Editors
Izabela Florczak, Zbigniew Góral

Developments in Labour Law from a Comparative Perspective

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INTRODUCTION

The need for comparative studies of labour law seems indisputable, inasmuch it arises from the international character of many labour law norms, as well as from the interconnection between working and social relations which are often conditional and international. Thus, it appears that academic research into the field of labour law would be incomplete without its comparative facet. For these reasons, numerous networks of international cooperation between labour law scholars are being established on both formal and informal levels. The underlying idea is to find a common denominator for the discourse concerning the present condition of labour law, and pathways for its further development. The *Labour Law Education Society*, established in 2012 at the initiative of Prof. Charles F. X. Szymanski, is one of the networks attempting to accomplish this objective. Its early days were crowned with *Developments in Labour Law From a Comparative Perspective*, a conference held on 23rd–24th of May at the Allerhand Institute's branch in Cracow, Poland. The present volume, which is an outgrowth of that conference, presents certain current issues frequently discussed in the realm of labour law. Also, it contains chapters considering the most significant developments within the discipline.

As its paradigm is changing to the requirements of the post-industrial economy, in its nature work is becoming less subordinated. Therefore, it appears natural that the legal status of worker in labour law relations has become one of the main strands of research. The issue is approached from different vantage points in three chapters of this monograph. In the first one, Darja Senčur Peček analyses various aspects of self-employment, considering the degree of similarity and dissimilarity in the legal status of self-employeds and employees. The above leads us directly to the discussion concerning the notion of 'worker', commonly used in EU legislation, which becomes the focal point of Jaana Paanetoja's analysis. Paanetoja attempts to ascertain what characteristics are required for worker to be protected by EU legislation. The last chapter devoted to the changes in the status of worker as an object of labour law is that by Izabela Florczak and Barbara Muszyńska, who explore selected differences between labour law employment and the economically competitive civil law employment.

The character of contemporary labour law is increasingly shaped by modern technologies, which affects many dimensions of working relations. This influence is studied by Juhani Korja and Karolina M. Szymorek-Chachuła. Korja discusses the concepts of surveillance in the work place, employee privacy, and changes in the working environment resulting from technological development. Szymorek-Chachuła focuses on the use of modern technologies with regard to the possibility of concluding employment contracts.

The present monograph also reports on other subjects that are relevant to the current research in labour law and its developments. Senad Jasarević outlines Serbian anti-discriminatory regulations which, given the country's non-EU status, seem crucial in terms of the future adjustments to EU legislation. Tatiana Wrocławska, on the other hand, analyses employment stability among older employees. In yet another general contribution to this book Bojan Urdarevic considers the right to strike in Serbian legislation. The monograph ends with a chapter by Zbigniew Góral and Ewa Staszewska, who summarise the changes in Polish labour law legislation in the past ten years of Poland's EU membership, providing a valuable point of reference for comparative studies.

As the scope of developments in labour law seems extremely wide, an exhaustive compilation would be a formidable task. For this reason, the present book seeks to present only a selection of developing tendencies, all of which, however, form a reliable basis for further comparative studies both within and without the *Labour Law Education Society*.

Izabela Florczak
Zbigniew Góral

Darja Senčur Peček[*]

THE SELF-EMPLOYED, ECONOMICALLY DEPENDENT PERSONS OR EMPLOYEES?

1. Introduction

Labour law traditionally protects employees, i.e. persons who perform work within the framework of an employment relationship. The main characteristic of employment relationship was (and still is) organisational integration of the person who carries out work in relation to the other contractual party, which allows the latter (employer) to direct and supervise the work. The employee does not look for opportunities in the market, but only works for the employer, is not in charge of the business, but instead undertakes to perform a specific job (part of the business), under the direction and supervision of the employer. As the weaker party in this relationship, the employee may not be able to ensure adequate regulation of their rights and obligations under the contract alone; therefore, labour legislation provides him with minimum rights, while additional rights may be agreed upon in collective agreements.

Unlike employees, the self-employed are persons who operate independently in the market, perform work on their own account, possibly for a number of contracting authorities, relationships with whom are regulated by civil or commercial contracts. They are thus subjects to the rules of corporate law, law of obligations, or commercial law, with labour law mainly applicable if they are also employers (if they employ workers).

Currently, an increasing number of persons carry out their work on a self-employed basis, i.e. without the employment relationship, however, not all of them

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perform their work in the market, at their own risk and independently. In order for labour law to ensure protection for every person who carries out their work in dependant relationships and is in need of protection, it must also deal with the issue of distinction between employees and self-employeds, and determine who should be protected by labour law (in full or in part)[1].

The fact is that it is not always easy to distinguish between employees and self-employeds. This is so because between a typical employment relationship and a typical relationship between two independent contractors there is a range of relationships where elements of the employment relationship are not explicitly expressed, or where elements of both relationships are intertwined. This is a so-called grey area between labour law and commercial law[2] which is ever increasing.

This grey area also includes those economically dependent persons who are self-employed, but are also in need of protection due to their economic dependence on the contracting partner (client), similarly to employees.

A special category[3] consists of persons who only appear to be self-employed, but actually carry out their work in a relationship where elements of employment relationship are present. These persons must be fully protected by labour law.

This article starts with a discussion of the concept of a self-employed person, different categories of self-employeds and their legal status. It then contemplates economically dependent persons, their definition and legal protection. Special emphasis is put on the problems of false self-employment and on a solution of this issue.

2. The self-employed and their legal status

The intention of labour law is to protect employees as the weaker party in the employment relationship. Labour legislation (and case law in some jurisdictions), therefore, provides a definition of an employee or an employment relationship, or sets out certain criteria that a person must meet to be considered an

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[1] In this respect, see: *Thematic Report 2009, Characteristics of the Employment Relationship, European Network of Legal Experts in the field of Labour Law*, 2009; G. Davidov, B. Langille (ed.), *Boundaries and Frontiers of Labour Law*, Hart Publishing, 2006. See also: D. Senčur Peček, *Komu zagotavljati delovnopravno varstvo*, Podjetje in delo, 6–7/2007, p. 1223–1237.

[2] See Green Paper: *Modernising labour law to meet the challenges of the 21st century*, COM (2006), 708 final, p. 11; A. Perulli, *Economically dependent/quasi subordinate (parasubordinate) employment: legal, social and economic aspects, a study prepared for the European Commission*, Brussels 2003, p. 15; E. Sanchez Torres, *Self-employed Worker: The Spanish Law on Dependent Self-employed Workers: A New Evolution in Labor Law*, "Comparative Labor Law & Policy Journal" 2010, Vol. 31, No. 2, p. 3.

[3] Which, according to some, also falls in a grey area, or is even described as a primary grey area. See: A. Perulli, *op. cit.*, p. 15; E. Sanchez Torres, *op. cit.*, p. 3.

employee[4]. A person who does not meet these criteria, from the perspective of labour law, is not considered an employee, but a self-employed. The self-employed are therefore negatively defined[5], or are defined in a residual manner[6].

The category of self-employment, therefore, includes all contractual relationships[7] that do not meet the criteria applicable to the employment relationship. In Slovenian legal system this pertains to any relationships that do not fulfil the criteria of Article 4 of the Employment Relationships Act (Zakon o delovnih razmerjih, ZDR-1)[8].

From the perspective of labour law the distinction or definition of self-employment is important, since self-employeds are not granted the rights available to employees. No less important are the definitions of self-employment in the field of social insurance, as they decide whether and to what extent such persons are included in the social insurance system, and in the area of taxation, where they determine the manner of taxation of such persons. For specific groups of self-employeds the legislation also regulates the conditions on which they can run their businesses (for example, for sole traders, for certain freelance professions).

The definitions of self-employment in the various fields of law in different legal systems (sometimes even within a single legal system) differ from one another[9]. Nevertheless, it is possible to highlight the key characteristics of self-employment (investment of one's own capital, autonomy on the labour market, control over one's own work, and responsibility for the work done and for employment of workers) and to identify basic groups within the broad category of the self-employed[10].

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[4] For more on the concept of the employment relationship, see: R. Rebhahn, *Der Arbeitnehmerbegriff in vergleichender Perspektive*, „Recht der Arbeit", 3/2009, Thematic Report 2009, Characteristics of the Employment Relationship, European Network of Legal Experts in the field of Labour Law, 2009.

[5] See: A. Perulli, *op. cit.*, p. 7.

[6] R. Pedersini, D. Coletto, *Self-employed workers: industrial relations and working conditions,* European Foundation for the Improvement of Living and Working Conditions, Dublin 2010, p. 13.

[7] In addition to the work contract (*locatio operis*), these are also supply services, agency work, pursuit of specific professions, as well as franchising, engineering, factoring, leasing, management, transfer of know-how, production and supply of software. See: A. Perulli, *op. cit.*, p. 8.

[8] Official Gazette of RS, No. 21/2013. The ZDR-1 defines the employment relationship in Article 4 as "a relationship between the employee and the employer, whereby the employee is voluntarily included in the employer's organised working process, in which he in return for remuneration continuously carries out work in person according to the instructions and under the control of the employer".

[9] The absence of a clear national definition was also emphasised by the European Parliament in its resolution, where it additionally stressed that it increases the risk of false (apparent) self-employment. See: the European Parliament resolution of 14 January on social protection for all, including self-employed workers, 2013/2111 (INI), paragraph 28.

[10] In the research conducted by R. Pedersini, D. Coletto (*op. cit*., p. 15), the following groups were specified:

It can be observed that in addition to the traditional forms (sole traders, craftsmen, independent professions, farmers), for which legislations set strict conditions, some new forms, too, qualify among the self-employed. In particular, this applies to professions that are not required to fulfil any special conditions (the new self-employed). These include, on the one hand, highly-educated professionals (graphic designers, web services providers, entertainment industry professionals, computer engineers, various consultants), who often are well-paid freelancers. On the other hand, there are self-employeds with low level of education, who work in construction, transport and similar industries, and are underpaid and unprotected, and not infrequently are disguised employees[11]. The new self-employed are thus both those who have acquired this status at their own discretion, because of tax advantages, greater freedom at work, or market advantages, and those who opted for it because they had no other choice – because, for example, the employer proposed business cooperation to a former employee[12].

The second observation refers to the distinction between self-employed employers (self-employeds who employ workers) and self-employeds who carry out their work alone and do not employ workers. This division has been adopted in their statistics by both the Eurostat and the ILO, as well as by some legislations (e.g. in regard to taxation)[13]. Self-employed employers have a status similar to other employers (corporations and other legal entities) in regard to the performance of work; however, for the self-employed who carry out work themselves, their status can hardly be distinguished from that of employees. Among the self-employed who perform their work themselves we can identify both those persons who are actually independent in the market, and those who are economically dependent on a single client, as well as those who, for meeting the criteria for the employment relationship, are actually employees.

– Sole traders who carry out their activities with help of employees;

– Traditional independent professions (freelance professionals) who need to fulfil certain conditions, exams, enter into register, are bound by codes of their professional associations (lawyers, doctors) in order to carry out their professions;

– Craftsmen, traders and farmers (traditional forms of self-employment), who often involve family members, sometimes even a small number of employees, in their work;

– Self-employed persons in activities that require education or training, but are not part of regulated professions (the so-called new independent professions or new professionals);

– Self-employed persons in activities that do not require special training, who perform their work without employees, with occasional help from family members.

[11] See: R. Pedersini, D. Coletto, *op. cit.*, p. 1; also R. Pedersini, *'Economically dependent workers', employment law and industrial relations*, European industrial relations observatory online, 2002, p. 21.

[12] See also: A. Baldassarini, *Boundary between self-employment and vulnerable work, informal contracts and undeclared work*, Thematic Review Seminar on "Promoting entrepreneurship and self-employment across Europe", 8th–9th November 2010, p. 8.

[13] R. Pedersini, D. Coletto, *op. cit.*, p. 13, 19.

According to the Eurostat[14], the self-employed accounted for 15.2% of the active working population in the EU in 2012[15]. The highest proportion of the self-employed was found in Greece (31.9%), Italy (23.4%), Portugal (21.1%), and Romania (20.1%), while the lowest was observed in Estonia (8.4%), Luxembourg (8.1%), Denmark (8.9%), and Lithuania (9.7%). In Slovenia, this share was 12.2%.

Only 28.3% of the self-employed in the EU (or 28% in Slovenia) employed workers, which means that the remaining self-employeds (almost three quarters) carried out their work themselves[16]. Most of the self-employed are active in market services (46.1% in the EU, 37.6% in Slovenia).

The findings of the Statistical Office of the Republic of Slovenia (RS)[17] clearly demonstrate that self-employment has long been an established form of work in Slovenia. After the country regained independence the number of the self-employed increased significantly. In 1993, the share of the self-employed among all actively working persons was just over 12%. After the initial increase in the number of the self-employed (mainly new local shopkeepers), the proportion of the self-employed decreased until 2009, but has once again increased in recent years. In 2010, among all the actively working persons in Slovenia, 12.4% were self-employed. The Statistical Office noted that the increase in the number of the self-employed was affected by the Employment Service of Slovenia and its programme of subsidies for new self-employeds (which was launched in this period), and even more by new forms of employment with employers. The Statistical Office of the RS observed that "they usually prefer to employ someone who has a status of a sole trader, rather than enter into an employment relationship with an employee. This method of recruitment allows employers to suspend cooperation with the self-employed faster, while having fewer obligations at the same time in terms of breaks, vacations, education, *etc*."

International institutions and academics from different countries also emphasise the tendency for employers to avoid employing employees and thus avoid labour law protection through decentralisation of business processes, outsourcing, and public procurement as one of the reasons for the increased number of the self-employed[18].

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[14] M. Teichgraber, *European Union Labour Force Survey – Annual Results 2012*, EUROSTAT, Statistics in focus, 14/2013.

[15] All self-employed persons other than founders of legal entities (who are usually also employed by these legal entities, e.g. limited liability companies); hence sole traders and certain other categories only.

[16] The data show that structure of the self-employed has changed in recent years, so that a greater proportion is represented by those who are not employers. The share of the self-employed who work only part-time has also increased. See: A. Baldassarini, *op. cit.*, p. 5.

[17] *Kako prožen in varen je trg dela v Sloveniji?*, Special Notice, Statistical Office of the RS, http://www.stat.si/novica_prikazi.aspx?id = 4375 [30th November 2011].

[18] See: R. Pedersini, D. Coletto, *op. cit.*, p. 13. Opinion of the European Economic and Social Committee on *'Abuse of the status of self-employed'* (own-initiative opinion), OJ C 161, 6th June 2013, item 4.1; E. Sanches Torres, *op. cit.,* p. 234; A. Baldassarini, *op. cit.*, p. 5.

Other reasons leading to the increase in the number of the self-employed (mainly due to the so-called new self-employeds) include increased service activities, new opportunities offered by information and communication technologies, emergence of new needs (related to ageing population), increased level of education in general population, increased share of women in the labour market, the need to include vulnerable groups in the labour market, and the ambition of some workers to more effectively balance their career and family life[19].

Whether self-employment takes on its traditional form or comes as the so-called new self-employment, the self-employed (including those who perform their own work) are in a very different position from employees. They are not subject to the rules of labour law (in regard to minimum wages, protection against dismissal, *etc*.), since international documents and national legislation, as well as collective agreements, only regulate the status of employees. Exceptions can be found in the field of prohibition of discrimination, against which the self-employed are protected as well[20], and occupational safety and health, where some international and national legal sources provide special rules for the self-employed that carry out their own work[21].

In the field of social security, in the majority of European legislations it is possible to observe that the status of the self-employed is becoming similar to that of employees as regards their inclusion in the systems of compulsory social insurance[22]. Where such inclusion in the various systems of social insurance for the self-employed is (was) voluntary, and where the amount of the basis or contributions depends on the self-employed themselves, the self-employed observably enjoy a significantly lower level of social security in comparison to employees. Increasingly obvious is another aspect of the new self-employment, namely the fact that the self-employed often find themselves below the poverty line due to insufficient income (from which they must also pay contributions)[23]. The European Parliament addressed the problem of insufficient social security for the self-em-

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[19] See: Opinion of the European Economic and Social Committee on '*New trends in self-employed work: the specific case of economically dependent self-employed work*' (own-initiative opinion), OJ C 18, 19th January 2011, item 3.1.1; A. Baldassarini, *op. cit.*, p. 5.

[20] See for example: Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (OJ L 180, 15th July 2010, p. 1).

[21] See: Council Recommendation 2003/134/EC of 18th February 2003 on safety and health (minimum social protection) of all self-employed workers (OJ L 53, 28th February 2003). See also: provisions of Articles 55 to 60 of the Zakon o varnosti in zdravju pri delu (Occupational Health and Safety Act), Official Gazette of RS, No. 43/2011 (ZVZD-1). See also: A. Perulli, *op. cit.*, p. 118.

[22] R. Pedersini, D. Coletto, *op. cit.*, p. 21. Fears expressed by A. Supiot in his famous report of 1999 (p. 3) that the young educated people will want to avoid the inclusion in social insurance through these forms of work is therefore (now) without merits in these countries.

[23] In Slovenia, a quarter of the self-employed are below the poverty line. See: http://www.delo.si/novice/slovenija/samozaposlovanje-enterprising-in-siromastvo.html

ployed in a Resolution on social protection for all, including the self-employed[24], in which, among other things, (paragraph 32) Member States are called upon to develop necessary social protection in terms of retirement, disability, maternity/paternity leave and unemployment, so that these rules will be better adapted to the needs of self-employed persons[25].

In the Resolution (paragraph 34), the European Parliament also called upon Member States to inform persons wishing to acquire the self-employed status how this new status will affect their position in the light of social security and labour law, as well as of other rights and obligations that are related to their economic activity. It is questionable whether all prospective self-employeds are fully aware of the legal status of self-employed persons.

The actual status of the self-employed (their employment and working conditions) was to some extent illustrated by a research conducted by the European Foundation for the Improvement of Living and Working Conditions[26]. It was demonstrated that the self-employed[27] often face low income, discontinuous work, insufficient qualifications, long and non-standard working hours, a high proportion of occupational accidents and health problems related to work. Furthermore, the authors of the research underlined the necessity of appropriate measures at both national and EU level (for example, adequate regulation of social protection, incentives for education, business support services[28], and promotion of collective representation of the self-employed). The European Parliament petitioned for introduction of some of these measures (in terms of lifelong learning, self-organisation of the self-employed, and their possible inclusion in collective negotiations) as well[29].

What all these measures have in common is that they aim to ensure minimum rights to all persons performing work, and not to equalise the status of the self-employed and employees. At the same time, regulation of the minimum status of the new self-employed and prevention of false self-employment can also be understood as a means to prevent distortions of competition and social dumping[30].

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[24] (2013/2111 (INI)), 14th January 2014.

[25] Specific subsystem of social security, adapted to the needs of the self-employed, is for example already regulated in Spain (among other things, they are, for example, provided with a sick leave compensation from the first day of the sickness). See: R. Pedersini, D. Coletto, *op. cit.*, p. 22–23.

[26] R. Pedersini, D. Coletto, *op. cit.*, p. 3, also p. 53–64.

[27] The situation of course varies depending on whether the self-employed carry out their work themselves, or if they employ workers; on their activity, and similar.

[28] The European Economic and Social Committee in its opinion of 2013 (item 2.9), for example, proposes to create service centres for the self-employed that would perform tasks for them, for example in relation to health and safety at work and to environmental protection.

[29] See: Resolution, paragraphs 6, 11, 12, 35.

[30] See: EESC Opinion 2013, Item 1.1, Resolution, item K of the preamble.

3. Economically dependent persons

The existence of a category of persons who are not employees, but are nevertheless economically dependent on a sole client, and the ensuing necessity of providing them with certain social rights, was already recognised in 1999 by a well-known labour law theorist Alain Supiot in his report for the European Commission[31]. In the ILO's materials, attention was also drawn to the phenomenon of such self-employed persons as electricians, plumbers, computer programmers, who eventually enter into permanent relationship with a sole client[32].

In addition to the well established basic distinction between employees, who are subject to labour law protection, and the self-employed, who are not, a new group that is emerging is that of the so-called economically dependent persons[33] who belong to the so-called grey area between the self-employed and employees[34]. These persons are not employees (they do not meet the criterion of personal dependence), but nevertheless need particular protection due to their economic dependence.

In many legal systems (for example in Italy, the UK, Germany, Austria, the Netherlands, Portugal, Spain, Sweden)[35], these economically dependent persons are provided with certain labour law protection, generally for being covered by certain norms of labour law[36], if they meet the prescribed criteria: the negative criterion of absence of personal dependence, and the positive criterion of existence of economic dependency resulting from personal performance of work, non--appearance in the market, long-time cooperation with a sole contractual partner, and the fact that the income earned from this relationship is the only or main source of their entire income[37].

With the implementation of the ZDR-1, Slovenia joined the countries that regulate the legal status of economically dependent persons. In doing so, both

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[31] Transformation of labour law and future of labour law in Europe, European Commission, 1999, p. 3.

[32] See: Report V (1), International Labour Conference, 95th Session, 2006, p. 12; Meeting of Experts on Workers in Situation Needing Protection (The employment relationship: Scope), Basic technical document, p. 27.

[33] In spite of different definitions of this category in each country (Arbeitnehmerähnliche Personen, parasubordinati), this term is widely used in Europe.

[34] See: S. Perulli, *op. cit.*, p. 15.

[35] See: Thematic Report 2009, p. 34–37.

[36] In Germany, these provisions relate to annual leave, safety and health at work, protection against discrimination, collective negotiations and jurisdiction of labour courts; in the Netherlands such provisions relate to minimum wage and protection against dismissal; in Spain, among other things, such provisions relate to collective negotiations, annual leave and protection against dismissal.

[37] R. Rebhahn, *Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive*, „Recht der Arbeit", 4/2009, p. 239; S. Perulli, *op. cit.*, p. 98–100.

theory[38] and practice encountered a number of questions, while potential risks also became evident.

One major risk, also encountered in other legal systems that regulate economically dependent persons, is that regulation of economically dependent persons might encourage employers to engage in various business strategies (outsourcing) designed to force their employees to acquire the self-employed status and, at the same time, only provide them with protection available to economically dependent persons[39].

This threat can be averted mainly by clearly defining the category of economically dependent persons and their distinction from other persons who perform work (the self-employed who are not economically dependent, employees) and by supervising the practical application of legal regulations. At this point, the following must be noted[40]:

Economically dependent persons are self-employed persons, not employees, and should therefore be clearly distinguished from false self-employeds (disguised employees). If a self-employed, who is economically dependent, also meets the criterion of personal dependence (i.e. if their relationship with the client contains elements of employment relationship), such a person is to be considered an employee.

Only those (truly) self-employed persons who are economically dependent on their client can be classified among economically dependent persons. These include self-employeds who satisfy the criteria set by legislation for classification of economically dependent persons.

The above-described characteristics of this category of persons can also be inferred from the legal definition of economically dependent persons, both in Slovenian, and, for example, in Spanish law[41]. Both countries list among the criteria those that separate economically dependent persons from employees, on the one hand, and those that distinguish them from other self-employeds (i.e. include them in the subgroup of economically dependent persons), on the other. The former are associated with the definition stating that economically dependent persons carry

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[38] Glej L. Tičar, *Delovnopravno varstvo ekonomsko odvisnih oseb – novost ZDR-1*, Delavci in delodajalci, 2–3/2013, p. 151–167; I. Knez, *Novi Zakon o delovnih razmerjih – korak bližje k prožni varnosti*, Pravna praksa, 10/2013, p. VI; T. Pustovrh Pirnat, *Položaj ekonomsko odvisnih oseb v luči uveljavitve novega ZDR-1*, Pravna praksa, 19/2013, p. 16–17; N. Weber, *Tudi ekonomsko odvisne osebe do delovnega razmerja*, Pravna praksa, 26/2013, p. 16–17.

[39] See: EESC Opinion, 2011, item 5.1.1. See: M. R. Jayesh, M. Skapski, *Reimagining the law of self-employment: a comparative perspective*, "Hofstra Labor&Employment Law Journal", 31/2013, p. 192; E. Sanchez Torres, *op. cit.*, p. 234–235.

[40] See also: EESC Opinion 2011, item 5.1.2; see also: A. Perulli, *op. cit.*, p. 76–77.

[41] Spain has regulated contractual situation of self-employed persons, and especially economically dependent persons, in a special act in 2007. The European Economic and Social Committee labelled this act as the most complete definition of economically dependent work. See: the EESC Opinion 2011, item 4.1.2.

out their work independently, on the basis of a civil law contract[42], or the definition stating that these persons may not perform work that is identical to the work performed by employees of the client, that they should have their own production facilities and their own materials, if this is necessary for their activity, that they must carry out their services in accordance with their own organisational criteria (while a client may provide them with technical guidance), and receive the agreed payment that depends on the results of their activity, which was performed at their own risk[43]. The latter are referred to by the definition stating that economically dependent persons carry out their work in person and do not employ workers[44], and that they are economically dependent on the client (according to Slovenian legislation this means 80%, and according to Spanish legislation 75% dependence on the income from the same client)[45].

These legal criteria significantly narrow the group of potential economically dependent persons[46], since they only include those persons who work on their own (without employees), essentially work for only one client, while working independently at the same time. As an example of such a person, it is possible to imagine a sole trader, who performs one of the secondary services for the client (such as cleaning), or who on the basis of a contract of business cooperation with a client repairs electrical appliances for consumers, while working independently, with his own resources, his own responsibility and is paid for successfully performed work.

A self-employed person who is no longer active in the market, but is economically dependent on contractual relationship with a sole or main client, is entitled to limited labour law protection, as defined by Article 214 of the ZDR-1, provided, however, that the client who must provide this protection is informed[47]. The reason is mainly to protect the self-employed from being one-sidedly granted disproportionally low payment by a sole client, and to prevent the latter from cancelling the contract without reason and without notice.

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42 Stipulated in Article 213 of the ZDR-1.

43 See: E. Sanchez Torres, *op. cit.*, p. 236–237.

44 See: Article 213 of the ZDR-1, as well as the Spanish act, which states that economically dependent persons may also not contractually transfer even part of their activities to a third party. See: E. Sanchez Torres, *op. cit.*, p. 236.

45 *Ibid*.

46 The same is the position of the Spanish theory, especially because of the criteria demanding that these persons perform work in person (without employees) and because owners of shops, workshops and offices, open to the public, and persons engaged in independent professions in partnership or in other forms of legal interaction with others are expressly excluded from the category of economically dependent persons. See: E. Sanchez Torres, *op. cit.*, p. 237.

47 As provided by Article 214 of the ZDR-1, provisions of the ZDR-1 referring to prohibition of discrimination, assurance of minimum notice periods, prohibition of cancellation of a contract in cases of unfounded reasons for cancellation, assurance of payment for contractually agreed work appropriate for the type, scope and quality of the undertaken work (taking into consideration collective agreement and general acts binding the client and the obligation of payment of taxes and contribution) and enforcement of liability for damage shall apply to economically dependent persons.

An economically dependent person is not an employee, and as such is not provided with other rights granted to employees by labour legislation and collective agreements. If, however, the contractual relationship between economically dependent persons and their sole or primary client develops or changes in such a way that it includes elements of the employment relationship, the status of an employee must be then granted to this person[48].

4. False self-employeds (disguised employment relationships)

A disguised employment relationship occurs when the relationship between the employee and the employer outwardly appears different from what it actually is, with the aim to exclude or reduce protection guaranteed to employees, or to avoid payment of taxes and contributions[49]. It can be stated that in Slovenia the practice of disguising the true nature of the relationship is escalating. In the past, the problem mainly manifested itself in conclusion of fixed-term employment contracts in cases which actually called for indefinite employment contracts[50]; in later cases employers posted job notifications, but concluded civil-law contracts (*locatio conductio operis*) instead of employment contracts with selected candidates, or concluded contracts of service, even though the manner in which the work was to be carried out would require an employment contract[51]. Recently, however, it is no longer uncommon to encounter job notifications where employers list the "sole trader" status as a condition to perform work in a vacant job position (or where they alternatively list conclusion of employment contract and cooperation with a sole trader). The intention is, therefore, to avoid labour law protection of a person who meets all the characteristics of an employee (all the elements of the employment relationship under Article 4 of the ZDR-1 are met), and to engage in "business cooperation" instead, since this person is formally self-employed (a so-called false self-employed). A similar situation often occurs in cases when the employer decides to outsource certain activities or parts

[48] See: also EESC Opinion, 2011, item 5.1.3.

[49] See: Report V (1), 2006, p. 12, Meeting of Experts, 2000, p. 26–27, which states that the most radical way of disguising an employment relationship consists of giving the relationship the appearance of a relationships of different legal nature – either civil, commercial or other. In addition, other forms of disguise are possible – permanent employment relationships are given the appearance of fixed-term employment contracts; in the case of tripartite relationships, the identity of the true employer is concealed (a person who is declared an employer is essentially only intermediary, while the true employer is thus free of any obligations towards employees).

[50] It has often been possible to observe among notifications of vacancies statements that the job is for a fixed time, with possibility of concluding a contract for indefinite period.

[51] According to the Report on the work of the Labour Inspectorate of the RS in 2012 (p. 58), 121 such cases were identified in 2012.

there of to external contractors – former employees who carry out "their" work in practically the same way as before, except that they are no longer employees, but sole traders.

These phenomena are not new. The International Labour Organisation (ILO) has long been cautioning against the phenomena of false self-employment or disguised employment relationships in its documents, particularly in the ILO recommendation No. 198 of 2006 concerning the employment relationship and in the preparatory materials[52]. In the context of the European Union, this problem has already been addressed by the Green Paper entitled "Modernising labour law to meet the challenges of the 21st century"[53]. Recent research suggests that this phenomenon is becoming more and more widespread[54].

The European Parliament rightly points out that high levels of unemployment in many Member States, in connection with the existing pressure to reduce labour costs, bring about practices that facilitate further development and growth of false self-employment[55].

As emphasised by the European Economic and Social Committee in its opinion on abuse of the self-employed status[56], self-employment has cropped up in the most vulnerable sectors of the labour market[57], where workers (also through various agencies) are hired as self-employed service providers, and no more as employees. Inexpensive work is available to employers for nothing more than payment of an invoice issued by a service provider. This situation, however, raises doubts about the actual status of the self-employed.

