w systemie postkomunistycznym *[A trade union as an independent party in industrial relations. A re-definition of "idependence" in the post-communist system]*, [in:] *W. Kozek* (ed.), Zbiorowe stosunki pracy w Polsce w perspektywie integracji europejskiej *[Collective Labour Relations in Poland in the Perspective of the European Integration]*, Warsaw 1997, p. 61 ff.

[52] See more in *Z. Hajn*, Status prawny organizacji… *[Legal status of…]*, pp. 212–213.

[53] See *T. Zieliński*, Prawo pracy. Zarys…, p. 296 ff. and the literature referenced there.

[54] *A. Sobczyk*, Prawne aspekty funkcjonowania organizacji pracodawców *[Legal aspects of functioning of employers' organisations]*, St.Pr.PiPSp 1994, p. 268; *J. Piątkowski*, [in:] Zbiorowe prawo pracy. Komentarz *[Collective Labour Law]*, ed. *K.W. Baran*, Warsaw 2016, pp. 262 ff.

[55] See also *L. Florek*, Ochrona praw i interesów pracowników *[Protection of Employees' Rights and Interests]*, Warsaw 1990, pp. 155–156.

on an equal basis with other business operators. Such definition of a union status in no way interferes with its independence in the labour relations.

In the light of applicable laws, trade unions and employers' organisations are in their statutory organisation independent of public administration bodies. Based on the *lege non distinquente* argument, it should be concluded that it refers both to the general and special administration. In practice, this means that neither the Supreme Audit Office *(Najwyższa Izba Kontroli)* nor the National Labour Inspectorate *(Państwowa Inspekcja Pracy)* is competent to control trade unions and employers' organisations. This is clearly in contrast with legal mechanisms applicable during the interwar Poland[56], even the labour inspectorate, based on copies and reports submitted by statutory authorities of trade unions, assessed the legality of their activities.

Trade unions and employers' organisations are independent also of local government bodies. To my mind, this applies not only to local government bodies but also to local authorities at all levels.

Another issue worth discussing in the context of independence of the employees' or employers' organisations is judicial supervision. A starting point for further deliberations will be a statement that in a democratic rule of law the legality of the activities of such organisations is subject to control of judicial authorities under special laws. A reference should be made in particular to article 36 of the Trade Unions Act and article 19 of the Act on Employers' Organisations[57], according to which if a registration court finds that a governing body of a trade union or employers' organisation runs an activity which is contrary to law, such court should set a time-limit of 14 days for that body to ensure compliance of its activity with the applicable laws. If such body fails to comply with the court's decision, its members may be sanctioned by a fine or the authorities of the trade union may be requested to hold new elections to such governing body, otherwise its activity may be suspended. If the latter also appears ineffective, the registration court may delete the entity against whom proceedings are conducted from the National Court Register *(Krajowy Rejestr Sądowy)*.

Further deliberations on the autonomy of employees' and employers' organisations should focus on the relations between those organisations and entities, other than public and administration bodies, functioning in the industrial rela-

[56] *M. Święcicki*, Instytucje polskiego prawa pracy w latach 1918–1939 *[Polish Labour Law in 1918–1939]*, Warsaw 1960, pp. 226 ff. *W. Masewicz*, Położenie prawne związków zawodowych w Polsce w latach 1919–1930 *[The Legal Status of Trade Unions in Poland in the Years 1919–1930]*, Warsaw 1972, p. 107 ff.

[57] See in particular *E. Baran*, *K.W. Baran*, W sprawie wykładni art. 36 ustawy związkach zawodowych i art. 19 ustawy o organizacjach pracodawców *[Interpretation of article 36 of the Trade Unions Act and article 19 of the Act on Employers' Organisations]*, Prz. Sąd. 1992, No. 10, p. 51 ff.

tions. Also in such case, the applicable laws (article 1 (2) of the Act on Trade Unions and article 3 of the Act on Employers' Organisations) lay down, *expressis verbis*, the principle of independence. In practice, what seems particularly important are relations with political parties and social movements. In the past – in particular in the labour movement – there existed various multi-level relations, including political relations. Very painful experiences regarding violation of independence of trade unions are associated with the period of the Polish People's Republic[58]. However, such mechanisms exist also in the contemporary market economy.

As regards the mutual relations between trade unions or employers' organisations and the political parties, special attention should be given to an objectively existing conflict of interests between them. Essentially, this refers to differences in their objectives. A fundamental objective of a political party in a democratic state is acquisition or exercise of public authority, while a fundamental objective of trade unions and employers' organisations is protection of rights and interests of their members in labour relations. A particular risk of collision of the social roles exists at the personal level in the case of persons involved in both of these organisational structures. By this I mean combining trade union positions with political party or public positions. I disapprove a cumulative holding of a trade union office and a public office, which is particularly characteristic of young democracies because I believe that it encourages oligarchization of state structures. On the other hand, I think that introduction of statutory prohibitions in this regard would be ineffective, easy to circumvent, and moreover it would compromise an autonomy and self-governance of trade unions or employers' organisations.

It should be emphasised that the principle of non-interference applies not only to political parties, but to all other organisations such as associations, non-government organisations, churches and religious associations. However, it should be strongly emphasised that in the legislation in force the main emphasis was placed on the mutual independence of trade unions and employers' organisations. The principle of mutual non-interference was laid down both in the international and national laws. Particularly important is the already mentioned article 2 (1) of the ILO Convention No. 98. Paragraph 2 of the mentioned article prohibits application of measures which are designed to promote the establishment of workers' organisations or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations.

According to the applicable standards, any interference by the employer in the activity of trade unions is unacceptable. This rule applies already at the stage of

[58] See in particular *J. Wratny*, Ewolucja zbiorowego prawa… *[Evolution of the collective…]*, *passim*; *T. Zieliński*, Nowy ład pracy… *[New Labour Order…]*, pp. 13–15.

formation of a trade union. Therefore, not only the actions (such as harassment) aimed at restricting the freedom of association of employees but also manipulating that freedom is prohibited. This applies to a situation where an employer or employers' organisation inspires the formation of a trade union favourably disposed to such organisation (a so-called "yellow" union). In the light of the legislation in force, any actions aimed at destruction of structures of employees' organisations, such as fuelling the antagonisms existing in the workers' movement, are illegal.

The same applies to any supervisory or control actions undertaken by an employer or employers' organisation towards trade unions. This means interference in the statutory powers of trade unions, both in the collective and individual sense. For that reason a manager of an establishment (employer) cannot control whether trade unions operating in his establishment respect the statutory (charter) provisions in their operations. This refers in particular to election of members of the management board, shortening or extending their term of office, removal of an employee from a list of members of a trade union.

4.2. The principle of social dialogue in the labour relations

4.2.1. Introduction

The essence of the principle of dialogue is a multidimensional process of communication between the actors in the labour relations. Its main purpose is to maintain social peace. It is an element of the negotiation-based model of formation of labour law in the democratic states of industrial civilization[59]. In the axiological sphere, the social dialogue in the labour relations is based on voluntariness and mutual respect of the fundamental interests of social partners and the common good.

[59] See *M. Seweryński*, Dialog społeczny. Współzależność gospodarki i prawa pracy *[Social dialogue. Interdependence between labour law and economy]*, [in:] Referaty na VI Europejski Kongres Prawa Pracy i Zabezpieczenia Społecznego *[Papers for the 6th European Congress of Labour Law and Social Security]*, Warsaw, 13-17 September 1999, Warsaw 1999, p. 23 ff., *W. Sanetra*, Dialog społeczny jako element ustroju społecznego i politycznego w świetle Konstytucji RP *[A social dialogue as an element of the social system in the light of the Constitution of the Republic of Poland]*, [in:] *A. Wypych-Żywicka*, *M. Tomaszewska*, *J. Stelina* (eds.), Zbiorowe prawo pracy w XXI wieku *[Collective Labour Law in the 21st Century]*, International Conference for the 30th anniversary of Solidarity trade union, Gdańsk 2012, p. 9 ff.; *M. Gladoch*, Dialog społeczny w zbiorowym prawie pracy *[A Social Dialogue in the Collective Labour Law]*, Toruń 2014, *passim*; *K. Walczak*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V… *[Labour Law System, vol. V…]*, p. 945 ff.

In personal terms, the social dialogue may be either bilateral or multilateral. Participants in a bilateral dialogue are exclusively social partners being entities representing employees, usually trade unions, an employer or organisations representing the employer. Participants in a multilateral dialogue, apart from the social partners, are also entities independent of the social partners. These include various mediation and conciliation bodies, also public authorities[60]. As regards the social dialogue, state plays a particular role[61].

In the labour relations of globalised economy, the social dialogue is universal. Such dialogue exists on various levels, starting from international through nationwide, regional, sectoral and ending with company level[62]. Generally speaking, the dialogue includes all problems relating to terms and conditions of employment in a broad sense, as well as relations between trade unions and employers' organisations. The highest level of the dialogue is negotiations[63].

Under article 20 of the Constitution of the Republic of Poland, a dialogue between the social partners is one of the pillars of the economic system of the Republic of Poland. It is a key instrument for implementation of the idea of the social market economy. The above general directive is specified in article 59 of the Constitution which guarantees to trade unions the right to bargain collectively[64]. At the material level, it is not subject to any limitations since the list included in the mentioned provision is only exemplary. Therefore, the social partners may negotiate on all matters relating to terms and conditions of employment which they consider important.

As regards the sphere of normative regulation, the social dialogue may be formalised when laws specify in detail the negotiation procedure, or non-formalised, when there is no such regulation. Although the principle of social dialogue calls for the minimum formality of any negotiations, when it comes to the issues which are of the greatest importance for the labour relations, the Polish legislator specifically regulates the course of the negotiations between the social

[60] See *M. Pliszkiewicz*, Trójstronność w krajach Europy Środkowej i Wschodniej *[Tripartism in the states of Central and Eastern Europe]*, [in:] *Z. Hajn*, *H. Lewandowski* (eds.), Syndykalizm współczesny i jego przyszłość *[Contemporary Syndicalism and Its Future]*, Łódź 1996, pp. 251–256.

[61] See *A. Buchner-Jeziorska*, Rola państwa w stosunkach pracy *[A role of state in the labour relations]*, Pol. Społ. 1997, No. 2, pp. 8–9; *B. Cudowski*, Rola państwa w rozwiązywaniu sporów zbiorowych *[Role of the state in resolution of collective disputes]*, PiP 1994, vol. 10, p. 69 ff.

[62] See *K. Walczak*, [in:] System prawa pracy, t. V… *[System of Labour Law, vol. V…]*, p. 970 ff.

[63] See *S. Borkowska*, Negocjacje zbiorowe *[Collective Negotiations]*, Warsaw 1997, *passim*; *M. Seweryński*, Negocjacje zbiorowe w zarządzaniu przedsiębiorstwem kapitalistycznym *[Collective negotiations in the management of a capitalist enterprise]*, SP-E 1990, vol. XLIV, pp. 72–75; *M. Gładoch*, Dialog społeczny w zbiorowym… *[A social Dialogue in the Collective…]*, p. 163 ff.; *K. Walczak*, [in:] System prawa pracy, t. V… *[System of Labour Law, vol. V…]*, p. 948 ff.

[64] See *W. Sanetra*, Konstytucyjne prawo do rokowań *[A constitutional right to bargain]*, PiZS 1998, No. 12, p. 3 ff.

partners. By this I mean both collective bargaining as well as negotiations conducted in collective disputes, collective redundancies and in the case of transfer of an undertaking. They are either obligatory for both parties, or semi-obligatory only for the employer. In both cases the need for maintenance of the social peace prevails over the idea of voluntary bargaining in the collective labour relations. A central Polish, nationwide forum for the social dialogue is the Council of Social Dialogue *(Rada Dialogu Społecznego)*[65]. It serves to maintain the social peace by conciliation of interests of workers, employers and the common good in compliance with the principle of participation and social solidarity in employment. Its statutory competences include matters of significant social and/or economic importance. This refers in particular to macro-economy and state budget. At the regional level, the forum for the social dialogue is voivodeship councils of social dialogue *(wojewódzkie rady dialogu społecznego)*[66].

4.2.2. Forms of social dialogue

The principle of social dialogue is best reflected in the collective bargaining. Article 59 (2) of the Constitution of the Republic of Poland assigns a special role to the negotiations between the social partners, particularly for the purpose of resolving collective disputes[67], and to conclude collective labour agreements[68]. The former are regulated in detail by the Act on Resolution of Collective Disputes[69]. It provides for two forms: bipartite, called conciliation and tripartite, called mediation. They are both obligatory in such sense that the parties to a collective dispute are obligated by law to start negotiations. In the normative sphere none

[65] See the Act of 24 July 2015 on the Council of Social Dialogue and on Other Social Dialogue Institutions *[ustawa z dnia 24 lipca 2015 o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego]*. See more: *J. Męcina*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A commentary]*, Warsaw 2016, pp. 487 ff.

[66] See article 41–50 of the Act on the Council of Social Dialogue

[67] See *K.W. Baran*, Model polubownego likwidowania zbiorowych sporów pracy w systemie prawa polskiego *[A model of amicable resolution of labour disputes in the Polish legal system]*, PiZS 1992, No. 3, p. 18 ff.; *B. Cudowski*, Model rozwiązywania sporów zbiorowych *[A model of resolution of collective disputes]*, [in:] *G. Goździewicz* (ed.), Zbiorowe prawo pracy w społecznej gospodarce rynkowej, Toruń 2000, p. 245 ff., *B. Wypchło-Grymek*, Prawne uregulowania w przedmiocie sporów zbiorowych a zasada zachowania pokoju społecznego *[Legal regulations on collective disputes and the principle of maintenance of social peace]*, St.Pr.PiPSp. 1996, p. 21 ff.

[68] See *M. Zubik*, Trybunał Konstytucyjny a układy zbiorowe pracy *[The Constitutional Tribunal and collective labour agreements]*, PiZS 2005, No. 3, p. 2 ff.

[69] See *B. Skulimowska*, Tryb i procedury rozwiązywania zatargów zbiorowych w Polsce na tle porównawczym *[Methods and Procedures for Resolution of Collective Disputes in Poland – a Comparative Study]*, Warsaw 1992, *passim*; *K.W. Baran*, Komentarz do ustaw o związkach… *[Commentary on the legal acts on trade unions…]*, p. 223 ff.

of the parties has the possibility to avoid the negotiations. It seems that the only exception is a situation in which demands put forward by an entity representing employees go beyond the subject-matter of the dispute specified by law, therefore it refers to issues which exceed the competences of the employer.

The obligation to start negotiations arises upon declaration of the collective dispute by trade unions. In practice it occurs when an employer does not accept in full the demands of the employees or fails to respond to such demands within three days of the date when the postulates have been put forward. Provisions of the Act on Resolution of Collective Disputes impose on the employer an obligation to immediately start the negotiations with a trade union representation. Each time, they should start as soon as possible in the specific circumstances, without any undue delay. It prevents the escalation of conflict resulting from its extended duration. It is worth noting that the laws do not specify – not even indirectly – the end date of the negotiations. In accordance with the principle of social dialogue they should continue for as long as there is still a chance to reach agreement.

The provisions of the Act on Resolution of Collective Disputes governing the conciliation procedure are very laconic. Unlike in the case of collective bargaining aimed at conclusion of a collective agreement, the parties participating in the negotiations must carry out such negotiations in good faith. They should avoid actions aimed at sabotaging or hampering the negotiations, such as intentional extension of the negotiations, frequent and unreasonable changes of the negotiators, keeping false or incomplete information, not responding to proposals from partners, refusal of any constructive proposals for resolution of a dispute or harassing employees participating in the negotiations. If the negotiations are conducted in the form of conciliation in a broad sense, then the parties other than the parties to a collective dispute may also participate[70]. For example, these may be independent observers or representatives of public authorities. However, under the laws in force, they do not enjoy independence such as, for example, a mediator or a social arbitration panel in the next stages of resolution of a collective dispute.

In the case of negative finalisation of the negotiations, a refusal to draw up the discrepancy report does not preclude continuance of the dispute at the stage of mediation procedure. If a party who initiated the dispute sustains its demands, such party is entitled to file an application for appointment of a mediator. Mediation consists in negotiations between the parties which however are carried out

[70] See *W. Masewicz*, Rokowania oraz spory zbiorowe pracy *[Collective Bargaining and Collective Labour Disputes]*, Warsaw 1993, p. 38. See also *A. Tomanek*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A Commentary]*, Warsaw 2016, pp. 388 ff.

with the participation or through an independent third party called a mediator[71]. The task of the mediator is to develop a compromise to end the dispute. According to article 10 of the Act on Resolution of Collective Disputes, there is no doubt that the mediation procedure is obligatory[72].

The principle of social dialogue in the labour relations is implemented also by collective bargaining[73]. The collective bargaining is triggered by proposing[74] an initiative to conclude a collective agreement[75]. The freedom of collective bargaining means that each of the parties may propose such initiative. Depending on whether a company or supra-company agreement is at issue, the right to propose the initiative can be exercised by different parties. In the case of a supra-company collective agreement, under article 241^{15} of the Labour Code the initiative to conclude a collective agreement may be proposed by employers' organisation or other authorized entity on the employers' part as well as each supra-company trade union organisation representing the employees for whom the agreement is planned. On the other hand, in the case of a company-level agreement this right is granted to an employer and each company trade union organisation (article 241^{24} of the Labour Code). By article 241^{30} of the Labour Code, the above directive applies also to an intercompany trade union organisation operating at the employer's. According to a literal interpretation of the latter provision, it is not

[71] The models of mediation bodies are presented in more detail by: *W. Masewicz*, Prawna regulacja sposobów rozwiązywania sporów zbiorowych pracy w świetle praktyk *[A legal regulation of methods of resolution of collective labour disputes – practical aspects]*, PiZS 1994, No. 2, p. 12.