Forms of false self-employment are becoming increasingly sophisticated. In addition to sole traders (a status that can be very quickly and easily acquired) and founders of one-person companies, who perform their work themselves (in the same way as employees), another form of false self-employment can, for example, be a civil law company which, in addition to the manager, involves a number of uneducated persons (usually foreigners) who carry out work in the same way as employees[58]. In all these cases, a person who is seemingly self-employed, but *de facto* is an employee, is not guaranteed labour law protection, while the employer also shifts the burden of contributions and taxes onto him or her.

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[52] See: Report V (1), International Labour Conference, 95th Session, 2006 (Report V (1), 2006), Report V (2A), International Labour Conference, 95th Session, 2006; Report V (2B), International Labour Conference, 95th Session 2006.

[53] Of 22nd November 2006; COM (2006) 708 final.

[54] See: Self-employment in Europe, 2010, p. 29; see: R. Pedersini, D. Coletto, *op. cit.*, p. 3, 64.

[55] Resolution, item M.

[56] See: EESC Opinion, 2013, item 2.4.

[57] For example, in the construction industry. See: Y. Jorens, *Self-employment and bogus self-employment in the European construction industry, A comparative study of 11 member states,* European Federation of Building and Woodworkers, FIEC and European Commission.

[58] See: Y. Jorens, *op. cit.*, p. 18–19.

All this calls for an urgent action against false self-employment, including strict enforcement of the existing regulations and development of new measures against these phenomena[59]. This is especially necessary in some sectors where this phenomenon is the most widespread[60].

One condition for action against false self-employment is a suitable definition of the employment relationship. To this end, some countries have already complemented national regulations with additional criteria or (rebuttable) presumption of existence of employment relationship.

As an example of good practice, the European Economic and Social Committee[61] mentioned Malta's legislation which dictates that a formally self-employed person is presumed to be an employee (and the person for whom services are provided is the employer), if at least five of the eight criteria are met in the performance of work[62].

A similar (rebuttable) presumption was enshrined in the amendment to Belgian employment relationships act of 1st January 2013 with regard to four activities where the problem of false self-employment is the most severe (construction, security and surveillance, transport of persons and goods, cleaning services), while its application may also be extended to other activities in the future. Formally self-employed persons are presumed to be employees, if they meet five out of nine criteria[63].

Although Slovenian legislation does not provide any similar presumptions of existence of employment relationship, I believe that the already mentioned (and other) criteria could serve as benchmarks for judicial practice and labour inspection when assessing the true nature of the relationship. Formally self-employed persons are in fact employees, if their position does not contain elements which are otherwise typical of self-employment (independence in decision-making and performance of work, own premises and work resources, responsibility for the performed work,

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[59] Resolution, paragraph 31, R. Pedersini, D. Coletto, *op. cit.*, p. 3.

[60] See: EESC Opinion, 2011, item 1.

[61] See: EESC Opinion, 2013, item 4.3.

[62] The criteria are as follows: he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year; he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out; he performs the work using equipment, tools or materials provided by the person for whom the service is provided; he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided; he cannot sub-contract his work (to other individuals to substitute himself when carrying out work); he is integrated in the structure of the production process, the work organisation or the company's or other organisation's hierarchy; the person's activity is a core element in the organisation and pursuit of the objectives of the person for whom the service is provided, and he carries out similar tasks to existing employees, or (in the case when work is outsourced) he performs tasks similar to those formerly undertaken by employees. See: Opinion of the EESC, 2013, item 4.3.

[63] See: http://www.laga.be/newsroom/legal-news/Belgian%20parliament%20tightens%20legislation-towards-the-practice-of-false-self-employment, http://www.ey.com/BE/en/Newsroom/News-releases/Tax-alert---Recent-developments-with-regard-to-anti-social-fraud-measures.

carrying business risks, employment of workers), while the elements typical of employees (economic dependence on the client, personal performance of work, dependence on the client) are present, instead.

An important indication of existence of the employment relationship can be provision of services which fall within the core business of the client. Courts and labour inspectors should therefore pay particular attention to sole traders who work as chefs in restaurant, as cosmeticians in beauty salons and the like. The same can be derived from the second paragraph of Article 13 of the ZDR-1 which states that work may not be performed on the basis of civil law contracts (amongst which contracts of business cooperation with sole traders and other self-employed persons can also be included), if elements of employment relationship exist pursuant to Article 4 of the ZDR-1 and in connection with Article 22 of the ZDR-1 (i.e. when the work is carried out at systematised working positions – these are exactly the jobs that fall within the core business of the employer).

Another obvious indicator can be performance of work in the same manner as it is performed by employees of this client (when a sole trader performs work together with the employees of his "client"), or the fact that a sole trader performs services or work in the same manner and under the same conditions as he did before acquiring the self-employed status[64] in employment relationship with the same "client"[65].

The fact is that the labour court can only establish the true nature of the contractual relationship on the basis of a lawsuit which, due to the poor prospects as regards other forms of employment, false self-employeds often do not dare to file[66]. In this situation even greater importance is attached to the role of labour inspection which, if it identifies a violation of the second paragraph of Article 13 of the ZDR-1, can take action against the employer. In my opinion, strengthened activities of labour inspection in the area of prosecution of false self-employment could have positive effects.

5. Conclusions

Everyone has a right to be self-employed, and labour law does not interfere with this right. The self-employed benefit from the advantages of independent activity in the market and make their own decisions about their work.

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[64] Which occurred due to outsourcing, i.e. due to a decision of the employer that certain secondary activities will no longer be carried out by the employees of this employer, but by the external contractors (former employees who became sole traders).

[65] See also: Self-employment in Europe, 2010, p. 29.

[66] Some of these cases can be found – See for example a decision of the Higher Labour and Social Court in Slovenia in the case Pdp 558/2013 of 22nd August 2013 and the judgment of the same court in the case Pdp 721/2012 of 5th December 2012.

When a business relationship between a self-employed and his/her contractual partner develops so that the self-employed does not appear in the market (anymore), but is economically dependent on the client, labour law in some legislations provides this economically dependent person with a certain level of protection. The category of economically dependent persons does not represent competition in relation to employment relationships, but rather extends certain level of protection to persons who are not employees.

Contractual cooperation with the self-employed must not constitute a form which would allow employers to deprive employees of labour law protection. This happens when employees are forced to carry out work as false (disguised) self-employeds. These sorts of practices urgently need to be stopped, however, to achieve this goal it takes to appropriately distinguish between employees and self-employeds, identify disguised employment relationships, and impose sanctions for abuse.

Jaana Paanetoja[*]

THE BROADENING INTERPRETATION OF 'WORKER' IN THE EUROPEAN UNION[1]

1. Starting points

1.1. Free movement as a fundamental freedom

The right of workers to free movement in the Single Market is enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). Paragraph 1 of the article states: 'Freedom of movement for workers shall be secured within the Union'[2]. This encapsulates the right of every EU citizen to move freely within the Union for work and to work and reside in another Member State without being discriminated against on the basis of nationality[3]. This right, set out in primary legislation, is elaborated in a number of secondary norms, such as Directive 2014/54/EU on measures facilitating the exercise of right conferred on

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[1] This article is based on a presentation given at the conference of the Labour Law Education Society held in Krakow, Poland, in May 2014.

[2] Consolidated version of the Treaty on the Functioning of the European Union (TFEU). Article 45 TFEU corresponds to Article 39 of the Treaty Establishing the European Community.

[3] COM(2010) 373 final. COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. Reaffirming the free movement of workers: rights and major developments.

Presents an overall picture of the legislation and case-law enhancing the free movement of workers and of the more important advances in that area.

workers in the context of freedom of movement for workers[4], Directive 2004/38/EC[5] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and Directive 2005/36/EC on the recognition of professional qualifications.

The right of workers to move freely hinges largely on the scope of the term 'worker'[6]. The term is not defined in Article 45 TFEU, nor are any definitions to be found in the treaties preceding it. The Court of Justice of the European Union (CJEU) has handed down a number of judgments in this matter and thus contributed to the meaning the term 'worker' has acquired and the concept has developed. The judgments of the Court primarily considered what activity is required in the practice of 'work' for the performer of that activity to be deemed a worker in the meaning of Article 45 TFEU.

The interpretation of the concept of 'worker' in Article 45 TFEU may also result in ambiguities 'temporally', that is, as regards when the right commences and how long it applies. The CJEU summarised the criteria for determining this in a recent decision in *Saint-Prix* (Case C–507/12).

The case involved the status of a woman who had stopped working due to pregnancy. The Court held that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or is seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

The grounds for the decision note the following: 'According to the settled case-law of the Court of Justice, the concept of "worker", within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the Treaty, must be interpreted broadly. Accordingly, the Court has held that any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence

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[4] The Directive lays down provisions which facilitate the uniform application and enforcement of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of Regulation (EU) No. 492/2011.

[5] Article 7 (1,2) of Regulation (EU) No. 492/2011 of the Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (codification) state the following:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

[6] In Finland at least, this question was deliberated already back in the early 1990s. See: M. Äimälä, *Suomen työoikeus ja EY*, Jyväskylä 1993, p. 48–54. See: R. Blanpain, B. Nyström, *EG/EU arbetsrätt och arbetsmarknad*, Göteborg 1994, p. 102–118.

falls within the scope of Article 45 TFEU –. The Court has thus also held that, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker –. Freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment –. It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship'.

The CJEU has given a broad interpretation to the term 'worker' in the context of the principle of free movement[7]. The definition of the term in Community law is deemed to have been set out in *Lawrie-Blum* (Case 66/85). The essential criteria for the status of 'worker' are the performance of services for and under the direction and supervision of another person in return for which a person receives remuneration.

The case involved a citizen of Great Britain resident in Germany, Deborah Lawrie-Blum, who applied for a period of preparatory service leading to the second state examination after first completing the examination for the profession of middle school teacher. According to the Court, the concept of 'worker' 'must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. The Court took the view that all of the essential criteria of employment relationship were met in the case and that trainee teacher Ms. Lawrie-Blum was to be considered a worker.

The Court noted that the concept of worker in Community law is independent of the national definitions of 'worker' in the different Member States. The content of the concept may vary in different member States, but when considering the right to freedom of movement, it has an autonomous meaning specific to European Union law[8]. According to Article 45 TFEU, in deciding on matters relating

[7] *Levin* (Case 53/81).

[8] See: *Lehtonen* (Case C-176/96): "As to the concept of worker, it must be borne in mind that, according to settled case-law, it may not be interpreted differently according to each national law but has a Community meaning. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration---".

to free movement of workers any national definition of the term must be ignored and the rights based on freedom of movement granted to all persons who fulfil the EU criteria for 'worker'[9].

1.2. Content and interpretation of the directives

The purpose of directives is to harmonise the legislation of the Member States. Directives in the area of employment law are designed to protect the weaker party, the one performing work and, on the other hand, to prevent distortion of competition between undertakings and Member States by laying down uniform minimum requirements for the terms of employment and working conditions. The significance and impact in the Member States of the legislative guidelines included in the directives naturally depend on the content and 'calibre' of each state's legislation vis-à-vis each directive. No changes are required if the national legislation already complies with the content of a directive.

The starting-point in implementing directives at the national level and in applying the provisions based on them is to adhere to the national definition of 'worker' in each Member State[10]. A directive may guide a state in this direction: for example, Article 3, paragraph 1, point a of the Directive on temporary agency work (2008/104/EC) defines 'worker' as 'any person who, in the Member State concerned, is protected as a worker under national employment law'.

Thus, the concept of a worker in Community Law has not traditionally been linked to directives, but rather to the interpretation of the provisions of the founding treaties that pertain to free movement of workers. Nevertheless the term 'worker' is also used in directives, with the term 'employee' occurring as well[11].

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[9] See: *Hoekstra* (Case 75/63): 'If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person'. See also: Kranemann (Case C-109/04).

[10] See: *inter alia* HE 29/2007. (Finnish Government Bill) Hallituksen esitys Eduskunnalle 95. Kansainvälisen työkonferenssin hyväksymän työsuhdetta koskevan suosituksen johdosta, p. 6.

[11] The term 'worker' is used at least in Directive 2003/88/EC concerning certain aspects of the organisation of working time, Directive 92/85/EEC 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, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies and Directive 2008/104/EC on temporary agency work. The term 'employee' is used to describe a worker in at least Directive 2001/23/EC on the approximation of the laws of the Member States relating to

The definition of 'worker' for the purposes of a directive and any interpretation thereof should thus proceed in terms of the national legislation of each Member State. One exception worth noting in this regard is that found in the Directive on the posting of workers (2008/104/EC). Article 2 (2) of the Directive prescribes that the concept of a worker is to be determined in keeping with the legislation of the country to which the worker has been posted: 'For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted'[12].

In a 2006 Green Paper, the Commission of the European Union pointed out that problems relating to the differing definitions of 'worker' had occurred primarily in the implementation of the directives on the posting of workers and on transfers of undertakings. In the Commission's view, the definitions of varying scope applied in these contexts by different countries were difficult to reconcile with the Community's social policy aims of striking a balance between flexibility and security for employees. The Green Paper also mentions the idea of harmonising the concept of worker in all Member States in matters falling outside the specific context of free movement[13]. Finland, among other countries, was opposed to this idea and stated that the concept of employment relationship in areas other than free movement of workers should continue to be defined nationally. The reasoning behind this position was the central status of the employment relationship and of

the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[12] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. See also Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Article 4 (5): "The elements that are referred to in this Article used by the competent authorities in the overall assessment of a situation as a genuine posting may also be considered in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of Directive 96/71/EC. Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties".

See also: Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers: 'seasonal worker' means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State.

[13] COM(2006)708 final. Green Paper. Modernising labour law to meet the challenges of the 21st century. See also: C. Barnard, *EU Employment Law*, Fourth Edition, Oxford, Great Britain 2012, p. 144–145. For a more extensive discussion on EU labour law, see also: R. Nielsen, *EU Labour Law*, Copenhagen 2013; B. Nyström, *EU och arbetsrätten*, Stockholm 2011.

its essential features in the application of the country's national labour legislation as a whole. Changes in the definition of 'employment relationship' would lead to changes in the application of national legislation that does not fall within the scope of Community law[14]. At this stage the discussion was thus confined to harmonisation of the concept of a worker outside of the provisions pertaining to free movement[15].

2. Focus of the present research

Interpretation of the definitions of 'worker' in Article 45 TFEU and in directives should be two separate undertakings. In recent years, the Court of Justice of the European Union has nevertheless taken the view in several of its judgments that the definition of 'worker' in Article 45 TFEU should be taken into account also when interpreting certain directives in the area of labour law[16].

The present article examines on a general level what the possible broadening of the EU concept of a worker will in fact mean and how it might affect national legislation in the Members States and the interpretation of the concept of a worker[17]. The particular example used in assessing the impacts is Finland, where the essential features of employment relationship are laid down in the Employment Contracts Act. The features set out in the Act, and thereby the definition of the status of 'worker', also affect the scope of application of other labour laws, such as the Acts on working hours, annual holidays and occupational safety. These laws make reference to the definition laid down in the Employment Contracts

[14] EU. GREEN PAPER Modernising labour law to meet the challenges of the 21st century (Europe communication) and Government Bill 29/2007, p. 6.

[15] See also: N. Bruun, *EU-työoikeus ja 2000-luvun haasteet – vuoden 2006 Vihreän kirjan tarkastelua. Työoikeudellisen Yhdistyksen vuosikirja 2006*, Helsinki 2007, p. 101–108.

[16] C. Barnard illustrates this development in the CJEU. C. Barnard, *op. cit.*, p. 144. In Finland Professor Bruun has dealt with this development in the praxis of the CJEU, particularly as it relates to legislation on working hours and annual holiday. See: C. Bruun, *Työsopimus, työsuhde ja työntekijän asema – EU-oikeuden vaikutus. Työneuvosto työlakien tulkitsijana – julkaisussa*, Helsinki 2013, p. 47–51. For purposes of the present article the author has not examined how the topic may have been dealt with in other contexts.

[17] Broadening can also be understood as the extending of the concept of 'worker' to cover self-employed persons. This facet of the topic is not examined in the article, however, which confines itself to the extension of Article 45 TFEU's concept of a worker to the interpretation of directives. See: C. Barnard, *op. cit.*, p. 144–155, where *inter alia* she deals with the status of dependent self-employed persons. This article does not deal with the above-mentioned extension of the concept of a worker or with the legislation enacted at the EU level to protect different groups of workers, for example, posted and seasonal workers. Anti-discrimination regulation and the effect it may have on different groups of workers also fall outside the scope of the present research.

Act. The definition in the Act thus is of crucial importance for the scope of labour legislation in Finland as a whole[18]. The article describes the basic principles for defining the status of 'worker' in Finland.

3. Broadening the interpretation?

3.1. Research questions

The Community concept of 'worker' is an understandable objective and one that ensures equality in particular where interpretations of the principle of free movement of workers are concerned.

Every Member State must implement the obligations set out in a directive as the state deems best using national measures, as long as the objectives of the directives are fulfilled. Directives are often drafted so as to give Member States a number of alternatives for achieving the desired end-result. The entity protected by directives – that is, who is considered a worker or employee – is determined in principle in terms of national legislation[19].

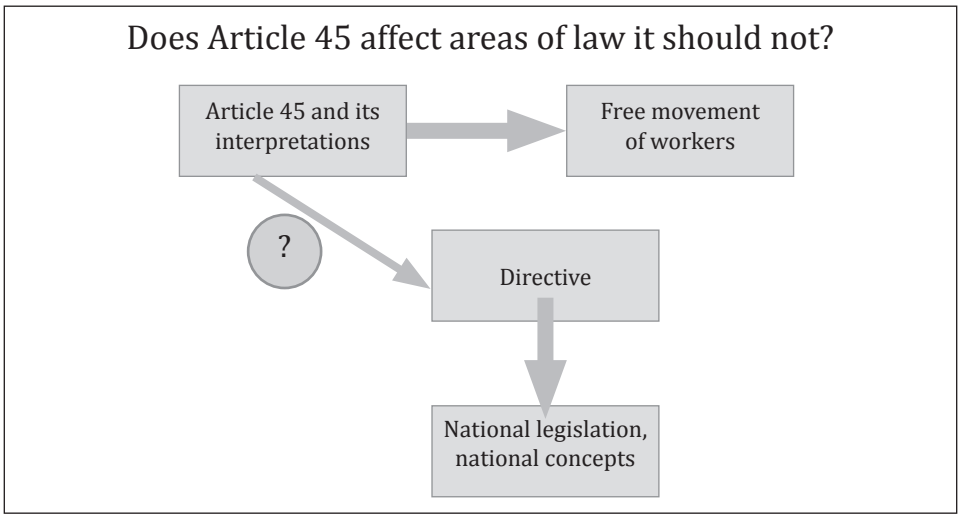

Figure 1. Influence of the concept of 'worker' as understood in Article 45 TFEU

[18] Labour laws are primarily applied to work done as part of an employment relationship. However, the scope of several labour laws has been extended to cover public-service employment. The Occupational Safety Act is applied widely to all work regardless of its legal status.

[19] Here I refer only to those directives in the area of labour law whose scope of application is linked to the definition of 'worker' or 'employee'.

National legislation, as well as any definitions of employment relationship or worker it may contain, are interpreted in light of the law of the relevant Member State and the principles of interpretation it applies. If a national provision has been influenced by a directive, the letter and the aims of the directive must be taken into account in interpreting national provisions, as must any interpretations emanating from judgments of the CJEU. At work here is what is known as the indirect effect of directives[20].

If the CJEU interprets the definition of 'worker' in a directive in a manner analogous to that within Article 45 TFEU, this may affect the content of any concepts of employment relationship and worker that have been defined nationally. This would seem to mean that the 'worker' who is protected by directives is meaningful on the EU level. If this is truly the case, how should the matter be addressed nationally and how does this affect labour law in Finland, for example? One might also ask whether the interpretation of Article 45 TFEU exerts influence in matters where it should not.

3.2. Views taken by the Court of Justice of the European Union

The CJEU has interpreted the concept of worker in Community terms outside the scope of Article 45 TFEU in at least *Union Syndicale Solidaire Isere* (Case C-428/09) and *Neidel* (Case C-337/10). The same phenomenon can be observed in the Court's interpretation of the Framework Agreement on part-time work in *O'Brien* (Case C-393/10). The agreement was adopted in the form of a directive, whereby 'worker' in the sense of the instrument is in principle to be defined nationally[21].

In *Union Syndicale Solidaire Isere*, the question addressed by the Court was whether Directive 2003/88/EC concerning certain aspects of the organisation of working time applies to casual or seasonal staff carrying out a maximum of 80 days of work per annum in holiday and leisure activity centres. The Directive does not define 'worker' for the purposes of its scope of application. Article 1, which defines the scope of the Directive, refers to an article of the Framework Directive on Safety and Health at Work and states that 'this Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive'. In the Framework Directive, 'worker' means 'any person employed by an employer, including trainees and apprentices but excluding domestic ser-

[20] See *inter alia*: C. Barnard, *op. cit.*, p. 156–158.

[21] Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work.

vants’. The Working Time Directive makes no reference to either that provision of the Workplace Health and Safety Directive or the definition of ‘worker’ to be derived from national legislation and/or practices.

In its judgment, the Court first refers to the broad scope of application of the Working Time Directive and takes the view that ‘for the purposes of applying Directive 2003/88, [the concept of ‘worker’] may not be interpreted differently in terms of the laws of Member States, but has an autonomous meaning specific to European Union law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration ---. It is for the national court to apply that concept of ‘worker’ in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved’.

Thus, in interpreting the Working Time Directive the Court decided to apply the concept of a worker in accordance with Article 45 TFEU. According to the conclusion of the Court, the Working Time Directive should also be applied to casual and seasonal work staff carrying out a maximum of 80 days of work per annum in holiday and leisure activity centres[22].

A similar broadening of the concept of ‘worker’ in the sense of Article 45 TFEU to the interpretation of directives can be observed in *Neidel* (Case C-337/10). The case involved application of the Working Time Directive to a fire fighter. Neidel had worked in Frankfurt am Main in Germany with the status of public servant and ambiguity arose regarding his right to an allowance in lieu of paid annual leave which had not been taken at the time of his retirement. The Court decided that the Working Time Directive was applicable.

The Court justified its decision with reference to the concept of a worker in Article 45 TFEU, which is broad and has a ‘specific independent meaning’. Thus, it reiterated the practice that had developed in the interpretation of Article 45 and its predecessors and cited *Lawrie-Blum* (Case 66/85)*, Collins* (Case C-138/02) and *Trojani* (Case C-456/02).

Lastly, the Court noted that it is irrelevant whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law. It stated that ‘[t]hese legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of European Union law’.

[22] See: C. Bruun, *Työsopimus, työsuhde ja työntekijän asema*…, p. 49.

In the two cases presented above, the concept of 'worker' in the sense of Article 45 TFEU was applied in the interpretation of directives. Bruun has drawn attention to the spillover effect of the judgments, which is seen in the interpretation of the Framework Agreement on part-time work in *O'Brien* (Case C-393/10). Interpretations of the Working Time Directive have already influenced 'other areas of law'[23].

O'Brien centred on the question whether judges fall within the scope of the Framework Agreement on part-time work. In the view of the CJEU, Member States must formulate their concept of a worker such that it does not arbitrarily exclude particular groups of persons from the scope of the Agreement. Exclusion from protection under the Agreement could be permitted only if the nature of the employment relationship concerned is different from the relationship between employers and their employees who fall within the category of 'workers' under national law.

Although the content or manner of defining the concept of a worker on the national level is not an aspect of Community law, the CJEU has taken the view that EU legislation may entail restrictions on the content of national legislation. The concept of a worker cannot be interpreted to mean that a particular group performing work is arbitrarily excluded from the protection provided under EU law.

3.3. The example of Finland

The conceptual framework governing the regulation on employment contracts and employment relations varies from country to country. For example, Finland has enacted the Employment Contracts Act as the basic law governing employment relationships[24], with the Act providing the legal definition of employment relationship and thereby of employment contract. The Act also has provisions on the conclusion and duration of employment contract, the rights and obligations of the employer and employee, transfer of undertakings, lay-offs and termination of employment contract (giving of notice and cancellation). In addition to the Employment Contracts Act, Finland has a range of other employment laws, such as the Working Time Act and Annual Holidays Act, Occupational Safety and Health Act, Collective Bargaining Agreement, Act on the Protection of Privacy in Working Life, Act on Co-operation within Undertakings, Employees Pensions Act, and Unemployment Security Act. The scope of application of all these Acts is in one way or another linked to the definition of employment relationship laid down in the Employment Contracts Act.

[23] *Ibid.*, p. 50.

[24] The Act currently in force dates from 2001. Its predecessors were the Employment Contract Acts of 1970 and 1922.

Whether an employment relationship exists is assessed, and the line between activities within and without employment relationship is drawn, by examining whether the work performed actually meets the definition of the scope of application of employment contract set out in chapter 1, section 1, subsection 1 of the Employment Contracts Act.

Employment Contracts Act
Chapter 1
General provisions
Section 1. Scope of application

> *This Act applies to contracts (employment contracts) entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer's direction and supervision in return for pay or some other remuneration.*
>
> *This Act applies regardless of the absence of any agreement on remuneration, if the facts indicate that the work was not intended to be performed without remuneration.*
>
> *Application of the Act is not prevented merely by the fact that the work is performed at the employee's home or in a place chosen by the employee, or by the fact that the work is performed using the employee's implements or machinery.*

Traditionally, the view has been taken that the essential criteria that must be met for an employment relationship to exist are the same as for an employment contract. An employment relationship exists if one or more workers together have committed themselves personally to perform work under the direction and supervision of an employer for a remuneration. For an employment relationship to exist, the work performed must in reality meet all of these individual or basic criteria for employment relationship.

The threshold for fulfilling the contract criterion *required of an employment relationship is low. An employment contract can be concluded orally, in writing or electronically (telefax or e-mail). It can also come into being tacitly through the work being done without any express arrangements having been made for its performance. In such cases, the worker begins doing the work and the employer permits its performance.*

In an employment relationship the work must be performed for another person, that is, an employer (criterion of work being done for another person). *Work in the sense of the Employment Contracts Acts encompasses all human behaviour or activity which has economic significance. This could involve active, passive, mental or physical behaviour. The requirement of performing work for another*

means that the benefit resulting from the work must accrue to the employer. The employee benefits from his or her work in the form of remuneration, which is paid in exchange for the benefit that the employer gains from the worker's efforts. For example, a traditional case of work being done for oneself is that done by a shareholder in a general partnership or a partner in a decedent's estate where this is based on no more than the person's status as a shareholder in the company or as a partner in an undistributed estate.

The criterion of remuneration *must also be met for an employment relationship to be created. In other words, the person performing the work must receive wages or some other form of compensation. A work-related legal relationship may, however, be an employment relationship even if no agreement has been made on compensation. The Employment Contracts Act states in chapter 1, section 1, subsection 2 that the Act is to be applied even if no agreement has been made regarding compensation; however, it is not applicable if the circumstances under which the work is done indicate that the parties' intention has been that the work be done without compensation. Compensation may take the form of any payment or performance which has economic value to its recipient. Thus, remuneration may be money, a payment in kind or a combination of the two. Reciprocal performance of work is also considered remuneration. In addition, the fact that the cloakroom attendant in a restaurant may receive tips from customers has fulfilled the criterion of remuneration. The opportunity to receive teaching has in some cases also been considered sufficient remuneration for purposes of the Act.*

A key element of an employment relationship is that a certain individual commits him- or herself to performing the work personally (personal performance criterion). *The personal obligation to perform the work entails that no one other than a natural person may have the status of 'worker'.*

According to the Employment Contracts Act the worker must perform the work under the direction and supervision of the employer (direction criterion). *What the direction and supervision are to consist of are not specified in the Act but the elements of the criterion are relatively well-established in the legal literature and case-law. Nevertheless, the factors determining whether the criterion has been met vary from case to case. 'Direction of the employer' refers to the employer's right before commencement and during the performance of the work to determine where, how and when the work is done. 'Supervision' means the employer's right to monitor that the worker observes the instructions given regarding performance of the work. The criterion is somewhat problematic in practice, because the employer is not required in concrete and specific terms to direct and supervise the worker's work. The position of the parties to an employment contract must be such as to allow the employer, should he or she so desire, to undertake actions geared to direction and supervision; in other words, no concrete direction and supervision are required. Direction and supervision make take the form of, among*

other actions, setting deadlines for performance of the work or reminding workers that the work has to be done[25].

Precisely because of this legal definition of employment relationship, difficulties in drawing the line between employment relationship and other forms of working are not common in Finland. Another factor possibly reducing the number of disputes is the long-established labour market practice. Whether or not an employment relationship has been created often becomes clear on the basis of a single criterion. Ambiguities and disagreements regarding the nature of the legal relationship under which work was performed frequently arise only after the employment relationship has ended. The actions brought tend to involve pay and payment of various forms of compensation. Most often the situation is one in which the party who performed the work demands outstanding remuneration, such as holiday or working time pay, based on the claim that he or she considered the existing legal relationship to be an employment relationship. The remuneration was not paid while the party worked for the employer, because at the time the work was not seen – at least not by the employer – as being done as part of an employment relationship, but rather, in the majority of cases, was viewed as work done by an independent entrepreneur[26].

For the most part, disagreement arises regarding the distinction between the work of a worker and of an independent entrepreneur. The decision as to whether an employment relationship exists is ultimately made by a court of justice[27].

Where difficulties arise in distinguishing between the work done under an employment relationship and other work, such as the work of an independent entrepreneur, the disputes can generally be described as difficult ones. Although 'employment relationship' has a legally defined and precise set of criteria, after examining the individual criteria for employment relationship it often becomes necessary to assess as a whole all of the facts that have been brought to bear in the case. Such an assessment may be required because the individual criteria may each be met regardless of whether the work is done as part of an employment relationship or not. Where the individual criteria for employment relationship are fulfilled, this does not necessarily – when detached from the context as a whole – provide a solution; an assessment of the situation as a whole is required. No such comprehensive assessment of the case is necessary, however, if one of the individual criteria, for example that requiring a binding contract between the parties, has not been met[28].

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[25] J. Paanetoja, *Työsuhteista työtä vai työtoimintaa? Tutkimus vajaakuntoisen tekemän työn oikeudellisesta luonteesta*, Helsinki 2013, p. 145–157 and references therein.

[26] No definition of 'independent entrepreneur' has been set out in Finnish law.

[27] At the request of the parties designated in the relevant legislation, the Labour Council may issue non-legally binding statements providing interpretations of, among other things, the Working Time and Annual Holidays Acts. These decisions on the application of the legislation may also examine whether an employment relationship existed.

[28] J. Paanetoja, *op. cit.*, p. 28–32 and references therein.

A comprehensive assessment takes into account all of the facts that have been brought to bear in the case. It is needed to distinguish between employment relationship and other legal relationships in which the individual criteria for employment relationship are fulfilled, but which nevertheless differ from employment relationship in a manner indicating that they can be deemed to fall outside the scope of protection afforded by employment legislation. Hence, it is not the case that a comprehensive assessment is required whenever it has to be determined whether an employment relationship exists. However, a comprehensive assessment is the means of last resort for making that determination. Ultimately, the decision on the existence of an employment relationship, that is, on whether a party in fact had the status of 'worker', is made in stages. First, an examination is made of the individual criteria and only when this has been done does it become necessary to assess the legal relationship as a whole. The law contains no provisions on making a comprehensive assessment, but it has become the established approach in practice. It has also been accepted in legislative drafting and in research.

A comprehensive assessment of a worker's status is just that: it is an examination of all of the facts pertaining to the contractual relation under which the work is done and a determination on that basis whether an employment relationship exists. However, the factors figuring in the assessment are individual, because decisions are always made on a case-by-case basis. Employment laws have for the most part been enacted to protect workers. Accordingly, it is vital for the court to be able to identify the person who is the object of protection, that is, a worker in an employment relationship. In a comprehensive assessment, efforts are made to do so by examining the circumstances under which the work is done. The question to be answered is this: Is it possible to judge by the given circumstances whether the party performing work is in need of the protection or not? In addition, the assessment can take into account the terms of the employment contract and the parties' own conceptions of their status. These two factors may influence the assessment of the nature of the legal relationship only if the parties have complied with those terms and conceptions. It should be pointed out, however, that only a proven common purpose and actions appropriate to that purpose may in practice be considered in the assessment. This being the case, a contract pertaining to work, the terms of the contract, and the parties' conceptions must in practice always be examined together with the actual circumstances[29].

Some of the work fulfilling the criteria for an employment relationship may nevertheless fall outside the scope of application of the Employment Contracts Act based on the demarcation set out in the Act. According to chapter 1, section 2 of the Act, it is not applied to ordinary voluntary non-vocational activities, for example in sports clubs, youth associations, parishes and patient associations, where

[29] *Ibid*., p. 157–166 and references therein.

no wages are paid for the work[30]; to those employment relationships or service obligations that are subject to public law[31] (e.g. central and local government posts); or to contracts for work to be performed that are governed by separate provisions in the law. For example, the Act does not apply to seamen, family carers referred to in the Family Care Act, or informal carers referred to in the Act on Support for Informal Care.

Determining the nature of an employment relationship and the status of a worker in the cases mentioned above always is, and in EU terms should always be as well, a national matter because the issues under consideration do not fall within the scope of free movement of workers.

Section 3.2 above analyses the decisions of the Court of Justice of the European Union in which the definition of 'worker' in the meaning of Article 45 TFEU, which relates to free movement of workers, was also applied in the interpretation of directives. This case-law may have ramifications in Finland when interpreting the Working Time and Annual Holidays Acts, but perhaps even more so when determining who has the status of 'worker'. The approaches taken in such interpretation and the influence they exert also have broader significance where the role of the EU and its competence are concerned.

Firstly, the end-result in *Neidel* (Case C-337/10) may lead to direct appeals to EU law in each Member State[32]. Such a situation may arise if, according to national legislation, the person performing work is deemed to fall outside employment relationship/the status of 'worker' and, therefore, not to be eligible to protection in respect of working hours and annual holiday afforded by directives. If the judgment in *Neidel* is observed, a person falling outside such protection may demand protection under the directive by invoking the concept of 'worker' in Article 45 TFEU, provided that the interpretation under national legislation is narrower than that based on Article 45 TFEU[33]. This may result in national legislation being bypassed when interpreting the national provisions that are based on the Working Time Directive.

In Finland it is possible to lay down a provision in the law whereby certain work remains outside the scope of application of the Employment Contracts Act and, by extension, outside the scope of application of other employment laws. For example, the law provides that work experience schemes organised for long-term

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[30] The scope of application of the Occupational Safety and Health Act is broad and the Act is applied in these cases as well.

[31] Employment relationships or service obligations that are subject to public law are, however, governed by the Working Time Act, the Annual Holidays Act and the Occupational Safety and Health Act.

[32] Article 45 TFEU is what is known as a directly applicable norm in a Member State, which creates direct legal effects regardless of whether it has been brought into force nationally. Even the provisions of directives that have not been properly implemented through national legislative means may under some circumstances have direct effect. However, a demand that such provision be given direct effect may generally only be addressed to a Member State.

[33] N. Bruun, *op. cit.*, p. 50.

unemployed persons and the specific work for people with disabilities based on the Social Welfare Act[34] do not give rise to employment relationships. These forms of work thus fall outside the scope of the Working Time and Annual Holidays Acts. How the decision in *Neidel* (Case C-337/10) might affect the protection of those performing work in the legal relationships mentioned is an interesting, but as yet unresearched matter[35].

If the definition of 'worker' within Article 45 TFEU must be taken into account in a Member State when interpreting the provisions of employment laws that are based on the Working Time Directive (in Finland the Working Time and Annual Holidays Acts), this could lead to fragmentation of the scope of application of employment laws. Finland has a large number of other employment laws whose interpretation adheres to the national definition of employment relationship, whereas in the case of the Working Time and Annual Holidays Acts the definition of 'worker' in the meaning of Article 45 TFEU should be taken into account. Moreover, the same worker and the same group of workers could end up being in different positions when interpreting different employment laws.

Secondly, the decision in *O'Brien* (Case C-393/10) would seem to lead to a situation where the concept of 'worker' could not be interpreted nationally in a manner that would arbitrarily exclude a certain group performing work from the protection provided by the Framework Agreement on part-time work. It would be possible for a worker to fall outside the protection afforded him or her by the Framework Agreement only if the nature of the work at issue differed substantially from the work enjoying that protection. This may mean that nationally it is not possible, at least categorically, to exclude certain forms of work from protection. Exclusion is only possible where the work at issue differs substantially from 'ordinary' work[36]. How ordinary work and substantial deviations from it are defined in this context are open questions. Among other things, Finnish law excludes from the protection of employment laws the previously mentioned work experience schemes and the work activity described in the Social Welfare Act. In

[34] Section 27e, paragraph 1 of the Act states: 'Specific work for people with disabilities is intended to allow them to maintain their functional capacity and activities promoting it. Such work is organised for persons incapacitated for work who due to their disability are not able to take part in the work referred to in section 27d and whose income is mainly based on benefits granted on the basis of illness or incapacity for work'. The work based on an employment relationship and referred to in section 27d of the Social Welfare Act may be provided as a social service 'for persons who have, due to their disability or illness or for comparable reasons, particular long-term difficulties in managing the ordinary functions in everyday life and who are in need of, in addition to the services and measures of the labour administration, the supportive measures mentioned… in order to find employment on the open labour market'. This work was previously known as sheltered work.

[35] These forms of work do not necessarily involve the activity which figured in *Bettray* (Case C-344/87). Both rehabilitative work activity and the work activity described in section 27e of the Social Welfare Act may be performed as "ordinary" work which is effective and genuine economic activity. For more information, see: J. Paanetoja, *passim*.

[36] J. Paanetoja, *op. cit.*, p. 254–255.

addition, in keeping with the established practice – but without the support of legislative provisions – the work activity described in the Act on the Special Care of Mentally Handicapped Persons has in practice been considered activity that does not give rise to an employment relationship[37].

On the basis of the foregoing, it is reasonable to ask about the extent to which Member States are ultimately free to define the scope of application of national laws based on EU directives, and about the possible range of impact the decisions of the CJEU may have. Furthermore, it must be asked whether the broadening interpretation of the concept of 'worker' is leading to a situation where the concept of 'worker' set out in Article 45 TFEU exerts influence in instances where it should not. Do directives no longer leave the national legislatures of Member States the freedom they should have, if the objects intended to be protected by the directives must always be interpreted in accordance with the Union's concept of 'worker'?

4. Topics for future study and research

To answer the questions posed above is not a simple task. The series of questions could be extended and one could also consider whether the broadening of interpretation now observed will continue or whether what we have seen so far are scattered cases that are no basis for generalisations.

The motives of the CJEU broadening the interpretation of the concept of 'worker' in the meaning of Article 45 TFEU so that it affects the interpretation of directives or their parts are unclear. If the Court is seeking uniform terms of employment and working conditions for workers who fall within the scope of free movement of workers, this aim will not be easy to achieve. The reason for this is that at least in Finland there is an extensive body of employment legislation which has no 'EU connection'; employment law directives cover a far narrower scope than Finland's employment laws. At the end of the day, one is left with a number of laws enacted to protect the worker whose scope of application is determined entirely on the basis of the national definition of 'employment relationship'.

In assessing the practical significance and impact of the broadening of the concept of 'worker' in the decisions of the CJEU, it must be taken into account that employment relationship and the status of 'worker' are not defined in the same way in each Member State. Unlike Finland, a number of Member States have no legal definition of 'employment relationship'. It is a matter for further research to determine whether the legal definition of 'employment relationship' may be 'extended' using the CJEU interpretation. In other words, could the CJEU conclude that Finland should interpret the provisions of its employment laws based

[37] The long-established view has, however, been challenged in research, with the conclusion being reached that the criteria for an employment relationship may be fulfilled also in the case of work activity engaged in by mentally handicapped persons. See: J. Paanetoja, *op. cit.*, p. 181–219.

on the Working Time Directive so that those workers who fall outside the national legal definition of 'employment relationship' would also be protected[38]?

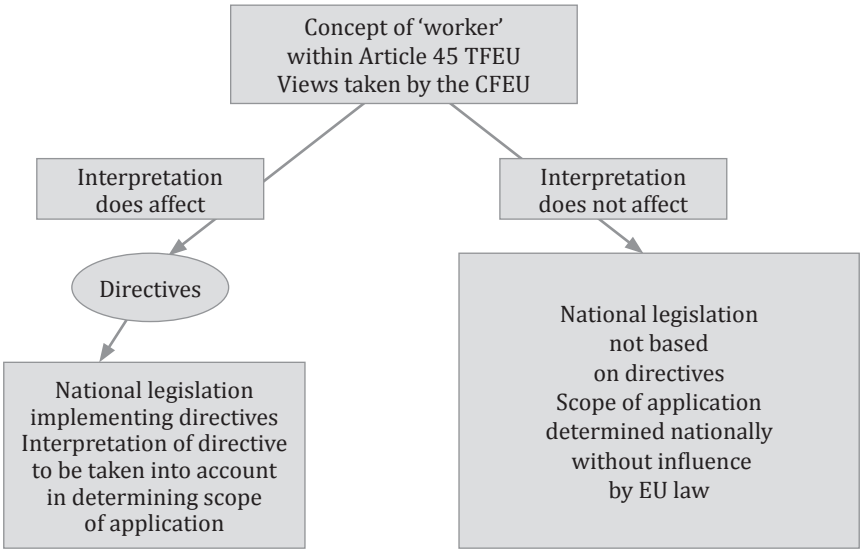

Figure 2. If the national legislation covers a broader scope than the directives, room is left for a national definition of 'worker'. Where this is the case, it will not be possible to achieve any objective of harmonising the rights of workers through a Community interpretation of the concept of 'worker'

Furthermore, it would be appropriate to consider in greater depth the content, bases and objectives of the development that has occurred. Does the situation we see indicate that the CJEU has in practice implemented the ideas brought out in the 2006 Green Paper? Has the CJEU fulfilled the aims of the Green Paper and sought to harmonise the concept of 'worker' in all Member States in cases falling outside the free movement of workers?

In 2006, the International Labour Organisation (ILO) issued its Employment Relationship Recommendation (No. 198). Chapter I, section 2 of the Recommendation states that the nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account the relevant international labour standards. The content and significance of the ILO Recommendation, as well as the status of the ILO more generally, would also be worthwhile topics to address in future research.

[38] In the present case, no study has been made of the legislative provisions on the employment relationship and the status of 'worker' in those countries affected by cases in which the CJEU has extended its interpretation; that is, no determination has been undertaken of whether those countries have a legal definition of 'employment relationship', 'worker' or status of 'worker'.

Izabela Florczak[*], *Barbara Muszyńska*[**]

SELECTED DIFFERENCES BETWEEN CIVIL LAW AND EMPLOYMENT LAW CONTRACTS RELATED TO WORK ON THE GROUNDS OF POLISH LEGISLATION

1. Introduction

The multiplicity of work-related contracts in Polish legislation makes it generally easy to find legal differences on comparison, but difficult to justify why they create such a different legal situation for people who are parties to such contracts. The aim of this article is to present a general overview of the contracts that may constitute the basis of work on the grounds of Polish law, and the disparate entitlements they grant. It is also crucial to decide whether such disparity is or is not justified.

When the Labour Code[1] was enacted in 1974, the differences between employment and civil law obligations were clear, despite the fact that both employment and civil law regulations in Polish legal system derived from one source – the Code of Obligations adopted in 1933. Civil law contracts were created to regulate relationships between parties who are equal in their rights and economic position, while employment law regulations were set to protect the weaker party in the workplace – the employee. In the course of time work-related civil contracts have begun to be abused to avoid labour law regulations protecting the employee

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[1] OJ 2014,See: item 1502 with further changes; hereinafter referred to as LC.

as the weaker party to employment relations. This is caused, e.g. by high costs of employment. Work performed under civil law contracts is still cheaper than that performed under employment contracts, when it comes to the costs of social security. Another reason is employers' conviction that their decisions and businesses are constrained by numerous and detailed provisions of employment law. Nowadays, Polish labour law doctrine is trying to decide whether this situation should be resolved by extending labour law regulations to civil law contracts[2] or, on the other hand, by increasing the sanctions for unlawful disguise of a labour law relation as a civil law contract, which would confirm the disparity between civil law contracts and labour law contracts[3].

To describe the background of this discussion it is necessary to present the main differences between civil law and employment law contracts. Also, it is crucial to provide examples of the diverse situations created by each of these contracts in the area of basic employee entitlements, as this is the main area of distinction between people who work under civil and labour law contracts.

In terms of Art. 2 Labour Code (LC), an employee is a person who is employed, among others[4], on employment contract. Both the content and form of employment contract are strictly regulated by employment law. The employment relationship is regulated by the Labour Code and other employment law regulations.

In terms of Art. 300 LC, the Civil Code[5] applies accordingly to employment relationship only when the given matter is not regulated by the provisions of employment law. What is more, the Civil Code cannot contravene the principles of employment law. This LC rule fills the gap in the general regulations of a legal relationship. The said solution is based on the fact that many provisions of employment law were based on civil law regulations[6]. The Civil Code may apply to employment relationship by defining, for example, the legal capacity, defects in the declaration of intent, and other general rules[7] which are not defined in LC, as long as they are not contrary to the principles of employment law.

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[2] Z. Kubot, *Szczególne formy zatrudnienia i samozatrudnienia*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*, Wrocław 2000, p. 32–33; Z. Hajn, *Regulacja prawna zatrudniania agentów,* [in:] Z. Kubot (ed.), *op. cit.*, p. 157.

[3] T. Zieliński, *Umowy o zatrudnienie w aspekcie rekodyfikacji prawa pracy*, [in:] Z. Kubot (ed.), *op. cit.,* p. 55–56; P. Prusinowski, *Umowne podstawy zatrudnienia*, Z. Góral (ed.), Warszawa 2012, p. 43.

[4] Other forms of employment include: appointment, election, nomination, or co-operative employment contracts. The co-operative employment contract is a type of contract, but due to its specific characteristics it is treated as a non-contractual basis of employment. Employment contract is the only contractual form of employment.

[5] OJ 2014, item 121 with further changes; hereinafter referred to as CC.

[6] M. Seweryński, *Polish labour law from Communism to Democracy,* Warszawa 1999, p. 21.

[7] W. Szubert, *Zarys prawa pracy,* Warszawa 1980, p. 64–65.

2. *Employee* and *worker*. Types of civil law contracts related to work

In terms of the abovementioned differences between civil law and employment law relations, there is an explicit difference between the notions of *employee* and *worker*. For the purpose of this article *workers* are all people hired on contracts other than employment contracts. An *employee* is a person who works on employment contract and is, therefore, protected by employment law, as it also has an extensive protective function. A *worker* is a person who is obliged to work on the grounds of civil law contract. Workers are protected by employment law only where this is expressly stipulated in employment law. One example of such protection is Art. 304 LC which obliges employers to ensure equal conditions of health and safety at work for employees and for individuals performing work on a basis other than employment contract (for example on the basis of civil law contracts)[8].

Employee is supervised by the employer, while worker does not work under the supervision of the other party to the contract. Employees' subordination to the employer used to be a fundamental characteristic of employment law contract[9]. As the relation between employees and employers has become more flexible over the decades, subordination is no longer a determinant of employment relationship. On Polish employment market the gap in the system (the need to create a relationship that will oblige one party to work for another party without a typical supervision-subordination relation) has been filled by civil law contracts which are mostly used to create a long-lasting relation between the parties.

There is a variety of civil law contracts which can be a source of the obligation to work. The most common contract of this kind is **contract for services**[10]. Under Art. 734 Civil Code (CC) by virtue of contract for services the mandator commits the mandatary to perform a specified legal act. Contract for services, however, is not limited to the commitment to perform a legal act. It can also oblige the mandatary to perform an activity for the mandator, which in fact means that the mandatary works for the mandator, but their work, instead of being based on employment law contract, is based on civil law contract for services. Both employment law contracts and contracts for services are acts of due care. That makes their performers responsible for careful, accurate actions, not

[8] T. Wyka, *Bezpieczeństwo i ochrona zdrowia w zatrudnieniu niepracowniczym typu cywilnoprawnego,* [in:] Z. Kubot (ed.), *op. cit.*, p. 171–172.

[9] A. Supiot, *Zatrudnienie pracownicze i zatrudnienie niezależne*, [in:] Referaty na VI Europejski Kongres Prawa Pracy z Zabezpieczenia Społecznego, Warszawa 1999, p. 144.

[10] In the Civil Code such a contract is called „mandate".

for the results of those actions[11]. Contract for services can create a long-lasting relation between its parties. It is a kind of contract of bilateral obligations, despite the fact that remuneration, which is an obligation of the mandator, is not *essentialia negotii* of contract for services[12]. In practice, unless otherwise stipulated in the contract, the mandatary is obliged to work while the mandator is obliged to pay remuneration for this work.

Another type of a civil law contract that can be the basis of the obligation to work is **specific work contract**. Under such contract the person who accepts the commission undertakes to perform a specific work, and the orderer undertakes to pay remuneration. In line with the above definition, specific work contract creates bilateral obligations by the same token as contract for services, however, in contrast to contract for services, remuneration is *essentialia negotii* of specific work contract[13]. Another difference between specific work contract and contract for services is the object of the obligation. In specific work contract the subject matter of the contract is a specified outcome. This type of contract, unlike employment contract and contract for services, is not an act of due care. In specific work contract it is the result of the services that is crucial. It is not important to the principal how the worker has achieved the result. The fact that the desired result has been achieved and passed to the orderer is the basis for paying the remuneration[14].

Another type of civil law contract that may constitute the basis of the obligation to work is **agency contract**. Agency contract differs from the contracts mentioned above in that the agent (the person who accepts the commission), by undertaking to act on behalf of the principal when executing contracts with clients for the benefit of the principal, acts as a professional within the scope of operations of their enterprise. Agency contract regulations limit the group of entities who can take on the obligation to work to professionals. Agency contract, too, is an example of a contract of bilateral obligations. Remuneration due to the agent is one of *essentialia negotii* of agency contract[15].

There is also an option of entering into **other service contracts**, which are not mentioned in CC. In such a case the provisions on contract for services apply accordingly (Art. 750 CC).

Several differences exist between the entitlements that Polish legislation grants to workers and employees. It is also crucial to decide, why only a group of people who work (workers or employees) benefit from such entitlements and whether such disparity is sufficiently justified.

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[11] Z. Radwański, J. Panowicz-Lipska, *Zobowiązania – część ogólna,* Warszawa 2008, p. 158; Z. Szczurek, *Prawo cywilne dla studentów administracji,* Warszawa 2012, p. 372.

[12] Z. Radwański, J. Panowicz-Lipska, *op. cit.*, p. 158–159.

[13] *Ibid.*, p 167.

[14] J. Wiszniewski, *Zarys prawa cywilnego,* Warszawa 1970, p. 361.

[15] Z. Radwański, J. Panowicz-Lipska, *op. cit.*, p. 194.

3. Anti-discrimination rights

Workers who are parties to civil law contracts do not benefit from the statutory right to be of equal treatment granted by LC. Prohibition against discrimination in employment, which is regulated by LC, does not apply to individuals performing work on a basis other than employment relationship. Due to the action brought against Poland by the European Commission[16], Polish government adopted a statute which, among others, should protect all workers from discrimination[17]. The statute is a failure of Polish law. *Inter alia*, it does not apply to acts of discrimination that may occur when the parties enter into civil law contract. The disparity of the rules in LC and the statute can result in penalisation for discriminatory choice of an employee (under LC), but will not result in sanctions for discriminatory choice of a worker (under the statute).

The rule of equal treatment is a refinement of the general rule of equality which is considered one of the main human rights[18]. Under LC it is covered by Art. 11^2 (the principle of equality of employees) and Art. 11^3 (prohibition against discrimination in employment). Further LC regulations define equal treatment, direct discrimination, indirect discrimination, harassment, and sexual harassment. Similar definitions of the above terms are stipulated in the statute adopted in December of 2010, but as it has already been indicated, it does not mean that protection from discrimination under LC and the statute is the same. The statute is not as strict in this matter as LC is.

4. Right to rest. Working time

What is more, CC does not provide workers with protection as regards the right to rest. Employees, according to LC, have the right to a minimum uninterrupted rest (in a 24-hour period and in a weekly period), break from work (15 minutes when their working time in a 24-hour period amounts to at least 6 hours). In addition, employees exercise the statutory right to a leave. Employees' leave is taken annually, is uninterrupted and fully paid. Workers hired under civil law contracts are not granted any of these entitlements. Of course, if they have strong bargaining power while entering into contract, they can obtain similar entitlements, but the statutory protection under LC will never apply to them.

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[16] Action brought on 7th of July 2010 – European Commission v Republic of Poland (Case C-341/10); Official Journal of the European Union, 25.9.2010.

[17] Statute of 3rd of December 2010 Implementing some of the European Union regulations regarding equal treatment, OJ 2010, No. 254, item 1700.

[18] Z. Góral, *O katalogu zasad indywidualnego prawa pracy*, Warszawa 2011, p. 153–154.

The distinction between work-related employment law and civil law contracts is also clear as regards the provisions on working time. In terms of the LC regulations, employees' working time may not exceed 8 hours in a 24-hour period and 40 hours on average in a five-day working week within a reference period not exceeding 4 months. Every hour above the limit is treated as overtime work which is, in the first place, compensated by extra free time or extra pay (by additional 50 or 100 per cent of the regular remuneration)[19]. In some working time systems an extra pay (or a day off) is also due to an employee who worked at night, on a Sunday or public holiday. The Labour Code also establishes a number of overtime working hours per year which cannot be exceeded.

All of the foregoing regulations do not apply to individuals who work on civil law contracts. Their working time is not limited and neither the limitation of nor the extra payment for overtime work are guaranteed by the law, but can be stipulated in the contract.

In terms of international legislation, such as the Universal Declaration of Human Rights[20], International Convent on Economic, Social and Cultural Rights[21] or the European Social Charter[22] the disparity between the break entitlements available to workers and employees is not justified. These sources of international law establish the right to rest and leisure for all working people without any distinction based on the source of their obligations. Taking the above into consideration it has to be indicated that *de lege lata* situation on Polish labour market, which creates two groups of people who work – those who have the right to rest and be protected by the limits of overtime work, and those who do not enjoy those rights, does not meet the international standards.

5. Right to remuneration

Article 13 LC establishes the rule of fair remuneration. Although the term "fair" is not defined, the term "lowest amount of remuneration" is. Pursuant to the Constitution of the Republic of Poland (Art. 65.4[23]), employees enjoy the right

[19] M. Rycak, *Czas pracy*, rozdz. XII, § 60 (pojęcie i instytucje dotyczące czasu pracy), pkt II (wymiar czasu pracy), [in:] J. Stelina (ed.), *Prawo pracy*, Warszawa 2013, p. 315–316.

[20] Art. 24 – Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

[21] Art. 7 (d) – The States Parties to the present Covenant recognise the right of everyone to the enjoyment of fair and favourable conditions of work which ensure, in particular: rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

[22] Art. 2 (5) – With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.

[23] "A minimum level of remuneration for work, or the manner of setting its levels shall be specified by statute".

to the minimum remuneration which is annually reviewed by the Commission composed of representatives of the government, private employers, and trade unions. In the year 2014 the minimum remuneration was defined on the level of gross PLN 1,680[24]. The minimum remuneration is due when employee works full--time (on average 40 hours per week). Workers are not eligible to the minimum remuneration, which gives the employing party the right to determine a compensation that can be lower than the minimum remuneration, even if the worker works on average 40 hours per week, or even more. No regulations on the minimum remuneration apply to workers whose contracts very often do not differ from employment contracts, when it comes to the obligations of the party who has to provide work. That is why it has to be raised that workers should have similar entitlements under the minimum remuneration regulations.

Art. 65.4 of the Constitution of Republic of Poland does not distinguish workers from employees as beneficiaries of this regulation, therefore there exists no justification for the legislature's failure to respond to the situation on the labour market. It has to be emphasised that over the decades the functions of employment contracts and work-related civil law contracts have become similar and that is why, in the authors' opinion, the regulations of the minimum remuneration should also cover workers.

6. Enforcement of rights through litigation

In case of a dispute between the parties to employment contract, which the parties cannot or have failed to resolve out of court, an employee who wants to enforce their rights has to file a lawsuit with an employment court. However, this is not a body outside the general judicial system, but one of the departments in a court of law. It is specialised in dealing with cases concerning employment relations[25]. What is even more important, such cases are conducted not to the general rules of civil procedure, but to a special procedure designed for this type of matters. This particular procedure for employment cases is stipulated in articles 459–477[7] of the Civil Procedures Code (CPC) of the 17th of November, 1964[26]. Therefore, it is part of civil procedures, but the legislature has established several crucial differences between general civil procedures and those governing employment cases. The reason for this is the specific nature of employment relations and, consequently, the need to protect the employee, who is the weaker party to

[24] Around 398 EUR. In year 2015 minimum remuneration will be defined at the level of gross PLN 1,750 – around 415 EUR.

[25] K. W. Baran, *Postępowanie w sprawach z zakresu prawa pracy z kazusami*, Gdańsk–Kraków 1999, p. 93–95.

[26] OJ 2014, item 101 (consolidated text), hereinafter referred to as CPC.

employment contract in the factual, social, and economic sense. As a result, they would probably be the weaker party to a lawsuit. Articles 459–477[7] CPC create a set of procedural guarantees and privileges that should secure equal positions of both parties during legal proceedings. This aim is manifested in a few major principles, specifically: the principles of employee privilege, limited formalism, and swiftness of proceedings, which govern this procedure[27].

The situation of workers who would also like to enforce their rights arising from providing work on the basis of civil law contracts is significantly different from employees. Since individuals who are parties to civil law contracts do not obtain the legal status of employees, their claims are not dealt with by employment courts, but by regular civil courts. These are the same courts that hear cases such as concerning torts, divorces, incapacitation, or a number of various civil law contracts, for instance sale contracts, tenancy contracts, *etc*. Therefore these courts are not specialised in disputes concerning the rights arising from one individual performing work to another individual or entity. What is more, these courts do not follow the procedural rules that apply to employment cases. On the contrary, these disputes are proceeded based on the general rules of civil procedures. In terms of these rules, parties to a lawsuit are formally equal. Since in a lawsuit most burdens rest upon the claimant, in the above-mentioned cases they actually lie with the worker. This leads to a paradox. In most cases, a person who works on civil law contract is, like employee, the weaker party of a legal relationship (factually, socially and economically). Nonetheless, as per the legal regulations, their position, including the position in a lawsuit, is equal to the position of the person who employs them. There are no privileges to support the procedural position of the worker. As a result, their position in a court of law can be actually weaker than that of the other party.

Probably the most important barrier to taking legal action are the high legal costs. For this reason, in terms of Polish law, if an employee files a claim against their employer and the value of the claim is not higher than PLN 50,000 (which is around 11,877 Euros), the employee does not need to pay the usual court fee. As for other legal actions during a lawsuit, there are fee remissions or reduced fees for employees. A claimant who is a worker, on the other hand, is obliged to pay all court fees, despite the fact that, since there is no guarantee of minimum wage for workers, they can in fact get lower remuneration than an employee who holds a similar post. In other words, they may not afford to take their case to a court of law.

Art. 466 CPC stipulates that an employee can make their claim orally in court building, instead of filing it in a paper form. Such an oral claim takes the same legal effect as a document presenting the statement of claim. It is the employee's decision which form they prefer. The only restriction is that the oral form is reserved

[27] M. Mędrala, *Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy*, Lex/el, Warszawa 2011.

for claimants who are not represented by a solicitor or legal advisor. If a case is proceeded to the general rules, the claimant – who in this case is a worker – has to file a claim in a paper form and follow strict formal provisions concerning its content. If a claim does not meet the requirements, it can be returned to the claimant with no legal effect.

Another important guarantee for employees is stipulated in Art. 477^2 and Art. 477^6 CPC. They oblige the court of first instance, if the same issues a judgement in favour of the employee, to order the verdict immediately enforceable up to an amount equal to the employee's 1-month salary. The same happens in the court of appeal with the rest of the claim, if the employee is the winning party. The reason is that in Poland earnings from employment contracts are the fundamental source of income (sometimes the only one) of employees, or even their whole families. It is reasonable to assume that remuneration plays the same role for most workers hired on civil law contracts. Therefore, it is difficult to accept that the above-mentioned guarantee does not apply to them. They have to wait until the final judgement is delivered (which means none of the parties can legally contest it any more) to make it enforceable. In practice, it can take quite a long time, even a few years.