[72] The Social Arbitration Panel at the Supreme Court, in its decision of 28 January 1997, KAS 3/96 (OSNAPiUS 1997, No. 7–8, pp. 146–147) rightly held that the proceedings before the social arbitration panel must be preceded not only by negotiations but also by mediation.

[73] The differences between collective bargaining and workers' participation are described in detail by: *J. Wratny*, Problemy partycypacji przedstawicielskiej *[Problems of representative participation]*, [in:] *M. Matey-Tyrowicz*, *T. Zieliński* (eds.), Prawo pracy RP w obliczu przemian,, Warsaw 2006, pp. 511–512.

[74] See *K. Rączka*, Rokowania układowe *[Collective bargaining]*, PiZS 1995, No. 45, p. 40; *I. Sierocki*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz, Warsaw 2016, pp. 614 ff.

[75] For general remarks on collective agreements, see in particular: *J. Raczyński*, Układy zbiorowe pracy *[Collective Agreements]*, Kraków 1937, *passim*; *S. Grzybowski*, Wstęp do nauki prawa pracy *[Introduction to the Labour Law Studies]*, Kraków 1947, pp. 65–75; *W. Szubert*, Układy zbiorowe pracy *[Collective Agreements]*, Warsaw 1960; *L. Kaczyński*, Charakter prawny układów zbiorowych pracy *[A Legal Nature of Collective Agreements]*, PiP 1996, vol. 7, p. 30 ff.; *M. Seweryński*, Układ zbiorowy pracy w okresie demokratycznej przebudowy państwa i gospodarki *[A collective agreement in the era of democratic reconstruction of state and economy]*, PiP 1992, vol. 12. Problemy funkcji promocyjnej układów zbiorowych w świetle zmian prawa pracy *[A promotional function of collective agreements in the light of amendments to labour law]*, PiZS 1998, No. 2, p. 25 ff.; *L. Florek*, Ustawa i umowa w prawie pracy *[Law and Contract in the Labour Law]*, Warsaw 2010, p. 282 ff.; *Z. Hajn*, Zbiorowe prawo pracy. Zarys… *[Collective Labour Law. An Outline…]*, p. 136 ff.

sufficient that an inter-company organisation covers the activity of an employing establishment. It must also operate in such establishment.

It should be emphasised that the parties entitled to propose the initiative to conclude a collective agreement are not always identical with the parties entitled to bargain collectively. In practice, this may occur in a situation where the initiative to conclude a collective agreement is proposed by a trade union which is not representative[76]. Proposing an initiative to conclude a collective agreement is required not only in the case of negotiations on a new collective agreement, but also to change the currently applicable collective agreement.

Under the Polish legislative system, collective bargaining is relatively mandatory and this does not correlate with the principle established in the international legislation. In the situations mentioned in article 241^2 § 3 of the Labour Code, a party who has a capacity to be a party to a collective agreement may not refuse the other party's demand to start the negotiations[77]. However, because of the fact that the second of the statutory conditions, which obligates to undertake negotiations, is very general and makes a reference to the economic and financial status of employers or the material and social level of employees, it seems that the party who has a capacity to be a party to a collective agreement has a little room for manoeuvre. In practice, the union party will easily find arguments to support the "worsening of the financial situation of employees". For example, it may involve inflation processes, loss of purchasing power of wages, reduction of the amounts of remuneration in relation to the minimum or average national wage or real wage decrease, calculated in relation to leading industry sectors. In this context it seems justified to argue that a party entitled to conclude a collective agreement only in exceptional circumstances could reasonably refuse to take up the negotiations, what raises serious doubts in the light of the international standard of voluntary nature of collective bargaining[78].

The idea of social dialogue covers also negotiations carried out by trade unions and an employer, regarding the planned collective redundancies[79] and

[76] See *G. Goździewicz*, Układy zbiorowe pracy. Regulamin wynagradzania. Regulamin pracy. Po nowelizacji kodeksu pracy. Komentarze *[Collective Agreements. Wage Rules. Work Rules. Following the Amendment of the Labour Code. Commentaries]*, Bydgoszcz 1996, p. 184.

[77] See more in *K. Rączka*, Rokowania… *[Collective bargaining…]*, pp. 40–41; *W. Sanetra*, O zdolności układowej *[Capacity to be a party to a collective agreement]*, PiZS 1995, No. 4, p. 11; *K. Rączka*, Uczestnicy układu zbiorowego pracy *[Parties to a collective agreement]*, Prz. Sąd. 1995, No. 4, p. 54 ff.

[78] *M. Gładoch*, Dialog społeczny w zbiorowym prawie pracy *[A Social Dialogue in the Collective Labour Law]*, Toruń 2014, p. 186 ff.; and the literature referenced there.

[79] *K.W. Baran*, Procedura zwolnień grupowych *[Collective redundancies procedure]*, St.Pr.PiPSp. 2003–2004, p. 93 ff.; *A. Sobczyk*, Uwagi do ustawy o zwolnieniach grupowych *[Comments on the Act*

a transfer of an undertaking[80]. They are semi-obligatory because the trade union organisations are not obligated by law to participate. It should be emphasized that apart from the negotiations carried out by social partners within the statutory framework, any negotiations between the social partners concerning all important labour relations issues are acceptable. This applies in particular to company-level bargaining (for example concerning crisis agreements). At this level the dialogue may be conducted also with a non-union representation of workers. Participation bodies play a significant role in this area.

The social dialogue in the labour relations is finalized by collective agreements concluded by the social partners[81]. In normative terms, in the light of article 9 § 1 of the Labour Code, the main criterion for differentiation is the basis for their conclusion. Under the mentioned provision it is of utmost importance to differentiate between agreements concluded under law and those without statutory authorization. It directly affects their legal nature. The first of the mentioned categories is normative in such sense that it includes regulations which relate to rights and obligations of the parties to an employment relationship. On the other hand, collective agreements concluded without a statutory basis usually lay down the mutual obligations of the parties to such agreements. Consequently, the normative agreements usually involve claims, since their provisions can be effectively pursued in court. The negotiation-based model of regulation of employment relations is a foundation of the social peace in the free market economy. A multidimensional dialogue between the social partners is an inherent characteristic of the labour system in industrial civilization.

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on Collective Redundancies], PiZS 2005, No. 10, p. 31 ff.; *A. Wypych-Żywicka*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz, Warsaw 2016, pp. 983 ff.

[80] *G. Goździewicz*, Uprawnienia przedstawicielstwa pracowniczego w razie przejścia zakładu pracy na innego pracodawcę *[Rights of workers' representation in the case of transfer of an undertaking to another employer]*, PiZS 2002, No. 10, p. 19 ff.; *D. Książek*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz… *[Collective Labour Law. A Commentary…]*, pp. 140 ff.

[81] See *B. Cudowski*, Charakter prawny porozumień zbiorowych *[A legal nature of collective agreements]*, PiP 1998, vol. 8, p. 59 ff.; *K. Rączka*, Porozumienia zawieszające przepisy prawa pracy *[Agreements suspending the provisions of labour law]*, PiZS 2002, No. 11, p. 26 ff.; *J. Stelina*, Charakter prawny porozumienia o stosowaniu mniej korzystnych warunków zatrudnienia *[A legal nature of an agreement on application of less favourable terms and conditions of employment]*, PiZS 2002, No. 1, p. 19 ff.; *M. Seweryński*, Porozumienie generalne *[General agreement]*, [in:] *Z. Góral* (ed.), Z zagadnień współczesnego prawa pracy *[The Problems of Contemporary Labour Law]*, Księga jubileuszowa Profesora Henryka Lewandowskiego *[A Jubilee Book of Prof. Henryk Lewandowski]*, Warsaw 2009, p. 79 ff.; *M. Włodarczyk*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V. Zbiorowe prawo pracy [System of Labour Law, vol. V. Collective Labour Law], Warsaw 2014, p. 424 ff.; *K.W. Baran*, Z problematyki innych porozumień zbiorowych *[Other collective agreements]*, [in:] *Z. Hajn*, *D. Skupień* (eds.), Przyszłość prawa pracy *[The Future of Labour Law]*, Liber Amicorum. W pięćdziesięciolecie pracy naukowej Profesora Michała Seweryńskiego, Łódź 2015, p. 519 ff.

4.3. The principle of participation of employees in the management of an establishment

4.3.1. Introduction

The essence of the principle of participation[82] of employees in the management of an establishment is their participation in the decision-making processes concerning the functioning of such establishment. At the axiological level, it is a manifestation of empowerment[83] of employees in the labour relations through their active or passive participation in the management of the employing entity. It is worth noting that participation does not mean an ordinary representation of rights and obligations of workers. It is characterised by a restriction of the freedom of an employer to manage the employees and material resources. As regards the material scope[84], the participation refers to business and economic level, legal and organisational level and employment and social level.

In the labour relations of the states of industrial civilization, the forms of influence on the decisions taken by employers are highly varied[85]. Essentially, they are either informative/consultative or control/decisive. As regards the former category, I include in it the rights to information, to consultancy, to submit pos-

[82] As for terminology, see *T. Mendel*, Argumenty za partycypacją pracowniczą *[Arguments for employee participation]*, [in:] *S. Rudolf* (ed.), Partycypacja pracownicza. Echa przeszłości czy perspektywy *[Employee Participation. Echoes of the Past or Perspectives]*, Łódź 2001, p. 44 ff.; *M. Seweryński*, Udział pracowników w organach przedsiębiorstwa kapitalistycznego *[Participation of employees in the governing bodies of a capitalist enterprise],* AUL. Folia Iuridica 1993, No. 58, p. 163; *W. Sanetra*, W sprawie pojęcia i koncepcji współzarządzania pracowniczego *[The concept of employee co-management]*, [in:] Pracownicze współzarządzanie. Materiały VII Zimowej Szkoły Prawa Pracy, Wrocław 1980, p. 26 ff.; *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu (problemy terminologiczne) *[Participation of employees in management (terminology problems)]*, PPH 2001, No. 5, p. 30 ff.; Uczestnictwo pracowników w zarządzaniu spółkami kapitałowymi *[Participation of employees in the management of companies]*, PiP 1989, vol. 4, p. 35 ff., *J. Wratny*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V. Zbiorowe prawo pracy, t. 5 *[System of Labour Law. Vol. 5]*, Warsaw 2011, pp. 849–850 and the literature referenced there.

[83] See *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu przedstawicielstwem w Polsce. Problemy teorii i praktyki na tle prawa wspólnotowego *[Participation of Employees in the Management of a Representative Office in Poland. Theory and Practice in the Context of Community Law]*, Toruń 2005, pp. 31–38.

[84] See *J. Wratny*, Problemy partycypacji… *[Problems of representative…]*, pp. 515–520.

[85] See *M. Seweryński*, Pojęcie i ideologia partycypacji pracowników w zarządzaniu przedsiębiorstwem kapitalistycznym. Zarys problematyki *[The concept and ideology of participation of employees in the management of a capitalist enterprise. An overview]*, SP-E 1989, vol. XLII, p. 40; *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu (problemy terminologiczne), p. 48 and the literature referenced there. *J. Wratny*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V… *[System of Labour Law. Vol. 5…]*, p. 850 ff.

tulates and complaints. The latter category includes executive and co-executive powers as well as control and supervisory powers. Following the criterion of the level of impact of employees' representation on the employer's situation, it is possible to differentiate between "soft" (non-executive) participation and "hard" (co-executive) participation[86]. The former is characterized by a low level of interference in employer's decisions, whilethe latter by a significant interference, which seriously affects the functioning of the entire establishment. The above division is universal in such sense that it can be applied to the entire scope of participatory competences or to a specific entitlement.

The principle of participation of employees in the management of an undertaking is characteristic primarily of the European law. However, it refers in particular to the laws applicable in the European Union. It is one of the pillars of the European Union social model[87].

The participation mechanisms are set out in article 21 of the European Social Charter (Revised), which obligates the Parties to adopt or encourage measures enabling workers or their representatives to be informed about the economic and financial situation of the undertaking employing them and to be consulted in good time on proposed decisions which could substantially affect their interests[88]. The methods of provision of information and of consultation by the em-

[86] See *A.M. Świątkowski*, *M. Wujczyk*, „Miękkie" (soft) standardy międzynarodowe i „twarde" (hard) prawo krajowe o informacji i konsultacji pracowników *[Soft international standards and hard domestic laws on information and consultation of employees]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consultation of Employees in the Polish Labour Law]*, Kraków 2008, p. 23 ff.

[87] See:. *Klich*, Idea partycypacji pracowniczej w zarządzaniu korporacjami przemysłowymi w EWG *[The idea of employee participation in the management of industrial corporations in the EEC]*, Problemy Ekonomiczne 1987, No. 2, p. 77 ff.; *D. Stateczny*, Prawo pracowników do informacji i konsultacji w Unii Europejskiej *[Workers' right to information and consultation in the European Union]*, SP-E 2002, vol. 6, p. 214 ff.; *R. Blanpain*, *P. Windy*, European Works Council. Information and Consultation of Employess in Multinational Enterprises in Europe, Leuren 1994, *passim*; *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu z perspektywy prawa wspólnotowego *[Employee participation in management in the context of the Community law]*, [in:] *W. Sanetra* (ed.), Europeizacja polskiego prawa pracy *[Europeanisation of the Polish labour law]*, Warsaw 2004, p. 155 ff.; *J. Wratny*, Zasada informacji i konsultacji pracowniczej w prawie europejskim. Uwagi dotyczące implementacji prawa europejskiego do prawa polskiego *[The principle of information and consultation of employees in the European law. Remarks on the implementation of the European law to the Polish law]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consultation of Employees in the Polish Labour Law]*, Kraków 2008, p. 9 ff.

[88] See *R. Blanpain*, *P. Windy*, European Works Council…, pp. 93–101; *R. Birk*, Prawo pracowników do informacji, konsultacji i współudziału w podejmowaniu decyzji w Poprawionej Karcie Społecznej *[Workers' right to information, consultation and participation in the decision-making process under the Revised European Social Charter]*, [in:] *A.M. Świątkowski* (ed.), Dorobek Rady Europy w zakresie kształtowania i ochrony praw społecznych. W kierunku powszechnej ratyfikacji Zrewidowanej Europejskiej Karty Społecznej *[Acquis of the Council of Europe Concerning the Formation and Protection*

ployers should be efficient and appropriate. This means a necessity of periodic information and consultation. It can be either individual or collective. The entities representing employees are bodies considered representative bodies under national laws. These can be trade unions and non-union bodies (such as works councils, workers' councils, personnel). If an employer violates the right to information or consultation, the national legislation should guarantee the possibility to file a claim or complaint with an independent body[89].

Under the Polish legislative system, participation of employees in the management of an establishment is considered a generally applicable fundamental principle. *De lege lata,* such participation is pluralistic. It is highly differentiated both at the personal and functional level. By this I mean in particular the differentiation of entities exercising their participation rights and a variety of forms of participation of employees in the management[90]. The qualitative pluralism is supported by a formula laid down in article 18^2 of the Labour Code. This provision does not specify any separate statutory regulations. This approach has one important advantage, namely it allows one to adjust the normative instruments to the specifics of the organisational and ownership relations in the labour relations. However, it results in differentiation of participation rights among employees.

According to the provisions of article 18^2 of the Labour Code, a party entitled to participate in the management of an employing establishment is the employees. However, the Labour Code does not specify the nature of such participation. On the basis of *lege non distinguente* argumentation, it seems reasonable to argue that the participation may be either individual or collective. Therefore, the Polish legislation provides for a number of participation instruments. In material terms, personnel of the establishment or its representative bodies and trade unions play a central role[91]. Therefore, there is a specific dualism[92] in the labour relations which sometimes results in interference of the participatory powers (for example appointment of workers councils at the employers' who already have trade unions).

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of Social Rights. Towards a Universal Ratification of the Revised European Social Charter], Warsaw 2005, p. 92 ff.

[89] See *A.M. Świątkowski*, Karta Praw Społecznych… *[Charter of Social Rights…]*, p. 347 ff.

[90] See *K.W. Baran*, [in:] *B. Wagner* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Gdańsk 2011, p. 95 ff. and *W. Perdeus*, [in:] *K.W. Baran* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2012, pp. 130.

[91] See *L. Florek*, Demokratyczne (zbiorowe) stosunki pracy *[Democratic (collective) labour relations]*, SI 1992, vol. 23, p. 21.

[92] See *G. Goździewicz*, Pozycja rady pracowników w stosunku do związków zawodowych *[A status of workers' council in relation to trade unions]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consulting Employees under Polish Labour Law]*, Kraków 2008, p. 94 ff.

The term "personnel" means employees of the establishment concerned[93]. In the market economy with strongly pluralized bases of employment, what requires consideration is the idea of extension of participation mechanisms to include other categories of persons working for employers. By this I mean in particular persons employed under civil-law contracts or self-employed.

In normative terms, according to the provisions of the Act of 25 September 1981 of Employees' Self-governing Representative Body in an Undertaking *(ustawa o samorządzie załogi przedsiębiorstwa państwowego)*[94], a general assembly of workers has important participatory powers[95]. Apart from the assembly, employees are represented also by workers' councils[96], democratically elected and accountable to the former. However, they are not an executive body of the workers' assembly. In my opinion, the workers' councils cannot be considered subordinated to the assembly.

The self-governing representative bodies as a mechanism of participation in the industrial relations have been marginalised as a result of progressive privatisation and commercialisation of state-owned enterprises. A role of the flagship representative body was taken up by workers' councils[97]. Even if they do not enjoy the universal status in the Polish labour relations, since they are appointed only at medium and large employers'[98], still they cover a significant number of persons who perform subordinated work in the industry and services sector. According to the provisions of article 1 (2) of the Act on Information and Consulta-

[93] See different opinions presented by the labour law literature. See in particular: *M. Seweryński*, Załoga zakładu pracy-uwagi de lege ferenda *[Personnel in an establishment – de lege ferenda deliberations]*, [in:] *G. Goździewicz* (ed.), Reprezentacja praw i interesów pracowniczych *[Representation of Workers' Rights and Interests]*, Toruń 2001, p. 47 ff; *J. Jończyk*, Zbiorowe prawo pracy *[Collective Labour Law]*, Wrocław 1983, p. 50; *K. Walczak*, *G. Orłowski*, Załoga a rada pracowników *[Personnel and workers council]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consulting Employees under Polish Labour Law]*, Kraków 2008, p. 103 ff.

[94] Consolidated text, Journal of Laws *[Dz.U.]* of 2015, item 1543.

[95] See *K. Rączka*, Uczestnictwo pracowników w zarządzaniu przedsiębiorstwami państwowymi w Polsce. Problematyka prawna *[Participation of Employees in the Management of State-owned Enterprises in Poland. Legal Problems]* Warsaw 1994, p. 118 ff.; *M. Błażejczak*, Samorząd załogi przedsiębiorstwa *[Employees' Self-governing Representative Body in an Undertaking],* Warsaw 1985, p. 120 ff.

[96] See *L. Bar*, Sytuacja prawna rady pracowniczej *[Legal status of workers council]*, PiP 1986, vol. 10, *passim*.

[97] See *J. Stelina*, *M. Zieleniecki*, Ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji z komentarzem *[The Act on Information and Consultation of Employees with a Commentary]*, Gdynia 2006, *passim*; *M. Wujczyk*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A Commentary]*, Warsaw 2016, pp. 705 ff.

[98] See *K W. Baran*, Powołanie rady pracowników *[Appointment of workers council]*, MPP 2006, No. 6, pp. 292–293; *M. Wujczyk* (ed.), [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy… *[Collective Labour Law…],* p. 707 ff. and the literature referenced there.

tion of Employees, establishment of the workers' council is allowed at the employers'[99] who conduct business activity[100]. In this normative context, it can be argued *a contrario* that provisions of the Act do not apply to the employers who do not conduct such activity. This applies in particular to any public offices or public administration, justice system as well as non-profit foundations and associations.

Other representative bodies are European Works Councils. They can be established in Community-scale undertakings or groups of undertakings[101]. The central headquarters of such body concludes with a special negotiation team an agreement on establishment of a European Works Council. Because of the supra-institutional dimension of the participation, the councils do not have the universal status in the Polish labour relations. Essentially similar are the participation mechanisms established for the European companies and cooperatives established in Poland[102].

The Polish model of participation in the labour relations at the employers' who do not have trade unions is complemented by *ad hoc* workers representatives appointed by the personnel. Such type of representation is governed by the provisions on crisis agreements[103], collective redundancies, company social ben-

[99] See *Z. Hajn*, Pojęcie pracodawcy w ustawie z 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji *[The concept of employer in the Act of 7 April 2006 on Information and Consultation of Employees]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consulting Employees under Polish Labour Law]*, Kraków 2008, p. 39 ff.

[100] See *M. Smusz-Kulesza*, Pojęcie działalności gospodarczej w określeniu pracodawcy w ustawie o informowaniu pracowników i przeprowadzaniu z nimi konsultacji *[The concept of business activity in defining an employer in the Act on Information and Consultation of Employees]*, [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consulting Employees under Polish Labour Law]*, Kraków 2008, p. 46 ff.

[101] See *S. Pawłowski*, *J. Stelina*, *M. Zieleniecki*, Ustawa o europejskich radach zakładowych z komentarzem *[The Act on the European Works Councils with a Commentary]*, Gdańsk 2006, p. 33 ff.; *M. Zieleniecki*, Rady pracowników a europejskie rady zakładowe *[Workers Councils and European Works Councils]* [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consulting Employees under Polish Labour Law]*, Kraków 2008, p. 222 ff. *Ł. Pisarczyk*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A Commentary]*, Warsaw 2016, pp. 823 ff.

[102] See *R. Markowska-Wolert*, Zaangażowanie pracowników w spółce… *[Involvement of employees…]*, pp. 157–160.

[103] See *K.W. Baran*, Z praktyki „innych porozumień" w zbiorowym prawie pracy *[The practice of "other agreements" in the collective labour law]*, R.Pr. 2006, No. 1, pp. 71–73; *J. Stelina*, Charakter prawny porozumienia o stosowaniu mniej korzystnych warunków zatrudnienia *[The legal nature of an agreement on application of less favourable terms and conditions of employment]*, PiZS 2003, No. 9, p. 76 ff.; *M. Gersdorf*, Próba umiejscowienia nowych porozumień o zawieszania postanowień umów o pracę w polskim porządku prawnym *[A place of the new agreements on suspension of provisions of contracts of employment in the Polish legal system]*, PiZS 2003, No. 1, p. 11 ff.

efits fund[104] and employee pension schemes[105]. A shortcoming of this regulation is the procedure of selection of such representatives, because it is specified unilaterally by an employer[106]. In practice it may lead to various dangers and correlated pathologies resulting from application of the mechanism of designation. For that reason, there should always apply democratic selection criteria, based on equal, secret and general voting.

Some elements of participation in the Polish legislative system can also be found in the laws governing professional associations. For example this will apply to the powers of medical doctors' association or association of nurses and midwives. The statutory objective of such organisations is to represent the professional, social and economic interests of these professions in the negotiations on wage and working conditions.

4.3.2. Types of Employee Participation

Essentially, the employee participation is based on cooperation of actors in the labour relations. As regards the material scope, the participation refers to three basic levels: business and economic level, legal and organisational level and employment and social level. In practice, they are very closely linked because it is not possible to separate the consequences and results of the participation activities. An employing establishment is usually a complex structure where particular elements interact in a specific closed system. Obviously, the economic and business situation of an employer always affects the status of employees and the technical and organisational level, and *vice versa*. In this context, it is worth noting that the scope *ratione materiae* of the participation is limited by its purposes in the social market economy, and at the functional level – by the right of ownership[107].

The participatory activities regarding the company as a whole and its financial status are of economic nature. In the Polish legislative system, the most extensive competences in this regard are held, *de lege lata,* by the self-government

[104] See *J. Suzdorf*, Pozazwiązkowe reprezentacje pracowników *[Non-union representation of employees]*, Pr. Pracy 2000, No. 3, p. 2 ff.

[105] See *I. Sierocka*, Strony zakładowej umowy emerytalnej *[Parties to a company pension agreement]*, PiP 2005, vol. 8, p. 70 ff.; *J. Skoczyński*, Nowa regulacja pracowniczych programów emerytalnych *[A new regulation on employee pension schemes]*, PiZS 2004, No. 9, p. 21 ff.

[106] See *B. Cudowski*, Zbiorowe zawieszenie treści umownych stosunków pracy *[Collective suspension of terms and conditions of contractual employment relationships]*, [in:] *L. Florek* (ed.), Prawo pracy a bezrobocie *[Labour Law and Unemployment]*, Warsaw 2003, p. 118 ff.; *K. Walczak*, Zasady zwolnień grupowych pracowników w 2003 i 2004 roku – podobieństwa i różnice *[Collective redundancies of employees in 2003 and 2004 – differences and similarities]*, MPP 2004, No. 1, p. 13.

[107] See *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu przedstawicielstwem *[Participation of employees in the management of a representative office]*, p. 86.

bodies of a state-owned enterprise. For example, a general meeting of employees is entitled to adopt multiannual plans of the company and to distribute profits[108].

On the other hand, workers' council adopts annual and investment plans and controls the overall activity of the enterprise, with particular emphasis on caring for the rational management of its property[109]. However, a significantly narrower scope of competence in business and economic matters is granted to workers councils. However, they are entitled to obtain information on the employer's financial balance sheet, including accounting method, principles of valuation of assets and liabilities[110]. Upon a written request of the council, the employer should provide data concerning profit, revenues and expenses.

Business and economic matters fall within the scope of responsibility of employee representative bodies at the supranational level. Employers are obliged to inform them about the economic and financial situation and the directions of the expected development of their business activity[111]. In this regard, the participation mechanisms provide employees with the opportunity to participate in the management bodies of companies which are subject to the Act on Commercialization and Privatization[112]. Participation of employees in the general meeting of shareholders is, in the economic sphere, the highest degree of participation in the management of an enterprise. They can influence strategic decisions regarding the company development.

Business and economic matters also fall within the scope of union participation rights. The first to mention are information competences concerning the economic and financial consequences of a transfer of business, collective redundancies, crisis agreements and social packages. Another important instrument are the rights laid down in article 28 of the Trade Unions Act [113]. It seems that,

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[108] See *K. Rączka*, Uczestnictwo pracowników w zarządzaniu… *[Participation of employees in the management…]*, pp. 118–120.

[109] See *L. Bar*, Sytuacja prawna rady… *[Legal status of workers…]*, p. 18.

[110] See *K.W. Baran*, [in:] *B. Wagner* (ed.), Kodeks pracy. Komentarz, Gdańsk 2007, p. 71; *A. Sobczyk*, Przedmiot i procedura informowania rady pracowników *[The subject-matter and the procedure for informing employees]* [in:] *A. Sobczyk* (ed.), Informowanie i konsultacja pracowników w polskim prawie pracy *[Information and Consultation Employees under Polish Labour Law]*, Kraków 2008, p. 145 ff. *M. Smusz-Kulesza*, Zbiorowe prawo pracowników do informacji *[Employees' Collective Right to Information]*, Warsaw 2012, p. 194 ff.

[111] See *S. Pawłowski*, *S. Stelina*, *M. Zieleniecki*, Ustawa o europejskich radach… *[The Act on the European Works Councils…]*, p. 133 ff.; *M. Smusz-Kulesza*, Zbiorowe prawo pracowników do informacji *[Collective Right to Information of Employees]*, p. 203 ff. *Ł. Pisarczyk*, [in:] Zbiorowe prawo pracy… *[Collective Employment Law…]*, p. 868 ff.

[112] Act of 30 August 1996 on Commercialization and Privatization *[ustawa z dnia 30 sierpnia 1996 o komercjalizacji i prywatyzacji]*, consolidated text, Journal of Laws *[Dz.U.]* of 2016, item 981, as amended.

[113] See *L. Florek*, Prawo związku zawodowego do informacji *[The right of a trade union to information]*, PiZS 2010, No. 5, p. 2 ff.; *M. Gersdorf*, Kilka uwag praktycznych o ochronie danych osobowych

within the meaning of this provision, the economic data[114] which affect the employer's financial condition are also considered necessary.

The legal and organizational matters are also matters concerning the employer as a subject in the legal transactions (juridical acts) and mechanisms of its internal functioning. Particularly noteworthy are the competences of the general meeting of employees in a state-owned enterprise, which is entitled to pass the company's statute. Much broader competences, in the discussed category of matters, are granted to workers' council, which adopts resolutions regarding merger, division of the company or change of direction of its business activity. The council may also suspend a director or, in some cases, dismiss such director.

Significantly narrower competences in legal and organizational matters are granted to other non-union employee representative bodies operating in industrial relations. They have information and consultative competences in matters relating to organizational changes in the workplace introduced by the employer. This applies, in particular, to new working methods as well as production and technological processes. Also, a change in the location of economic activity and other structural transformations (e.g. mergers, divisions) belong in the discussed category of matters.

Essentially similar participatory competences are granted to trade unions. Especially in the case of a transfer of business[115], crisis agreements [116] and collective redundancies, trade unions can express to the employer their opinion regarding the legal and organizational consequences of such activities. At this point, it is worth emphasizing that the above-mentioned rights are only indicative.

Employee matters, being the subject of participatory rights, have both an individual[117] and a collective dimension. The range of matters falling into this category is very broad. They include strictly personal matters, regarding the hiring

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pracowników *[Practical remarks on the protection of personal data of employees]*, PiZS 2005, No. 5, p. 19; *M. Wujczyk*, Prawo pracownika do ochrony prywatności *[Employee's Right to Protection of Privacy]*, Warsaw 2012, *passim*.

[114] See *K.W. Baran*, Komentarz do ustaw o związkach… *[Commentary on the legal acts on trade unions…]*, p. 113 ff.

[115] See *G. Goździewicz*, Uprawnienia przedstawicielstwa pracowniczego w razie przejścia zakładu pracy na innego pracodawcę *[Rights of workers' representation in the case of transfer of an undertaking to another employer]*, PiZS 2002, No. 10, p. 11 ff.

[116] See *K. Rączka*, Porozumienia zawieszające przepisy… *[Agreements on Suspension of Provisions…]*, p. 26 ff.

[117] See *J. Skoczyński*, Kompetencje zakładowej organizacji związkowej w zakresie stosowania prawa pracy w indywidualnych stosunkach pracy *[Competences of a company trade union organisation regarding application of labour law in individual employment relations]*, PiZS 1993, No. 2, p. 50 ff.; *A. Sobczyk*, Współdziałanie pracodawcy ze związkami zawodowymi w indywidualnych sprawach ze stosunku pracy *[Cooperation of an employer with trade unions in individual labour law matters]*, Prz. Sąd. 1998, No. 9, p. 17 ff.; *J. Stelina*, Związkowa ochrona indywidualnych praw pracowników

mechanism, through working conditions, in particular health and safety at work, ending with layoffs. In particular, the various dimensions of the company's employment policy are the subject-matter of participatory activities. Representatives of employees also participate in meeting the social and living needs[118]. First of all it refers to the issue of managing the social benefits fund, employee self-help organization, health care, leisure, culture and company construction. All these categories of cases go beyond the scope of the content of individual labour relations, because they relate to the staff as a collective. Under the Polish labour legislation system, in the discussed category of matters a dominant position is held by trade unions which have the majority of participatory competences. Non-union employee representative bodies play only a subsidiary role in this respect.

The form of participation is the method of influencing employer's decisions by employee representation. Depending on the level of intervention and the level of decision-making, in the Polish legislative system one can distinguish between cooperation and co-decision. In the former case, employees or their representatives influence the decisions of the employer indirectly through their information and consultation powers and entitlement to file applications. In the latter case, the employees' representative bodies participate in the decision-making process directly and with a decisive voice. The classification presented above is purely a model based on the idealistic scientific theory. *De lege lata* there are many different forms of participation adapted to the specific organizational, ownership and social conditions in which the employer runs its business. Hence the participation scales defined by the labour law scholars[119] are of limited use because of their subjective character.

In the industrial relations, the right to information about the condition of an undertaking appears to be the most common form of employee participation. In its essence, it is ancillary to all other forms of participation. In practice, it is not possible to ensure effective and rational consultation or co-decision by representative bodies without the knowledge of the employer's situation[120]. On the one hand, I share the often expressed view that the right to information is the weakest

niezrzeszonych w związkach zawodowych *[Trade union protection of individual rights of non-union employees]*, PiZS 1994, No. 6, p. 59 ff.

[118] See *K. Rączka*, Zakładowa działalność socjalna – nowa regulacja prawna *[Social activity of an undertaking – new regulations]*, PiZS 1994, No. 8, p. 33 ff.; *W. Sanetra*, Zakładowy fundusz świadczeń socjalnych po nowemu *[New regulations on the Company Social Benefits Fund]*, PiZS 1997, No. 2, p. 13 ff.

[119] See *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu przedstawicielstwem, p. 40 and the literature referenced there.

[120] *T. Mendel*, Zarządzanie partycypacyjne w teorii i praktyce *[Participatory Management in Theory and Practice]*, Poznań 1987, p. 28.

form[121] of participation, but on the other hand it is worth emphasizing that it is a pillar on which all other competences relating to employee participation in the company management are supported.

In the Polish employment relations, the right to information is universal. Competences in this area are granted to union and non-union representative bodies. Moreover, in many cases these powers duplicate. As regards the non-union representative bodies, the information rights of the workers' councils are of key importance. However, article 13 of the Act on Information and Consultation of Employees does not specify the level of their detail[122]. *Ratio legis* speaks for the adoption of the principle of appropriateness, which means that the information should be appropriately insightful. Similar mechanisms apply to the European works councils[123] as well as European companies and cooperatives. Also trade unions have the right to obtain information necessary to carry out the trade union activity, in particular the information regarding the working conditions and remuneration[124]. Under article 28 of the Trade Unions Act, it is a trade union organization that defines the data necessary in a particular situational context. Any information provided by the employer to any entities representing employees should be true and accurate and have a supra-individual character. However, this information cannot contain data on the status of a particular employee.

The right to information is a functional basis for all other forms of participation. Without information about the employing establishment it is difficult for employees to participate in managing it in a responsible and competent manner. This applies also to consultations, which in the system of Polish labour legislation do not have a uniform character. The Polish literature[125] distinguishes between two types of consultation: consultation in a large sense, which includes solely powers to give opinions and submit postulates and consultation in a strict sense consisting in obligatory negotiations of the employer with the entity representing the employees whose purpose is to arrive at common standpoints.

[121] See *J. Wratny*, Problemy partycypacji… *[Problems of representative…]*, pp. 515–520; *M. Smusz-Kulesza*, Zbiorowe prawo pracowników do informacji *[Employees' collective right to information]*, p. 67 ff.

[122] See *J. Stelina*, *M. Zieleniecki*, Ustawa o informowaniu pracowników… *[The Act on Information…]*, 71 ff.; *M. Wujczyk*, [in:] Zbiorowe prawo pracy… *[Collective Labour Law…]*, p. 777 ff.

[123] See *S. Pawłowski*, *S. Stelina*, *M. Zieleniecki*, Ustawa o europejskich radach… *[The Act on the European…]*, p. 133 ff.;

[124] See *M. Wujczyk*, Prawo związków zawodowych do informowania o sytuacji zakładu pracy i możliwość jego dochodzenia na drodze sądowej *[Right of trade unions to information on the situation of an establishment and to pursuance of such right before court]*, St.Pr.PiPSp. 2007, p. 133 ff.; *D. Książek*, [in:] *K.W. Baran* (ed.), Zbiorowe prawo pracy. Komentarz *[Collective Labour Law. A Commentary]*, Warsaw 2016, pp. 146–147.