The above-mentioned guarantees are only examples of the regulations concerning the legal procedures in employment cases. Employees enjoy a set of privileges and guarantees designed to give them a fair chance of success in a legal dispute with their employers. Even though both employees and workers face a similar, or even identical, factual and economic situation, the latter group is not granted similar procedural guarantees. Consequently, their position in court of law is, in fact, weaker than that of the party that hires them. It is also weaker than the position of employees in a similar situation. If we take into account the low stability of contractual relationship under civil law contracts and Poland's relatively high unemployment rate (almost 14 per cent at the beginning of 2014), we can conclude that the actual chances of workers enforcing their rights is dramatically small.

It should be added that there is one situation when workers enjoy the same procedural privileges as employees. In terms of Art. 22 section 1^1 and section 1^2 LC, employment on the terms and conditions set forth in LC is considered employment on the basis of the employment relationship, whatever the name of the contract concluded between the parties. Employment contracts cannot be replaced with civil law contracts where the conditions of the performance of work laid down in LC remain intact. Consequently, if the parties have concluded a civil law contract, but the conditions of this relationship are characteristic of employment contract, the worker can take their case to employment court. Such a worker can apply to the court to ascertain (confirm) the existence of an employment relationship. In terms of Art. 476 section 1.1^1 CPC, such lawsuits are conducted to the rules specific to employment cases. This could facilitate false workers' fight

for their rights. However, this measure can only help those workers who are actually in a bogus employment relationship. An interesting situation takes place when, as a result of a lawsuit, it is proved that the contract does fall within the civil law regime. In such a case it occurs that the dispute between parties to a civil law contract has been proceeded based on the regulations applicable to employment relations (with all the privileges designed for the party who performs work). Nevertheless, such a lawsuit remains legal and its outcome is valid. It is expressly stipulated by the provisions of law[28]. The rationale for such a regulation is to support the alleged employee, but it also reflects the legislature's will to prevent violations of the law. It does not, however, change the fact that workers who actually work on civil law contracts, or at least are not interested in having their employee status ascertained by the court, are in a worse position than employees when litigating to enforce their rights arising from work.

7. Employment stability

Next to the high costs of employment, another important reason why entrepreneurs prefer civil law contracts is that these are easy to terminate. Employment regulations supporting job security are legion, which reflects the principle of protection of employment stability that is considered to be a certain legal value that must be protected[29]. The intensity of this protection varies, depending on different factors. Generally, two categories of such protection are recognised in literature and jurisprudence: general protection against dismissal, and special protection against dismissal. The former covers the general provisions that must be followed when dismissing people. The latter means that termination of employment contracts of certain groups of employees is subject to certain restrictions due to their specific private, family or social situation[30]. There is no similar protection against termination of the legal relationship in the civil law regime. The process of terminating both types of relationships is worth a closer look.

General protection against dismissal consists of a few elements. Most of all, it concerns employees who work on indefinite contracts which are considered to create typical and the most stable employment relationships[31]. However, some elements of this protection can be identified with respect to fixed-term contracts as well.

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[28] Judgement of the Supreme Court of 15th of November 2006, I PK 98/06, OSNP from 2007, No. 21–22 item 309; judgement of the Supreme Court of 9 September 2004, I PK 659/03, OSNP from 2005, No. 10, item 139; P. Prusinowski, *Rozstrzyganie indywidualnych sporów ze stosunku pracy*, Z. Góral (ed.), Warszawa 2013, p. 62.

[29] A. M. Świątkowski, *Zasady prawa pracy*, Warszawa 1997, p. 89.

[30] A. Dral, *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*, Warszawa 2009, p. 36.

[31] J. Wratny, *Problemy ochrony pracowników w elastycznych formach zatrudnienia*, „Praca i Zabezpieczenie Społeczne", 7/2007, p. 2; A. Dral, *op. cit.*, p. 34.

First of all, in terms of Art. 38 LC the employer has an obligation to consult the intended dismissal with the enterprise trade union. Specifically, this means that the employer must give a written notice to the trade union representing the employee of the intent to terminate their indefinite employment contract, and must provide the reasons for such termination. If the employee is not a member of any trade union operating within the enterprise, then they can ask one of the unions to represent them. If the trade union decides that termination of employment is unjustified, it may, within a fixed period of time, present the employer with reasonable objections. The employer must consider the opinion presented by the union. However, the final decision whether to dismiss a person or not is made solely by the employer[32].

The next aspect of general protection is the requirement to specify just cause of dismissal. Pursuant to Art. 30 section 4 LC, the notice of termination of an indefinite employment contract given by the employer must provide the reasons for termination. There exists no list of legal reasons for termination of employment with notice[33]. Polish Supreme Court has indicated examples of such situations, *inter alia* insolvency of the employer, redundancy, employee's misconduct[34]. However, the reason for dismissal must be real, not ostensible[35]. Furthermore, the Supreme Court has ruled that termination is inadmissible even when the given reason for termination was true, but because of its importance or nature it did not suffice to give an effective notice[36]. The rationale behind Art. 30 section 4 LC is that the employee must know the employer's arguments against them, or what was the reason for this particular personnel decision. Therefore, it enables the employee to decide whether to appeal to the labour court against their dismissal[37]. Moreover, based on the cause given, the labour court can examine and evaluate the facts and circumstances that contributed to the termination of the contract and rule whether it was unlawful or not[38].

An important guarantee, without which the above mentioned regulations would be meaningless, is the possibility of a judicial review of the termination of employment. Moreover, the case is proceeded based on special rules, favourable to the employee, as described herein above. The labour court, upon request from the employee, examines whether dismissal was defective[39], i.e. whether termination

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[32] T. Liszcz, *Prawo pracy*, Warszawa 2012, p. 154.

[33] There is such a list in case of dismissal without notice in Art. 52, Art. 53, and Art. 55 LC.

[34] Judgment of the Supreme Court of 27th of June 1985, III PZP 10/85, OSNCP from 1985, No. 11, item 164.

[35] Judgment of the Supreme Court of 17th of October 2006, II PK 31/06, Lex, No. 950617.

[36] Judgment of the Supreme Court of 7th of October 2009, III PK 34/09, Lex, No. 560866.

[37] K. Jaśkowski, *Komentarz aktualizowany do art. 30 Kodeksu pracy*, [in:] K. Jaśkowski, E. Maniewska, *Komentarz aktualizowany do ustawy z dnia 26 czerwca 1974 r. Kodeks pracy (Dz.U.98.21.94)*, Lex/el 2014.

[38] Judgment of the Supreme Court of 15th of February 2002, I PKN 901/00, Lex, No. 564464.

[39] T. Liszcz, *Odpowiedzialność odszkodowawcza pracodawcy wobec pracownika – cz. 1*, „Praca i Zabezpieczenie Społeczne", 12/2008, p. 4–5.

of the indefinite employment contract was unjustified or violated the provisions of law on termination notices[40]. In such a case, the court alternatively declares the notice of termination ineffective (or if the contract has already been terminated – orders reinstatement of the employee in their job on the previous terms and conditions), or awards compensation[41]. It is basically up to the employee what they will claim for in a lawsuit[42]. The compensation is due in the amount of the remuneration for the period of 2 weeks to 3 months, though not less than the remuneration for the period of notice (Art. 47^1 LC). Accordingly, the compensation amount is limited and is not closely related to the damage suffered by the employee. This compensation is of a specific nature and does not correspond to the classical formula of damages known in civil law[43]. Additionally, compensation for unfair dismissal performs a social function by providing the employee with livelihood. It also has a repressive function, since it should be a punishment for the employer for violating labour law[44].

The notice period is also considered an element of the general protection of employment stability. It concerns both definite and indefinite contracts. However, notice periods in the latter cases are more diverse and adjusted to the duration of employment. In terms of Art. 36 section 1 LC they are 2 weeks, 1 month or 2 months, depending on how long a person has been working for the given employer. For fixed-term contracts, the notice period is 2 weeks[45]. Furthermore, the said notice periods are the minimum ones. The parties are entitled to prolong them in the contract. An employment relationship ends on the day when the period of notice expires. In this way the person involved does not lose the opportunity to make a living overnight, but has some time to prepare themselves for a new situation[46]. What is more, there is a method of counting the period of notice that favours dis-

[40] Termination with notice of a fixed-term employment contract does not require giving the reasons for dismissal, therefore its defectiveness can only concern infringement of the regulation on dismissals.

[41] An employee for a fixed-term period can, in most cases, only request compensation, not reinstatement (Art. 50 LC).

[42] There are, however, some situations in which court can only award compensation. See: Art. 45 section 2 and 3 LC.

[43] A. Rycak, *Powszechna ochrona trwałości stosunku pracy*, Lex 2013.

[44] Ł. Pisarczyk, *Odszkodowanie z tytułu wadliwego wypowiedzenia lub rozwiązania umowy o pracę przez pracodawcę*, „Praca i Zabezpieczenie Społeczne", 8/2002, p. 18–19; judgment of the Polish Constitutional Tribunal of 18th of October 2005, SK 48/03, OTK-A 2005, No. 9, item 101.

[45] But in this case some additional conditions must be followed to make a termination with notice permissible, see: Art. 33 LC.

[46] Termination notice is a typical way of ending employment contract. However, it can also be terminated (by any party) without notice. It has an immediate effect. There is an exhaustive list of situations in which it is allowed by the employer, connected to the loss of ability or qualifications to perform work or serious violation of the employee's basic duties (Art. 52 and Art. 53 LC). Likewise, an employee can instantly end an employment contract in certain cases (Art. 55 LC).

missed employees. Pursuant to Art. 30 section 2^1 LC, the notice period of one or more weeks always ends on a Saturday, and the notice period expressed in months ends on the last day of the month. Consequently, if an employee is given notice, for instance, on the 7th of July and their notice period is one month, their employment will actually terminate on the 31st of August (not on the 7th of August).

Finally, in accordance with Art. 30 section 3 LC, the notice of termination of employment contract by either party must be made in writing. While a failure to comply with this regulation by the employee does not actually bear any consequences, it is reverse for the employer. Moreover, the termination notice given by the employer must include information on the employee's right to appeal to labour court (Art. 30 section 5 LC). If the employer does not meet these requirements, the termination notice is still legally effective, but the employee can successfully appeal against it on the grounds of violation of the law concerning dismissals[47]. The said regulation applies to both indefinite and fixed-term contracts.

Perhaps even more burdensome for the employer is special protection against dismissal. As mentioned earlier, this kind of protection is related to employees who are at a particular risk of losing their job because of their family or private situation, or certain social functions they perform. This type of protection can apply in one of two variants. In the first one, the employer cannot give notice to a person for the duration of their particular situation that justifies such protection[48]. This applies, *inter alia*, to pregnant women, employees in pre-retirement age or employees on leave or during other justified absence from work for a certain period. The second variant of protection consists in prohibition of dismissal without consent of a certain body or authority. For instance, the employer cannot give notice to a member of the board of an enterprise trade union, unless this board consents to it[49]. The employer who infringes the rules on special protection against dismissal may be sued by the employee.

The foregoing examples demonstrate that employees enjoy quite secure employment. Hence, the discretion of employers in creating their employment policies is to some extent limited. Therefore, employers who hire people on civil law contracts avoid a number of legal restrictions and pitfalls. At the same time, such entrepreneurs enjoy financial advantages – not only because they do not have to pay remuneration to employees they no longer need, but also they do not risk bearing the costs of possible lawsuits and compensations. Employment on civil

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[47] Z. Góral, *Komentarz do art. 30 Kodeksu pracy*, [in:] K. W. Baran (ed.), *Kodeks pracy. Komentarz*, WKP 2012, Lex.

[48] Sometimes even the possibility of termination of an employment without notice is restricted – in case of a pregnant woman, maternity leave, paternity leave and parental leave (Art. 177 and further, LC).

[49] More detailed regulations in that matter are found in Art. 32 Trade Unions Act of 23 May, 1991, OJ of 2014, item 167.

law contracts is much more flexible, which means that it can be easily and quickly terminated by either party. However, in practice, it is the employing party that mostly benefits from such a situation. Taking into account the shortage of work, people are unlikely to resign from their jobs willingly. As a result, workers on civil law contracts are particularly vulnerable to dismissal, as well as to abuse by the employing party. What is more, workers face problems arising from job insecurity, also outside their workplace. For instance, they have difficulty in obtaining a loan since they are not creditworthy.

One exception is the agency contract. Art. 764^1 CC stipulates that an indefinite agency contract can be terminated with notice by either party. The minimum periods of notice are prescribed and depend on the duration of the contract (they range from 1 to 3 months). Statutory notice periods cannot be shortened, but they may be extended in the contract. This is, therefore, an ordinary way of terminating a legal relationship between the parties to indefinite agency contract[50]. Furthermore, other civil law contracts can include provisions providing some kind of protection against unfair or immediate termination of the legal relationship. Introduction of such provisions depends on the parties and, in fact, the negotiating position of the person applying for a job. As a result, with the exception of top-level managers and skilled professionals, workers are very unlikely to enjoy comparable protection against dismissals that is available to employees.

8. Conclusion

From the social point of view, there are no good reasons for leaving workers on the employment market without legal protection that might improve their weaker position vis-à-vis employers. Each working individual should have the right to fair remuneration, the right to rest and protection against discrimination or sudden unfair dismissal. They should also have equal opportunities when they want to defend their rights in court. These rights should not depend on the contract on which they provide work. As stated in Polish doctrine of labour law[51], given that the profound economic transformations in Poland have entailed profound labour market transformations, Polish legislature should stop avoiding the process of granting workers the rights equal to those available to employees[52]. The context of

[50] K. Kopaczyńska-Pieczniak, *Komentarz do art. 764(1) Kodeksu cywilnego*, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część szczególna*, Lex 2010. It can also apply to a fix-term agency contract provided it has been transformed into a non-fixed term contract, see: Art. 764 and 764^1 section 4 CC.

[51] Not only Polish doctrine of labour law presents this point of view. Similar conclusions are presented by T. Gyulavári, *A bridge too far? The Hungarian regulation of economically dependent work*, "Hungarian Labour Law E-Journal", 1/2014, p. 22.

[52] Z. Hajn, *Regulacja prawna zatrudnienia agentów*, [in:] Z. Kubot (ed.), *op. cit.*, p. 159.

industrial relations is changing, which is why the traditional concept of labour law protection techniques should be re-considered[53]. The issue of extending labour law protection was observed in the theory of labour law a long time ago[54]. While the role of the law is to protect all working individuals, irrespective of the basis of their obligation to work or the type of contract[55], it seems unreasonable that Polish law sustains the disparity between the entitlements granted to people who work, or ignores the situation of some of them on the employment market.

On the other hand, and this is the statement shared by the authors of this paper, extending labour law regulations to civil law relationships may ruin labour law as a field of law. Labour law relations will not be competitive, if workers working on civil law contracts are granted the same entitlements as employees. The essence of civil law contracts, subject to certain limitations[56], is the freedom of contract. The rule of contractual freedom should not be limited in more cases than stipulated in the current statute. Independent civil law contracts related to work (services) are an indispensable part of economic freedom. The actual problem in the field of employment is the disguising of labour law relationships as civil law contracts. Even though a plethora of regulations have been enacted to prevent such misuse of civil law contracts (such as financial sanctions in the Labour Code, the power of State Labour Inspection to impose a fine, or the option of ascertaining the existence of a labour law relationship when the work is done under a misused civil law contract), such misuses are still very common. There are many reasons for this. The main reason is that the demand for employment exceeds the supply offered by employers, as well as the high costs of work, as has already been mentioned herein above. What is more, the definition of labour law relationship, which dates back to 1996, does not fit the new economic reality[57]. The necessity to prove the existence of employment relationship (by proving that work has been provided under the supervision of the employer and at the location and time specified thereby) does not meet the current needs of the employment

[53] M. Tiraboschi, O. Rymkevitch, *The Regulation of Temporary Agency Work at European Union Level: Problems and Perspectives,* [in:] T. Davulis, D. Petrylaitė (ed.), *Labour and Social Security Law in the XXI Century: Challenges and Perspectives,* p. 309; P. Leighton, M. Wynn, *Classifying Employment Relationships – More Sliding Doors or a Better Regulatory Framework?,* "Industrial Law Journal", March 2011, Vol. 40, No. 1, p. 41–44.

[54] P. L. Davis, *Zatrudnienie pracownicze i samozatrudnienie w świetle common law,* [in:] Referaty na VI Europejski Kongres Prawa Pracy i Zabezpieczenia Społecznego, Warszawa 1999, p. 201.

[55] A. Supiot, *op. cit.*, p. 171.

[56] According to Art. 353[1] LC there are three limits to the freedom of contract:

- the content or purpose of the contract is not contrary to the nature of the relationship;
- the content or purpose of the contract is not contrary to the law;
- the content or purpose of the contract is not contrary to the principles of community life.

[57] Z. Góral, *Najnowsze tendencje w polskim prawie pracy na tle integracji europejskiej,* Prace Naukowe Wydziału Administracji, Zeszyty Naukowe vol. 23, Szkoła Wyższa im. Pawła Włodkowica w Płocku, p. 212.

market. The market has transformed to the extent that employee mobility is replacing the strict bond between the employee and the employer. It is obvious that inasmuch as work provided on civil law contracts is provided on the same terms and same conditions as that provided on labour law contracts, there is no justification for the existing disparity between the entitlements granted to working people. It seems, however, that there are more arguments in favour of the idea to ensure more effective enforcement of the regulations that prohibit the misuse of civil law contracts than in favour of extending labour law regulations to workers who are parties to civil law contracts.

Juhani Korja[*]

SURVEILLANCE IN THE WORKPLACE AND WORKER PRIVACY

1. Introduction

As long as there has been employment, employees have been monitored. Recent years, however, in part due to technological advancements, have witnessed an explosion of monitoring and surveillance in the workplace[1].

With the present technological advancements, increased informatisation of our daily lives, and the potential for social management, surveillance has become a key to understanding the workings of power within the global information economy, and the exercise of power has always been an integral component of any employment relationship[2]. Therefore, it can be argued that once modern techno-

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[1] Long before the first electronic information systems, Jeremy Bentham and Robert Owen hatched schemes for improving human character through rigorous surveillance. What they had in common was that both had the idea that watching people more closely and correcting their behaviour more systematically would lead to more rational social arrangements. Both Owen and Bentham saw the workplace as the quintessential setting where enhanced surveillance and social control would help produce more efficient conduct, and ultimately better people.

[2] Although surveillance is seen as privacy invasive and intrusive, surveillance has also been linked to empowerment. As Ariene Ellerbrok puts it: "Can surveillance technologies be viewed as having the potential to empower those who are 'watched'? Or put another way, as an individual is made increasingly visible through their exposure to surveillance, is this visibility fundamentally exploitative, or might a person turn it to their own ends? The internet, web blogs, online social networks, and mobile phones all come to mind here, where increased visibility may allow for the "building of self as brand" and other forms of identity empowerment". A. Ellerbrok, *Empowerment: Analysing Technologies of Multiple Variable Visibility*, p. 201, http://library.queensu.ca/ojs/index.php/surveillance-and-society/article/view/3486/3440 [13.07.2014].

logy has given employers new tools to monitor employees and exercise power in the workplace, surveillance in the workplace must also be understood as the employer's means of exercising power.

Surveillance, due to its privacy invasive nature, is usually perceived as intrusive. For this reason, surveillance has become a central topic of legal discourse in the society. The problem with workplace surveillance lies in the competing interests of the employer and the employee.

Employees expect to have some privacy in the workplace in relation to the employer, even if they are on the employer's premises and using the employer's equipment. At the same time, it is normal that working for someone means giving up some privacy, suitably to the employee's position and tasks. Employers need basic information about their employees for things like pay and benefits, and they have to be able to ensure that work is being done efficiently and safely[3].

By protecting privacy, including privacy in the workplace, the society protects the moral and other values in the society. Privacy is a counterpart of surveillance because one important aspect of privacy is the right to be beyond the reach of surveillance. Privacy therefore protects individuals from unauthorised intrusion into their private sphere.

2. Surveillance as a right of the employer

2.1. What is surveillance?

Surveillance technologies are increasingly embedded in the minutiae of our daily lives, tracking our more significant activities[4].

Earlier the word surveillance was reserved for highly specific scrutiny of suspects. Since then the situation has changed. Surveillance nowadays occurs rou-

[3] In the Finnish Employment Contracts Act is stated that the employer must ensure occupational safety and health in order to protect employees from accidents and health hazards, as provided in the Occupational Safety and Health Act (Chapter 2, Section 3). The act also states that the employees shall perform their work carefully, observing the instructions concerning performance issued by the employer within its competence. In their activities, employees shall avoid everything that conflicts with the actions reasonably required of employees in their position (Chapter 3, Section 1), and that employees shall observe the care and caution required by their work duties and working conditions and apply all available means to ensure their own safety and the safety of other employees at the workplace (Chapter 3, Section 2).

[4] The increasing surveillance has led to the discussion about whether or not we are living in a surveillance society. It can be argued that we are currently living in a surveillance society where massive surveillance systems underpin our everyday activities. The same argument has been provided by L. Amoore et al., *A Report on the Surveillance Society: For the Information Commissioner by the Surveillance Studies Network*, edited by: David Murakami Wood and Kirstie Ball, http://libertyparkusafd.org/lp/Hale/Special%20Reports%5CSurveillance%20State%5CA%20Report%20on%20the% 20Survillance%20Society%20--%20Public%20 Discussion%20Document.pdf [13.07.2014].

tinely, locally and globally. One might even say that surveillance has become an unavoidable feature of everyday life in the modern society.

The Concise Oxford Dictionary equates surveillance with "supervision, close observation and invigilation of individuals who are not trusted to work or go about unwatched"[5]. While this definition has a traditional sounding ring to it, it captures a dimension of surveillance which is increasingly discussed in current debates – trust. Trust is the traditional element of and a motive for surveillance: surveillance is practiced because those in positions of authority do not trust those below them. Alternatively, however, surveillance can also be defined as collecting and processing personal data, whether identifiable or not, for the purposes of influencing or managing those whose data have been garnered, and does not usually involve embodied persons watching each other[6]. Surveillance can therefore be considered as a practice of gathering and sorting data with one explicit purpose: to influence and manage the data subject. Therefore it can be argued that surveillance, especially workplace surveillance, should be viewed as a means of exercising power[7].

2.2. Does the employer have the right to surveillance?

Power, in its most basic form, is the ability of a person (i.e. the employer or the employer's representative) to exert his or her will over another. How the employer/representative chooses to use power in a workplace context depends greatly on his or her personality and position within the company[8]. The work situation

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[5] H. W. Fowler, F. G. Fowler, *The Concise Oxford Dictionary, 8th Revised edition*, Clarendon Press, 1990, p. 1302.

[6] D. Lyon, *Surveillance Society: Monitoring Everyday Life*, Open University Press, Buckingham 2001, p. 2. This kind of definition of surveillance describes well how the surveillance has changed from the traditional into the "modern" surveillance.

[7] Power can be defined as the possession of control, authority, or influence over others. In the Finnish labour legislation one characteristic of an employment relationship is to perform work for an employer under the employer's direction and supervision (Employment Contracts Act, Section 1).

[8] Lipkin discusses the different types of power in her book, "What Keeps Leaders up at Night". Her analysis uses the five types of power introduced by psychologists John French and Bertram Raven in 1959, along with two types that were introduced later.

According to Lipkin, workplace power can be categorised accordingly:

1) **Legitimate power**: a person in a higher position has control over people in a lower position in an organisation;

2) **Coercive Power:** a person leads with threats and force;

3) **Expert Power:** the perception that one possesses superior skills or knowledge;

4) **Informational Power:** a person possesses needed or wanted information;

5) **Reward Power:** a person motivates others by offering rises, promotions, and awards;

also dictates the proper way to exercise power. For example, an employer attempting to exercise a type of power inappropriate for the given situation may find employees less receptive to obey.

The exercise of power is an integral element of any employment relationship. This is based on the fact that work is performed under the employer's direction and supervision. Each employer exerts a form of power in the workplace. How an employer chooses to use power in a workplace context depends greatly on the employer. The work situation also dictates the proper way to exercise power. One part of this power is surveillance. Surveillance can be justified at least for the following reasons:

- to guarantee legal compliance,
- to ascertain legal liability,
- to protect business information, security and safety,
- financial reasons (i.e. productivity and quality control).

Because the employer is responsible for all of the activities that happen during the working hours[9], the employer has the right and obligation to monitor the workplace. This is also a strong indication that surveillance is an integral part of the workplace and of the rights of the employer[10].

2.3. Possible Effects Of Workplace Surveillance

The growth of surveillance practices in the workplace has brought about discussion on the possible effects surveillance activities may have on the workplace.

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6) **Connection Power:** a person attains influence by gaining favor or simply acquaintance with a powerful person;

7) **Referent Power:** the ability to convey a sense of personal acceptance or approval.

N. Lipkin, *What keeps Leaders Up at Night: Recognizing and Resolving Your Most Troubling Management Issues*, American Management Association, 2013.

[9] It should be noted, however, that the employer's responsibility over the activities of the employees is not absolute. This is because the employee is also responsible for his/her actions. For example, in the Finnish Employment Contracts Act is stated that employees shall perform their work carefully, observing the instructions concerning performance issued by the employer within its competence. In their activities, employees shall avoid everything that conflicts with the actions reasonably required of employees in their position. The act also states that employees shall observe the care and caution required by their work duties and working conditions and apply all available means to ensure their own safety and the safety of other employees at the workplace (Chapter 3, Sections 1 and 2).

[10] It should be noted, however, that the means and limits of surveillance differ in every situation. For example, in the Finnish legislation some more privacy intrusive surveillance activities have strict limits set in legislation. This is the case with i.e. video surveillance which has been stipulated by the Act on Privacy Protection in the Working Life (Chapter 5, Sections 16 and 17). This is to show that the surveillance activities of the employer are limited by legislation. In the lack of legislation, the surveillance activities of the employer are limited by the responsibility to respect the rights of others, in this case the employee's right to privacy.

Productivity and quality control are vital matters in running a business. Managers, therefore, believe that monitoring improves employee productivity and assures quality of service. This is understandable, because surveillance is a useful way of shaping conduct as individuals know they will be assessed and may start to behave accordingly[11].

On the other hand, however, it could be argued that monitoring has negative effects on employees. This is so because monitoring can lead to stress, anxiety, and loyalty decline. Workplace monitoring sends a direct message to employees that they are likely to do something wrong and, therefore, need to be watched[12]. This causes distrust, which can be very harmful in an employment relationship, because it demoralises the employees. In any human relationship trust is a crucial element; without trust human interaction would be very limited.

Therefore opponents of surveillance also say that surveillance has adverse impacts on employees' attitudes, which results in lower productivity. It is argued that surveillance shows employers' distrust toward their employees, and when employees feel that their employers do not trust them, it might lead to a loss of motivation to work hard.

It has to be pointed out that surveillance may also harm the relationship between employers and employees. Surveillance might, therefore, generate undesirable tension between employers and employees.

3. Counterpart of surveillance – employee right to privacy

3.1. What does "privacy in the working life" mean and why is it protected?

Privacy can be seen as a contingent concept. Although privacy has been identified as one of the major ethical issues in the era of ICT, no one has been able to give an explicit definition of the concept[13].

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[11] The main reason not to engage in surveillance is because it affects employee conduct. B. Meier, *Panopticon Dreams: The Nightmarish Effects of Workplace Surveillance*, p. 105, http://ethicapublishing.com/ATEOI_ch7.pdf [13.07.2014].

[12] This view is shared by B. Meier, according to whom, employers who use panoptical surveillance are constantly knowingly or unknowingly increasing paranoia in the workplace. She argues that some companies even want their employees to feel as though their every move could be under surveillance. B. Meier, *op. cit.*, p. 100–101.

[13] According to Solove, privacy is one of the most important concepts of our time, yet it is also one of the most elusive. As rapidly changing technology makes information increasingly available, scholars, activists, and policymakers have struggled to define privacy, with many conceding that the task is virtually impossible. Solove, Understanding Privacy. See also Saarenpää who describes

A sound communitarian treatment of privacy views it as a place or state in which an actor can legitimately act without disclosure and accountability to others. Privacy thus is a societal licence that exempts a category of acts from communal, public and governmental scrutiny[14]. In addition, privacy encompasses behaviours that members of a particular social entity are positively expected, by prevailing social mores or laws, to carry out so as not to be readily scrutinised. This kind of privacy definition is very normative because it includes an exemption from scrutiny and the requirement to close to view or hearing those elements considered normatively appropriate or inappropriate by the relevant society. Both the scope of privacy and the nature of the specific acts that are encompassed by definitions of privacy reflect particular values in the society[15].

Because of the moral and societal nature, privacy is a multifaceted and dynamic concept that changes with the society and over time[16]. An exhaustive definition of privacy can therefore be seen unnecessary and even misleading[17]. But in order to evaluate the various privacy concerns, it takes to understand the areas[18]

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the difficulty of defining privacy accordingly: "As a word, legal concept and institution, privacy is exceptionally challenging. It is easy enough to understand but difficult to define and identify. It is not particularly easy to legislate either. For the legislator, privacy very much resembles Tantalus's fruit: just when it seems to be in reach, it withdraws yet remains temptingly visible". A. Saarenpää, *Preface*, [in:] A. Saarenpää (ed.), *Legal Privacy*, Prensas Universitarias de Zaragoza, 2008, p. 9–16.

[14] A. Etzioni, *The Limits of privacy*, Basic Books, New York 1999, p. 196.

[15] *Ibid*., p. 197. See also: F. H. Cate, *Privacy in the Information Age*, Washington D.C., 1997, p. 31 and A. Westin, *Privacy and Freedom*, New York 1967, p. 42.

[16] A. Etzioni has stated that although we realise that individual rights were formulated under certain historical conditions, we tend to conceive of these formulations as truths rather than mores fashioned for a given time that are open to amendment as conditions change. A. Etzioni, *op. cit.*, p. 188.

[17] According to A. Saarenpää a transitory comprehensive definition of privacy is unnecessary and would even be misguided. It must be recognised that privacy is not only a legal concept and principle but also, and above all, we are dealing with a broader description of the right to self-determination that is associated with the rights of the individual. If privacy was defined as a legal concept with utmost precision, that definition and any regulation that relied on it would have to be amended constantly to keep up with the development of society and technology. A. Saarenpää, *Perspectives on Privacy…*, p. 25.