[125] See *M. Gładoch*, Uczestnictwo pracowników w zarządzaniu z perspektywy… *[Employee participation in management…]*, pp. 157–158.

The first of the mentioned categories of consultation has a broad personal scope as it concerns both union and non-union representative bodies. An example of this type of competence is provided by article 4 of the Act on Commercialization and Privatization, under which the workers' council and a director are entitled to file an application for commercialization of a state-owned enterprise. The consultative powers in a broader or narrower material scope are granted, *de lege lata*, to all representative bodies. A reference can be made to article 13 (4) of the Act on Information and Consultation of Employees, which authorizes the workers' councils to present the employer the opinions[126] on all matters important to the staff. Similar mechanisms were also introduced in the European works councils and *societas europaea*. Consultations should include situations in which an employer, when issuing an internal act, is obliged to take into account a standpoint expressed by representatives of employees, normally trade unions. This is usually the case when a collective agreement has not been concluded due to the divergence of positions of parties representing the employees[127].

In the Polish legislative system there are also authoritative forms of participation, if the employees' representation has competence to co-decide with the employer about the establishment. In this category of powers, a division[128] can be made into positive powers involving participation in the issuance of decisions and acts together with the employer and negative powers, characterized by the competence to block the employer's intentions. In the broadest sense, the former competences were awarded to trade union organizations in matters relating to establishment of internal rules of labour law. Statutory regulations require that the contents of the internal rules are agreed upon with a trade union organization. Such agreement means determination of key assumptions and a literal formula of the internal rules concerned. This means that the union participates with a decisive voice in the decision making by the employing entity[129]. Similar mechanisms exist in the case of collective agreements. In this context, it is worth emphasizing that the powers to conclude collective agreements are also granted to non-union representative bodies. Among them, the most important are pro-

[126] *K.W. Baran*, Zbiorowe prawo pracy. Komentarz, Warsaw 2010, p. 81.

[127] See *J. Piątkowski*, Uprawnienia zakładowej organizacji związkowej *[Rights of a Company Trade Union Organisation]*, Toruń 2005, p. 155; *G. Goździewicz*, Wpływ działań zbiorowych na indywidualne stosunki pracy *[Impact of collective actions on individual employment relationships]*, [in:] *H. Lewandowski* (ed.), Polskie prawo pracy w okresie transformacji w oświetleniu prawa wspólnotowego *[Polish Labour Law in the Period of Transformation in the Light of the Community Law]*, Warsaw 1997, p. 104 ff.

[128] See *J. Piątkowski*, Uprawnienia zakładowej organizacji związkowej *[Rights of a Company Trade Union Organisation]*, Toruń 2005, p. 155; *G. Goździewicz*, Wpływ działań zbiorowych… *[Impact of collective actions…]*, p. 104 ff.

[129] See *K.W. Baran*, Zbiorowe prawo pracy *[Collective Labour Law]*, Kraków 2002, pp. 190–191.

visions of article 14 (2)(5) of the Act in Information and Consultation of Employees, which authorize the conclusion of an agreement between the workers' council and the employer.

Negative participatory competences dominate among the non-union powers of employees' representation in state-owned enterprises. According to a directive formulated in article 40 of the Act on Employees' Self-governing Representative Bodies in State-owned Enterprises, a workers' council is entitled to withhold a decision of a director if such decision violates the law or has been issued in breach of procedure. At the functional level such competences are complemented also by the possibility to raise objections to a decision of the director suspending the implementation of a resolution of the workers' council or opposition to the decisions taken by the founding body.

In conclusion, I believe that at the normative level participation has a varied character. This differentiation occurs both in the personal, as well as material and functional dimension. The advantage of this is that it allows one to adapt the rules of employee participation to the specifics of the employer's activity. At the same time, unification processes at the normative level seem inevitable due to the ongoing globalization of the economy.

4.4. The principle of freedom of collective action in labour relations

4.4.1. Introduction

The essence of the freedom of collective action is the freedom of the organizations which unite employees to undertake and carry out strikes and protests[130]. It is an instrument of guarantee of a trade union freedom in a broad sense. Because of the fact that collective actions in labour relations are diverse, it is reason-

[130] See *B. Wertheim*, Pojęcie i wolność strajku w świetle prawa *[The Concept of strike and the Freedom to Strike under Law]*, Warsaw 1933, passim; *T. Zieliński*, Strajk. Aspekty polityczno-prawne *[Strike. Political and legal aspects]*, PiP 1981, vol. 4, p. 5 ff.; See in particular: *A.M Świątkowski*, Swoboda podejmowania akcji zbiorowych a prawa obywatelskie, ekonomiczne i socjalne regulowane prawem pracy *[Freedom to undertake collective actions and civil, economic and social rights governed by labour law]*, St.Pr.PiPSp. 1995, p. 158 ff.; *W. Masewicz*, Strajk. Studium prawno-socjologiczne *[Strike. Legal and Sociological Study]*, Warsaw 1986, p. 25 ff.; *M. Kurzynoga*, Warunki legalności strajku *[Legality of a Strike]*, Warsaw 2011, passim.

able to distinguish between the strike and "other" industrial action[131]. A strike[132] is a situation where workers refrain from work, without their readiness to perform the work, and industrial action means other protest actions[133] against the employer[134]. Both of these normative categories are non-irenic methods of resolution of labour disputes since their purpose is to exert pressure by the collective of workers on the employer. Such pressure may be organisational, economic or psychological. Both the strike and the industrial action may be treated as a public liberty or as an economic right. In the former case the collective actions are classified solely within the category of the freedom of workers or their representative organizations to act[135], where civil, administrative or, possibly, criminal norms define its limits. On the other hand, in the latter case, the collective action takes the form of a collective personality right of individual employees or of their representatives. The former is the individualistic concept of the right to collective action, while the latter is a collectivist concept. Because of the collective nature of strike or other industrial action, those dimensions encroach upon one another and determination of their mutual relations is highly varied within the national legal systems[136].

In the Polish legislative system the collective actions are governed both by constitutional legislation and ordinary legislation. Article 59 (3) of the Constitution of the Republic of Poland sets out the right to organize strike and other forms of protest, subject to limitations specified by law[137]. *De lege lata* such limitations are laid down in the Act on Resolution of Collective Labour Disputes.

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[131] See *K.W. Baran*, "Inne" niż strajk akcje… *[Industrial actions other than strike…]*, [in:] *A. Sobczyk* (ed.), Stosunki zatrudnienia w XX-leciu społecznej gospodarki rynkowej. Księga pamiątkowa Prof. Barbary Wagner, cz. I *[Labour Relations in the Two Decades of the Social Market Economy. A Memorial Book Dedicated to Professor Barbara Wagner. Part I]*, Warsaw 2010, p. 121 ff.

[132] See *W. Masewicz*, Zatarg zbiorowy pracy *[A Collective Labour Dispute]*, Bydgoszcz 1994, p. 154 ff.; *L. Florek*, Niektóre problemy prawa do strajku w ujęciu porównawczym *[Some aspects of the right to strike – a comparative study]*, PiP 1980, vol. 10, p. 28.

[133] See *K.W. Baran*, Komentarz do ustaw o związkach… *[Commentary on the legal acts on trade unions…]*, p. 267 ff.

[134] See more in *J. Oniszczuk*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V. Zbiorowe prawo pracy *[System of Labour Law. Vol. V. Collective Labour Law]*, Warsaw 2014, p. 705 ff. and the literature referenced there.

[135] See *K.D. Ewing*, The Right to Strike, Oxford 1991, p. 45 ff.

[136] See *K.W. Baran*, Zbiorowe prawo… *[Collective Labour…]*, p. 293 ff. and *J. Oniszczuk*, [in:] System prawa pracy, vol. V… *[System of Labour Law, vol. V…]*, p. 709 ff. and the literature referenced there.

[137] See *K.W. Baran*, Konstytucyjne aspekty wolności związkowych *[Constitutional aspects of the freedom of association]*, Prz. Sejm. 2001, No. 6, p. 16 ff.

4.4.2. Types of collective actions

The Polish legislation has adopted a collectivist formula of freedom of collective actions. Such regulation confirms that the right to organise a strike and other forms of protest is granted exclusively to trade unions[138]. In practice, this means that a strike or industrial action declared by an *ad hoc* strike committee appointed by the workers outside the trade union structures is illegal. The monopoly of trade unions[139] as regards organisation of strikes is to prevent anarchy in labour relations by "wild"[140] strike and industrial actions undertaken spontaneously by workers. However, the statutory monopoly of the defence of rights, interests and collective freedoms by – sometimes bureaucratized or corrupt – union apparatus can lead to pathology in the work environment due to the inadequacy of its actions as compared with the expectations of employees.

The collectivist model of regulation of the right to strike dominant in article 59 (3) of the Constitution of the Republic of Poland has yet another collective dimension in the Act on Resolution of Collective Disputes. This means that a decision on declaration of strike must be approved by workers in a referendum[141].

Following the enactment of the Constitution of the Republic of Poland, the individual dimension of the right to strike and/or other forms of industrial action in labour relations became of secondary importance. This means that an employee cannot be forced to participate in a strike or to refuse participation in a strike. In terms of time, this principle applies to all stages of a strike. *Per analogiam,* it applies also to "other" industrial actions.

The right to collective action is not absolute, therefore it is worth devoting a little attention to its statutory restrictions mentioned in article 59 (3) of the Constitution of the Republic of Poland. The basic element is a public good in

[138] See *M. Masewicz*, Prawna regulacja sposobów rozwiązywania sporów zbiorowych w świetle praktyki. Doświadczenia polskie *[A legal regulation of the methods of resolution of collective disputes in practice. Polish experience]*, PiZS 1994, Nos. 2, pp. 13–14; *M. Seweryński*, Problemy legislacyjne zbiorowego prawa pracy *[Legislative problems in the collective labour law]*, [in:] *M. Matey-Tyrowicz, T. Zieliński* (eds.), Prawo pracy RP w obliczu przemian *[Labour Law of the Republic of Poland in the Era of Changes]*, Warsaw 2006, p. 247.

[139] In my opinion, the right to strike may be voluntarily waived in a collective agreement. See also *L. Florek*, [in:] *T. Zieliński* (ed.), Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 2000, p. 993. See an opposite opinion: *K. Rączka*, [in:] *M. Gersdorf, K. Rączka, J. Skoczyński*, Kodeks pracy. Komentarz *[The Labour Code. A Commentary]*, Warsaw 1999, p. 621.

[140] See *A.M. Świątkowski*, Rozwiązywanie sporów zbiorowych pracy *[Resolution of collective labour disputes]*, St. Pr.PiPSp 1994, p. 323; *P. Korus*, Strajk nielegalny *[Illegal strike],* St.Pr.PiPSp 1997, p. 145 ff.

[141] See *M. Kurzynoga*, Warunki legalności… *[Conditons of legality…]*, p. 213 ff. and *J. Oniszczuk*, [in:] System prawa pracy, vol. V… *[System of Labour Law vol. V…]*, p. 777 ff. and the literature referenced there.

a broad sense. It seems to refer to the category of "essential services" known to international legislation[142].

Under the legislation in force, the restrictions of the right to strike introduced in article 59 (3) second sentence of the Constitution of the Republic of Poland are different in nature. As regards personal dimension[143], the provisions of the Act on Resolution of Collective Disputes stipulate which employees are not entitled to strike and in material dimension, they indicate in which organisational units strike cannot be organised[144] or at which work positions the work cannot be stopped as a result of a strike action[145]. At this point, it is worth emphasizing that, regardless of the statutory formula for banning strikes, it amounts to excluding the constitutional legitimacy of trade unions to organize a strike[146].

The heterogeneous restriction of the right to strike is stipulated also in article 19 (1) of the Act on Resolution of Collective Disputes. It provides that the stoppage of work as a result of a strike action in the work positions, on installations and equipment where such stoppage poses risk to human life or health or threat to the state security, is prohibited[147]. The above directive is selective in the sense that it applies to groups of workers employed in the positions which involve particular responsibility for human life and health[148] or state security[149]. This means that employees employed in other positions in the same establishment may refrain from work within the strike action.

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[142] See *B. Paździor*, Strajk w orzecznictwie organów… *[Strike in the Case Law of…]*, p. 50; *A.M. Świątkowski*, Międzynarodowe prawo pracy, vol. 2 *[International Labour Law, vol. 2]*, p. 44 ff.

[143] See *B. Cudowski*, Spory zbiorowe w polskim prawie pracy *[Collective Disputes in the Polish Labour Law]*, Białystok 1998, pp. 132–133; *G. Goździewicz*, Podstawowe zasady zbiorowego prawa pracy *[The fundamental principles of collective labour law]*, p. 46 ff.

[144] See *K.W. Baran*, O zakresie podmiotowym zbiorowego prawa pracy – de lege lata i de lege ferenda *[A personal scope of collective labour law – de lege lata and de lege ferenda]*, [in:] *B.M. Ćwiertniak* (ed.), Aktualne zagadnienia prawa pracy i polityki socjalnej (Zbiór studiów) *[Current Labour Law and Social Policy (a Collection of Studies)]*, vol. 1, Sosnowiec 2012, p. 224.

[145] See *K.W. Baran*, Zbiorowe prawo pracy *[Collective Labour Law]*, Kraków 2002, pp. 297–298.

[146] See *J. Piątkowski*, Uprawnienia zakładowej organizacji związkowej *[Rights of a Company Trade Union Organisation]*, Toruń 1999, p. 173.

[147] See B. *Paździor*, Strajk w orzecznictwie organów… *[Strike in the Case Law…]*, p. 50 and ILO documents referenced there.

[148] See *B. Cudowski*, Spory zbiorowe w polskim… *[Collective Disputes in Polish…]*, p. 134. *M. Kurzynoga*, Kwestia prawa lekarzy do strajku *[The right of doctors to strike]*, PiZS 2012, No. 5, p. 20; *K.W. Baran*, Zbiorowe prawo pracy… *[Collective Labour Law…]*, pp. 452–453.

[149] See *J. Żołyński*, Strajk i inne rodzaje akcji protestacyjnych jako metody rozwiązywania sporów zbiorowych *[Strike and Other Types of Industrial Action as the Methods for Resolution of Collective Disputes]*, Warsaw 2013, p. 211 ff.

Certain doubts arise especially when interpreting the term "threat to state security". In my opinion, it should be objective and result from the actual threat[150]. Unfortunately, the applicable laws do not provide for effective mechanisms of judiciary control of actions undertaken by employees. The procedure laid down in article 36 of the Trade Unions Act [151] creates only illusory possibilities in this regard. That is why I suggest, *de lege ferenda,* that labour courts should have the power to impose a ban on taking or continuing a strike. Such a judgment could be issued at the request of a labour inspector or prosecutor who establishes that prohibitions formulated in article 20 of the Act on Resolution of Collective Disputes have been violated. A similar mechanism should also function in all other situations when a strike or "other" industrial action is illegal.

Restrictions of the right to strike are also functional. At the normative level, these are regulations that define the rules for organizing a strike. In the Polish legislative system, the proportionality directive seems to be of particular importance. The entity organizing the strike should take into account the circumstances relating to the demands raised to the employer, and in particular their proportionality to the losses resulting from the strike. This is because the purpose of the strike cannot be to ruin economically or cause damage, as serious as possible, to the employer[152]. Therefore, the organisers of a strike action should refrain from the strike if it is known in advance that fulfilment of the postulates is unrealistic or will cause damage preventing restoration of normal operations of the establishment.

It should be kept in mind that if irreparable damage is caused to an employer, which prevents continuance of his business activity, this will also be detrimental to the vital interests of employees who will lose their jobs in the case of bankruptcy of the employer.

In the light of article 17 (3) of the Act on Resolution of Collective Disputes[153], it is of crucial importance that the organiser of a strike should find a balance between profits and losses, in particular at the socio-economic level. In this context, there must exist a "just cause"[154] of the strike, underlying the employer's

[150] See also deliberations of *W. Masewicz*, Ustawa z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych. Komentarz *[The Act of 23 May 1991 on Resolution of Collective Labour Disputes. Commentary]*, Warsaw 1992, p. 55.

[151] See *K.W. Baran*, Zbiorowe prawo pracy… *[Collective Labour Law…]*, p. 327.

[152] See *T. Zieliński*, Prawo pracy. Zarys… *[Labour Law. An Outline…]*, p. 144 ff.

[153] On the basis of the mentioned provision the Supreme Court of Poland in its judgment of 27 November 1997, I PKN 393/97 (OSP 1999, vol. 3, item 151 with a commentary of B. Cudowski), found a hunger strike to be illegal.

[154] This aspect is particularly emphasized by the Catholic social teaching based on the encyclical of John Paul II, *Laborem exercens.* See more in *F. Kampka*, Istota i zadania związków zawodowych w świetle dokumentów społecznych kościoła *[The Meaning and the Roles of Trade Unions ccording to the Social Documents of the Catholic Church]*, Lublin 1990, p. 242.

non-fulfilment of the postulates raised by the workers. Those postulates should be rational also in such sense that they must relate to matters which fall within the competence of the employer[155]. In particular, raising "general" socio-economic demands in a macro-scale is in breach of the rationality principle. Organisers of a strike, when formulating the postulates, should take into account the financial situation of the undertaking. For that reason, when raising the demands it is necessary that they respect the economic reality and economic factors which determine preservation of competitiveness of goods and services and protection of reputation of the undertaking among its clients and contractors.

In analysing the provisions of article 17 (3) of the Act on Resolution of Labour Disputes it should be emphasized that the directive included in this provision does not mean an obligation to cause the least damage to the employer, but merely an obligation to balance the proportion between losses caused as a result of strike and benefits expected by the collective of workers. Organisers of strike should bear in mind that a strike often produces a number of negative consequences outside the organisational structure of the establishment concerned and disorganizes the functioning of the society (such as strikes in the public transport).

Another essential restriction of the right to strike is the *ultima ratio* (the last resort) directive. This means that a strike can be commenced only after all the irenic methods of resolution of a collective dispute have been exhausted. Specifically, these are conciliation and mediation since article 17 (2) of the Act on Resolution of Collective Disputes makes reference to the provisions governing these two methods. In practice this means that under the Polish legislation, a legal strike may be organised without submission of a collective dispute for resolution to a social arbitration panel[156].

As mentioned above, under article 17 (2) of the Act on Resolution of Labour Disputes a strike, as a non-irenic[157] method of resolution of collective disputes, is subsidiary to conciliation and mediation. The mentioned article clearly prefers resolution of a dispute without the economic and organisational pressure, which is characteristic of every strike. An exception to the principle according to which a strike cannot be declared without previously exhausting the possibilities for resolution of the dispute through negotiations or mediation is granted in a situation where an unlawful conduct of the employer prevented the negotiations or

[155] See *B. Cudowski*, Spory zbiorowe w polskim… *[Collective Disputes in Polish…]*, p. 130.

[156] See *K.W. Baran*, Z problematyki charakteru orzecznictwa kolegiów arbitrażu społecznego *[The nature of the case-law of social arbitration panels]*, PiZS 1994, No. 2, p. 16 ff.

[157] See *J. Żołyński*, Aksjologiczne, normatywne i społeczne podstawy prawa rozwiązywania sporów zbiorowych pracy *[Axiological, Normative and Social Foundations for Resolution of Collective Disputes]*, Gdańsk 2016, p. 405 ff.

mediation or the employer terminated an employment relationship with a trade union activist conducting the dispute.

The restrictions of the right to strike under the Polish legal system are also of temporal nature. Article 4 (2) of the Act on Resolution of Collective Disputes provides that a collective dispute relating to the content of a collective agreement or other arrangement to which a trade union organisation is a party, may be initiated only upon termination of such agreement or arrangement. In this normative context, based on the *a fortiori* argument, it may be concluded that since trade unions cannot initiate a collective dispute then all the more they cannot organise a strike.

"Other" industrial action[158], just like strikes, means exercising the right to collective actions in the labour relations.

Industrial action commenced prior to declaration of a dispute or during conciliation is illegal. Such action is allowed only after a report of controversies has been drawn up. However, if an employer wrongly refuses to sign the report, the industrial action other than a strike can be initiated after the negotiations end.

Industrial action other than a strike should be in compliance with legal order. Trade unions may set out the rules concerning collective actions only in such a manner as to ensure that they do not violate the existing legal order. Therefore, leading the action which is in breach of law constitutes an offence specified in article 26 (2) of the Act on Resolution of Labour Disputes[159]. This means that all actions undertaken by the protesting workers must be in compliance not only with the labour laws but also with the provisions governing other areas of social relations (for example administrative law or criminal law). The basis of statutory restrictions in this regard are provisions of article 59 (3) of the Constitution of the Republic of Poland.

In the light of the applicable civil and administrative laws, it is undisputed that illegal industrial action is an action involving blockade of public roads, railroads and waterways and border crossing points. The same applies to the protests consisting in occupation of public administration buildings, parliamentary offices and other public places and facilities. Other examples of gross, and thus illegal, violation of privacy include picketing at the places of residence of representatives of public authorities or following representatives of an employer outside work (such as worker patrols). Also, cyberbullying of representatives of the

[158] See *K.W. Baran*, "Inne" niż strajk akcje… *[Other Than Stirke…]*, p. 121 ff.; *B. Cudowski*, Pozastrajkowe środki prowadzenia sporów zbiorowych *[Non-strike methods of resolution of collective disputes]*, MPP 2009, No. 4, p. 173 ff.; *J. Żołyński*, Strajk i inne rodzaje… *[Strike and Other Kind of…]*, p. 327 and the literature referenced there.

[159] Judgment of the Polish Supreme Court of 17 May 2000, IV KKN 69/00, OSNKW 2000, No. 7–8, item 75.

employer (such as disseminating information on private status or behaviour of such persons via internet or mobile phones) should be considered illegal. In this respect the universal principle *ex iniuria ius non oritur* will apply.

The act on resolution of collective disputes does not provide for any specific restrictions in this regard apart from the above-mentioned conditions of legality. In particular, it does not require a referendum and does not limit their frequency in a collective dispute. Therefore, there are no normative obstacles to multiple and varied renewal of the protest during one dispute.

Participants in industrial action organised by a trade union may be also non-union employees, provided that they participate voluntarily. No person can be forced to participate in such action. Teleological reasons clearly support the view that the same principles as in the case of strike should be followed.

Under article 25 (1) of the Act on Resolution of Collective Disputes, in the case of industrial action an organiser is not obliged to notify the employer in advance of taking such action, unlike in the case of declaration of strike. If the protest takes place at the premises of the employing establishment, an organiser should cooperate with the manager of the establishment to the extent necessary to ensure protection of assets of the establishment and uninterrupted work of facilities, equipment and installations the disruption of which might pose risk to human life or health or prevent restoration of regular operations. This follows from *a simili* argumentation.

During industrial action (protest), just like in the case of a strike, a principle of non-restriction of a personal freedom of the employer applies. This is particularly important in a situation where workers block the premises of the employer or access roads to the establishment.

Chapter 5. Basic Principles of Procedural Labour Law

K.W. Baran

5.1. The principle of the right to a fair trial

5.1.1. Introduction

The right to a fair trial is one of the fundamental guarantees of civil liberties in a democratic state.

In the Polish legislative system the right to a fair trial is guaranteed by constitutional provisions. According to the provisions of 45 (1) of the Constitution of the Republic of Poland, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Under article 77 (2) of the Constitution of the Republic of Poland, statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights. The regulation adopted in the mentioned provisions is universal since it refers both to the procedural and organisational aspect (article 45 (1)) and to the functional and competency aspect (article 77 (3)).

At the personal level, neither article 45 (1) nor article 77 (2) of the Constitution of the Republic of Poland provide for any restrictions on the right to a fair trial. Both of the mentioned provisions establish universal rights. The former uses the term "everyone" and the latter uses the term "no one". In the labour relations it means that the right to a fair trial in the same dimension applies both to employees and employers, as well as other actors in the industrial relations (such as trade unions, employers' organisations). Such interpretation option is supported by *a completudine* and *a cohaerentia* argumentation.

Also at the material level no such restrictions were introduced. Under article 45 (1) of the Constitution of the Republic of Poland, the right to a fair trial is granted – *lege non distinguente* – in every matter, also in labour law matters. The provisions of article 77 (1) of the Constitution also do not provide for any dif-

ferentiation criteria. In this context it is obvious that access to court is open for the protection of rights and freedoms violated in connection with employment. In this context a consideration comes to mind that normative deliberations regarding the right to a fair trial adopted in the Polish Constitution are more favourable in comparison to article 6 (1) ECHR since they do not create a distinction between contractual labour relations and employment in the public service. Therefore, in the Polish legislative system, in each case it is possible to trigger the judicial control system when a plea in law is raised. Such procedural mechanism fully corresponds with the concept of democratic rule of law, which implements the idea of broad access to court.

In analysing the right to a fair trial in labour law matters worth considering is a question to what extent the extrajudicial procedures diminish the constitutional judicial protection in labour relations. Before I go into merits and for the sake of clarity and accuracy of the deliberations, certain systematization of these procedures is necessary. Usually they are divided into extra-judicial and prejudicial procedures. However, logically this division seems not correct since it is not separable. I feel obliged to make it more precise.

A convention which may be adopted is that the extrajudicial procedures in a large sense include both prejudicial procedures (when a labour law dispute, before a party submits it to a court, may or must be submitted for consideration, not necessarily resolution, to other statutory body which is not a court) and extrajudicial procedures in a strict sense (when a labour law dispute by law falls within the competence of statutory bodies other than courts).

The analysis of the extrajudicial procedures in a large sense in individual labour disputes in terms of restriction of the right to a fair trial should start with extrajudicial procedures in a strict sense. A starting point should be a finding that in such categories of matters where they apply to the full extent, specifically in all instances, the parties are completely denied the right to a fair trial. In practice this means that disputes arising between them are resolved by other bodies or authorities, with no judicial control. In the Polish legislative system these regulations are unconstitutional since they directly infringe the provisions of articles 45 (1) and 77 (2) of the Constitution of the Republic of Poland. This applies in particular to disciplinary proceedings in which decisions are made by disciplinary committees being specific quasi-courts which are not considered public judicial authorities. The case-law of the non-judicial disciplinary bodies should also be subject to judicial supervision of courts.

I should now focus on pre-judicial (pre-trial) proceedings. As regards the optional procedures, in my opinion the normative possibility to refer an individual labour dispute to such procedure raises no doubts in terms of the right to a fair trial. I believe that the parties to an employment relationship may each time end

a dispute in any conciliation and mediation formula, even an imperative one, provided that it is voluntary and not prohibited by law. In constitutional terms, it is important that in the case of failure of such initiative the entitled party should be free to obtain a final resolution of the dispute in court proceedings.

5.1.2. Jurisdiction of labour courts

At the material level, a starting point for the deliberations on jurisdiction of labour courts will be a finding that in the states of industrial civilisation labour courts resolve mainly rights disputes. On the other hand, interests disputes fall within a jurisdiction of arbitration or conciliation bodies. The arbitration procedure applicable in the Polish legal system will be described in detail in one of the following chapters of this book.

As regards the scope of jurisdiction of the Polish labour courts, significantly important is the term "labour law matter" defined in article 476 § 1 of the Code of Civil Procedure. The mentioned article determines, in a decisive although not exclusive manner, the competences of labour courts.

In analysing this issue, first to be considered are the grounds of judicial decisions. These include all provisions of labour law, not only statutory provisions but also the so-called specific sources of labour law, such as collective agreements, rules of procedure and statutes (charters), if they are based on law and set out the rights and obligations of the parties to an employment relationship. A very simplifying concept is that labour law matters are matters assessed under provisions of labour law. Such opinion only expresses a rule. However, when there is a rule, there are always exceptions to it. A substantive basis for resolution of a particular labour law matter may be provisions which belong to the branches of law other than labour law.

For a specific case brought to a labour court to be given the status of a labour law matter, it is irrelevant whether the claim for legal protection is legitimate or not. The legitimacy of the claim is established under the applicable substantive law and facts of the case. Such interpretation is based on the assumption that the claim raised in the proceedings (demand for legal protection) demonstrates the intention of the party initiating the proceedings and never arises from substantive laws.

Matters involving claims arising out of employment relationship are matters relating to rights and obligations of the parties to an employment relationship set out in the legal and contractual provisions governing the employment relationship. A contract of employment creates a set of rights and obligations both for the

employee and the employer, arising not only from the contract of employment[1], but also from applicable laws, collective agreements, internal rules and statutes. Therefore, the subject-matter of a dispute is non-performance or improper performance by one of the parties of the respective obligations.

In the material sense, the matters regarding claims arising out of employment relationship cover all rights and obligations arising from such relationship. Since there are no standard terms and conditions of employment, a strict and consistent specification is not possible. The multiple dimensions of rights and obligations[2] under different employment relationships often make it impossible to determine unambiguously whether the claim concerned falls within the scope of an employment relationship.

In each case it is of significance to determine the source of the claim. In the Polish legislative system it may be either normative or based on internal rules[3], contract[4] or collective agreement. In the latter case the source of claims are collective agreements based on law, setting out the rights and obligations of the parties to an employment relationship. They include normative provisions of collective agreements[5], agreements on suspension of provisions of labour law[6], agreements on application of terms and conditions of employment less favourable than those prescribed by a contract of employment[7], agreements concerning collective re-

[1] Judgment of the Supreme Court of Poland of 12 January 2012, I PK 88/11, argument 1.

[2] See in particular: *B. Wagner*, O swobodzie umowy o pracę raz jeszcze *[More about freedom of concluding employment contract]*, [in:] *M. Matey-Tyrowicz*, *L. Nawacki*, *B. Wagner* (eds.), Prawo pracy a wyzwania XXI wieku… *[Labour Law Challanges of XXI century…]*, p. 379–381.

[3] If provisions of internal regulations relate directly to the terms and conditions of an employment relationship, the matter concerned should be classified as a matter involving claims arising out of employment relationship, and if such relation is indirect – as a matter involving claims relating to an employment relationship. In this context a reference should be made to a judgment of the Supreme Court of 15 January 2009, II PK 125/08, OSNP 2010, No. 15–16, item 180, in which the Court held that a matter regarding return of awards unduly collected by a member of the management board of a foundation, the basis for which were internal regulations and not provisions of a contract of employment is a matter involving claims relating to an employment relationship and not a matter regarding claims arising out of employment relationship.

[4] Judgment of the Supreme Court of Poland of 14 April 2005, II CK 606/04.

[5] See *K.W. Baran*, Zbiorowe prawo pracy *[Collective Labour Law]*, Kraków 2002, p. 54

[6] See *K. Rączka*, Porozumienia zawieszające przepisy prawa pracy *[Agreements on suspension of provisions of labour law]*, PiZS 2002, No. 11; See *K.W. Baran*, [in:] *K.W. Baran* (ed.) Kodeks pracy *[The Labour Code],* pp. 68–74 and 186–189.

[7] See *M. Gersdorf*, Próba umiejscowienia nowych porozumień o zawieszania postanowień umów o pracę w polskim porządku prawnym *[A place of the new agreements on suspension of provisions of contracts of employment in the Polish legal system]*, PiZS 2003, No. 1, p. 15 ff.

dundancies[8], agreements ending a collective dispute[9] and agreements in connection with transfer of business to a new employer.

Relations between an employee and an employer may give rise to multiple and different conflicts, which makes it impossible to create an exhaustive catalogue of claims arising out of employment relationship. Because of the fact that the formula established in article 476 § 1 (1)(1) of the Code of Civil Procedure is open, it precludes application of an exhaustive list. It seems that only exemplary indication of the kinds of matters which are of practical importance is possible. By its nature it is only illustrative.

Matters involving claims arising out of employment relationship in a material sense are those concerning:

- notice of change to wage or working conditions and other transformations of an employment relationship;
- termination of an employment relationship[10],
- expiration of an employment relationship,
- protection of personal rights[11],
- equal treatment in employment (for example in the case of discrimination or harassment),
- workplace mobbing,
- basic remuneration for work,
- bonuses and awards and other components of remuneration (such as balance surplus),
- leaves,
- business trips,
- severance payments,
- rights of women,
- rights of young workers,
- employment certificates,
- working time,
- allowances in-kind and other benefits in-kind,
- annulment of penalties for breach of workplace order, policies or procedures,

[8] See for example: *E. Wichrowska*, Zwolnienia grupowe *[Collective redundancies]*, Warsaw 1991, p. 24; *J. Iwulski*, *K. Jaśkowski*, Zwolnienia grupowe, Praktyczny komentarz *[Collective Redundancies. A Practical Commentary]*, Warsaw 1995, p. 62 ff.

[9] See *K.W. Baran*, Porozumienia zawierane w sporach zbiorowych jako źródła prawa pracy *[Agreements concluded in collective disputes as sources of labour law]*, MPP 2008, No. 9, p. 3 ff.

[10] Judgment of the Supreme Court of 22 May 2012, II PK 248/11.

[11] According to a judgment of the Supreme Court of 5 November 2008, I CSK 189/08, a matter regarding protection of personal rights may be classified as a matter involving claims arising out of employment relationship if it relates to violation of such rights by employer's conduct in which case it is both materially and personally related to the employment relationship.

– protection of work,
– employer's liability for damages,
– employee's liability for damages,
– employer's obligation to provide an employee with information of significant importance for the employee's situation.

I have focused on the matters the classification of which into the category of matters involving claims arising out of employment relationship raises no doubts. It should also be kept in mind that not only the employee but also the employer has the capacity to sue if the latter raises claims based on the provisions of labour law. For example, according to article 61^1 of the Labour Code, in the case of unjustified termination by the employee of a contract of employment without notice under article 55 § 1^1 of the Labour Code, the employer shall have a claim for compensation. From a procedural point of view it is not relevant that the claim is pursued after the end of the employment relationship. Also a claim of an employer for repayment of unduly collected employment benefits raised against a former member of the management board of a joint-stock company who is employed with such company under a contract of employment is an employment matter.

Labour courts have jurisdiction also in matters involving employment-related claims that are matters relating to rights and obligations indirectly related to the employment relationship. This indirect relation means "genetic and functional" connection with the employment relationship in such sense that if the latter did not exist the right which is the subject-matter of the claim would not be established. A decisive factor will be the "level of intensity" of the relation between the claim and the employment relationship. In the normative sphere, there is no objective instrument which would allow one to establish such link, in abstract terms, in each specific dispute. It seems that the "level of intensity" of the relation between the claim and the employment relationship should be evaluated taking into account both the personal and material aspect. At the functional level, it may be argued that the legal basis of employment-related matters arises not from direct performance of the rights and obligations of the parties to an employment relationship but from other statutory or contractual obligations of the employer or parties related to the employer towards the employee or his family or heirs. In each case they are subsidiary to the employment relationship and may be illustrated as satellites.

Examples include disputes arising from allotment and redemption of shares of privatised state-owned companies. In the light of the applicable laws, there is no normative justification in support of the argument that preferential acquisition of shares by the employee falls within the scope of employment relationship. However, it is integral to such relationship since the existence of that relationship on a date specified in the shares allotment regulations is a precondition for acqui-

sition of the rights by the employee. A similar view was presented by the Supreme Court in its judgment of 6 August 1998, III ZP 24/98, in which the court held that an action brought by the employee (former employee) against State Treasury – the Minister of Treasury to order a statement of transfer of shares of a company established as a result of commercialisation and privatisation of undertakings as well as claims for compensation for loss of right of free acquisition of shares are matters involving employment-related claims. Also, cases brought by heirs of an employee against State Treasury for compensation for loss of entitlement to free acquisition of shares as a result of transformation of a state-owned enterprise belong in this category of matters.