[18] A. Saarenpää has divided privacy into eleven main core areas: 1) physical privacy, 2) spatial privacy, 3) social privacy, 4) media privacy, 5) anonymity, 6) privacy in the processing of personal data, 7) ownership of information, 8) right to be assessed in the proper light, 9) patient privacy, 10) privacy in working life, and 11) communicative privacy. See also Stefanova, who separates four subcategories in privacy:

1) Physical inviolability – protection of the person in his or her physical aspect against procedures of interference such as tests for medications, experiments and so on;

2) Confidentiality of correspondence – security and confidentiality of the post services, telephone lines, including electronic mail and other means of communication;

3) Privacy of private property – posing restrictions against trespassing into the home and other kinds of environment.

which privacy protects. One of these areas is privacy in the working life. Privacy in the working life could be defined as follows: The employee's state or condition of being free from unauthorised and illegitimate observation or disturbance by other people in the workplace.

But why is privacy protected? On the individual level privacy is necessary for healthy personal development. An individual requires privacy to become autonomous and independent person who is able to interact with others, and also able to create rewarding and useful relationships. Respecting privacy can therefore be seen as an expression of respect for the autonomy of others. Since a society of incomplete individuals cannot function, privacy can also be justified by social considerations. Privacy not only allows us to develop healthy interpersonal relationships, it also seems to be required for democratic states to function. The answer to the aforementioned question is quite simple. Privacy is necessary for democratic states to function properly. This is also the reason why privacy needs protecting. We, as a society, should value and protect privacy, not because of its individual meaning, but because of its societal value.

3.2. Does the right to privacy apply to the workplace and to what extent?

The issue of privacy is central to the concerns raised by surveillance, wherever surveillance is applied. The multifaceted nature of privacy creates inevitable regulatory complexity. This is especially pronounced in relation to surveillance, particularly to the extent that it involves activities in the workplace. Surveillance is regulated to varying extent by constitutional or *quasi*-constitutional protections of privacy: statutory data protection regimes, civil law actions and laws restrict surveillance activities.

While the need for privacy protection against surveillance is not a new issue, it has become a more important one in recent decades because of the developments in technology. Technological development has increased the prevalence of surveillance and the forms it takes[19].

Despite the ever-changing nature of privacy it has become an inerasable part of working life. Given that in nature privacy is a fundamental human right, employees enjoy at least a limited privacy protection in the workplace. In various

Inviolability of personal information – definition of rules managing the gathering of personal data such as credit information, medical expertise and so on. A. Stefanova, *Privacy on the Web*, [in:] A. Saarenpää (ed.), *Legal Privacy*, Prensas Universitarias de Zaragoza, 2008, p. 149–150.

[19] The negative implications of surveillance first received detailed consideration in the context of convergence of computer and telecommunications technologies and its impact on information privacy. See, for example, M. Paterson, *Privacy Protection in Australia: The Need for an Effective Private Sector Regime*, "Federal Law Review" 1998, Vol. 26, p. 371.

institutions much of the traditional institutional power has yielded, the exclusive control of the employer over matters involving employee privacy is diminishing. The reasons for this are the general changes that have taken place in the working life, culture and, in part, legislation.

Human beings basically have, and should have, a right to be alone in society in relation to other individuals and organisations[20]. This is the core of the right to self-determination. Private and public are profoundly different spheres. However, the right to privacy is clearly neither absolute nor inviolate. If this was the case, society and democracy would be impossible. This is also the case with workplace privacy. This is so because privacy not only allows employees to develop healthy interpersonal relationships, it is also required for the workplace to function properly. Privacy can therefore be seen as a moral value, even in the workplace context. It should be noted, however, that privacy, especially in the workplace context, is a relative right which sometimes has to give way to other important societal values[21].

Although employee is under the direction and supervision of the employer and, therefore, subordinate to the employer, the right to privacy is a fundamental employee right which also applies in the workplace. The employer does not waive his/her right to privacy or any other fundamental rights and freedoms for entering into an employment contract. But because of the subordinate nature of the employment relationship, the employee's right to privacy has limited applicability. The reason for this is quite simple: the employer is responsible for all the activities that take place during the working hours. This does not mean that the employer has an absolute right to violate employee privacy. The employee should be able to function normally in the workplace without the employer's intrusion into the employee's private sphere.

This poses the question: How much surveillance is too much? One cannot set any definite and explicit demarcation line between surveillance and privacy. It can be said, however, that one knows that there is too much surveillance when employees begin to fear the surveillance activities and no longer feel free to exercise

[20] According to B. C. Stahl, we require privacy to become autonomous and independent humans, able to interact with others and create rewarding and useful relationships. B. C. Stahl, *Privacy and Security as Ideology*, [in:] S. Mercado Kierkegaard (ed.), *Legal, Privacy, and Security Issues in Information Technology. Volume 2. The First International Conference on Legal, Privacy and Security Issues in IT*, Institutt for rettsinformatik, Oslo 2006, p. 286–287.

[21] One example of this kind of balancing of societal values is privacy vs. security. This balancing is a current question in the workplace context as well as in the society in general. The reason for this is that privacy and security overlap and reinforce each other. According to B. C. Stahl, security can be seen as a precondition of privacy because a lack of security may allow unauthorised access to data, which will jeopardise privacy. Both of these concepts also have to do with control. They also cater to the individual's psychological need to feel protected from outside interference. B. C. Stahl, *op. cit.*, p. 289.

their lawful rights[22]. The limits of privacy and surveillance can also be found in the Golden Rule: One should treat others as one would like others to treat oneself. In the workplace context this means that the employer should be very considerate when engaging in surveillance activities in the workplace.

3.3. Privacy in the workplace – finding the equilibrium

Privacy can be seen as an absolute or a relative right. Where it is perceived absolute, it requires no further justification. Privacy as an absolute right will have the status of a human right. But there is the other side of understanding privacy: privacy as a relative right. If perceived as such, privacy needs to be justified with regard to other values and rights[23].

The employer's right to monitor and the employee's right to privacy can be seen as counterparts, and both enjoy strong moral and legal protections. It should be noted, however, that it should not be about choosing one over the other. Surveillance in the workplace can be applied in a privacy-friendly way. The issue is about finding equilibrium between the rights of the employer and the rights of the employee. As Etzioni has said: "Good societies carefully balance individual rights and social responsibilities, autonomy and the common good, privacy and concerns for public safety and public health, rather than allow one value or principle to dominate"[24].

As mentioned in the previous chapters, the employer has a justified right and, in some cases, even a legal obligation to keep the workplace under surveillance[25]. But this legitimate surveillance should be balanced with the employee's right to privacy. Essentially, this is an ethical issue[26].

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[22] B. Goold, *How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy and the Political Value of Privacy*, [in:] D. W. Schartum (ed.), *Overvåkning i en rettsstat*, Oslo 2010, p. 46.

[23] This distinction mirrors the one between privacy as an intrinsic or instrumental value. What both sides have in common is that both agree that privacy is a moral good. B. C. Stahl, *op. cit.*, p. 286. It should be noted, however, that both the European Convention for the Protection of Human Rights and the Charter of Fundamental Rights of the European Union state that everyone has the right to respect for his or her private and family life. This indicates that privacy can be understood as a human right and as a fundamental right. The Charter of Fundamental Rights of the European Union differs from the European Convention for the Protection of Human Rights in that the Charter also stipulates data protection as an individual fundamental right.

[24] A. Etzioni, *op. cit.*, p. 184.

[25] For example, in Section 3 of the Finnish Employment Contracts Act is stated that the employer must ensure occupational safety and health in order to protect employees from accidents and health hazards. This is one of the legitimate reasons of workplace surveillance.

[26] If a company truly wants to change behavior using virtue ethics is a simple way of doing so. B. Meier, *op. cit.*, p. 108.

The discussion of the ethics of surveillance should begin by noting the principles of fair information practice. These principles received widespread public notice in 1973 when drafted by the U.S. Health, Education and Welfare Department. Colin Bennett has expanded these to include[27]: 1) accountability 2) identifying purposes 3) openness 4) limiting collection 5) limiting use, disclosure and retention 6) accuracy 7) safeguards 8) individual access 9) challenging compliance[28].

On the basis of these principles of fair information processing, the following surveillance principles have taken shape:

1) Respect of privacy

Surveillance always impinges upon the employee right to privacy, wherever it is applied. Therefore respect of the employee right to privacy must be the starting point. This stems from the societal value and fundamental nature of privacy. In a society an individual has a right to be apart from others. Therefore, the employer should respect the employee right to privacy when engaging in surveillance activities. In order to guarantee respect of the employee right to privacy, the employer should go through with a privacy impact assessment before engaging in surveillance.

2) Proportionality

Surveillance should be adequate, relevant and not excessive in relation to the purposes for which it is employed. The proportionality principle has three components: suitability, necessity and non-excessiveness. Suitability encompasses the notion of relevance, which means that the surveillance is relevant to the purposes for which it is employed[29]. This implies that an employer should not engage in surveillance just because it is easy, cheap and effective. There must be a genuine need, a necessity, to engage in surveillance activities for the purposes of the legitimate interests of the employer[30]. The employer should also remember that one aspect of harm and crossing possibly perilous personal borders involves going farther than is required or than has been publicly an-

[27] C. Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*, Cornell University Press, Ithaca, New York 1992. G. Marx has stated that these principles are not adequate and that a more encompassing framework is needed. G. Marx, *Ethics for The New Surveillance*, http://web.mit.edu/gtmarx/www/ncolin5.html [13th July 2014].

[28] This data protection model forms the basis of the OECD Guidelines and most national legislation, i.e. the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[29] This also implies that it is logically capable of achieving those purposes.

[30] In the Finnish Act on the Privacy Protection in the Working Life the necessity is phrased the following way: The employer is only allowed to process personal data directly necessary for the employee's employment relationship which is connected with managing the rights and obligations of the parties to the relationship or with the benefits provided by the employer for the employee or which arises from the special nature of the work concerned (Chapter 2, Section 3 of the Act on the Privacy Protection in the Working Life).

nounced. Therefore the employer should remember that one should go no farther than is necessary for the task at hand. Non-excessiveness, therefore, implies that the means of surveillance is to be the one that is most privacy-friendly to fulfil the legitimate purpose[31].

3) Openness

The openness principle can be divided into two different parts: awareness and consent.

A vital issue in surveillance is employee consent. Should the employer seek the employees' consent to surveillance? The answer is yes. The employer should seek employee consent. By consenting to it, employees are able to make informed decisions related to surveillance. Consent, as part of the openness principle, is necessary to respect employee privacy. Coercive surveillance does not belong in a constitutional state.

In keeping with the openness principle employers should inform employees whether they are subject to random or continuous surveillance[32]. Employees must also be informed about what surveillance tools are currently being used in their workplace and be provided with intelligible information as to what the management does with the data so acquired. Employees should be able to establish the existence of a surveillance system, its main purposes, as well as the identity of the person responsible for surveillance.

By doing so, the employer maintains openness and the employees are aware of the surveillance activities of the employer. Openness of surveillance is an essential part of the rights of the employee because covert surveillance does not belong in a constitutional state. According to Gary Marx, one component of justice is fair warning, which means providing people with information about the rules, procedures, rewards and punishments they are subject to. Marx argues that beyond showing respect for the person, full disclosure can be a means of shaping conduct as individuals know they will be assessed and may behave accordingly[33]. This establishes an important point about surveillance: the ability of surveillance to make employees behave the way the employer wants them to behave. This is also the reason why surveillance can been seen as a means of exercising power.

4) Co-operation

Privacy is an essential part of individual self-determination. Individuals should have the right to choose to be beyond the reach of surveillance. This also applies to the workplace. Therefore, and in view of its privacy invasive nature,

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[31] See more on proportionality, Bygrave – Schartum: Consent, proportionality and collective power.

[32] According to the Finnish Act on Privacy Protection in the Working Life it is stated in the case of using video surveillance in the work place there must be prominent notification of the video surveillance and its method of implementation is displayed in the areas in which the cameras are located (Act on Privacy Protection in the Working Life, Section 17).

[33] G. Marx, *op. cit.*

workplace surveillance should be implemented in co-operation with employees. This means that employees should be invited to participate fully in the decisions how and when electronic monitoring takes place. By doing so, the employer will know how the employees feel about the planned surveillance activities[34].

5) Safeguards

In order to effectively protect personal rights of individuals it is requisite to integrate sufficient safeguards into the surveillance system. In the context of workplace surveillance, these safeguards include the right to inspect, seek redress and sanctions, and challenge and express grievance.

Even if they're not required to do so by law, employers should give employees access to their personal information stored. This should be done so that employees can verify, and if necessary challenge, its accuracy and completeness. Employees must be permitted to inspect, challenge, and, when appropriate, request correction of their personal details and performance data.

Given the technological development dynamics and the fundamental nature of privacy, in order to guarantee that employee right to privacy is respected, certain legal safeguards must be put in place. This is so because the right to privacy, as a fundamental and societal value, cannot be hinged on morale alone. The stakes are too high for the workplace environment and for the society. People need privacy to develop themselves into properly-functioning individuals. Therefore surveillance activities in the workplace and the employee right to privacy need legal regulation in order to be balanced. The aforementioned workplace-surveillance principles can be used as a starting point for this legal regulation of workplace surveillance. Employers do not need an in depth understanding of privacy as a concept. But this does not mean that only awareness of the fact that the right to privacy also applies to the working life is enough in order to respect this right. Employers should also be aware of the value of privacy for the workplace environment.

[34] In the Finnish legislation the co-operation principle has been taken into account According to Section 21 of the Act on privacy protection in working life, the purpose and introduction of and methods used in camera surveillance, access control and other technical monitoring of employees, and the use of electronic mail and other data networks, are governed by the cooperative procedure referred to in the Act on Cooperation within Undertakings and the Act on Cooperation in Government Departments and Agencies. In undertakings and in organisations subject to public law that are not governed by the legislation on cooperation, the employer must, before making decisions on these matters, reserve the employees or their representatives an opportunity to be consulted. After the cooperative or consultative procedures, the employer shall determine the purpose of the technical monitoring of employees and the methods used, and inform employees about the purpose and introduction of and methods used in the monitoring system, and about the use of electronic mail and the data network.

4. Conclusion

As mentioned above, workplace surveillance is not, in itself, a new practice. Nonetheless, this does not mean that the nature of supervising and controlling workers should be considered a stable, unchanging aspect of workplace relations.

This idea stems from the fact that the advancement of technology has significantly changed the workplace environment. The Internet and e-mail, in particular, allow employees to communicate effectively and efficiently with others. These technological developments have also provided employers with tools to monitor employees in the workplace. Monitoring could help reduce employee misconduct, increase productivity and prevent leakage of confidential information. On the other hand, it may also cause employee morale to decline in effect of the invasion of their privacy.

Surveillance has become a normal component of everyday working life. Paradoxically, surveillance, and in particular workplace surveillance, is much used but little understood. This is indicative of the need to understand how to manage an automated environment. We should remember that although technology is often involved in various privacy problems, these problems are not caused by technology alone. Privacy problems are primarily caused by people, businesses and governments, whose activities disrupt other valuable activities and thus create a problem[35].

Despite its controversial nature, surveillance is also an integral part of the rights of the employer. On the other hand, privacy, as the counterpart of surveillance, is a fundamental right of the employee. Therefore it can be argued that there are three major questions regarding surveillance in the workplace. First, the question of employer responsibility for employees. Employer has the right to monitor employees in the workplace during working hours because employer is responsible for all of the activities that take place during the working hours. Second major question is that of workers' privacy. Privacy is a fundamental part of the employee right to dignity and self-determination. This means that the employer is obliged to comply with the privacy rights of the employees. Putting these two questions together creates the third and probably the most difficult question: How to balance these to rights?

Employers have legitimate requirements for personal information about their employees. They need to know who they are hiring. They need to address performance issues and ensure physical security of their workplace. And they may see electronic monitoring and other surveillance as necessary to ensure productivity, stop confidential information leaks, and prevent workplace harassment.

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[35] D. Solove, *Understanding Privacy*, Harvard University Press, Cambridge, Massachusettes 2009, p. 188.

In order to comply with the legal responsibilities in the workplace, employers sometimes have to delve into private matters. But they can keep those instances to a minimum, and limit the impact on personal privacy.

The possibility that an individual employee might do something harmful does not justify treating all employees as suspects. The questionable benefit of knowing what every employee is doing during working hours must always be weighed against the cost of surveillance – including the cost to staff morale and trust. Preventing workplace harassment, for example, is an important goal, but it must be noted that it is best achieved through workforce training and sensitisation, explicit anti-harassment policies, and appropriate remedial measures, rather than by depriving everyone of their privacy rights.

As a society, we should treat employees in a virtuous way. The virtue ethics perspective attempts to help people understand themselves and develop moral capacities to live and work well in all situations. We should therefore assume that workers are honest, trustworthy, loyal and focused employees[36].

How these two competing interests are balanced together is, in the end, a question of choice. Whatever the choice will be, it should be kept in mind that these two rights should be carefully balanced with each other, keeping in mind that good privacy practice is not just about avoiding complaints, grievances, or lawsuits. Fostering a workplace culture where privacy is valued and respected contributes to morale and mutual trust, and makes good business sense.

[36] B. Meier, *op. cit.*, p. 108.

Karolina M. Szymorek-Chachuła[*]

CONCLUDING AN EMPLOYMENT AGREEMENT VIA ELECTRONIC MEDIA

1. Introductory remarks

Pursuant to Art. 29 section 2[1] of the Labour Code[2] employment contract is concluded in writing. If concluded otherwise, the employer must, at the latest on the employment commencement date, confirm to the employee in writing the arrangements concerning the parties to the contract, type of work and its terms and conditions.

Hence, employment contract should in principle be concluded in writing, however, non-abidance by this form does not cause an employment contract concluded otherwise than in a written form to become invalid or ineffective. This position is grounded both in the doctrine and judicature[3]. An employment contract concluded otherwise than in writing is, therefore, valid, effective, binding on both parties, and constitutes an employment relationship[4].

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[1] Article 29 section 2 of the Labour Code: An employment contract must be made in writing. If an employment contracts is not made in written form then the employer must, at the latest on the date when the employee commences work, provide the employee with a written statement of the settlements in relations to the parties to the contract, the type of the contract as well as its conditions.

[2] Labour Code Act dated 26 June 1974, Journal of Laws of 1998, No. 21, item 94 uniform text with as amended.

[3] Judgement of the Supreme Court dated 6.10.1976, I PRN 66/76, Legalis; judgement of the Supreme Court dated 20.9.1977, I PR 67/77, Legalis; judgement of the Supreme Court dated 8.10.1987, I PRN 47/87, Sł.Prac. 1988, No. 3, p. 29.

[4] A. M. Świątkowski*, Komentarz aktualizowany do art. 29 Kodeksu pracy*, [in:] K. Jaśkowski, E. Maniewska, *Komentarz aktualizowany do ustawy z dnia 26 czerwca 1974 r. Kodeks pracy (Dz.U.98.21.94)*, Lex, No. 156677.

At this point it needs to be said that the multiplicity of electronic media and the ensuing diversity of the forms of statements that can be made by parties to the prospective employment relationship entail a more exhaustive study of the issue of concluding employment contracts through electronic media.

First of all, employment relationship is established upon mutual intent being declared by both the employer and the employee. It is, therefore, reasonable to regulate that non-abidance by the written form of the declaration made cannot cancel the legal relationship itself, as it does not rely on the form in which the declaration is made. Given that the basic rule of law is the freedom of employment contract[5], whereby employment relationship is only conditional upon mutual intent of the parties, and the parties are also free to choose the manner and form of making such mutual declarations, as well as the basis and terms of employment[6].

Furthermore, the Labour Code does not regulate the form in which a declaration of intent has to be made, or the manner of concluding employment contracts, or the consequences of not applying the given form, hence, pursuant to Art. 300[7] of the Labour Code, these matters are governed accordingly by the applicable provisions of the Civil Code[8], unless these contravene the provisions of labour law.

2. Provision of art. 29 section 2 – "written" form

Art. 29 section 2 of the Labour Code only requires that employment contract must be concluded "in writing". It is not clear, however, whether this "written" form may be understood otherwise than the conventional written form within the Civil Code regulations. In my opinion, the "written" form within labour law is not the conventional written form within the Civil Code regulations.

Given that the provision of Art. 29 section 2 of the Labour Code indicates a "written" form, it could be assumed that reasonable lawmakers have applied this term for a purpose. The term "written form", on the grounds of the Labour Code, is elucidated by T. Wrocławska as including handwritten, digital, printed or electronic form[9]. To my mind this "written form" within Art. 29 section 2 of the Labour Code approaches a declaration of intent in the objective meaning, i.e. as a result of an act by the declarant, which result takes on the form of a certain

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[5] L. Florek, *Kształtowanie stosunku pracy przez ustawę i umowę*, [in:] L. Florek, *Ustawa i umowa w prawie pracy*, Oficyna 2009, Lex, No.108050.

[6] More information: Z. Góral, *O kodeksowym katalogu zasad indywidualnego prawa pracy*, Warszawa 2011, p. 117 et seq.

[7] Article 300 of the Labour Code: In cases not regulated by the provisions of labour law, the provisions of the Civil Code apply accordingly to an employment relationship, provided they are not contrary to the principles of labour law.

[8] Civil Code of 23 April 1964, Journal of Acts 1964, No. 16. item 93 uniform text as amended.

[9] T. Wrocławska, *Problemy dopuszczalności rozwiązywania umów o pracę za pomocą środków komunikowania się na odległość – artykuł dyskusyjny*, PiZS 2006, No. 11, p. 13.

substrate of a sign (e.g. a document in written or electronic form) that carries specific thoughts expressed by the declarant[10]. Concluding an employment contract "in writing", therefore, means that it is necessary to record it in a written form containing the declaration of intent of both parties to the prospective employment contract[11], however, not necessarily in the form of a document (sheet of paper) signed by both parties to the employment contract.

Such interpretation of the regulation is closer to the contemporary process in which electronic documents and declarations made through electronic media are increasingly ubiquitous. Also, one cannot ignore the fact that since the time when the provision within Art. 29 section 2 of the Labour Code was enacted, technology has developed to the extent that it does affect labour law regulations and its interpretation[12]. For a long time now literature has brought to attention the dynamic development of labour law and its relation to the ever changing economic life[13]. It seems that the interpretation of the word "written" within Art. 29 section 2 of the Labour Code should adapt to such changes. The more so that the form of the employment contract is not solely reserved for evidentiary purposes. The option of applying provisions restricting the admissibility of witness and testimonial evidence in labour law and social security proceedings has been expressly excluded in terms of Art. 473 of the Civil Procedures Code[14].

3. Concluding employment contracts

It goes without saying that certain inconsistency of the legislature, who in the first sentence of the provision of Art. 29 section 2 of the Labour Code use the term "in writing" and in the next sentence the term "written form" induces one to assume that employment contract should be concluded in the "conventional written form". This position is also expressed in most of the doctrine[15]. The Supreme

[10] A. Janiak, *Komentarz do art. 60 Kodeksu cywilnego,* [in:] A. Kidyba (ed.), Z. Gawlik, A. Janiak, A. Jedliński, K. Kopaczyńska-Pieczniak, E. Niezbecka, T. Sokołowski, *Kodeks cywilny. Komentarz. Tom I. Część ogólna,* WKP 2012, Lex, No. 128098 and its literature.

[11] M. Zieleniecki, *Komentarz do art. 29 Kodeksu pracy*, [in:] U. Jackowiak, M. Piankowski, J. Stelina, W. Uziak, A. Wypych-Żywicka, M. Zieleniecki, *Kodeks pracy z komentarzem*, Fun.Gosp. 2004, Lex, No. 66057.

[12] See: B. Kaczmarek, *Nowe technologie, nowe możliwości – nowoczesne formy komunikowania się sądu i stron procesu cywilnego, a także sądów między sobą – uwagi na tle aktualnych przepisów,* [in:] J. Gołaczyński, *Prawo Mediów Elektronicznych,* "Legalis" 2008, No. 8.

[13] T. Wrocławska, *op. cit.,* p. 13.

[14] Code of Civil Procedure as of 17 November 1964, Journal of Laws of 2014, item 101, uniform text as amended.

[15] M. Zieleniecki, *op. cit.*; A. M. Świątkowski, *op. cit.*; M. Tomaszewska, *Komentarz do art. 29 Kodeksu pracy*, [in:] K. W. Baran (ed.), B. Ćwiertniak, S. Driczinski, Z. Góral, A. Kosut, W. Perdeus, J. Piątkowski, M. Skąpski, M. Tomaszewska, M. Włodarczyk, T. Wyka, *Kodeks pracy. Komentarz*, WKP 2012, Lex, No. 126484.

Court, too, has indicated that the "written form" under the labour law provisions must meet the conditions within Art. 78[16] of the Civil Code[17].

In order to conclude an employment contract in the conventional form, as described in Art. 78 of the Civil Code, it suffices to exchange the documents that contain the declarations of intent of the employee and the employer, both signed by one of the parties, or the documents each of which contains the declaration of intent signed by one of the parties. Therefore, the minimum requirement to abide by the written form of employment contract is to sign the document (employment contract) or documents, should the documents be exchanged in the manner specified in the second sentence of the provision of Art. 78 of the Civil Code[18].

Placing a safe electronic signature – by means of a qualified certificate – under the declaration of intent in electronic form is equivalent to making such declaration in the conventional written form (Art. 78 section 2 of the Civil Code). This is not the case with "check box" declarations, e.g. available on websites, and signed e-mails, where, pursuant to the Act on Electronic Signatures, such signature is an "ordinary" electronic signature.

Importantly, in terms of Art. 60[19] of the Civil Code, applied accordingly on the grounds of labour law, subject to the exceptions provided in the act, a person with legal capacity may express the intent by any conduct that sufficiently communicates that intent, also in electronic form. The provisions of Art. 60 of the Civil Code, as well as Art. 8 of the Act on Electronic Signatures[20] (hereinafter referred to as A.E.S.) refer to all declarations of intent made electronically with any kind of electronic signature, including the one which is not the electronic equivalent of personal signature. Using an electronic form is only one option of expressing intent. It is not a competitive form separate from the already existing written form[21]. A candidate may express the intent to establish employment relationship

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[16] Article 78 of the Civil Code: section 1 In order to observe standard written form for a legal act, it is sufficient to set a handwritten signature to a document containing a declaration of intent. In order to execute a contract, it is sufficient to exchange documents containing declarations of intent, each of which is signed by one of the parties, or documents, each of which contains a declaration of intent of one party and is signed by this party. section 2 A declaration of intent made electronically and bearing a secure electronic signature verified by a valid qualified certificate is equivalent to a declaration of intent made in standard written form.

[17] Resolution of the Supreme Court as of 2.10.2002, Chamber of Labour, Social Security and Social Affairs, III PZP 17/02, Labour Law 2003/9/33, Decisions of the Supreme Court Official Compilation, Chamber of Labour, Social Security and Social Affairs 2003/20/481, Labour and Social Security 2003/11/33, Legal Monitor 2004/4/187–189, Decisions of the Polish Courts 2004/9/464.

[18] K. Jaśkowski, *op. cit.*

[19] Article 60 of the Civil Code: Subject to the exceptions provided for in the law, the intention of a person performing a legal act may be expressed by any behavior of that person which manifests his intention sufficiently, including the intent being expressed in electronic form (declaration of intent).

[20] Act on Electronic Signatures dated 18 September 2001, "Journal of Laws" 2001, No. 130, item 1450 as amended.

[21] J. Janowski, *Elektroniczna postać a elektroniczna forma oświadczenia woli*, [in:] *Podpis elektroniczny w obrocie prawnym*, WKP 2007, p. 284.

by communicating that he/she accepts the employer's employment offer[22]. In particular, he/she may submit the declaration electronically. The provision of Art. 60 of the Civil Code states that the intent of a person aiming at producing legal effects may be expressed in any way that is understood by the recipient[23], but only when the law does not lay down farther-reaching requirements for the declaration of intent in respect of the given legal transaction.

It follows that the conduct of the person submitting a declaration of intent must be clear to other people – particularly to its recipients – i.e. it must be a meaningful sign (an act of communication)[24]. It is not important, however, what means of communication are used by the person submitting the declaration, if such means are subject to certain rules. Therefore, „electromagnetic waves connected with the movement of electrons or light waves may be a means of communication, provided that they are encoded in a way that allows to establish the content of the messages and its sender"[25]. In contemporary technology such waves are data media in computer connections, while information communicated by electronic media cannot be denied legal relevance[26].

Thus, declarations of any future parties to employment contract may be made electronically and if both parties wish to establish an employment relationship, they may do so by submitting the declarations through electronic media. In order to specify whether the parties have actually concluded an employment contract or any other kind of agreement, e.g. a civil law contract, it takes to determine the type of work to be performed – whether the person has agreed to perform work individually, in a continuous manner and pursuant to the recommendations of the employer and whether the work shall be performed in the place and time specified by the employer, and if yes, the contract so concluded will be regarded as an employment contract. The intent and object of the contract concluded by the parties are relevant, too, and so are employee subordination and employment stability[27].

There is therefore no doubt that the form of employment contract has no influence on the employment relationship. Valid and effective may be an oral, or even implied contract, i.e. by letting the employee do his/her job. It is essential however that in order to establish an employment relationship, the employer must undertake, at least factually (without preserving the required form), to engage

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[22] R. Sadlik, *Zawarcie umowy o pracę w sposób dorozumiany*, MPP 2011, No. 9, p. 470.

[23] S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2004, p. 249.

[24] Z. Radwański, *Elektroniczna forma czynności prawnej*, MoPr 2001, No. 22, p. 1110.

[25] E. Diakowska, *Miejsce zawarcia umowy elektronicznej*, CBKE – e-bulletin, p. 4, http://cbke.prawo. uni.wroc.pl/files/ebiuletyn/Miejsce_zawarcia.pdf [10.02.2014].

[26] Z. Radwański, *Prawo cywilne – część ogólna. t. 2. System Prawa Prywatnego*, Warszawa 2002, p. 164–165.

[27] R. Sadlik, *op. cit.*, p. 471.

the employee for a compensation[28]. The notion of legal transaction concluded impliedly refers just to the form (manner) of expressing one's will. Whether the declaration comes from a person who can effectively make it is a different question. Therefore, an employment contract may only be concluded implicitly if, on making the declaration, the employer is duly represented by a person authorised to conclude employment contracts[29]. The same goes for making declarations of intent electronically – declarations of intent of the parties may be made on their behalf, but in order to verify whether an employment contract has been concluded it takes to ascertain whether the declaration to employ the employee was made by the employer and whether the type of work has been specified in the contract (which is an essential element of employment contract). When it is impossible to ascertain the type of work to be performed, the transaction concluded cannot be deemed to be an employment contract[30].

4. The term "electronic media"

At this point it feels right to elucidate the term "electronic media". It has been regulated in the Act on Rendering Electronic Services of 18 July 2002[31]. Pursuant to the provision of Art. 2 section 5 of the foregoing Act, electronic media are any and all technical solutions, including ICT equipment and matching software, which enable remote communication between individuals using data transmission between ICT systems, in particular electronic mail. The ICT system described in the foregoing Act realises two purposes: data processing (like IT systems) and remote data transmission between data processing systems (like telecommunication systems)[32]. Essentially, such technical solutions, i.e. electronic communication media, are to enable individual remote communication.

By definition, electronic media are used for individual electronic data transmission[33]. In the judgment of 5 December 2006 the Administrative Court decided that facsimile machine cannot be considered an electronic medium[34]. On the other hand, mobile telephone is a means of electronic communication, but only in respect of data transmission by SMS, MMS, WAP or e-mail[35].

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[28] Specified by the Supreme Court in the judgment of 18.6.2007, II PK 341/06, MoPr, No. 12/2007, p. 647.

[29] Judgment of the Supreme Court of 5.12.2002 r., I PKN 629/01, OSNP, No. 11/2004, item 194.

[30] K. Jaśkowski, *op. cit.*

[31] Act on Rendering Electronic Services of 18 July 2002, "Journal of Laws" 2002, No. 144, item 1204 as amended.

[32] A. Sobczyk, *Telepraca w prawie polskim*, WKP 2009, p. 32.

[33] J. Janowski, *Elektroniczny obrót prawny*, WKP 2009, p. 79.

[34] Judgment of the Administrative Court of 5.12.2006, III SA/Wa 1836/06, Lex, No. 295045.

[35] J. Janowski, *op. cit.*, p. 79.

The primary, though not exclusive, medium through which employment contracts nay be concluded is the Internet. It offers various forms of individual electronic communication, in particular by electronic mail, but also via websites, online chats, IRC[36], instant messaging (e.g. Gadu-Gadu)[37].

5. Declaring intent in electronic communication

Out of the afore-mentioned electronic communication techniques two appear to be particularly fit and potentially universal for concluding employment contracts: websites and electronic mail (or other individual means of remote communication). The doctrine emphasises that concluding contracts with the use of one of the foregoing techniques is different from the conventional form to the extent that supports the distinction between them within Art. 66[138] of the Civil Code[39] (which regulates matters pertaining to the submission of offers by means of the foregoing techniques). Inasmuch concluding contracts through websites takes place *on-line,* e-mails and SMS and MMS texts are characterised by "passive" access to the net, hence in this mode contracts are concluded *off-line.*

Therefore, considering the options of concluding an employment contract via electronic media, it is recommendable to specify the kind of media to be used. Before a contract is actually concluded, the text of the declaration to be made electronically must be entered into the electronic medium so that the recipient may read it.

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[36] IRC (*Internet Relay Chat*) – one of the oldest online services that allows communication on various channels, also a private one with another person. The chat process works on a client/server model of networking, i.e. it is a group of connected servers and programs – clients. IRC offers communication on various channels. Some of them are constant, others may be opened by a user, who wants to communicate with another person. The screen displays messages sent by people communicating on a particular channel. Such messages are displayed immediately after they are sent to the server and in the same order. Therefore the user gets the feeling of a real conversation of people sitting in the same room.

[37] Instant Messenger – a computer program that allows for an immediate message transfer (instant communication) between two or more computers through a computer network, usually the Internet. It differs from a standard e-mail in that the user also receives information about the accessibility of other users, which gives the feeling of a direct conversation.

[38] Article 66[1] of the Civil Code: section 1 An offer made electronically binds the of error if the other party immediately confirms receipt thereof. section 3 The provision of section 2 applies accordingly it an entrepreneur invites the other party to enter into negotiations, make offers or execute contracts in any other way. section 4 The provisions of section 1–3 do not apply to the execution of contracts by electronic mail or similar means of individual remote communication. Neither do they apply in relations between entrepreneurs if the parties so agree.

[39] D. Karwala, *Zawieranie umów elektronicznych w trybie ofertowym – uwagi na tle art. 66[1] KC*, [in:] J. Gołaczyński, *Prawo Mediów Elektronicznych*, "Legalis" and its literature.

Pursuant to the judgment of the Supreme Court as of 16 May 2003[40], a declaration of intent in electronic form, as described in Art. 61 section 2[41] of the Civil Code, is made by the text of the declaration being correctly entered into an electronic device (computer) of the sender and then transmitted via the Internet using the software tools that enable remote data transmission and receipt through the server of the telecommunication service provider (Internet service provider) and immediately accessible to the recipient – owner of an email account.

At that, whether the declaration so made has been delivered effectively depends on whether the recipient can read it normally, without any extra expenditures and effort[42]. In principle, the risk of the declaration not being delivered in due time to the recipient lies with the declarant. Also, it is important to find out what happens in a situation when the declaration that has gone through the addressee's interface cannot be read thereby due to some technical problems, e.g. no appropriate software, software failure, wrong format of the declaration, or file damage during its transfer to the recipient. In such cases, the declarant will have the evidence confirming that the file has been sent and, therefore, as suggested by E. Diakowska[43], the recipient will have to prove that even though the declaration was entered into the electronic communication medium the addressee was unable to read its text. In either situation, it should be considered whether the recipient was able to read the declaration of intent. If not, the declaration is deemed not to have been effectively delivered. Therefore, it cannot be assumed that the declaration was made effectively, if, even though was entered into the electronic communication medium, but in a form that actually prevented the recipient from reading its text[44]. In the foregoing situations the risk lies with the recipient only when the obstacles to reading the text of the declaration are on his side, e.g. for reason of the addressee's computer being "infected"[45] or out of order, of which the sender is unaware and only receives information that the file has reached the recipient[46].

To sum up the foregoing considerations, for the purpose of judging whether an employment contract has actually been concluded via electronic media, it is important to ascertain whether the declaration was made appropriately, i.e. whether it was duly delivered, considering the specific nature of making and transmitting such declarations via electronic communication media.

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[40] Judgment of the Supreme Court of 16.05.2003,I CKN 384/01, Lex, No. 358821.

[41] Article 61 section 2 of the Civil Code: A declaration of intent expressed in electronic form is deemed made to another person at the time it is introduced to the means of electronic communication in such a manner that the person could have read its content.

[42] J. Barta, R. Markiewicz, *Internet a prawo*, Kraków 1998, p. 50.

[43] E. Diakowska, *Miejsce zawarcia umowy elektronicznej,* CBKE – e-bulletin, p. 13, http://cbke. prawo.uni.wroc.pl/files/ebiuletyn/Miejsce_zawarcia.pdf [10.02.2014].

[44] W. Dubis, *Elektroniczne oświadczenie woli*, [in:] J. Gołaczyński (ed.), *Umowy elektroniczne w obrocie gospodarczym*, Warszawa 2005, p. 32.

[45] M. Świerczyński, *Prawo Internetu*, Warszawa 2004, p. 91.

[46] X. Konarski, *Internet i prawo w praktyce*, Warszawa 2002, p. 78.

6. Concluding employment contract through websites

To conclude a contract via a website it usually takes to fill in the form available on that website and send it *on-line.* With this kind of contracts it is decisive whether doing so is regarded as the addressee's response to and acceptance of the offer, or just an invitation to negotiations, i.e. making an offer. At this point it needs to be emphasised that in terms of the Civil Code regulations, which apply accordingly on concluding an employment contract, a contract may be concluded by way of offer and acceptance, negotiations, as well as auction or tender. For the purpose of concluding employment contracts the first two modes are particularly important.

An agreement is concluded through negotiations when the parties agree to all the contractual provisions by negotiating the same, and by way of offer and acceptance, when the offer is accepted.

It goes without saying that the legal nature of the form available on the website may be determined by the owner of the website. It may clearly state that by filling in and sending the form the offeree (candidate) has responded to the offer of concluding an employment contract presented by the offeror (employer). However, a website is comparable to a prospectus, a form of an invitation to negotiations, and, therefore, it should rather be governed accordingly by the Civil Code regulation which indicates that announcements, advertisements, price lists and other information presented to the world at large or to definite persons, in case of any doubt are considered not to be an offer, but an invitation to negotiations. This would rather suggest that the filling in and sending the "employment contract" form *on-line* is the beginning of employment negotiations with the future employer[47].

In terms of Art. 66^1 section 1 of the Civil Code, whether an offer is binding is regulated differently and relative to the electronic communication medium used to make it. When an agreement is concluded through a website, i.e. *on-line*, the addressee is required to immediately confirm the receipt of the offer (Art. 66^1 section 1 of the Civil Code), while when e-mail is used (*off-line*), Art. 61 section 2 of the Civil Code[48] applies.

Also, employment contract may be concluded implicitly, or by conduct, e.g. by allowing the candidate to work. Therefore, when concluding an employment

[47] See e.g.: J. Barta, R. Markiewicz, *op. cit.*, p. 59; R. Golat, *Internet – aspekty prawne*, Warszawa 2003, p. 66; D. Kasprzycki, *Handel elektroniczny. Etap przedofertowy*, [in:] J. Barta, R. Markiewicz (ed.), *Handel elektroniczny. Problemy prawne*, Kraków 2004, p. 51; D. Szostek, *Czynność prawna a środki komunikacji elektronicznej*, Zakamycze 2004, p. 147.

[48] M. Wiktorczyk, *Zawieranie umów przez sieć Internet*, CBKE – e-bulletin, p. 5, http://cbke.prawo.uni.wroc.pl/files/ebiuletyn/Zawieranie%20umow%20przez%20siec%20Internet.pdf [10.02.2014].

contract through electronic communication media it takes to determine when and where such a contract is concluded, because any doubts about the legal status of, e.g. the *on-line* application form may lead to the conclusion that the contract was in fact concluded by conduct only, after the beginning of employment, as previously the parties had only used the website to negotiate employment, or exchange information about the possible future employment[49].

7. Concluding contracts through e-mail or similar means of remote individual communication

Essentially, sending a signed employment contract by e-mail does not cause the same to meet the requirements for the conventional written form of the contract. Such document may only increase the likelihood that the contract has been concluded. In case of a dispute, the obligation to prove that the employment contract has been concluded falls upon the claimant (Art. 6 of the Civil Code and Art. 232 of the Code of Civil Procedure). One obvious exception to this rule is when the declarations of intent are made in electronic form and affixed with safe electronic signature that can be verified with valid qualified certificate. Such declarations are equivalent to declarations of intent made in writing.

In general, however, e-mail messages are not affixed with safe electronic signature verified with valid qualified certificate. Usually, these messages are accessible to the recipient almost immediately after being sent (in normal use of electronic mail). It is also possible to scan the signed declarations of the parties and send them by e-mail. The scan of such declarations only contains electronic reproductions of the signatures, therefore the requirements for the conventional written form are not met. Furthermore, declarations submitted by e-mail may raise some doubts whether the declarant is the sender of the e-mail. It is essential to verify the person that makes the declaration. If a person is employed on an employment contract not abiding by the written form requirement, the employer is required to confirm in writing all the arrangements regarding the parties, job description and conditions at the latest on the employment commencement date.

To sum up, employment contract may be concluded through electronic communication media, however, on a case-by-case basis it should be ascertained whether the declarations of the parties were actually made, whether they were correctly entered into the electronic communication medium so that the addre-

[49] See also judgment of the Supreme Court of 5.11.2003, I PK 633/02, OSNP 2004, No. 20, item 346, based on which: even when an employment agreement turns to be invalid, i.e. did not create an obligation on the date of signing it, such obligations arise when an employee is permitted to work pursuant to the conditions of the agreement.

ssee was able to read them, as it is only when they are affixed with safe electronic signature verified with valid qualified certificate the written form requirement is met (assuming, of course, that it is the "written" form within Art. 29 section 2 of the Labour Code, i.e. the conventional written form of the contract). Failure to affix a "safe" signature on the declarations of intent will cause the employer to have to confirm in writing, at the latest on the employment commencement date, the arrangements regarding the parties, job description and conditions.

Additionally, upon concluding employment contract through electronic communication media it is important to determine the actual intent of the parties as well as the nature of the agreement. However, if the parties are willing to establish the employment relationship, they may make their declarations by any means, including electronic communication media. Considering the rate of technological development and growing popularity of electronic communication media, it seems that their use for the purpose of concluding contracts will be more and more common, too. Which is a good reason to define the legal effects of this manner of concluding employment contracts, as well as develop a uniform interpretation of the term "in writing" within Art. 29 section 2 of the Labour Code.

Senad Jasarević[*]

SERBIAN ANTI-DISCRIMINATION LABOUR LEGISLATION[1]

This paper presents Serbian anti-discrimination legislation in the field of labour, comprising five acts passed after the year 2006, including the Labour Code. The said legislation was drafted along the lines of the EU document on equality. This paper also summarises the content of Serbian anti-discrimination acts and analyses certain solutions related to the EU and other international standards.

1. Introduction

In the past ten years, Serbia has made a serious effort to regulate protection of citizens equality, which also included protection from discrimination at work. Following the Labour Code enactment in 2005 (as the first instance of a more particularised regulation prohibiting discrimination)[2], a set of anti-discrimination acts was also adopted, which concurrently improved the regulations related to the field of work. Among them were the Act on Prevention of Discrimination Against Persons with Disabilities of 2006, Anti-Discrimination Act of 2009, Gender Equality Act of 2009, and the Act on Prevention of Harassment at Work of 2010[3].

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[2] The Code was published in the Official Gazette of the Republic of Serbia (RS), No. 24/2005, 61/2005, 54/2009, 32/2013, 74/2014.

[3] Mentioned laws were published in: 1) Official Gazette of the RS, No. 33/2006; 2) Official Gazette of the RS, No. 22/2009; 3) Official Gazette of the RS, No. 104/2009; 4) Official Gazette of the RS, No. 36/2010, 5) Official Gazette of the RS, No. 24/2005, 61/2005, 54/2009.

These regulations incorporated the model of equality protection in place in the European Union (EU). After the year 2000, Serbia began its accession to the European Union and in 2012 it acquired the status of a membership candidate[4].

Legislation on equality of employees in the EU is considered to be among the most developed in the world. It makes more than a half of the EU labour law standards. In addition, these regulations contain ample documents on gender equality. The provisions on equality of employees are present in many of the EU acts, from the most important documents of the Union, such as The Treaty on European Union and the Treaty on the Functioning of the EU of 2010[5], through the Charter on the Fundamental Rights of the EU of 2000[6], the European Union Community Charter of the Fundamental Social Rights of Workers of 1989[7], including particularised legislation (regulations, directives)[8].

The present concept of protection of equality of citizens in the EU is based on the idea of transformative – integrative practice aiming to establish full social and economic equality of all EU citizens, and eliminate the so-called systemic inequalities. This entails not only challenging discrimination at work, but also eliminating the inequalities rooted in social mechanisms and structures that lead to inequalities in practice[9].

By adopting the above-mentioned anti-discrimination acts, Serbia has made a big positive step towards the EU standards. Still, we cannot talk about "har-

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[4] More about the process of Serbia's accession to the EU can be seen in: B. Budimir, V. Međak, *Serbia's EU accession*, ISAC Fund, Belgrade 2010, http://www.isac-fund.org/download/Pridruzivanje-Srbije- EU.pdf; Office of the Government of the Republic of Serbia for European integration, http://www.seio.gov.rs/početna.1.html

[5] The Treaties were published in the Official Journal (OJ), C 83, of 30 March 2010. See: Treaty on European Union – item 3 of the Preamble, Art. 2, 3, 9. Treaty on the Functioning of the European Union – Art. 8, 10, 153, 157 – items 1–3, 4.

[6] The entire third chapter of the Charter is dedicated to equality (Articles 20–26). The Charter was republished in the same bulletin as previously mentioned agreements (2010).

[7] From 9 December 1989. See item 16. The Charter is available at: http://www.aedh. eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community_Charter_of_the_Fundamental_Social_Rights_of_Workers.pdf.

[8] There are numerous documents that were being brought in 1970s and on, but they will not be listed in this paper. Only those more recent and most important ones will be mentioned, such as: 1) Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation – 27 November 2000; 2) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; 3) Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), of 5 July 2006 (which integrates earlier directives on gender equality, No. 75/117/EEC, 76/207/EEC and 2002/73/EC, 86/378/EEC, 96/97/EC, 97/80/EC, 98/52/EC). According to the above given sequence, these documents were published in: 1) OJ L 303, 02/12/2000; 2) OJ L 180, 19/07/2000, 3) OJ 204/23, 05/7/2006.

[9] See: B. Hepple, B. Veneziani, *The Transformation of Labour Law in Europe, Oxford and Portland, Oregon*, 2009, p. 129 and 158; S. Jašarević, *Protection of equality of employees in European Union legislation*, Law Journal 2010, No. 3, University of Novi Sad, Novi Sad, p. 258.

monisation" with the EU practices. The biggest problem is the application of regulations. Many solutions of Serbian anti-discrimination law have not yet been implemented (e.g. in the field of non-discrimination, recruitment and promotion of "vulnerable" categories in society, greater representation of women at leadership positions, reconciliation between work and family life, recognition of home work, access to work for disabled persons, mobbing), thus leaving room for speculations as to when these issues will be resolved. The reasons for this are rooted in the society itself and cannot be changed overnight. These are for example: specific mentality (formed under the influence of socialism), the state's unwillingness to implement legislation consistently, general public's non-compliance with the existing regulations, formalism in law implementation, ineffective judicial protection, unwillingness to accept different standards of conduct at work, prejudices and stereotypes, social mechanisms that diminish discrimination (e.g. lack of participation of "vulnerable" groups in the field of education, patriarchal approach).

2. Serbian legislation on prohibition of discrimination at work

Art. 21 of the Constitution of the Republic of Serbia prohibits all forms of discrimination on any grounds (except for the affirmative action)[10]. Also, in 2003 Serbia became a member of the Council of Europe and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, along with the accompanying protocols[11], and thus took on the obligation to comply with the prohibition of discrimination under Art. 14 of the Document and the Protocol No. 12[12].

In particular, prohibition of discrimination at work is governed by a separate head in the Labour Code as well as by the aforementioned anti-discrimination regulations along with some other acts related to the field of work[13]. We will make

[10] The Constitution was published in Official Gazette of the RS, No. 98/2006.

[11] Official Journal of the FRY, International Treaties, No. 9/2003.

[12] See *Handbook on European non-discrimination legislation*, The European Union Agency for Fundamental Rights, 2010, the Council of Europe, 2010, p. 12 and 58.

[13] For example, The Act on Employment and Unemployment Insurance (Official Gazette of the RS, No. 36/2009, 88/2010), in Art. 5 provide the principle of prohibition of discrimination and the principle of gender equality; Act on Vocational Rehabilitation and Employment of Disabled Persons (Official Gazette of the RS, No. 36/2009) in Art. 2 establishes the principle of prohibition of discrimination of persons with disabilities and the principle of gender equality; The Act on Civil Servants (Official Gazette of the RS, No. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009) guarantees equal access to employment (Article 9) and equal legal protection. Act on Health Protection (Official Gazette of the RS, No. No. 107/2005, 72/2009, 88/2010, 99/2010, 57/2011), Art. 20 sets forth the ban on discrimination in the provision of health services.

a brief overview of these regulations and the most important solutions related to non-discrimination.

In the *Labour Code* (LC), the entire fifth head (Art. 18–23) is dedicated to prohibition of discrimination. In addition to the general prohibition of discrimination, it deals with the following issues: bases of discrimination, the concept of direct and indirect discrimination, fields of discrimination (from the conditions for recruitment, education, promotion, up to termination of employment), prohibition and the concept of harassment and sexual harassment, justifiable exceptions, availability of affirmative action, possibility of initiating court proceedings for reimbursement of damages[14].

The Anti Discrimination Act (hereinafter ADA) of 2009 – is the governing act in this field, although it was enacted after some of the mentioned acts. This Act regulates: general prohibition of discrimination, forms and cases of discrimination, and methods of protection against discrimination. It also establishes the Commissioner for Protection of Equality (CPE as an autonomous and independent government authority assigned to ensure protection against discrimination. This act is very comprehensive. It establishes the general prohibition of discrimination and defines its forms, regulates specific cases of discrimination (discrimination in proceedings before public authorities, in the field of labour, provision of public services and use of facilities and sites, discrimination based on religion, in education and training, discrimination based on gender, sexual orientation, discrimination of children, age discrimination, discrimination of ethnic minorities, discrimination based on political and trade union membership, discrimination of persons with disabilities, discrimination based on the state of health). It also regulates the procedure for the protection of rights before the CPE and before the court, which is characterised by special rules different from the civil procedure (urgency, admissibility of review in all cases, specific requirements for the plaintiff, the burden of proof – transferred to the defendant, option of imposing a temporary measure), possibility of taking action by other parties (the Commissioner or organisations involved with the protection of human rights – implying the consent of the affected party), the existence of "voluntary examiners", penalties and sanctions (albeit very modest)[15].

The Act on Prevention of Discrimination against Persons with Disabilities, of 2006, (hereinafter referred to APDAPD), was the first specific anti-discrimination act in Serbia. It was adopted in 2006. The Act is based on modern "social concept" of persons with disabilities, which means that the measures envisioned focus on elimination of discrimination by greater inclusion of these persons into

[14] The Labour Code has been changed in July this year. As for the part related to discrimination, there are no major changes, except in Art. 23, item 2, which introduces the burden of proving on the part of the respondent (it was not provided previously).

[15] Up to 850 EUR for legal entities.

society and active work[16]. Similarly to the previously mentioned Act, it postulates general prohibition of discrimination and regulates various forms of discrimination (direct and indirect discrimination, violation of the principle of equal rights and obligations, severe forms of discrimination), establishes specific instances of discrimination (in proceedings before public authorities, in relation to associations, provision of services and use of facilities and sites, health services, care and education, in employment and labour relations, in transport, marriage and family relations). It also lays down the measures aimed at promoting equality of persons with disabilities (establishment of support associations, creating accessible environment, integration into mainstream education, access to information, *etc*.). In addition, it makes provisions for enhancement of equality of persons with disabilities (greater possibilities of initiating court proceedings – e.g. by the accompanying persons, claims of the plaintiff are adjusted to discrimination disputes; possibility of revision), and finally, sets forth the penalties and sanctions (regrettably, modest fines).

The Act on professional rehabilitation and employment of persons with disabilities of 2009 should help resolve the problem of employment of persons with disabilities. Under this Act, persons with disabilities may be employed under special conditions (implying adjustment of business or work place). One important novelty is the obligation of every employer with more than 20 employees to employ a certain number of persons with disabilities (Art. 24). If he fails to comply, the employer is bound to pay a penalty equal to the triple minimum wage determined by the labour regulations for each person he missed to hire.

The Act on Gender Equality, of 2009 (hereinafter: AGE) pays great attention to improving the position of the sexes (mostly women) in the field of labour. The second part of the Act is entitled "Employment, social and health care", Art. 11–26. It can be said that its "structural approach" aimed at eliminating discrimination makes the difference. Namely, in addition to the general prohibition of discrimination (and harassment and sexual harassment), the Act contains a number of concrete measures and mechanisms conducive to eliminating inequality (e.g., obligatory Plans for elimination or mitigation of unequal gender representation, preparation of annual reports on the implementation of the Plan, 30% quotas for employment of both sexes in public bodies, compulsory enforcement of measures of affirmative action; an obligation of the employer to implement gender representation that reflects the gender structure of employees in every phase of professional development, possibility of establishing special state funds for

[16] According to Art. 3 of the Act, persons with disabilities include: "… people with congenital or acquired physical, sensory, intellectual or emotional disability that, due to social or other barriers, are not able or have limited opportunities to engage in social activities at the same level as others, regardless of whether they can engage in those activities with the use of technical aids or support services".

hiring underrepresented gender, *etc*.). So called "measures for reconciliation of professional and family life" are also provided, so that, for example, institutions of social and health services are obliged to adapt their work organisation and working hours to the needs of customers – i.e. employees (Art. 25 of the Act). However, this brings moderate effects as, for the most part, the Act has remained a "dead letter" so far.

The Act on the Prevention of Harassment at Work, of 2010 indirectly belongs to the set of anti-discrimination acts. Namely, despite the fact that this act deals with discrimination issues indirectly, save Art. 3 where it approaches discrimination directly by stipulating that the protection covers cases of sexual harassment as well), it actually regulates "mobbing"[17]. By implicating that the environment that tolerates mobbing stimulates discrimination, prohibition of mobbing will have a positive influence on protection against discrimination.

3. Protection against discrimination at work in Serbia

Based on the concept of this article, thorough analysis of the subject matter will be substituted by appropriate basic questions and specific provisions.

The concept of discrimination in these regulations meets international and European standards. For example, according to the Anti Discrimination Act (ADA), Art. 2, the terms "discrimination" and "discriminatory treatment" shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership of political, trade union and other organisations and other real or presumed personal characteristics.

The grounds on which discrimination is prohibited are similar to those found in international standards. For example, the Constitution prohibits any direct or indirect discrimination "… on any grounds, in particular race, sex, nationality, social origin, birth, religion, political or other opinion, property status, culture, language, age, or mental or physical disability" (Art. 21). While Labour Act stip-

[17] The Act defines all that constitutes mobbing, possible performers, processes of internal (mediation) and judicial protection (including certain specific characteristics, similar to those in already mentioned acts, e.g. urgency, specific plaintiff claims, the burden of proving, provisional measures). Fines are slightly higher than those in previously mentioned acts, up to 34,000 EUR (400 000 dinars) for legal entities.

ulates twenty grounds for discrimination[18], the ADA provides twenty five. This list is not "closed", as it envisages an "open clause on discrimination", so that the number of bases of discrimination is in fact indefinite. The Constitution, for example, prohibits discrimination based on any grounds. The LC says that discrimination may be based on any other personal quality, and in ADA: "presumed personal characteristics". This solution is very important in the field of labour relations, where besides the usual basis of discrimination many specific reasons for discrimination may occur, such as work experience, years of service, personal status, position, marital status (married, divorced, not married), birth outside of marriage, family responsibilities (number of children, taking care of incapacitated family members), the intention to have offspring, whether the person is a smoker or not or drinks alcohol, suffers from obesity or high blood pressure, it could be as well membership of an association or affiliation to a specific movement, place of residence, dressing habits[19].

Forms of discrimination also correspond to current comparative legal standards. In addition to the usual distinction between direct and indirect discrimination, other forms of discrimination found in international documents are mentioned in Serbian regulations as well. For example, besides already mentioned forms of direct and indirect discrimination, ADA provides a stipulation on "severe forms of discrimination" (Art. 13), such as repeated discrimination, "extended" discrimination (discrimination that lasts) or "cross-discrimination" (discrimination on several basis). In terms of the Act on Prevention of Discrimination against Persons with Disabilities, Art. 26 (the part related to discrimination at work), "particularly gross form of discrimination based on disability is disturbing, insulting and belittling of the employee with a disability by the employer or immediate superiors in the work process, because of his/her disability". The same Act also prohibits "transferred discrimination" (in terms of Art. 21, par. 1: "It is forbidden to discriminate against employment and use of labour rights of: 1. person with disability seeking employment; 2. person assisting a disabled person seeking employment , 3. employed persons with disabilities; 4. employed escort of the person with disabilities…".

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[18] "Both direct and indirect discriminations are prohibited against persons seeking employment and employees in respect to their sex, origin, language, race, colour of skin, age, pregnancy, health status or disability, nationality, religion, marital status, familial commitments, sexual orientation, political or other belief, social background, financial status, membership in political organisations, trade unions or any other personal quality" (Art. 18 of the LC).

[19] See for more: *Equality at work, Tackling the Challenges*, International Labour Conference, ILO, 2007, Geneva, p. 15, 45–53; I. Grgurev, *Discrimination on grounds that are not explicitly prohibited in the employment code*, Labor Code, Zagreb 2007, No. 3, p. 42; R. Doting, *Can boss insist on healthy habits*?, Christian Science Monitor, January 11, 2006 edition: http://www.csmonitor.com/2006/0111/p15s01-ussc.html/; U. Furi-Perry, *Butting In: Employers penalise Smokers and Overweight Workers*, 8 November 2004, Employer # Crossing, http://www.lawcrossing.com/article/416/Butting-In-Employers-Penalise-Smokers-and-Overweight-Workers/#.

The definitions of direct and indirect discrimination are more or less taken from the EU standards. For example, the Labour Code, Art. 19: "(1) Direct discrimination, pursuant to this law, shall be any action caused by some of the grounds referred to in Article 18 of this law that puts a person seeking employment or employee in a less favourable situation than other persons in the same or similar situation"[20]. "(2) Indirect discrimination, pursuant to this law, shall be recognised in case an apparently neutral provision, criterion or practice puts or would put a person seeking employment or employee in a less favourable situation than other persons, due to a certain quality, status, belief or position of such person referred to in Article 18 of this law"[21].

Following the example of EU legislation, prohibition of discrimination includes protection against harassment and sexual harassment[22]. In terms of Art. 21 of the LC: "… (2) Harassment, pursuant to this law, is any unwanted behaviour resulting from some of the grounds referred to in Article 18 of this law aimed at or representing a violation of dignity of a person seeking employment or employee, causing fear or breeding adverse, humiliating or insulting environment. (3) Sexual harassment, pursuant to this law, is any verbal, non-verbal or physical behaviour aimed at or representing a violation of dignity of a person seeking employment or employee in the area of sexual life, causing fear or breeding adverse, humiliating or insulting environment"[23].

The forms of discrimination are also defined in conformity to the recent legal standards in this area. For example, in terms of Art. 5 of ADA: "The forms of discrimination are direct and indirect discrimination, as well as violation of the principle of equal rights and obligations, calling to account, associating for the purpose of exercising discrimination, hate speech and disturbing and humiliating treatment".

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[20] This implies an assumed basis for discrimination, as discussed previously.