Polish labour courts have jurisdiction also in the following categories of actions:

- to establish a basis of employment (such as appointment),
- to establish a type of a contract of employment,
- to establish a type of work,
- to establish the date of commencement of work,
- to establish the place of performance of work,
- to establish the terms and conditions of employment,
- to establish the scope of responsibilities of an employee,
- to establish the currency or exchange rate for the payment of remuneration,
- to establish invalidity of individual clauses of a contract of employment,
- to establish invalidity of a non-compete agreement,
- to establish invalidity of an agreement on joint financial liability of employees[12],
- to establish invalidity of autonomous clauses of a contract of employment,
- to establish applicable labour standards,
- to establish coverage of an employee by a special protection under an employment relationship[13],
- to establish non-existence of an obligation to return the costs incurred by the employer in connection with employee's education during employment[14],
- to establish a transfer of the establishment under article 23^1 of the Labour Code[15],
- to establish invalidity of a competition for a post, conducted contrary to law,

[12] *A.M. Świątkowski*, Kodeks pracy. Komentarz t. 1 *[The Labour Code. A Commentary vol. 1]*, Kraków 2002, pp. 604–618.

[13] Decision of the Supreme Court of 8 March 2010, II PK 240/09, OSNP 589975, argument 2.

[14] Resolution of the Supreme Court of 19 July 1990, III PZP 13/90, OSNC 1991, No. 5–6, p. 67 with a commentary of U. Jackowiak.

[15] Judgment of the Supreme Court of 1 July 1909, I PKN 133/99, OSP 2001, vol. 4, item 57 with a commentary of T. Kuczyński.

– to establish the right to free acquisition of shares or the period of employment required to be entitled to free acquisition of employee shares[16],
– to establish invalidity of a labour law transaction (such as settlement),
– to establish that work was performed in the conditions harmful to health,
– to establish lack of obligation to refrain from competitive activity.

As regards the actions to establish existence or non-existence in the context of employment relationships, certain doubts arise as to whether it is acceptable to establish in court proceedings the so-called law-creating facts. As regards the case-law of the Supreme Court of Poland, there are various opinions presented by the Court. According to the prevailing view, it is unacceptable to establish defectiveness or invalidity of declarations of will of an employer or a lack of legal basis for such declarations. In particular, it applies to termination of an employment relationship when an employee intends to use the court's decision to prove the entitlement to social insurance benefits. A similar mechanism applies in the case of an action against an employer to establish performance of work in specific conditions in order to obtain an unemployment benefit.

5.2. The principle of special protection of legitimate interests of an employee in labour law matters

The essence of the principle of special protection of the employee's interests is that in the proceedings in labour law matters, the legitimate interests of an employee should be protected with particular care. In the procedural sphere, it comes down to helping an employee in a situation where the employer has a real advantage over him in the proceedings. In axiological terms, this mechanism of equalization of position of the parties in the labour law proceedings seems to be the guiding idea of this principle. It functions mainly when the employee acts as a claimant, and to a limited extent when he acts as a respondent. The special protection of employee's interests in the procedural labour law manifests itself in two aspects: procedural advantages of an employee as an active party in labour law matters and increased control by the court of dispositive actions taken by an employee in the course of the proceedings.

Worth presenting are the procedural institutions which serve implementation of the principle of special protection of employee's interests. A provision of central importance is article 5 of the Code of Civil Procedure. It stipulates that in the event of a justified need, the court may give to the parties acting in the

[16] Judgment of the Supreme Court of 19 March 2002, I PKN 959/00, OSNP 2004, No. 5, item 76.

case without legal representation the necessary instructions regarding the procedural steps[17]. This directive is optional, which means that the court, *lege non distinguente*, also the labour court, is to decide whether such instructions should be given or not.

The basic premise of court's action under article 5 of the Code of Civil Procedure is a justified need for information measures. The "justified need"[18] should be included in the category of vague phrases considered general clauses. The Polish legal literature[19] distinguishes between two types of general clauses. The first one includes phrases containing direct and explicit reference to non-legal norms and assessments, while the second includes phrases and words that *in concreto* change their denotation depending on which non-legal assessments and norms are used by the interpreter in a particular case. Therefore, a question arises into which of the two groups the concept of justified need should be included. In my opinion it should be included in the second category of general clauses. In the process of judicial enforcement of law, it allows for differentiated treatment of each individual case, according to the existing factual situation. This kind of legal structure makes it possible for the labour court to provide assistance to the party who, in the court's opinion, actually needs it. This is usually the case where an employee without legal representation would be deprived of influence on the ongoing process and would not be able to exercise his rights[20].

Under article 5 of the Code of Civil Procedure, the instructions may relate only to procedural steps. On the other hand, instructions regarding the substantive laws are unacceptable[21], in particular when they relate to the anticipated resolution of the case. In fact, the court's interference with the substantive assessment of the procedural steps would mean a prior declaration of the outcome of the proceedings, which would seriously undermine the objectivity of court's decisions. Therefore, the court is not obliged to advise an employee if it believes

[17] This provision applies when an attorney of an employee is a representative of a social organization (e.g. trade union). The list of attorneys laid down in article 5 of the Labour Code is exhaustive. See also a judgment of the Supreme Court of Poland of 27 February 2014, II PK 134/13, argument No. 3.

[18] The "procedural need" clause has already been developed in the case-law of the Supreme Court of Poland; see a judgment of the Supreme Court of 13 May 1997, II UKN 100/97, OSNAPiUS 1998, No. 4, item 133; See also a judgment of the Supreme Court of 9 September 2013, II PK 366/12.

[19] See *T. Zieliński*, Klauzule generalne w prawie pracy *[General clauses in labour law]*, Warsaw 1988, p. 67 ff.

[20] Judgment of the Supreme Court of 30 June 1999, II UKN 21/99, OSNAPiUS 2000, No. 18, item 695 and a judgment of the Supreme Court of 7 April 2010, II PK 291/09, argument 4.

[21] Judgment of the Supreme Court of 26 September 2000, I PKN 48/00, OSNAPiUS 2002, No. 8, item 189.

the claim is unfounded[22] and should not advise the employee that heshe can effectively pursue other claims.

Article 5 of the Code of Civil Procedure limits the court's assistance only to the necessary instructions. Therefore, it does not impose an obligation to give detailed instructions to a party regarding all possible procedural steps. In this context, it seems reasonable to conclude that this provision does not apply when the party takes steps which are obviously understandable to everyone. This applies in particular to evidentiary procedure. An initiative in this matter rests with the parties and the court is not in principle obliged to give instructions regarding the advisability of taking specific evidence[23].

However, article 5 of the Code of Civil Procedure should not be interpreted[24] to mean that a labour court is relieved from any information obligations. In this regard, I think that a labour court should, whenever it is justified by the circumstances of the case, inform the employee about his procedural claims[25]. According to a directive formulated in article 477 *in fine* of the Code of Civil Procedure, the presiding judge should instruct the employee about the claims arising from the facts he relies on. This refers in particular to the situations mentioned in article 477^1 of the Code of Civil Procedure.

The instruction under article 5 in connection with article 477 *in fine* of the Code of Civil Procedure should be appropriate to the specific situation in the proceedings. If it appears false or inaccurate and the party relied on it, such party cannot suffer negative consequences arising from it. Moreover, the violation of the directive formulated in this provision constitutes a procedural error having a significant impact on the outcome of the case, if only *in concreto* there was a justified need to provide the employee with procedural guidance. An example of this situation is failure to inform the employee of the possibility to file an application for a court-appointed attorney.

Article 5 of the Code of Civil Procedure fulfils the *vigilantibus iura scripta sunt* directive. Thus, also in the procedural labour law, a paternalistic approach to the employee's procedural status, characteristic of the previous systemic for-

[22] See *M. Cieśliński*, W kwestii stosowania art. 5 k.p.c. *[Application of article 5 of the Code of Civil Procedure]*, Prz. Sąd. 1999, No. 4, p. 101 ff. and a judgment of the Supreme Court of 27 March 2007, II PK 235/06, MPP 2008, No. 2, p. 59.

[23] Judgment of 9 February 2000, III CKN 590/98.

[24] See *P. Prusinowski*, System dyskrecjonalnej władzy sędziego w sprawach z powództwa pracownika *[System of the judge's discretionary power in matters initiated by employee's claim]*, PiZS 2013, No. 1, p. 26 ff.

[25] See in particular a decision of the Supreme Court of Poland of 28 September 1999, II CKN 269/99, Pracownik i Pracodawca 2000, No. 2, item 27; a judgment of the Supreme Court of 11 October 2000, II UKN 33/00, OSNAPiUS 2002, No. 10, item 251 and a judgment of the Court of Appeal in Katowice of 22 April 2015, V ACa 726/14.

mation, was rejected. The normative formula adopted *de lege lata* introduces, in the field of legal assistance, an element of flexibility necessary also in labour law matters. At the functional level, however, it supports the elimination of a harmful phenomenon in the procedural relations, which is the passive attitude of a party to the proceedings, manifested by passive waiting for the court to act *ex officio*. It should be emphasized[26] that violation of article 5 of the Code of Civil Procedure does not invalidate the proceedings, because it is not a situation in which a party is deprived of the possibility to defend rights, but it can only be qualified as violation of the procedural laws.

The principle of special protection of employees' interests in the procedural labour law is primarily reflected in the fact[27] that a labour court takes procedural steps *ex officio* – somehow in substitution for an employee. These steps can be taken at various stages of the proceedings – be it in the phase of preparation of the case for resolution as to the merits (e.g. appointment of a court officer – article 460 § 2 of the Code of Civil Procedure) or the phase of resolution of the case (e.g. granting an alternative claim – article 477^1 of the Code of Civil Procedure, making a decision/judgment immediately enforceable – article 477^2 § 1 of the Code of Civil Procedure). Starting with the above classification, worth analyzing are the aspects of the "judicial paternalism" focusing on the protection of employee's interests in the labour law matters.

I will start my deliberations on this subject by characterizing the forms of assistance which I include in the first group and which are decreed in articles 460 § 2 and 477 of the Code of Civil Procedure. The first of the mentioned provisions may serve as a classic example of an obligation imposed on the court to act *ex officio* in the interest of the employee. In other procedures in civil law matters *(sensu largo)* a court officer may be appointed for a party who does not have a capacity to take part in legal proceedings as a party and does not have a statutory representative as well as for a party who does not have a body appointed to represent it, only at the request of the opposite party. In labour law matters the right of initiative can be exercised also by the labour court, which can appoint such officer *ex officio*, if such need arises[28]. Such interpretation of article 460 of the Code of Civil Procedure – which I consider appropriate – means that the legislature left it to the court to decide whether it is necessary in particular circumstances.

[26] Decision of the Supreme Court of 15 October 2014, I PZ 20/14.

[27] The idea of assistance provided to employees is also implemented implicitly by other institutions of civil procedural law (for example, articles 461 § 1, 462, 464 § 1, 466 of the Code of Civil Procedure).

[28] See *A. Machnikowska*, [in:] *K.W. Baran* (ed.), System prawa pracy, t. V. Zbiorowe prawo pracy *[System of labour law. vol. V, Collective Labour Law]*, Warsaw 2016, p. 486 ff.

A legal mechanism similar to this laid down in article 460 of the Code of Civil Procedure is provided for also in article 477 of the Code of Civil Procedure. This provision states that the court, in the proceedings initiated by an employee[29] may *ex officio* summon[30] the entities mentioned in article 194 §§ 1 and 3 of the Code of Civil Procedure to participate in the proceedings[31]. This holds true in a situation where an action is brought not against a person[32] who should be a defendant or a situation where an action for the same claim can be brought against other persons who do not act as the defendants.

The analysis of the wording of article 477 of the Code of Civil Procedure implies that the legislature left to the court a broad margin of discretion as regards summons to participate in the case because it did not specify any specific condition, as opposed to the repealed article 194 § 4 of the Code of Civil Procedure[33] which would impose such obligation on the court. *Expressis verbis* its function is not even to protect employee's interest[34], although it should be borne in mind that in matters brought by an employee such protection is somehow inherent to court's actions taken *ex officio*. The wording of article 477 of the Code of Civil Procedure allows the court to be flexible and adapt its decision to the circumstances of a particular case. I have no doubt that the court plays a subsidiary role in such sense that it makes an appropriate decision *ex officio* only when, despite the instruction, the employee failed to submit an appropriate application.

Now I will look at the steps taken by a labour court on its own *(ex officio)* to protect the vital interests of an employee already in the ruling phase. By this I mean such activities as granting an alternative claim[35] (article 477[1] of the Code

[29] At this point, it is worth emphasizing that in a labour law matter in which the respondent is an employee, the general regulations governing summons to participate will apply (article 194 of the Code of Civil Procedure).

[30] Resolution of the Supreme Court of Poland of 7 January 2010, II PZP 13/09, OSNP 2010, No. 13–14 item 155.

[31] *A. Machnikowska*, [in:] System prawa pracy, vol. VI… *[System of Labour Law, vol. VI…]*, p. 492 ff. and the literature referenced there.

[32] The function of this provision is to remedy the lack of capacity to act as the defendant in the proceedings.

[33] It was based on protection of social property. See more in the judgment of the Supreme Court of Poland of 12 October 1965, III CR 179/65, OSPiKA 1966, vol. 11, item 245.

[34] Judgment of the Supreme Court of Poland of 24 June 2015, II PK 182/14 and decision of the Supreme Court of 22 July 2014, III PZ 7/14.

[35] For general remarks see: *T. Zieliński*, Prawo pracy. Zarys systemu, Część III. Ochrona pracy. Prawo sporów pracy. Prawo administracji pracy. Prawo ruchu zawodowego [*Labour law. An Outline of the System. Part III. The Law of Labour Disputes. The Law of Labour Administration. The Law of Labour Movement]*, Warsaw-Kraków 1986, p. 185; *A.M. Świątkowski*, Zasady prawa pracy *[The Principles of Labour Law]*, Warsaw 1997, p. 152 and *R. Flejszar*, Ograniczenie zasady dyspozycyjności w postępowaniu w sprawach z zakresu prawa pracy *[Restriction of the principle of dispositiveness in the proceedings in labour law matters]*, St. Pr.PiPSp. 2012, p. 446 ff.

of Civil Procedure) or making a judgment immediately enforceable (articles 477^2 and 477^6 of the Code of Civil Procedure). In the cases indicated here, there are significant differences between the provisions governing these institutions in the proceedings in labour law matters and the provisions governing these institutions in the proceedings in other categories of civil matters.

An instrument of special protection of employee's interests is the possibility for the court to grant an alternative claim[36] if the claim chosen by the employee turned out to be unjustified. A directive decreed in article 477^1 of the Code of Civil Procedure refers to a situation where an employee has at least two claims[37] that are in such a relationship that satisfaction of one of them is sufficient for the employer to comply with his obligation. The choice of the claim which can be based both on a contract and on law, is the responsibility of the employee. If, however, he makes a wrong choice – without article 477^1 of the Code of Civil Procedure his claim would be dismissed by the court and would not receive any benefit, and his interests would undoubtedly suffer.

The central issue that arises from interpretation of the provisions of article 477^1 of the Code of Civil Procedure is the question whether granting an alternative claim by a labour court is obligatory or optional. Analyzing the problem only at the textual level, it is difficult to assume that the obligation to grant an alternative claim imposed on the court is absolute. According to this provision, "a court may on its own[38] grant another alternative claim." However, my opinion is that teleological reasons, and in particular the need to protect the employee's legitimate interests, support an interpretation different from the rule of law. Hence, I propose to accept that the grant of an alternative claim does not fall within the discretion of the court, but it is the court's duty if the circumstances of the particular case speak for it.

As regards the provisions of article 477^1 of the Code of Civil Procedure, a question arises whether the court should advise the parties of the possibility to grant an alternative claim. Although the Act does not expressly establish such an obligation, I would approve such conduct of the court in the case concerned. This is required by a directive of objectivity and elementary loyalty to the parties involved in the case.

A procedural step taken by a court *ex officio* in the adjudication phase, which serves directly to protect the employee's interests, is making the judgment im-

[36] Judgment of the Supreme Court of 10 March 2010, II PK 266/09. Judgment of the Supreme Court of 3 September 2009, III PK 33/09, OSNP 2011, item 120, argument 2; judgment of the Supreme Court of 23 July 2009, II PK 26/09, argument 1; judgment of the Supreme Court of 16 January 2009, I PK 138/08, OSNP 2010, No. 15–16, item 184.

[37] Judgment of the Supreme Court of 14 October 2014, II PK 293/13, argument 1.

[38] Judgment of the Supreme Court of 2 December 2012, II PK 131/10.

mediately enforceable[39]. They key provision among the laws governing these issues in labour law is article 477^2, which provides that in awarding a payment to an employee in this category of matters, "the court shall, *ex officio*, upon issuance of a judgment make the judgment immediately enforceable in the part not exceeding the full one-month remuneration". The structure of article 477^2 § 1 of the Code of Civil Procedure clearly indicates that making a judgment immediately enforceable is a duty of the labour court. This is evidenced by the use of the expression "shall make". This categorical wording leaves to the court no room for manoeuvre, not even similar to this laid down in article 333 § 2 and 3 of the Code of Civil Procedure. The regulation discussed here, however, almost directly refers to the one in article 333 § 1 of the Code of Civil Procedure.

In the context of the provisions of article 477^2 § 1 of the Code of Civil Procedure, a question arises regarding the scope of this obligation[40]. In my opinion, it has two main levels: the first – what judgments in labour law matters are made immediately enforceable, and the second – the "dimension" of such immediate enforceability. I will start the analysis with the former level. The point of departure will be an assumption that in labour law matters, as in other categories of civil matters in a broad sense, the immediate enforceability is granted only to those judgments that are enforceable[41]. This means that it does not apply in principle to constitutive judgments[42] and those of the declaratory judgments that establish the existence or non-existence of a legal relationship or law. All of them are self-enforceable[43]. Thus, only declaratory judgments that order specific performance

[39] See in particular *H. Mądrzak*, Natychmiastowa wykonalność wyroków w procesie cywilnym *[Immediate enforceability of judgments in civil proceedings],* Wrocław 1965, *passim*.

[40] See *A. Góra-Blaszczykowska*, [in:] *K.W. Baran* (eds.), System prawa pracy, t. VI Procesowe prawo pracy *[A System of Labour Law, Volume VI. Procedural Labour Law]*, Warsaw 2016, p. 699.

[41] See more in *K. Korzan*, Wykonanie orzeczeń w sprawach o roszczenia pracowników ze stosunku pracy *[Enforcement of judgments in matters regarding employees' claims arising from an employment relationship]*, Katowice 1985, pp. 72–74.

[42] See more in *K. Korzan*, Orzeczenia konstytutywne w postępowaniu cywilnym *[Constitutive judgments in the civil proceedings]*, Warsaw 1972, *passim*.

[43] In the theory of labor law, certain doubts arise as to whether the rulings concerning ineffective termination or reinstatement to work can be considered enforceable. See in particular: *W. Broniewicz*, Z problematyki przywrócenia do pracy *[Reinstatement to work]*, NP 1959, No. 1, p. 58 ff.; *K. Korzan*, Konstytutywny czy deklaratoryjny charakter orzeczenia o przywrócenie do pracy *[Constitutive or declaratory nature of a judgment on reinstatement to work]*, PiZS 1969, No. 11, p. 7 ff.; *K. Kolasiński*, Sankcje wadliwego wypowiedzenia umowy o pracę *[Sanctions for defective termination of a contract of employment]*, PiP 1977, vol. 2, p. 86 ff.; *T. Liszcz*, Nieważność czynności prawnych w umownych stosunkach pracy *[Invalidity of Juridical Acts in Contractual Employment Relations]*, Warsaw 1977, p. 228 ff.; *W. Piotrowski*, Charakter sankcji wadliwego rozwiązania umowy o pracę *[The nature of sanctions for defective termination of a contract of employment]*, PiP 1975, vol. 12, p. 83 ff.

by the defendant should be taken into account[44]. Because of the fact that article 477^2 § 1 of the Code of Civil Procedure[45] uses the term "amount due", which *de lege lata* can be referred only to cash, I conclude that only the judgments awarding cash benefits are subject to this provision. The accuracy of such interpretation can be confirmed by the further part of the discussed provision, in which the immediate enforceability covers the amount (in cash) of a "monthly remuneration".

The upper limit is the full one-month remuneration of an employee. This interpretation was based on the literal wording of art. 477^1 § 1 of the Code of Civil Procedure according to which a court declares the judgment immediately enforceable in the part not exceeding the full one-month remuneration. In practice, this means that if an amount lower than full one-month remuneration is awarded in a labour law matter, the regime of immediate enforceability should be granted to the whole judgment.

Ratio legis of article 477^2 § 1 of the Code of Civil Procedure is to provide the employee with the necessary means of subsistence until the judgment favourable to the employee becomes final and valid. Therefore, the obligation to declare the judgment immediately enforceable up to the amount of full one-month remuneration serves to protect the vital interests of the employee and performs a maintenance function. This remains valid also in relation to other aspects of the immediate enforceability of judgments governed by article 477^2 § 1 of the Code of Civil Procedure. I am thinking in particular of the second sentence of this provision, allowing a judgment to be declared immediately enforceable in a part not exceeding the full one-month remuneration, even if it could result in irreparable harm to the defendant employer (article 477^2 § 1 second sentence in conjunction with article 335 § 1 of the Code of Civil Procedure). In addition, under this provision a court cannot make the declaration of immediate enforceability conditional upon provision of an adequate security by the employee, to which the court is authorized under article 334 § 1 of the Code of Civil Procedure in civil matters other than labour law matters[46].

A quasi-regime of immediate enforceability established to protect the interests of an employee, is provided for in article 477^2 § 2 of the Code of Civil Proce-

[44] In the light of the *lege non distinguente* argument, the view expressed by the Supreme Court in its resolution of 6 March 1986, III PZP 11/86 (OSNCP 1987, No. 1, item 11) seems disputable. The Court held that the obligation to make a judgment, *ex officio,* immediately enforceable under article 477^2 § 1 of the Code of Civil Procedure does not apply to remuneration awarded conditionally in favour of an employee in a judgment reinstating him or her to work.

[45] See *A. Jabłoński*, [in:] *K. Antonow*, *A. Jabłoński* (eds.) Kodeks postępowania cywilnego. Postępowanie odrębne w sprawach z zakresu prawa pracy i ubezpieczeń społecznych *[The Code of Civil Procedure. Separate Proceedings in Labour Law and Social Insurance Matters]*, Warsaw 2014, p. 335 ff.

[46] Article 477^2 § 1 second sentence in connection with article 334 § 4 of the Code of Civil Procedure.

dure. According to this provision, if a termination of a contract of employment is considered ineffective, a court may, at the request of an employee, impose on the employer (employing establishment) the obligation to continue to employ the employee until the case is finally resolved. In material terms, the scope of this provision is quite narrow. *Explicite*, it has been limited only to judgments that render termination of a contract of employment ineffective. Therefore, it cannot be applied to judgments reinstating an employee, regardless of whether the employment relationship was terminated upon notice or without notice.

The various mechanisms of special protection of employee's interests by the labour court presented above inspire ambivalent reflections. Each of these mechanisms considered separately deserves to be approved, because it directly serves to secure the employee's rights. However, a comprehensive analysis of all these mechanisms raises concern over whether the role of labour court is changed from impartial arbitrator to employee's crypto-supporter. The element of paternalism, which is clearly present in the Polish civil procedural law, in particular at the ruling phase, raises concern regarding equality of the parties to the proceedings. Hence, I fully accept the guardian function of the labour court only at the stage of preparation of the case for resolution. However, in the ruling phase, the role of the "guardian" should be minor and limited only to situations where, due to circumstances beyond the employee's control, he is unable to take care of his interests. Under no circumstances can the labour court be a party seeking to ensure the resolution of the case most favourable to an employee.

Apart from the official protection of the employee's interests by the labour court, many provisions of civil procedural law facilitate pursuance by an employee of labour law claims. By this I mean in particular the alternative jurisdiction[47] of labour courts, the limitation of formal requirements for procedural steps[48] taken by the employee and the extension of the personal scope of employee's representation in the proceedings[49]. All the facilities listed here indirectly serve the interests of the employee, because they enable him to overcome individual procedural obstacles. Thus, along with the official care provided by the labour court, they implement the principle of protection of legitimate interests of the employee in labour law matters.

[47] See *A. Góra-Błaszczykowska*, [in:] System prawa pracy, vol. VI… *[System of Labour Law, vol. VI…],* p. 435 ff. and *D. Książek*, [in:] *K.W. Baran* (ed.), Procesowe prawo pracy *[Procedural labour law]*, Warsaw 2013, p. 168 ff.

[48] See *M. Manowska*, [in:] *K.W. Baran* (ed.), System prawa pracy, vol. VI. Procesowe prawo pracy *[System of Labour Law, vol. VI, Procedural Labour Law…]*,Warsaw 2016, p. 529 ff.

[49] See *A. Machnikowska*, [in:] System prawa pracy, vol. VI… *[System of Labour Law, vol. VI…]*, p. 515 ff. and the literature referenced there.

5.3. The principle of objective truth in labour law matters

The essence of the principle of objective truth is that the basis for all decisions in labour law matters should be factual findings consistent with the actual situation[50]. However, before I go into merits, it is worth noting that the name of this principle raises some doubts. In addition to the principle of objective truth, the legal literature often uses the expression "the principle of material truth". It was established somehow in opposition to the situation when the court issues a judgment solely on the basis of the evidence provided by the parties, in accordance with the court files, even if it was convinced that it is not consistent with the actual status of the case[51], that is on the basis of legal ("formal") truth[52]. Without going into further deliberations on truth[53] as a philosophical problem, I conclude that both adjectives: "objective" and "material" used in the name of the principle, in gnoseological terms, have the same weakness – they suggest that there exists some other "subjective" or "formal" truth while there is no such other truth. In this situation, there is no sufficient justification to explicitly opt for one of the two variants of the name of the principle. I believe that the use of one of these adjectives in the name of the principle should only emphasize the directive addressed to the adjudicating authorities, so that in the course of the proceedings they do not accept the formal substitutes of truth, and thus eliminate from the judicial practice a particularly harmful phenomenon – "a procedural game of evidence".

According to the above, it is clear that the adjective used in the name of the discussed principle is of secondary importance. However, because of a well-established tradition in the labour law literature[54] in which the name principle of "objective truth" prevails, further in this study I will use the latter term.

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[50] See *K. Knoppek*, Zmierzch zasady prawdy obiektywnej w procesie cywilnym *[The end of the principle of objective truth in the civil procedure]*, Palestra 2005, No. 1–2, passim.

[51] *W. Siedlecki*, Postępowanie cywilne. Zarys wykładu *[Civil Procedure. An Outline]*, Warsaw 1977, p. 53.

[52] See more in *W. Broniewicz*, Zasada kontradyktoryjności procesu cywilnego w poglądach nauki polskiej *[The adversarial principle in the civil procedure – as viewed by Polish legal scholars]* (1880–1980), [in:] *Jędrzejewska*, *T. Ereciński* (eds.), Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci Zbigniewa Resicha *[Studies in procedural civil law]*, Warsaw 1985, p. 40.

[53] As regards the concept of truth in jurisprudence, see in particular *T. Gizbert-Studnicki*, Prawda sądowa w postępowaniu cywilnym *[Judicial truth in civil procedure]*, PiP 2009, vol. 7, p. 5 ff.; *T. Pietrzycki*, *B. Wojciechowski*, Równość, prawda i sprawiedliwość w procesie cywilnym. Rozważania na tle nowelizacji k.p.c. *[Equality, truth and justice in civil proceedings in the context of the amendment of the Code of Civil Procedure]*, Palestra 2004, No. 9–12, p. 11 ff.

[54] See *T. Zieliński*, Prawo pracy. Zarys… *[Labour law. Outline…]*, p. 173 ff.

The roots of the principle of objective truth in the classic version can be found in Aristotle's concept of truth as a judgment consistent with reality. In the light of the provisions of article 3 of the Code of Civil Procedure such approach has a limited application in the civil proceedings. The directive formulated in it shifts from the court to the parties the obligation to seek to clarify all the relevant circumstances of the case[55]. However, in the labour law matters in which the employee is a claimant, special procedural guarantees have been established allowing the court to find the truth. First to mention is article 473 of the Code of Civil Procedure. This provision removes certain restrictions regarding evidence applicable in the general civil procedure, thereby expanding the possibilities of comprehensive clarification of circumstances of a particular case.

The central problem arising from the provisions of article 473 § 1 of the Code of Civil Procedure is a question which of the restrictions regarding evidence from witnesses and from hearing of the parties, does not apply to labour law matters initiated by an employee. Before going into detailed deliberations on the wording of article 473 § 1 of the Code of Civil Procedure, it is worth keeping in mind[56] that the procedural legislation in force introduces both subjective and subjective restrictions on evidence from witnesses and from hearing of the parties[57]. On the basis of the directive formulated in article 473 § 1 of the Code of Civil Procedure, it is possible to develop three basic interpretation options. According to the first option, in labour law matters there are no personal or material restrictions on evidence. According to the second option only material restrictions do not apply and according to the third option – only personal restrictions do not apply.

Because of the multitude of interpretation options, it should be analyzed in more detail. If we accept a logical level as a starting point for interpretation of article 473 § 1 of the Code of Civil Procedure, the *lege non distinguente* argument is inevitable. Its use makes it possible to approve the interpretation according to which the mentioned provision abolishes both material and personal restrictions. However, different conclusions can be drawn if we use textual analysis. I am referring to the fact that the concept of admissibility of evidence from testimonies of witnesses and the hearing of parties is used by the legislator only in article 246 and 247 of the Code of Civil Procedure. In this context, an opinion presented in

[55] Judgment of the Supreme Court of 2 July 2015, V CSK 624/14, and a judgment of the Supreme Court of 7 May 2008, II PK 307/7.

[56] By this I mean articles 246, 247, 259, 260 and 299 of the Code of Civil Procedure and article 74 § 2 of the Civil Code in connection with article 300 of the Labour Code.

[57] See *A. Skąpski*, Ograniczenia dowodzenia w procesie cywilnym *[Restrictions on taking evidence in the civil procedure],* ZNUJ 1981, vol. 93, pp. 63–65.

the literature on the civil procedural law[58], according to which article 473 § 1 of the Code of Civil Procedure refers only to these two provisions, would be justified, therefore personal restrictions would apply also in labour law proceedings in which an employee is a claimant. Such interpretation concept is supported not only by textual considerations, as seen in the dissimilarity of the semantic construction of article 259 and 261 of the Code of Civil Procedure and article 246 and 247 of the Code of Civil Procedure, but also teleological considerations. In my opinion, there is no substantive justification for the abolition of personal restrictions, established in the Code of Civil Procedure, in the proceedings in labour law matters initiated by an employee. Particular attention should be paid to the fact that in principle – as regards evidence from testimonies of witnesses – they are absolute.

By adopting article 473 § 1 of the Code of Civil Procedure, the legislature implicitly reduced, in the proceedings before the labour court, the advantage of the documentary evidence[59] and thus significantly expanded the possibilities of such court to establish the objective truth[60]. Moreover, on this occasion, it supplemented the gap in the Labour Code relating to the issue of invalidity of an employment contract and the problem of the so-called factual labour relations.

As regards the special guarantees enabling the implementation of the principle of objective truth, I include into this category also the investigation activities[61] (article 468 of the Code of Civil Procedure). In the proceedings in labour law matters in which an employee is the claimant, they fulfil various functions. One of them is to clarify the circumstances that are important for the proper resolution of cases, especially those that are disputable. In principle, they are an important instrument for the court, serving real relations between the parties.

The investigation activities constitute a separate phase of the proceedings before the labour court of the first instance. An important question is whether these activities are optional or obligatory. I support a compromise standpoint according to which under the legislation in force, the investigation activities are semi-

[58] See *A. Zieliński*, Ochrona roszczeń pracowników w sądowym postępowaniu cywilnym *[Protection of Workers' Rights in the Court Civil Proceedings]*, Warsaw 1969, pp. 100–101.

[59] See in particular *K. Piasecki*, Problematyka formy czynności prawnych i dowodów z dokumentów w zakresie stosunków pracy *[A form of juridical acts and documentary evidence in employment relations]*, Palestra 1965, No. 10, p. 32 ff.

[60] See *A. Jabłoński*, [in:] Kodeks postępowania cywilnego… *[The Code of Civil Procedure…]*, p. 230 ff.

[61] In the original version of the Code of Civil Procedure such activities were called investigation "procedure" (article 471). A similar normative formula was adopted in article 47 of the Act on Regional Labour and Social Insurance Courts.

obligatory[62]. This means that the labour court cannot refrain from carrying them out if the circumstances listed in the Act do not occur explicitly in the case concerned. This view is supported by article 468 of the Code of Civil Procedure. It provides that the court will undertake investigation activities if it is justified by the results of the preliminary examination of the case or if other conditions specified in the act occur[63]. The categorical wording of the directive formulated in article 468 § 1 of the Code of Civil Procedure does not provide for full freedom of the labour court to decide whether the investigation should be conducted or not[64]. For this reason, I think that the arguments in support of the optional nature of these activities are unjustified.

Assumption of the obligatory character of the investigation activities does not mean that the labour court has no room for manoeuvre as regards a decision to conduct or discontinue these activities. The point is that some of the conditions, laid down in article 468 § 1 of the Code of Civil Procedure, for omitting the activities in question are expressed in very general terms. Such regulation allows the court to be flexible and adjust its decision to the circumstances of a particular case. Also, because of the fact that the discussed provision includes a condition ("[…] shall take […] if […]"), the obligatory nature of the directive included in it becomes clearly relative. As a result, in practice the boundaries between the obligatory nature and the optional nature of the investigation activities are blurred. However, this does not affect the accuracy of the preliminary argument that these activities serve implementation of the principle of objective truth in labour law matters.

One of the special guarantees which serve implementation of the principle of objective truth is also the possible submission by a non-government organisation (e.g. a trade union), to the court, of an opinion of significant importance to the case[65]. This opinion should relate to the facts that are relevant to the particular case being examined. There are no statutory obstacles that would prevent a un-

[62] See *K. Flaga-Gieruszyńska*, [in:] *K.W. Baran* (ed.), System prawa pracy, vol. VI. Procesowe prawo pracy *[System of Labour Law, vol. VI. Procedural Labour Law]*, Warsaw 2016, pp. 591–592.

[63] According to article 468 § 1 of the Code of Civil Procedure, I conclude that three situations are possible: 1) the case has already been examined by the conciliation commission; 2) the investigation will not accelerate the course of the proceedings; 3) for other reasons the investigation activities are pointless (for example a judicial conciliation procedure has been carried out in the case concerned). It is described in detail by *K. Flaga-Gieruszyńska*, [in:] System prawa pracy, vol. VI… *[System of Labour Law. Vol VI. Procedural Labour Law…]*, p. 592 ff. and the literature referenced there.

[64] Already in the guidelines of the judiciary (a resolution of the Supreme Court of 30 September 1966, III PZP 28/66, OSNC 1967, No. 1, item 1) regarding protection of employees' rights in the separate proceedings, the Supreme Court pointed out the exceptional nature of the situation in which the investigation activities (procedure) are omitted.

[65] See *A. Machnikowska*, [in:] System prawa pracy, vol. VI… *[System of Labour Law. Vol. VI. Procedural Labour Law…]*, p. 508 ff. and the literature referenced there.

ion organization from expressing its opinion on general matters, but it should not express its views on interpretation of law. Only exceptionally, its view may influence the legal basis of the decision, when the facts presented in it indirectly affect the interpretation of law in the case concerned.