[21] For example, according to Art. 2, Para 2 of the EC Directive No. 78/2000, of 2000th years, "(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary…". The definition is similar to the definition found in Art. 2 of the Directive No. 54/2006.

[22] Harassment is prohibited by all EU directives on discrimination released after the year 2000, while Directive 2006/54/EC prohibits sexual harassment as well.

[23] This definition of harassment corresponds to the definition of harassment under Art. 2, item 3 of the EU Directive No. 78/2000. The term sexual harassment was taken from the Directive on Gender Equality of 2006. (Article 2, item 3) that originates from former Directive No. 2002/73, whereby the concept of sexual harassment was introduced into the EU law. However, there are tiny differences arising from translation, that slightly change the meaning of the definition.

Similarly to EU law, *reasonable exceptions* to the prohibition of discrimination are set as well, and they can be applied when different treatment is justified or necessary. For example, in terms of Art. 22, paragraph 1 LC: (1) "Differentiation, exclusion or prioritisation for a certain job shall not be considered discriminating when the nature of the work is such or the work is done under such circumstances that relating to some of the grounds referred to in Article 18 of this law represent the true and decisive requirement for the performance of such a job, and that the purpose aimed at is justified". In terms of Art. 14 of the ADA (subtitle: Special measures): "Measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position shall not be considered to constitute discrimination"[24].

Justifiable exceptions include *measures of affirmative action*. In Art. 22, paragraph 2 of the LC it is stipulated as follows: "Provisions of this law, the general document and labour contract relating to special protection and assistance to certain categories of employees, particularly those relating to protection of disabled persons, women on maternity leave and absence from work for childcare, special childcare and provisions relating to special rights of parents, adoptive parents, guardians and foster parents – shall not be interpreted as discrimination".

"Quotas" were introduced as one of the measures of affirmative action. Pursuant to Art. 14 of the AGE (subtitle: "Equal access to jobs and positions"), "If representation of the less represented gender in each organisational unit at the level of managerial positions, management board and supervision is less than 30%, the public authorities have to implement affirmative action in accordance with the Law on Civil Servants and the Law on State Administration".

"Prohibition of victimisation" (retaliation or repression arising from initiation of the proceedings against discrimination or addressing discrimination) is a precondition that has to be fulfilled in order to have effective prohibition of discrimination. Victims of discrimination who bring unequal treatment into open are often harassed in many different ways (for example: current discrimination is more intensified, discriminated person is avoided by other employees, the person is moved to another, "worse" job or harassed or mobbed in order to quit the job, or even dismissed from job on the false grounds or declared redundant). Prohibition of victimisation was first introduced by EU documents (Art. 11 of the Directive No.: 78/2000, Art. 9 of the Directive No. 43/2000, Art. 24 of the Directive

[24] For example, according to the Directive No. 78/2000 (Article 2, item 5.), of 2000, the prohibition of discrimination shall not apply to measures laid down by the national legislation which are necessary in a democratic society for protection of public safety, public order, prevention of crime, and for protection of health, rights and freedoms of others. Pursuant to the Directive on Gender Equality of 2006 (Article 2), there is no discrimination "… if such provision, criterion or practice is objectively justified by a legitimate goal and if the means for achieving it is appropriate and necessary".

No. 54/2006)[25], and soon spread to the national legislation. According to Art. 8 of the AGE: "No one shall bear any consequence as a witness to or victim of discrimination based on gender when testifying before the competent authority, or if warning the public of the occurrence of discrimination". According to Article 20 of the same Law, initiation of proceedings by the employee for discrimination based on sex cannot be considered a justifiable reason for termination of work agreement, i.e. termination of employment and other (contractual) involvements related to his/her present work, nor it can be considered a reasonable ground for declaring the employee redundant. Art. 9 of the ADA provides "ban on calling to liability": "Discrimination exists if a person or group of persons unjustly receives or would receive worse treatment than others, solely or mainly because they seek or intend to seek protection from discrimination, or because they are offering or intending to offer evidence of discriminatory treatment".

The very *proof of discrimination* is a major problem in practice. Since discrimination is generally not openly apparent, statistical data or other indicators are often used as evidence in comparative practices. Also, the "test cases" or "voluntary examiners" are used in practice. The Law on Prohibition of Discrimination (Art. 46) refers to "voluntary examiners": "… (3) A person who has deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to prohibition of discrimination in a particular case may initiate a lawsuit referred to in Article 43 items 1, 2, 3 and 5 of this Law… (5) If the person referred to in paragraph 3 of this Article has not initiated a lawsuit, a court may hear him/her as a witness. (6) The person referred to in paragraph 3 of this Article may not be claimed to share any responsibility for the damage resulting from a discriminatory act". In order to provide relevant statistical data, the AGE provides that the employer is obliged to keep records of the gender structure of employees, in accordance with the relevant labour law and to make the data available to authorised labour inspection and the body appointed to observe the implementation of gender equality (Art. 12).

In evidentiary proceedings, the burden of proof is of the highest importance. It is extremely difficult for victims of discrimination to prove it in Court, as it is applied in a secretive, sneaky way, or witnesses to discrimination are reluctant to confirm it. To facilitate detection, under the influence of American law, the EU has introduced a "split burden of proof" and "burden of proof on the employer". The Directive No. 97/80/EC on the burden of proof in cases of discrimination

[25] For example, Article 24 of the Directive 54/2006, subtitle: *Victimisation,* provides the following: "Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment".

based on sex was introduced in 1997. It stipulates that after concluding the *prima facie* discrimination the burden of proof shall be transferred to the respondent (in the field of labour – the employer). This solution was subsequently adopted in all EU anti-discrimination documents[26], as well as in most recent national legislations on prohibition of discrimination that were made under the influence of EU law. In terms of Art. 45 of Serbian ADA: "If the Court establishes that a direct act of discrimination has been committed, or if that fact is undisputed by the parties to a lawsuit, the defendant may not be relieved of responsibility by supplying evidence that he/she is not guilty".

It became obvious that anti-discrimination laws without *sanctions* are hardly sustainable. According to the EU regulations, sanctions for discrimination at work should be: effective, proportionate, convincing[27]. Sanctions for discrimination in Serbian law can be divided into: monetary and non-monetary. According to Art. 43 ADA, through a lawsuit the plaintiff may demand: "1. imposing a ban on an activity that poses a threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity; 2. that the court should establish that the defendant has treated the plaintiff or another party in a discriminatory manner; 3. taking steps to redress the consequences of discriminatory treatment; 4. compensation for material and non-material damage; 5. that the decision passed on any of the lawsuits referred to in items 1–4 of this Article be published". Monetary fines under this law range from 10,000 to 100,000 dinars (about EUR 85 to 850), for legal entities, entrepreneurs, public officials, and physical persons". (Art. 51 of the Law)[28]. Although punitive sanctions are anticipated

[26] For example, Art. 10 of the Directive No. 78/2000 says: "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 there has been no breach of the principle of equal treatment". See also: Art. 19 of the said Directive 54/2006.

[27] "Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted Pursuant to this Directive and shall take all measures necessary to Ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them". Art. 17 of the Directive 78/2000.

[28] We believe that such a regulated financial sanctions do not fit into the concept of EU discrimination law, because such penalties are not dissuasive enough, having in mind the low fine. *See* ECJ, judgment of 25 April 2013, Case C-81/12, Assoçiatia Accept v Consiliul Național pentru Combaterea Discriminării, para. 64). The Court (Third Chamber) hereby rules: "…3. Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on

as well, they are rarely enforced. Art. 137 of the Criminal Code of the Republic of Serbia, 2005[29] provides: "(2) Whoever, by force, threat, or other improper means inflicts severe pain or suffering on another person in order to obtain from him/her or any third person a confession, statement or other information, or to intimidate him/her or a third person, or inflicts an illegal punishment, or does so for any other reason based on discrimination of any kind, shall be punished with imprisonment from six months to five years".

So far, the Courts have rarely brought judgments related to discrimination at work, and moreover, initially imposed minimum fines that could actually not discourage, but rather encourage discrimination[30]. According to the recent data, it seems that the penal policy is changing, as indicated by much larger fines[31].

4. Conclusion

By adoption of the package of anti-discrimination legislation, Serbia has significantly improved the general legal framework for the protection of equality at work. In addition to judicial protection, the Commissioner for Protection of Equality has also begun to play a very constructive role. Activities in this field in the past few years have also been aided by significant activities of the National

which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it".

[29] Official Gazette of the RS, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013.

[30] For example, Municipal and then after the Court of Appeal in Novi Sad (Serbia) have decided that a public company from Novi Sad has to pay the sum of 100,000 dinars (it was at that time about 900 EUR) along with the court expenses to the plaintiff because of discrimination and as reimbursement for pecuniary and non-pecuniary damages for mental distress inflicted by the breach of honour, reputation, freedom and personal rights. It was the case of discrimination based on political affiliation where, in consequence of the leadership change, and after certain period of time, the person was moved to less favourable (lower) position in the working process (December 2004), and then after discharged. During the said period, as stated, he was harassed and subjected to pressures on daily basis and roll calls, he was named "the yellow" (referring to his political orientation). After, the hearing of evidence, the Court has verified the accuracy of the allegations made and brought the said judgment *(Municipal Court in Novi Sad, No. P-1-6/2011 of 8 4 2011, the Court of Appeal GZ. 1-1406/11, 9 11 2011).*

[31] For example, in early February 2012, a local company "JAT Airways" was bound to pay more than 3.8 million dinars (about 32,000 Euros) to a pilot A.P. (52), covering material damage, court expenses and interest, related to discrimination based on ethnicity and abuse. The judgment of the High Court in Belgrade of 5 January 2012 is available at the sight of the Court: http://www.bg.vi.sud.rs/lt/

Ombudsman[32], as well as the Provincial Ombudsman (in the Autonomous Province of Vojvodina)[33], that function as independent institutions for the protection of human rights.

One particular quality of the new regulations on protection of equality in Serbia is a high degree of compliance with the EU and international standards (OUN, SE, ILO). However, at the same time, this is where the shortcomings of discrimination acts arise from, since it often happens that individuals or courts are not capable of implementing rules and regulations related to prohibition of discrimination, mainly due to prejudices and social stereotypes. This does not only require a more stringent application of antidiscrimination regulations, but above all necessitates a higher level of consciousness and tolerance in the general public. As far as the area of labour is concerned, a guided action aimed at cultivation of both consciousness and tolerance should mainly focus on employers, employees and their organisations.

5. Summary

In this article the author gives a brief presentation of Serbian antidiscrimination legislation. Serbia has started the process of accession to the European Union, so that gradual harmonisation of Serbian law with EU legal standards is to be expected. Legislation on equality of employees is one of the most developed areas of the law of the European Union. The EU documents on equality of the employees have served as a model used by Serbian legislature. Although many solutions in these acts are based on community standards (e.g. definition of direct and indirect discrimination, harassment, sexual harassment), it is evident that in practice harmonisation of Serbian law is by far inadequate. Many legal norms inspired by the EU standards have not yet been implemented and it is uncertain whether they will ever be applied. The main causes are found in the different mentality, prejudices and stereotypes, formalism in implementation of the law, and unwillingness of employees to accept changes in conduct and attitude at work.

[32] This body, which deals with the protection of citizens' rights in relation to state authorities, became operational in 2007. See for more at: http://www.ombudsman.rs/

[33] See for more at: http://www.ombudsmanapv.org/apvomb/

Tatiana Wrocławska[*]

PERMANENCE (STABILITY) OF AN EMPLOYMENT RELATIONSHIP OF OLDER EMPLOYEES – ANALYSIS OF CHANGES

1. Introduction

The aim of this study is to analyse the changes in Polish legislation that have taken place in the last twenty years with respect to sustainability of employment relationship in elderly employees. The fact that the very title of this study indicates elderly employees as an object of protection somewhat automatically implies that employment of this category of employees is protected, which poses the question about the extent and level of this protection. Despite the terminological diversity, which can still be encountered at times[1], the category of elderly employees has been used in legal literature for a long time. It developed in response to the need to apply special legal measures to this category of employees, as it was classified in the group exposed to a very high risk of unemployment, next to young people, pregnant women, disabled people, *etc*. On the other hand, however, elderly employees enjoy some privileges, as their employee rights increase together with the duration of service and include, e.g. employment sustainability which intensifies with the imminent end of professional activity and is often identified in the literature with the rule of seniority[2].

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[1] In fact, we can also meet with the concept of ageing old persons, older, elderly or persons that achieved retirement age, persons aged at 45+, 50+, 60+.

[2] See: A. Rycak, *The common protection of the durability of the employment relationship*, chapter II, point 2 in part. III, Lex 2013, No. 166604.

The title of this paper signifies that the legal analysis is reduced to the protection guaranteed by the provisions of the Labour Code, leaving out other instruments and solutions intended to protect employment of elderly employees and save the existing jobs or create new ones[3]. This is so for the reason that discussion of employment relationship sustainability may also involve different notions with various meanings, e.g. permanence of employment, employment stabilisation, employment relationship stability, and protection of the right to keep a job[4]. However, the notion of sustainable employment is certainly closely related to the legal protection of jobs, since protection of employment relationship provides opportunity to work within the existing employment relationship[5]. At this point it feels right to distinguish between general protection, which is usually connected with control of the reasons for termination and applies to all employees, and special protection, which offers a wider range of protection and applies to employees who are found in exceptional personal or work situations for a certain period known as protection period[6]. From the perspective of elderly people, both types of employment protection deserve attention.

The recent changes in Polish legislation have been accompanied by evolution of the doctrines and jurisprudence. The revisions were caused by the need to adapt the applicable legal solutions to the ever changing conditions and social policies. Also, these changes reflect the European Union policies and regulations which are part of our legal system. The increasing average life expectancy of the population, on the one hand, and the demographic low underlain by various causes but also increasing, on the other hand, entail applying on the various employment levels special solutions adequately diversified to suit the older age. However, it is doubtless that legal regulations intended to protect sustainable employment, even if they are compatible with the interests of elderly employees, may collide with the interests of their employers and infringe on the interests of the unemployed, in particular the interests of young people[7]. Here, the conflict of interests of certain social groups, the young and the elderly, becomes evident, as the right to employment of the elderly clashes with the efforts to combat youth unemployment. Hence, reasonable as it is to review the sequence of changes, it is equally justified to consider the existing laws and regulations from the angle of their potential amendments.

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[3] See comments on the concept of protecting jobs and protecting the sustainability of employment relationship L. Florek, *Protecting jobs and the interests of workers, employers and the unemployed*, [in:] L. Florek (ed.), *Labour law and unemployment*, Warszawa 2003, p. 11.

[4] H. Szewczyk, *Common protection of the durability of the employment relationship after the amendments to the Labour Code*, [in:] *Within the issues of labour law and social policy, vol. 13*, Katowice 1998, p. 23, 24.

[5] See also comments concerning narrow and broad understanding of the protection of the durability of employment relationship, with quoted representatives of doctrine, H. Szewczyk, *op. cit.*, p. 25–27.

[6] Compare H. Szewczyk, *op. cit.*, p. 27, 28.

[7] *Ibid*., p. 11–23, especially p. 22.

Stabilisation of employment by protecting employment relationship of the elderly, who are within the group at particular risk of unemployment, is also indicative of the guarantee of a viable transition to retirement. If no restrictions on elderly employees' employment termination were in place, this would be very detrimental to them in the face of negligible job opportunities and high probability of losing the right to receive retirement pension that also depends on sufficient work periods[8]. The guarantee of employment stabilisation, being a demonstration of special protection, applies to employees in the pre-retirement age bracket, i.e. workers who are in the course of attaining the right to retirement pension. However, here arises a question about the extent of protection applicable to those elderly employees who are already eligible to receive retirement pension. Employees who have reached the retirement age are not subject to special protection, so their employment contracts may be terminated in keeping with the general terms and conditions that fall within the notion of general protection. However, it is unquestionable that those people may be very interested in staying in employment. With the present retirement system, the retirement age is no longer the key factor for persons considering application for retirement pension. Taking into account the fact that the basis for pension calculation is the value of registered premiums recorded on the insured's account. Reaching the retirement age has become less important than collecting an appropriate amount of premiums which are conditional upon employment periods and earnings[9].

Also, it needs to be emphasised that legal protection, whether special or general, of employment sustainability, applies to persons who are employed on employment contracts, since employment on contracts other than employment contracts certain modifications to this protection may be considered, especially with respect to workers employed on the basis of nomination and cooperative employment contracts that may be terminated only after achieving the right to retirement pension[10].

2. Older employee as an object of protection

The title of this paper mentions older employees. The criterion for distinguishing this category, therefore, is age, specifically older age. It is beyond doubt that the notions of an elderly or elder, older people as well as the elderly or old

[8] Compare Z. Góral, *Comment to article 39 of LC*, [in:] K. W. Baran (ed.), *Labour Code. Commentary*, legal status as at 2012.04.15, WKP 2012.

[9] See: J. Skoczyński, *Retirement age as reason for termination of the employment contract,* PiZS 2005, No. 4, p. 23–24.

[10] See about this: B. Wagner, *Retirement age as the event of labour law*, PiZS 2001, No. 3, p. 26.

age may be understood differently, hence the meanings and the semantic scope of the foregoing notions could be different. The different meanings could be justified by diverse reasons that determine the use of these terms. Therefore, different meanings are given to these notions in medical, social, economic or legal sciences[11].

As a legal category that appears in various law disciplines, age affects personal legal capacity, capacity to carry rights or obligations, and legal liability. On the other hand, as a source of social security law rights, age may also affect employee's situation[12]. Therefore, it is essential to set forth an age limit that will be the starting point from which employment of old persons will be protected. This poses a question about the semantic scope of the notion of an old person. First of all, the regulations of the Labour Code, which constitutes the main point of reference for this legal analysis, do not use that notion. However, they do refer to retirement age or, more precisely, in terms of employment protection they refer to employees who have no more than 4 years to go before they retire. Such workers are called employees in the pre-retirement period (Article 39 of the Labour Code (LC)[13]). Hence, it seems justified to focus on those elderly employees who are included in or excluded from employment sustainability guarantees. Therefore, the considerations will oscillate around two categories of elderly employees, i.e. employees who have reached the pre-retirement age and employees who have reached the retirement age.

Before the Labour Code entered into force, protection against termination of employment contracts was not universal and could only be applied under the provisions of collective labour agreements. That state of affairs changed after the Chairman of the Ministers Council in 1960 issued a circular letter on Sole Wage-earners in Families concerning the specific guidelines and rules of lay-offs, which were not binding, but were to be taken into account when assessing compatibility of employment termination with the principles of social coexistence. Employees within the pre-retirement and retirement age bracket were one of the categories that were protected against termination of employment contracts[14].

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[11] There is no way to even discuss in part the views expressed in the literature with regard to the proposed definition or attempts to reconstruct these definitions due to multithreading issues and limited framework. More about this B. Mikołajczyk, *International protection of the rights of the elderly*, WKP 2012, Lex, No. 156494.

[12] See: B. Wagner, *op. cit.*, p. 20.

[13] Labour code of 26 June 1974, OJ l 199, No. 21, item 94 consolidated text with amendments.

[14] The employer should not have to terminate the employment contract of employee who archived the so-called old age. Another example of policy guidelines for employees dismissals was Central Trade Union Council's circular of 5 October 1961 on protection against dismissals for only family providers and workers that achieved retirement age, but who do not have a pension. Accordingly to this, the rules applied to abovementioned employees should be considered as the principles of social justice and the violation of these principles made dismissal, accordingly to article 41 of civil law, ineffective. See about it A. Rycak, *The universal protection of the durability of the employment relationship, part. I, 2 in*. (II), Lex 2013, No. 166604. See also: B. Wagner, *op. cit.*, p. 22.

After the Labour Code entered into force, by virtue of Article 39 protection was granted to employees who had not more than 2 years to go before reaching the retirement age, if the length of service entitled them to retirement pension after reaching that age. Also, the pre-retirement age that delimits the period of protection, was understood as the age that predates the right to become eligible for retirement pension[15].

Unquestionably, retirement age is a notion typically used in the field of social security law, where it appeared for the first time in the provisions of the Act of 23 January 1968[16] and replaced the notion of the "elderly age" used in legal provisions until that time[17]. This change should be certainly recognised as positive. The notion of the old or elderly age, without any doubts, sounds quite pejoratively. In contrast, the term 'retirement age' is identified with appropriate experience or length of service, rather than old age and disability.

Talking about retirement age, we could mean general retirement age, reduced retirement age, or earlier retirement age[18]. Therefore, a question arises which kind of retirement age is used in the Labour Code. Article 39 of LC does not explain this issue, referring to an employee who has not more than 4 years to go before retirement. It is worth pointing out here that the extension of the protection period from 2 up to 4 years resulted from the amendment of Article 39[19]. However, the four-year protection only applies to those employees whose length of service entitles them to retirement pension after reaching that age. What should be highlighted, too, are certain differences in legal regulations that apply to employees employed on the basis of nomination. Under the provisions of Article 72(3) of LC, employment of an employee who has not more than 2 years to go before becoming eligible for retirement pension from the Social Security Fund (SSF)[20] may be terminated, but the dismissing authority has the duty to offer that employee another job that corresponds to his/her professional qualifications, where such an employee is entitled to remuneration in the amount due prior to the dismissal from office for a period equal to the period of notice.

General retirement age, also referred to in literature as "regular" or "usual", now means the age of 67 which at present applies to employees of both sexes[21].

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[15] Compare B. Wagner, *op. cit.*, p. 23.

[16] The law on Common social security for employees and their families, OJ 1968, No. 3, item 6.

[17] On the basis of art. 28 and n. of the Decree of 25 June 1954 for Common social security for workers and their families, OJ 1954, No. 30, item 116 was talking about the right to old age pension for people of senile age with appropriate period of employment.

[18] See: B. Wagner, *op. cit.*, p. 21 and J. Skoczyński, *op. cit.*, p. 23. This also indicates M. Łajeczko, K. Tymorek, *Preretirement age protection of employees*, SP 2000, No. 3, p. 1–4.

[19] From 1 January 2004.

[20] Social Security Fund.

[21] Until the end of 2012, the age was diversified and stand at the level of 60 years for women and 65 for men.

Retirement age was changed under the provisions of the Law of 11 May 2012 on amending the law on pension benefits and disability pension benefits from the Social Security Fund and certain other laws[22], effective as of 1 January 2013, which resulted in gradual increase of retirement age. Gradual monthly increases of retirement age take place at the end of the subsequent quarters of the calendar year[23]. This solution means that retirement at the age of 67 years will apply to men in 2020, 8 years after the law came into force, and to women in 2040, i.e. after 28 years[24].

Moreover, we should also remember about Article 18 of the aforementioned amending Law, under which employees who upon the effective date of that Law were covered by employment protection provided by Article 39 of the Labour Code, or employees who could be covered by such protection, if they were in employment at the time, are protected against termination until they reach the retirement age specified in the regulations within Article 24(1a) and (1b) and Article 27 (2) and (3) of the Law[25]. Consequently, this leads to extension of the period of protection in respect of some employees. It is aptly noticed that if no transitory provisions have been introduced, this would cause the employees, who upon the effective date of the amending Law were covered by special protection to gradually lose protection over a period from 3 months to 4 years[26].

Retirement age may also mean reduced retirement age which is lower than general retirement age[27]. This is about a certain lower retirement age limit that is applicable to specified groups of employees doing specific jobs or working under special conditions. For certain groups of employees, this reduced retirement age is their regular retirement age. Hence, job protection is also offered to employees in the pre-retirement age bracket. For quite a long time, however, dominant was the opinion that special protection did not cover employees entitled to earlier retirement. This was also confirmed by judgments of the Supreme Court (SC). At that, the SC Resolution of 12 May 1976 and its later judgments, including

[22] OJ from 2012, 637.

[23] Compare K. Jaśkowski, *Commentary to article 39, article 40 of the Labour Code, the legal status on 2014.06.15*, Lex/el 2014, No. 174694.

[24] Pursuant to article 3 of this Act retirement age at 67 years will be applicable to women born after September 30, 1973 (retirement age shall be at least 60 years for women born in the period up to 31 December 1952) and men born after September 30, 1953 (retirement age of at least 65 includes men born before 31 December 1947). See: K. Antonów, *Commentary to art. 24 the law on Pensions from Social Security Fund. Commentary, the legal status for 2014.04.15*, Lex 2014, No. 172025.

[25] Hence workers who on 1 January 2013, were covered by the protection of relationship resulting from the article. 39 of LC (or they could be subject of it, if that day remained in the employment relationship), retain this protection by the time until retirement age referred to in article 24 section 1a i 1b, that will result in the extension of the temporary 4-year period of protection (from one month to one year and 4 months) for certain employees: women born from 1 January 1953 to 31 December 1956 and men born from 1 January 1948 to 31 December 1951. See: K. Antonów, *op. cit.*

[26] See: K. Jaśkowski, *op. cit.*

[27] Governed by the provisions of article 32–45 of the pensions ordinance.

the SC judgment of 12 March 1991 deserve special attention. Pursuant to the latter, employees who were eligible for earlier retirement were not protected, because the cases of earlier retirement – outside the general retirement age scheme – were treated as a kind of social privilege, regardless of the nature of the work, whether difficult or carrying health hazards. It was aptly noticed, however, that there existed no strong arguments to justify exclusion of job protection of employees, whose reduced retirement age was not a privilege ensuing from factors other than employment, but from the conditions strictly linked to the nature of their jobs. Subsequently, this was the general direction taken in consecutive judgments of SC[28]. The judgment of 11 July 2007, III PK 19/07 explicitly emphasised that the lower-than-general retirement age of workers employed under special conditions or performing special jobs is in fact their regular statutory retirement age, which in turn causes such employees to enjoy special employment protection within Article 39 of LC over the period of 4 years before they reach the retirement age that is appropriate for these categories of employment. That interpretation was also confirmed in other judgments, i.e. the judgment of SC of 8 July 2008, I PK 309/07, judgment of 9 March 2009, I PK 180/08, and judgment of SC of 19 April 2010, II PK 311/09. Pursuant to the judgment of 6 December 2012, I PK 145/12[29], employment protection provided by Article 39 should be applied to employees who have not more than 4 years to go before they reach the age entitling them to the bridge to retirement, provided that once they have reached that age they will become eligible for retirement pension. However, these employees cannot regain the right to protection in case they reach general retirement age, otherwise they would be protected for an extended period of 8-years'.

It is necessary to distinguish general and reduced retirement age from the right to earlier retirement, which entitles the persons covered by the relevant regulations to receive their pension earlier. In terms of Article 29 of the Law on Pension and Disability Pension Benefits from SSF, the insured that were born before 1 January of 1949 who have not reached the retirement age specified in Article 27(2) and (3), may retire: in case of women – having reached the age of 55, if their premium and

[28] Consequently, in the judgment of 28 March 2002, PKN 141/01, court assumed that protection provided by article 39 of LC also includes workers employed in particular conditions or specific character during the 2 years period before reduced retirement age (2 years period was in an earlier version of this provision) if the period of employment enables them to obtain the right to pension reaching a lower retirement age. Likewise, SC ruled in respect of specific occupational group. So in the judgment SC of 29 July 1997, PKN 227/97 stated that the retirement age within the meaning of article 39 of LC for railway employees stands at 60 years for men. Following the judgment of the SC of 5 February 2004, and PK 348/03, the retirement age entitling miners to retirement pension is the age within the meaning of article 39 of LC This line has been retained after the amendments to this article 39 of LC, providing for employees protection the period of 4 years before retirement age. Compare Z. Góral, *Commentary to article 39 of LC*, [in:] *Labour code*…

[29] Lex, No. 1284682.

non-premium periods are at least 30 years, or at least 20 years and they have been recognised as completely unable to work, in case of men – having reached the age of 60 years, if their premium and non-premium periods are at least 35 years, or at least 25 years and they have been recognised as completely unable to work. The right to earlier retirement does not protect employees eligible for earlier retirement against dismissal, because earlier retirement is the of the insured which they may or may not exercise[30]. Therefore, there is no sustainable employment for such persons during the four-year period predating the said earlier retirement. In the judgment of 16 July 2008, I PK 11/08, SC also ruled that protection within Article 39 does not apply to eligibility for pre-retirement benefit.

The solution within Article 72 of LC refers to the 2-year period prior to becoming eligible for retirement pension from SSF. This formulation could suggest that the regulation is inclusive of all cases in which employee may become eligible for retirement pension and benefits, including earlier retirement. This interpretation, however, was overruled by the SC in its judgment of 9 February 2006, II PK 159/05, where it stated that protection within Article 72 (3) in conjunction with Article 72(2) of the LC does not apply to the right to earlier retirement within Article 29 of the Law on Pension Benefits[31].

Protection of sustainable employment of employees in pre-retirement age bracket is subject to certain exclusions and modifications. Article 39 of LC will not apply to an employee who has become eligible for disability living allowance on the ground of total incapacity to work (Article 40 of LC)[32]. In terms of Article 12 of the Law on Pension and Disability Pension Benefits from SSF, a person is completely incapable to work if they have lost the ability to perform any kind of work. This means that protection will not be excluded in respect of persons receiving disability living allowance due to partial incapacity to work. In terms of the judgment of 18 January 2012, II PK 149/1, protection against termination of employment contract within Article 39 is only excluded in respect of such persons, whose right to disability living allowance due to their total incapacity to work has been confirmed by the order of a competent authority (Article 40). However, legal literature presents disparate standpoints, too, where the right to disability living allowance suffices to exclude employment protection[33]. The amendment to Article

[30] See: M. Zieleniecki, *Commentary to article 29 of the Act on Pensions from Social Security Fund, Commentary, the legal status for 2014.04.15*, Lex 2014, No. 172025.

[31] See: Ł. Pisarczyk, *Commentary to article 72 of LC*, [in:] L. Florek (ed.), *The Labour Code. Commentary*, legal status for 2011.05.16, Lex 2011, No. 104447.

[32] Within the previous version, article 39 couldn't be applied in the event of an employee's right to invalidity pension for I or II group of disabled persons. Replacing the notion of invalidity groups by partial or complete incapacity for work was justified by the changing of rules under the Act from 2002 of 26 July 2002 amending the law – the Labour Code and other acts, OJ, No. 135, item 1146.