The three procedural institutions mentioned above (i.e. the abolition of certain evidentiary restrictions, investigation activities and the admissibility of presentation by a trade union organisation of the opinion relevant to the circumstances of the case) exhaust, in my opinion, the catalogue of special guarantees serving the implementation of the principle of objective truth, and decreed in articles 459–477[7a] of the Code of Civil Procedure. They are all preventive. There are basically no[66] special guarantees of a repressive nature. In the context of the mentioned norms, it seems reasonable to conclude that in the proceedings in labour law matters no legal instruments were introduced that would significantly expand the area of activity of the adjudicating body. In principle, there are "general" mechanisms applicable in such proceedings, similar to those applicable in other procedures. I approve such solution. I cannot see any justification for further restriction of the adversarial elements in the "employee" procedure. In my opinion, maintaining a balance, under the civil procedural laws, between the investigatory and adversarial form is of utmost importance. A visible dominance of one of them may lead to various pathologies in the proceedings. In the case of full dominance of adversarial forms, there is a risk that the labour court will be forced to adjudicate only on the basis of evidence provided by the parties[67], and thus on the basis of the "formal truth". On the other hand, in the case of predominance of investigatory forms, there is a real risk that the parties will be deprived of the initiative in conducting a dispute, which should be considered a peculiar phenomenon in the social free market economy.

[66] A specific, repressive, guarantee of implementation of the principle of objective truth are rights granted to the labour court in article 475 of the Code of Civil Procedure.

[67] Independence of the court from the parties' initiative in collective evidence is emphasized by *W. Siedlecki*, Rola sądu w postępowaniu cywilnym (rozpoznawczym) *[Role of the court in civil (investigation) procedure]*, PiP 1966, vol. 12, pp. 860–861.

5.4. The principle of amicable resolution of disputes in labour law matters

The essence of the principle of amicable resolution of labour law disputes is that parties can reach a settlement[68] at each of its stages. In the Polish legislative system it was formulated in article 243 of the Labour Code. It provides that both an employer and an employee should seek amicable resolution of a dispute arising from an employment relationship. Because of the fact that this provision was included in the general part of the twelfth section of the Labour Code, according to the *a rubrica* argumentation I conclude that the directive formulated in it refers to all forms and stages of individual labour disputes. Its material scope is not limited only to matters involving claims arising out of employment relationship, but in the light of the *lege non distinguente* rule, it concerns all disputes connected with this relationship, including those which do not involve claims.

Violation of the provisions of article 243 of the Labour Code does not produce any negative sanctions for its addressees. It is therefore justified to classify it in a *lege imperfecta* category. It only indicates a socially useful attitude in the event of a dispute arising out of an employment relationship. However, it is not absolutely binding, because there are no effective normative instruments to verify whether it affects the behaviour of the parties to which it is addressed.

Amicable resolution of individual labour disputes is based on the mediation method. It consists in intermediation by a third party, aimed at resolution of a dispute through an agreement between the parties, without the use of coercive measures. The essence of the mediation is that such third party, called a mediator, to whom the dispute was submitted for consideration, is acting as a liaison between the parties involved, and provides them with assistance in development of a resolution of the dispute acceptable to both of the parties. With this, the parties are able to voluntarily reach an agreement on the disputable matters. The agreement – unlike a settlement – does not have to involve mutual concessions. Therefore, in the light of the formal logics, it is reasonable to conclude that every settlement is a voluntary agreement while not every voluntary agreement is a settlement. The amicable (irenic) resolution of a dispute occurs also where the claims of one of the parties were fully satisfied or the party waived such claims and withdrew a demand for legal protection.

[68] See *K.W. Baran*, Ugodowe likwidowanie sporów o roszczenia ze stosunku pracy *[Amicable resolution of disputes involving claims arising out of employment relationship]*, Kraków 1992, p. 27 ff. and the literature referenced there.

There are two main homologous models[69] which can be distinguished among the amicable (irenic) procedures: the judicial model and extra-judicial model[70]. In the former case, the mediation activity is conducted by the court which has a status of a judicial authority within the meaning of article 175 of the Constitution of the Republic of Poland, and in the latter case – by an entity without such status, regardless of its statutory name. Between these two extreme solutions, in the Polish legislative system it is also possible to distinguish a heterogeneous (mixed) model which incorporates both courts and non-judicial bodies. To substantiate the above classification, it should be pointed out that the judicial model includes judicial conciliation (articles 184–186 of the Code of Civil Procedure) and mediation conducted in the course of the trial (article 10 and article 468 § 2 point 2 of the Code of Civil Procedure). As regards the extra-judicial model, I include in it an in-company conciliation procedure (article 244 ff. of the Labour Code). On the other hand, heterogeneous procedures are procedures conducted by a mediator under articles 183^1–183^{15} of the Code of Civil Procedure[71] as well as procedures conducted by an arbitration tribunal (article 1164 of the Code of Civil Procedure[72]), since they include both judicial and extra-judicial bodies.

As regards the analysis of issues relating to judicial amicable procedures, I will start with the provisions of article 10 of the Code of Civil Procedure. The mentioned provision includes a general normative directive for the amicable resolution of civil-law matters. Through article 13 § 2 of the Code of Civil Procedure it applies to the entire court procedure, also appeals procedure and, what is new in the Polish legal system, to the arbitration tribunals. Given the material scope of article 1 of the Code of Civil Procedure, there is no doubt that this provision applies also to labour law matters. The obligative nature of an employment relationship and mainly semi-imperative character of these provisions does not prevent

[69] In discussing the issue of amicable resolution of individual labour disputes, worth mentioning is the methodological aspect. The starting point will be an argument that the modeling process presents the subject of the analysis, without a reference to its features, which, due to the research objectives, were considered irrelevant. A consequence of this simplification is that the presented model is an essence of the key characteristics assumed by a researcher.

[70] See deliberations in *A. Góra-Błaszczykowska*, *K. Antolak-Szymańska* (eds.), Procesowe sposoby rozwiązywania sporów pracowniczych *[Procedural Methods of Resolution of Labour Disputes]*, Warsaw 2015, *passim*.

[71] See *K.W. Baran*, *D. Książek*, Postępowanie mediacyjne w sprawach z zakresu prawa pracy *[Mediation in labour law matters]*, [in:] *A. Góra-Błaszczykowska*, *K. Antolak-Szymańska* (eds.), Pozasądowe sposoby rozwiązywania sporów pracowniczych *[Extrajudicial Methods of Resolution of Labour Disputes]*, Warsaw 2015, p. 34 ff. and the literature referenced there; M. *Mędrala*, Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy *[Protective Function of Civil Court Proceedings in Labour Law Matters]*, Warsaw 2011, p. 344 ff.

[72] See *Ł. Błaszczak*, [in:] *K.W. Baran* (ed.), System prawa pracy, vol. VI Procesowe prawo pracy,Warsaw 2016, p. 145 ff. and the literature referenced there.

and even encourages mutual concessions between the parties in order to amicably settle the dispute between them. It is also worth emphasizing that none of the applicable labour laws – unlike in the case of social insurance matters[73], not even *implicite,* prohibits conclusion of settlements.

When analyzing the judicial model of amicable settlement of labour disputes, attention should be paid to two procedural institutions serving amicable resolution of labour law matters. I am referring to judicial conciliation and investigation activities.

The judicial conciliation[74] is an independent procedure aimed at bringing reconciliation to the antagonized parties. In functional terms, it is preliminary, because the mediation activities undertaken by the court in such procedure occur when the civil proceedings are not yet pending. According tothe prevailing view[75], court proceedings are initiated when a legal action is brought before a court. Such action starts the course of activities aimed at resolution of the disputable legal relationship and issuance of a judgment[76]. In such context, it seems reasonable to conclude that initiation of a judicial conciliation procedure suspends, at least temporarily, initiation of a civil procedure. Therefore, in procedural terms, it is completely autonomous.

A judicial conciliation procedure is voluntary in such sense that a party summoned to conciliation does not have to take part in the proceedings if it does not intend to conclude a settlement. The avoidance of the conciliation will not directly produce any negative consequences in the legal and procedural terms. The Code of Civil Procedure does not provide the court with any coercive measures by which it could enforce the appearance of the parties at the conciliation meeting. However, in certain situations, a party who disregarded the call for reconciliation may suffer the financial consequences of such behaviour. According to the directive laid down in article 186 § 2 of the Code of Civil Procedure, if the opponent fails to appear at the court hearing without an excuse, the court, at the request of the party demanding the conciliation who subsequently brings an action in the case concerned, will include the costs of the conciliation hearing in the judgment concluding the proceedings. This norm is of practical importance in

[73] See more in *T. Zieliński*, Ubezpieczenie społeczne pracowników i ich rodzin *[Social Insurance of Workers and Their Families]*, Kraków 1987, p. 158.

[74] See *K. Flaga-Gieruszyńska*, [in:] System prawa pracy, t. VI… *[A System of Labour Law, Volume VI…]*, p. 101 ff. and the literature referenced there.

[75] See *L. Siciński*, Postępowanie pojednawcze i wyjaśniające w nowym kodeksie postępowania cywilnego *[Conciliation and investigation procedure in the new Code of Civil Procedure]*, Palestra 1967, No. 1, p. 81; *J. Turek*, Cywilne postępowanie pojednawcze *[Civil conciliation procedure]*, Palestra 2004, No. 1–2, p. 58 ff.

[76] See *T. Wojciechowski*, Kontrola ugody sądowej *[Control of a court settlement]*, KPP 2001, vol. 3, p. 639 ff.

the labour law matters only where an employee losing the case was charged with expenses relating to the actions taken by the court in the course of the proceedings, and earlier in the same matter the employer requested a conciliation hearing which failed through the fault of the employee.

An important procedural mechanism which serves irenic resolution of individual labour disputes is investigation activities[77]. Such conclusion can be derived from the provisions of article 468 § 2 (2) of the Code of Civil Procedure, according to which the purpose of such actions is to encourage the parties to reconcile and conclude a settlement. Therefore, they are taken already after a statement of claim has been filed. Therefore, they belong in the general structure of the proceedings in labour law matters. However, unlike in the case of the judicial conciliation procedure, they are not autonomous. They are only a separated phase of the first-instance proceedings.

The second of the homologous models of amicable resolution of individual labour disputes is the out-of-court (extrajudicial) model. This means that the mediator status is granted to bodies which are not judicial authorities. The mediation rights are granted to conciliation commissions[78]. Under article 244 § 1 of the Labour Code, the conciliation commissions may only make attempts to settle the labour disputes amicably. Without statutory authorisation their activity cannot transform into resolution of disputes and they can apply only non-imperative methods.

When describing the out-of-court conciliation, special attention should be paid to its impact on the court proceedings. In practice, a situation may arise in which two procedures will be conducted concurrently before a labour court and a commission, between the same parties and regarding the same claim arising from an employment relationship. This may happen also where an employee files, at short intervals, a motion and a statement of claim. In particular, what needs consideration is a question whether a labour court can suspend[79] its proceedings because the out-of-court conciliation procedure is pending. In my opinion such

[77] See also *Cz.Jackowiak*, Postępowanie pojednawcze w sporach ze stosunku pracy *[Conciliation procedure in labour law matters],* PiP 1965, vol. 4, p. 606; *K. Kołakowski*, Postępowanie wyjaśniające w sprawach pracowniczych *[The investigation procedure in labour law matters]*, NP 1967, No. 1, p. 53; *K.W. Baran*, Procesowe prawo pracy *[Procedural Labour Law]*, Kraków 2003, pp. 258–260 and *K. Flaga-Gieruszyńska*, [in:] System prawa pracy, t. VI… *[The System of Labour Law. Volume VI…]*, p. 597.

[78] See *K.W. Baran*, Status prawny komisji pojednawczych po nowelizacji kodeksu pracy z 2 lutego 1996 r. *[The legal status of conciliation committees after amendment of the Labour Code of 2 February 1996]*, St.Pr.PiPSp. 1997, vol. 3, p. 327 ff.; *T. Romer*, Pojednanie w prawie pracy *[Conciliation in labour law]*, Pr. Pracy 1997, No. 1, p. 3 ff.

[79] See *A. Bąk*, Podstawy spoczywania procesu cywilnego w ustawie i praktyce *[The bases for suspension of civil proceedings in law and in practice]*, Prz. Sąd, 2001, No. 3, p. 27 ff.

decision of the court is acceptable. An argument in support of this view is based on the literal interpretation of article 177 § 1 (1) of the Code of Civil Procedure. This provision establishes a directive that a court may suspend proceedings *ex officio*, if resolution of a case depends on the result of other civil proceedings pending. The category of "other" civil proceedings may include also an out-of-court conciliation procedure. If a settlement is concluded in such procedure in a dispute that is also the subject of a pending lawsuit, then its continuation will turn out to be pointless.

When describing the relationship between out-of-court conciliation and the judicial process, it is worth considering whether the labour court can refer a case involving claims arising out of employment relationship to the conciliation commission if it becomes convinced in the course of the trial that there is a chance to settle it amicably. The answer to such question should be negative since in the context of the civil procedure there is no such provision which could be the basis for issuance of such judgment. *De lege lata,* such possibility exists under article 183^8 § 1 of the Code of Civil Procedure, which authorizes the court to refer the case to a mediator. However, this specific provision cannot be interpreted broadly to apply also to extrajudicial conciliation procedure.

As regards the heterogeneous model of irenic procedures, I include in it a mediation procedure (articles 183^1–183^{15} of the Code of Civil Procedure)[80] and a procedure before an arbitration tribunal (article 1164 of the Code of Civil Procedure)[81]. They include both extrajudicial bodies and judicial authorities. This applies to the obligative mediation procedure and arbitration courts since a settlement agreement concluded in such procedures is subject to approval by the labour court under article 183^{14} or article 1213 of the Code of Civil Procedure.

When analyzing the nature of the mediation procedure (articles 183^1-183^{15} of the Code of Civil Procedure) in relation to court proceedings, it is worth noting that it may be either completely extrajudicial when it is conducted under a mediation agreement, or in-process when it is inspired by a decision of the court issued under article 183^8 of the Code of Civil Procedure. The out-of-court mediation may be initiated either under a mediation agreement (article 183^1 § 3 of the Code of Civil Procedure) or under a request for mediation (article 183^7 of the Code of Civil Procedure), if the other party to a dispute agrees (article 183^1 § 2 of the Code of Civil Procedure *in fine).* The "in-process" mediation is initiated by a decision of the labour court under article 183^8 of the Code of Civil Procedure.

[80] See *K.W. Baran*, Mediacja w sprawach z zakresu prawa pracy *[Mediation in labour law matters]*, PiZS 2006, No. 3, *passim* and *K. Flaga-Gieruszyńska*, [in:] System prawa pracy, vol. VI… *[System of Labour Law. Vol. VI…]*, p. 116 ff. and the literature referenced there.

[81] See *Ł. Błaszczak*, [in:] System prawa pracy, vol. VI… *[System of Labour Law. Vol. VI…]*, p. 145 ff. and the literature referenced there.

The court may issue such a decision until closing of the first hearing. After such hearing is closed, the court may refer the case to mediation, only upon a mutual request of the parties[82]. In the context of the above regulation in labour law matters, it can be concluded that such a decision may be issued only in exceptional situations and it is subsidiary, because usually the general principles set out in articles 10 and 468 § 2 of the Code of Civil Procedure should apply. In practice, these are matters in which agreeing a compromise before an out-of-court mediator will be easier for functional reasons (e.g. the interest of the mediators in the course of the lawsuit).

As regards the procedure before an arbitration tribunal[83], it has a dual nature: mediation and arbitration. In a situation when it ends amicably, by conclusion of a settlement agreement, it is mediation and if it ends by issuance of a judgment – it is arbitration. Pursuant to article 1164 of the Code of Civil Procedure, an arbitration clause in labour law matters may be concluded only after the dispute arises. Essentially, this procedure is voluntary since under article 1165 § 1 of the Code of Civil Procedure a dispute is referred to an arbitration tribunal only under an agreement between the parties. It should be made in writing (article 1162 § 1 of the Code of Civil Procedure). In labour law disputes, a problem arises as regards determination of the period in which such agreement can be signed. In my opinion, according to a literal interpretation of article 1164 of the Code of Civil Procedure, it can occur only after the conflict has been institutionalized, that is after a party to an employment relationship has forwarded specific demands to the other party.

The heterogeneity of the procedure before the arbitration tribunal and the labour court results from the interpenetration of the two procedures. This occurs not only when a settlement agreement is declared by the labour court to be enforceable under article 1213 of the Code of Civil Procedure, but also in the case of security of claims pursued before an arbitration tribunal under article 1166 § 1 of the Code of Civil Procedure. Under the *lege non distinguente* argument, this provision applies also in labour law disputes.

When discussing the principle of amicable resolution of labour disputes, a question arises whether the out-of-court irenic procedures, i.e. conciliation, mediation and arbitration clause do not violate the right to a fair trial (article 45 in connection with article 77 of the Constitution of the Republic of Poland). Be-

[82] See *T.M. Romer*, Ugoda w postępowaniu procesowym i pojednawczym *[Settlement in court and conciliation procedure]*, MPP 2005, No. 11, p. 293.

[83] See *Ł. Błaszczak*, [in:] System prawa pracy, vol. VI… *[System of Labour Law. Vol. VI…]*, p. 164 ff. *A. Węgrzyn*, Sądownictwo polubowne w sporach z zakresu prawa pracy *[Arbitration in labour law matters]*, St.Pr.PiPSp. 2007, p. 399 ff.; *M. Mędrala*, Zapis na sąd polubowny w sprawach z zakresu prawa pracy *[Arbitration clause in labour law matters]*, St.Pr.PiPSp. 2007, p. 411 ff.

cause of the fact that they are voluntary, I do not see any violation of the above-mentioned constitutional provisions. From this point of view, the most important is the unhampered access of the parties to resolution of a dispute by a court judgment in the event of failure of the out-of-court procedure. None of the analyzed procedures introduces any such normative restrictions. They are only obligative.