[33] Shows this Z. Góral, *Commentary to article 40 of LC*, [in:] *Labour code…*

40 of LC, which had previously excluded applicability of the regulations within Article 38 of LC in the event when employee had achieved the right to disability living allowance for being classified as disabled in the 1st or 2nd degree, nevertheless means that employment termination for this reason is subject to consultation with the trade union[34].

2.1. Scope of protection of sustainable employment of elderly employees – changes in legal regulations and evolution of the outlook of the doctrine and jurisprudence

The scope of protection of sustainable employment of elderly employees is very important, too. As has been mentioned before, this protection varies between employees in the pre-retirement and retirement age brackets.

Polish legislature offers special treatment to employees in the pre-retirement age bracket, where, as has been mentioned herein above, this applies to persons eligible for retirement upon reaching general or reduced retirement age, as long as upon reaching retirement age they acquire the right to retirement pension under national insurance[35].

Protection within Article 39 should be classified as a time-limited absolute protection[36]. This is so because it encompasses prohibition to terminate employment contracts with persons being in the protection period. Therefore, termination of employment contract prior to the protection period is legally admissible. The legality of such termination will not be affected by the circumstance that in the course of the notice period employee will have entered the protection period. This is so because employer cannot terminate employment contract only during the protection period, while the ensuing termination itself may become effective during the protection period, if the termination notice is given earlier.

Thus, the scope of protection of employees in the pre-retirement age bracket is reduced to prohibition of giving the contract termination notice, but does not exclude the option of terminating employment contract with immediate effect. It should be highlighted that the said prohibition applies not only to final termination, but to terminations with notice amending the terms and conditions of work or pay as well. By way of an exception, the legislature allows to terminate on notice revising the terms and conditions of work or pay, if the requirements set forth in

[34] See: L. Florek, *Commentary to art. 40 of LC*, [in:] *Labour code*…

[35] Therefore, it was pointed out that article. 39 of LC should be treated as provisions that protect workers approaching retirement age, but as article that protects the employment stability in the period before achievement the right to retirement pension, treating this protection as conditional because of dependence from right to pension. See: B. Wagner, *op. cit.*, p. 23.

[36] It also occurs in the literature under the term of protection of the third degree, see. A. Dubowik, *Special protection against termination of employment relationship*, PiZS 1997, No. 3, p. 24.

Article 43 of LC are met[37]. Furthermore, Article 241[13] of LC must be taken into account, too, as it allows to terminate with notice revising the contractual terms and conditions so as to implement less favourable provisions set forth in the new contract. This excludes applicability of the regulations that restrict the right to terminate the terms and conditions of employment contract or any other instrument that creates employment relationship[38].

Protection of sustainable employment of older employees in the pre-retirement age bracket is also excluded in case of bankruptcy or winding-up of employer. Today it goes without saying that protection guarantees prevail in case of bankruptcy with composition option, as well as when employer winds-up upon takeover[39]. Protection of sustainable employment of employees in the pre-retirement age bracket has been modified in respect of dismissals on the grounds of the regulations of the act on layoffs for reasons not attributable to employees, where in case of collective or individual dismissals contracts may be terminated with notice revising the terms and conditions of work or pay[40].

Quite different is the situation of older employees who are reaching retirement age. In their case special protection (Art. 39 of LC) is excluded, which makes them eligible for general protective guarantees that are part of the general sustainable employment protection[41]. Therefore, the legal situation of older employees reaching retirement age deserves a closer analysis to address the question about the right to work after reaching retirement age[42]. The right to work while concurrently receiving retirement pension has also been recognised as a key issue in earlier publications[43]. It is no wonder, then, that the legal solutions we experienced several years ago and which made the right to retirement pension conditional upon terminating the employment contract were treated as compatible with the principles of social justice[44].

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[37] Among them are indicated: introduction of new terms and conditions of remuneration applying to all employees of that employer, or to a group of employees to which that employee belongs, as well as incapacity to perform certain work, confirmed by medical certificate.

[38] Compare Z. Góral, *Commentary to article 43 of LC*, [in:] *Labour code…*

[39] See judgment from 4 April 2007, III PK 1/07, resolution of 16 March 2010 r., I PZP 1/10 and judgement from September 2008 r., II PK 44/08.

[40] Article 5 paragraph 5 p. 1 and art. 10 of the Act. It should be noted at this point that law introduces the admissibility of termination of employment contracts concluded for a specified period, that are couldn't be terminated in principle, by two-week period of notice.

[41] The same point presents J. Skoczyński, *op. cit.*, p. 21.

[42] See: Z. Hajn, *Right to work beyond retirement age*, Folia Iuridica, 58, 1993, p. 39 and *Admissibility of the termination of employment contract accordingly to retirement age or entitlement to a retirement pension*, [in:] Z. Góral (ed.), *Anniversary Book for Prof. H. Lewandowski*, p. 278–279 and points of the other authors indicated therein. On retirement age as a reason justifying the termination indicates also B. Wagner, *op. cit.*

[43] See: W. Szubert, *Social insurance. Overview of the system*, Warsaw 1987, p. 165 and n.

[44] See: idem, p. 167.

In the pre-war legal system, pensions granted due to old age were treated as disability benefits, which caused old age itself to be identified with the disability[45]. In the pre-Labour Code period protective regulations were correlated with retirement regulations. Employers had the right to decide about the retirement of employees, which was done by terminating employment contracts in the legally prescribed manner. Hence, eligibility for retirement pension was treated as the legal reason for terminating employment contract[46].

After the Labour Code entered into force, the then binding Article 39 in conjunction with Article 40 gave rise to disparate standpoints both in judicature and labour law doctrine. Article 40 Section 2 of LC which excluded the duty of consulting the trade unions with regard to the reason for termination in the case of employees reaching retirement age was interpreted as a provision that entitled employers to terminate employment contracts for the reason of them having reached retirement age[47]. Even though this was the prevalent standpoint, on the grounds of the contemporary legal system disparate opinions were voiced, too[48]. The changes in the interpretation of this provision were brought about by the amendment of 2 June 1996 by virtue of which the aforementioned section 2 of Article 40 of LC was deleted[49]. According to some, the deletion of this regulation was construed as an exclusion of retirement age from the notion of good reason for termination of employment contract, in recognition that otherwise consultations with the trade unions would be completely pointless[50]. Others, however, were of the opinion that the amendment still justified recognising retirement age as a good reason for termination of employment contract, but even more than retirement age itself, that good reason was the right to retirement pension, in recognition that the said amendment aimed to change the general control of employment contracts termination[51].

The SC resolution of 27 June 1985, III PZP 10/85, determined the guidelines concerning the interpretation of Article 45 of LC, where retirement age was recognised as a good reason for termination of employment contract. According to the SC, retirement age was to be understood as the age prescribed in the retirement regulations and making employees eligible for retirement entitlements within the regular procedure. Despite the severe criticism of the Supreme Court's

[45] More about this W. Szubert, *op. cit.*, p. 108.

[46] See about it: B. Wagner, *op. cit.*, p. 22. Noteworthy is also the Act of 15 July 1968 on Employees of national councils, that introduced admissibility of the termination of employment contract only in specific cases and the one of them was the achievement of the right to pension.

[47] See: Z. Hajn, *op. cit.*, p. 44–46.

[48] The authors that presents dissent points shows Z. Hajn, *op. cit.*, p. 278.

[49] OJ, No. 24, item 110.

[50] See: W. Sanetra, *The retirement age as a cause of termination*, PiZS 1997, No. 6, p. 22; M. Skąpski, *Retirement age as the reason for termination of the employment contract*, PiZS 2001, nr 3, p. 21.

[51] See: W. Sanetra, *op. cit.*; Z. Hajn, *The Admissibiliy*…, p. 280; B. Wagner, *op. cit.*, p. 22.

standpoint, it was rather consistently, though with some modifications, emulated by other courts and the doctrine[52]. Interestingly, however, in light of the said guidelines the situation of re-employed pensioners appeared disparate, as in case of their dismissal it was necessary to provide a good reason for employment termination. The Supreme Court, however, recognised employment of a younger or fully fit person to be a good cause for employment termination[53].

The standpoint that retirement age provides the grounds for termination of employment contract was quite consistently sustained in subsequent judgments of SC. For example, in the judgment of 10 April 1997, SC found that reaching retirement age may be an intrinsic reason for termination, in turn in the judgment of 21 April 1999, SC decided that termination of employment contract for reason that a woman has reached retirement age (60) and is eligible to receive retirement pension is legitimate and may not be deemed as discrimination on the grounds of sex or age (Article 11^3 of LC). SC adopted a similar standpoint in its order of 18 July 2003, I PK 210/03.

Retirement age was approached in a similar fashion also in later decisions of SC, e.g. the judgment of 26 November 2003[54], I PK 616/02, and the judgment of 29 September 2005, II PK 19/05[55]. However, disparate interpretations were formulated, too. For example, in its judgment of 15 October 1999, I PKN 111/99, SC ruled that eligibility for earlier miner's retirement does not intrinsically justify termination of employment contract. The later amendment to the Labour Code of 2 February 1996, by virtue of which section 2 of Article 40 of LC was deleted, did not bring about a definite change of direction in its interpretation.

A significant change of the Supreme Court's viewpoint, certainly inspired by the judgments of the European Court of Justice, took place in the judgment of 19 March 2008, I PK 219/07 which stated that termination of employment contract, if solely justified by a woman's eligibility to receive rail pension at the age of 55, violates the prohibition of discrimination on the grounds of sex within Article 11^3 of LC. A similar viewpoint was adopted in the SC resolution passed by a chamber of seven judges on 19 November 2008, I PZP 4/08. But a real breakthrough in the interpretation occurred as a result of the resolution adopted by a chamber of 7 SC judges on 21 January 2009, II PZP 13/08. The Supreme Court's standpoint was developed with reference to European law and judicature. The Supreme Court decided that retirement age and eligibility for retirement pension are not relevant

[52] Indicates this Z. Hajn, *Right to work beyond…*, p. 45 and n. See also: W. Sanetra, *op. cit.*

[53] See the justification of judgment contained in IV point.

[54] According to it, the achievement by the employee retirement age is an independent reason justifying termination of the employment contract and is not a manifestation of discrimination against the worker who has acquired the right to a pension.

[55] The achievement by the employee the right to pension is a reasonable cause for employment contract (concluded for indefinite period) termination (article 45 section 1 of LC); that does not mean discrimination against employees on the ground of their age (article 11section 3 of LC).

to work and, therefore, cannot be an intrinsic reason for employment termination with notice. It is, therefore, necessary to quote objective reasons attributable either to employee or employer[56].

Nevertheless, retirement age can be looked at from a different angle as a criterion for selecting an employee to be dismissed in the event of redundancies for economic reasons, especially when eligibility for retirement pension may be a convincing argument for keeping in employment an employee who has no such source of income[57]. However, reference to employer's right to implement his own employment policy must be approached differently. According to SC, retirement age is a socially justified criterion for selecting redundant employees and, what follows, cannot be deemed as a criterion that discriminates a specific group of employees – the judgment of 14 January 2008, II PK 102/07[58]. A similar viewpoint was expressed in the judgment of 25 July 2003, I PK 305/02.

At this point it is by all means reasonable to consider the cases of termination of employment contract with employees who have reached retirement age and become eligible for retirement pension, frequently referred to as "automatic termination of employment contract" or "compulsory retirement". The recent changes in the legislation must certainly be recognised as positive. In part, they were informed by implementation of the regulations prohibiting discrimination on the grounds of age, increased retirement age, and in other cases, by exclusion of the duty to retire[59].

However, still in force are regulations that envisage termination or expiry of employment contract with a certain category of employees. The forced distribution of employment opportunities may give rise to controversies, especially in the face of the danger of permanent withdrawal of elderly people from the labour market[60]. This is claimed to be justified by the generational change on the labour market and reasonable need to "ration rare goods", such as jobs[61]. In that light,

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[56] See: Z. Hajn, *Admissibility of*…, p. 285.

[57] See: *ibid.*, p. 286. About this see also judgement of SC from 3 December 2003, PK 80/03, OSNPUSiSP 2004, No. 21, item 363. See also justification to the resolution of the SC from January 21, 2009, (II) PZP 13/08, underlining that singling out (selection) for dismissals employees who after the termination of the employment contract will have retirement benefits is socially justified, compatible with social principles and couldn't be treated as discrimination because it allows to stay at work for those who are not entitled to benefits from social security.

[58] Lex, No. 437024.

[59] This confirms the amendments made in the following laws: art. 13 sec. 1 p. 5 law of 16 September 1982 r. on Public Service Employees, art. 41 sec. 2 p. 1 law of 24 August 2006 r. on Civil Service, art. 93 sec. 2 p. 1 law of 23 December 1994 r. on Superior Audit Office, art. 62 sec. 1 p. 7 law of 13 April 2007 r. on Labour Inspection.

[60] The abovementioned doubts and problems indicates G. Orłowski, *To give way (work) for the younger*, MPP 2011, No. 6.

[61] See also comments made by B. Mikołajczyk, *The retirement age in cases before the Court of Justice. The problems of contemporary international, european and comparative law*, Vol. X, A.D. MMXII, p. 10.

retirement of older employees reaching retirement age becomes socially justified and gives ground to moral arguments expressed by the principle of non-discrimination on the grounds of age[62]. This, however, only applies to special categories of employees.

This can be exemplified by the following regulations. Article 127 of the Law of 27 July 2005 on Higher Education[63] specifies the cases of expiry of employment contract of nominated teacher by virtue of law and stipulates that employment relationship with academic teacher employed by a public university expires at the end of the academic year in which the teacher has reached the age of 67, if the teacher has become eligible for retirement pension[64]. Likewise, employment relationship of nominated researcher employed by research facilities or other organisational units of the PAN [Polish Academy of Sciences] as an associate professor or professor, expires at the end of the year in which the employee has reached the age of 70[65]. However, the position of employees of the National Audit Office is different following the deletion of Article 93(2)(1) of the Law on Supreme Audit Office[66] which contemplated termination of employment contract without notice as a result of employee reaching the age of 65 and becoming eligible for retirement pension from the Social Security Fund[67]. The change was informed by the increase of retirement age as of 1 January, 2013.

The influence of retirement of age on the situation of teachers employed under the provisions of Teachers' Charter Law[68] looks a bit different. By virtue of the Law of 23 November 2012 on amending certain laws in connection with the raise of retirement age[69] overruled were the provisions that required to terminate employment contract with nominated teachers who have reached the age of 65[70]. Until 21 October 2001 taken into account was not the age limit, but rather

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62 Compare G. Orłowski, *op. cit.*

63 OJ 2012, No. 572, c.t.

64 Act of 23 November 2012 changed the retirement age of 65 years. It was raised due to changes in pension law. If the age of 67 year will entitle to retirement pension, the termination of employment contract will take place following the end of the academic year in which employee will acquire this right. In turn, the employment contract with Professor expires at the end of the academic year in which he achieves 70 year of life.

65 Article 102 of the Act of 30 April 2010 on Polish Academy of Sciences, OJ 2010, No. 96, item 619 with amend.

66 The Act on Supreme Control Chamber of 23 December 1994 r., OJ 2012, 82, c.t. with amend.

67 Under the Act of 23 November 2012, OJ 2012, 1544.

68 The law from 26 January 1982, Teacher's Card, OJ 2014, 191, c.t. with amend.

69 OJ from 2012, item 1544.

70 The equalizing of age for termination of employment contract was the consequence of pronounced discrimination on the grounds of sex and occurred as a result of the judgment of the CC of 28 March 2000, K 27/99, OTK 2000, No. 2, item 62. Accordingly to the previously applicable law the employment relationship with the teacher employed on the basis of the appointment was terminated at the end of the school year in which the teacher has achieved 65 years.

eligibility to retire for having reached retirement age, as set forth in the regulations on retirement benefits of employees and their families (this provision was rescinded by the law of 23 August, 2001[71]). In such a case, employer was obliged to terminate employment contract at least 3 months before the end of the school year[72]. If teacher was not eligible for retirement pension at the age of 65, their term of employment could have been extended for the maximum of 2 years after reaching that age[73]. Following the aforementioned changes (in force as of 1 January 2013) it will not be possible to terminate employment relationship with teachers for the sole reason of their eligibility for retirement entitlements[74].

Another issue that also needs to be considered here is the Law on the System of Courts of General Jurisdiction[75] which specifies the maximum age upon which judges retire. Article 69 of that law provides that judges shall retire at the age of 67[76], unless not later than six months prior to turning 67[77] they deliver to the Minister of Justice an expression of interest in staying in office and submit a medical certificate confirming their ability to perform judicial duties that has been issued in keeping with the rules specified for candidates for judicial positions[78]. It has been noted that this regulation, with regard to the retirement age limit, may raise doubts, as it provides no reason for the age limit so defined which, once reached, would entail retirement[79]. At that, it is indicated that as a rule judges should stay in office until the age of 70, and only upon request could they retire at 67, as has been adopted in the case of judges of the Supreme Court. In terms of Article 30 of the Supreme Court Act[80], Supreme Court judges retire at the age of 70, and only upon request can they retire at 67. Hence, the Supreme Court Act lays down

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[71] OJ, No. 111, item 1194.

[72] The termination at the end of the school yeas wasn't applied to the teachers employed in schools, which does not provided school holidays.

[73] See: M. Szymańska, *Commentary to art. 23 of the Act on Teacher Card*, [in:] *Teacher's Card. Commentary*, Lex 2012, legal status 2012.05.01, No. 126255.

[74] This is connected with article 88 of Card, providing the possibility for teachers to retire regardless of age, by their request on condition of the required employment period.

[75] Act of 2013, it. 427, c.t. with amend.

[76] The change related to the raising of retirement age.

[77] The Act of 11 May 2012, amended the law on pensions and certain other laws (OJ 2012, item 637), which entered into force on 1 January 2013 giving the new wording of article 69 section 1, replacing the date of age of 65 years by 67 years of age.

[78] After conditions fulfillment, referred in section 1, the judge may perform work but no longer than until 70 years of age. The judge may at any time be retired on the base of his own request declared to the Minister of Justice.

[79] In the past, this limit was higher and, for example, under the rule of the law on Courts system from 1928, judge was retired when he achieved 70 years, and for the judges of the Supreme Court, this period could be extended up to 75 years old – see about it P. Dąbrowski, A. Łazarska, *Commentary to art. 69 of the Act on Courts system*, [in:] A. Górski (ed.), *The law on Courts system. Commentary*, legal status, Lex, 2013.06.30, No. 152626.

[80] *Ibid*.

the rule that Supreme Court judges reach retirement age at 70 and do not have to document their health condition with medical certificate. Also questioned is the duty to submit medical certificates by judges of courts of general jurisdiction, in recognition that in case of any doubts concerning a judge's ability to perform their duties the court college may require to provide an appropriate certificate. It is also highlighted that lowering this age limit is not reasonable, the more so that over the last century the average life expectancy has increased. Nevertheless, the postulate of life-long service of judges, unless prevented by health condition, can be deemed controversial[81].

The length of service is regulated likewise by the Prosecution Service Law[82]. However, courts have had to be involved to resolve the issue of some fundamental changes to the right to work of prosecutors, once they have reached the prescribed age limit, which will be discussed further herein. Pursuant to Article. 62a, prosecutors may stay in office, if the General Prosecutor grants such consent upon request from the applicant and against favourable medical certificate and following consultations with the applicant's superior.

With regard to legitimacy of employment contract termination for reason of employee reaching the prescribed age limit, an important role is played by EU regulations and judicature of the European Court of Justice (ECJ) concerning equal treatment of employees and non-discrimination on the grounds of age. Importantly, the number of ECJ judgements in this respect is growing by the year. Also, they inform how EU laws and regulations are interpreted by Polish legislature. The solutions adopted are basically warranted by the need for generational replacement at work, or for sharing employment opportunities between generations[83]. Generational replacement, as the reason for refusal of further stay in office, is also more and more commonly claimed by Polish body of final appeal which relies on the judgements passed by ECJ. Examples of this include SC judgements concerning sustainability of employment of older prosecutors, e.g. the SC judgment of 13 May 2010, III PO 1/10[84], in which generational replacement at work was treated with much reserve, and the judgment of 14 January 2010, III PO 7/09[85], in which it was ruled that good health and intention to wait until the 45th anniversary of professional career, as well as work satisfaction, or sharing professional experience with the younger generation of prosecutors may not be recognised as the grounds which automatically support further stay on the prosecutor's job. In the reasons for the judgement it was argued that the General Prosecutor's

[81] The Act of 23 November 2002 r., OJ 2013, 499, c.t. with amend.

[82] P. Dąbrowski, A. Łazarska, *Commentary to article 69*.

[83] It is often the main point for justification of retirement age (if it connected with the right to pension) as a criterion leading to termination of employment relationship, used by Court of Justice of the European Union.

[84] Lex, No. 1086917.

[85] Lex, No. 578147.

decision cannot be informed by the abstract notion of "generational replacement of prosecutors", but by needs and conditions of HR policy related to the actual situation in the given prosecution service unit. Hence, the General Prosecutor stands committed, within the authority granted under the said regulation, to consider all the circumstances or interests. At this point it feels right to bring to attention the judgment of 24 January 2012, III PO 7/11[86], and the judgment of 14 February 2012, III PO 8/11[87], pursuant to which generational replacement of prosecutors is a reason which the General Prosecutor may take into account while assessing whether the prosecutor's request concerning further the stay in office is really justified.

The rule of no age discrimination in employment is laid down by the Council Directive no. 2000/78/EC of 27 November 2000 which lays down the general framework of equal treatment in employment and work. However, Article 6(1) provides that Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary[88]. The Tribunal emphasises the freedom of Member States in choosing the appropriate measures of differentiation[89].

Article 2(5) of the Directive also deserves attention at this point[90]. Retirement age may justify different treatment with regard to continuing employment, if that entailed taking measures necessary to ensure public security, protection of health, rights and freedoms of other persons. In this respect a close relationship with biological aging of human body is certainly present here. But also this circumstance may not always justify employment contract termination. In the ECJ judgment of

[86] Lex, No. 1129352.

[87] Lex, No. 1171292.

[88] Article 6 section 1 of Directive cannot be interpreted as permitting under any circumstances termination of employment due to achievement by the employee the right to old age pension. On the contrary, it is clear that to terminating of employment contract due to retirement age and acquisition of pension violates the prohibition of discrimination on grounds of age, if it was not justifiable circumstances provided in it. See also justification to the resolution of the SC from January 21, 2009, *op. cit.*

[89] This means, that there will be substantial differences in the law regulations of the Member States will, causing that the retirement age as the cause of the termination of the employment contract in one country will be considered to be compatible with the directive, while in the other will be treated as unreasonable criterion of differentiation. See: M. Tomaszewska, *Commentary to the judgment of the ECJ on the C-411/05, GSP-PO 2009*, No. 1, p. 163.

[90] This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

13 September 2013[91] the Tribunal analysed whether the retirement age prescribed for airline pilots automatically leads to termination of employment contracts. In the judgment it was found that the age limit of 60, prescribed for airline pilots as the limit of their licence to practice the profession, does not warrant prohibition of practising the profession, but rather its possible limitation[92]. In terms of Article 101 of Polish Aviation Law[93] licensed aircraft or airline pilot who has reached the age of 60 cannot pilot international flights, unless he/she is a member of several-strong crew, or is the only crew member who is 60 years old, while licensed pilot, as described in sec. 1, who has reached the age of 65 may pilot an aircraft used in air transport. The amendment of 1 January, 2013 overruled the provisions of sec. 3 which prohibited licensed air controllers from practising the profession at the age of 60.

Recognition of retirement age as a good reason for automatic termination of employment contract appears to raise serious doubts. The assessment whether we are dealing with discrimination or justified disparate treatment on the grounds of age depends on whether the conditions set forth in Article 6(1)(a) are met cumulatively. In the opinion of ECJ, employment support is an unquestionably justified aim of social or employment policy of member states[94]. A number of ECJ judgments appear to make this point. ECJ recognises that a measure intended to promote access of young medical professionals to the profession of a dentist within the system of health insurance may be an example of a regulation representing a justified employment policy measure[95]. Likewise, compulsory retirement of prosecutors (at the age of 65) was also found compatible with the directive, inasmuch the aim of the national law was to establish a favourable age structure in order to further recruitment and promotion of young people, improve human resources management and, thereby, prevent possible disputes concerning employees' fitness to work beyond a certain age[96]. Also, in the *Rosenblad* case, ECJ stated that national regulations which provide for automatic termination of em-

[91] In case C-447/09, *R. Priggie, M. Fromm i V. Lambac p. Deutsche Lufthansa AG (Lex, No. 898237)*.

[92] See: par. 73 in case C-447/09: it was underlined that, both national and international legislation provide that pilots may continue to carry out their activities, under certain restrictions, between 60 and 65. Thus, national and international authorities consider that, until the age of 65, pilots have the physical capabilities to act as a pilot, even if, between 60 and 65, they do so only as a member of a crew in which the other pilots are younger than 60.

[93] The Act of 3 July 2002 r., OJ 2013, 1393, c.t. with amend.

[94] See justification of the judgment in case *Palacios de la Villa*, pkt. 65: Furthermore, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy (see, in particular, Case C-208/05 [2007] ECR I-181, paragraph 39) and that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers.

[95] See justification of the judgment in case *Petersen*, p. 68.

[96] See the main thesis of the judgment of the EC in case *Hesja*.

ployment contracts of building cleaners who have reached retirement age (65) are also compatible with Article 6(1) of the directive, as long as such a termination meets the criteria set forth in the said regulation.

However, it is not always the case that national regulations are found to be compatible with EU regulations. In its judgment of 18 November 2010[97], ECJ analysed the rule of compulsory retirement of university professors[98] and found that the quite enigmatic definition of the aim of Bulgarian regulations was insufficient and entailed a national court specifying the real aim of those regulations. To sum up, as long as the actual limitation of service in effect of expiry of employment contract of persons becoming eligible for retirement entitlements helps increase job opportunities for younger employees, the aim of disparate treatment is legitimate.

The European Court of Justice also explicitly emphasises that termination of employment contract does not automatically entail employees withdrawing from the labour market[99]. Does not the right to work of persons whose employment contract terminates automatically in some cases become only illusory due to the nature of their job, education background, and qualifications? No access to the given profession may actually really mean no opportunity to work at all, regardless of the abilities, experience, and specific fitness for work of the person concerned. Therefore, it is necessary not only to apply the narrowing interpretation of exceptions, but to assess the reasonability of their application, as well, considering the changes in the employment policy and in separate segments of the labour market, as well as the present situation of persons to whom that differentiating measure is applied. Hence, the ECJ is right to have committed national authorities, resolving disputes over refusals to apply national regulations that contravene the directive, to determine whether the national regulations are compatible with the directive (taking into account the transparency and adequacy of the differentiating measures to the aims pursued by the labour market policy)[100].

The principle of generational replacement, therefore, cannot be approached without consideration. Certain social or economic changes will justify the need to consider the option of continuing employment of persons reaching retirement age. This is the direction to be followed by Polish legislation and judicature, too. The right to work should emphasise the exceptional nature of dismissal policies,

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[97] In case (C-250/09) *W. I. Georgiev v. Techniczeskiemu uniwersytetowi Sofia, filia Plowdiw*, Lex, No. 612132.

[98] Compare, the paragraph 51, in case of *W. I. Georgiev.*

[99] See also the thesis contained in the justification to the judgment of EC in case *Rosenblaudt,* p. 68, 74–77.

[100] See in particular paragraphs 81 in case *Petersen,* in which EC stresses that if national legislation does not satisfy the conditions set out in Article 6(1) of Directive 2000/78, the national court must decline to apply that legislation, even if provisions were in force before directive and even if the national law does not provide provisions that allow to refuse it's application.

including that which determines the age limit for employment of older employees eligible for retirement so that they give up their jobs for the sake of younger employees. The bizarre transformation of the privilege that the right to retirement used to be into an obligation, referred to *privilegium odiosum*, may consequently lead to the loss of the right to work[101]. The cases judged by ECJ show quite a big, and still growing, discord between national regulations and the needs of contemporary employees who claim incompatibility with Article 6 of the Directive 2000/768/EC. Therefore, it feels right to deem reasonable the postulates for flexible and new understanding of retirement age by the legislature, doctrine and judicature which must take into consideration increased professional activity, as well as the growing tendency to increase retirement age in tune with the average life expectancy[102].

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[101] Compare comments made by W. Szubert, *op. cit.*, p. 109.

[102] Compare B. Mikołajczyk, *Retirement age*…, p. 13 and 19–20. See also comments to the identified problem, contained in a monograph of the same author: International protection of the elderly, WKP 2012, Lex, No. 156494, part. I, The aging of humanity as a global problem, and point 1.2, The concept of older person and old age.

Bojan Urdarevic[*]

PERSPECTIVES OF THE RIGHT TO STRIKE IN THE REPUBLIC OF SERBIA

The right to strike is not an absolute right in terms of the Constitution of Serbia, however, its dimensions are determined by a constitutional provision which prescribes it as an employee right regulated either in compliance with the provisions of the law dealing with the right to strike or by a collective contract. Although the right to strike today belongs to the body of basic human rights, under certain circumstances it can be prohibited or limited by an obligation to fulfil certain conditions. A general prohibition of strikes would contravene the principles of the freedom of association. However, even the international labour standards allow the possibility to either prohibit or limit the right to strike for a certain set of employees. National legislations are obliged to adjust their internal needs to limit the right to strike so as to comply with the international norms. Any venture beyond the framework of internationally recognised conditions for the limitation of strike can become its opposite, a restriction on the rights of employees to exercise and protect their socio-economic rights to organise a (lawful) strike.

1. Introduction

Observing from a purely theoretical point of view, considering the existence of the current law on labour, institutions dedicated to preserving safety and protection at work, organisations for peaceful settlement of labour disputes, inspectorates, or the Socio-Economic Council, one might get the impression that in this

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context strike is a "museum piece", a relict of the past with no rational need for continued existence. In practice, due to the gravity of the economic and social crisis, problems with new company owners, negative effects of the global economic crisis, excessive indebtedness, *etc*., employees frequently resort to radical steps aiming to protect their rights. Because of that, the wave of new strikes increasingly resembles social rebellion. When reviewing the current and prospective industrial relations in Serbia, we should take into account another common characteristic of mutual interconnectedness and conditionality of industrial relations and social environment – the fact that industrial relations to a great extent mirror the overall political, economic and social state of the society. Many issues and phenomena in the political and economic sphere, which can be concealed or at least embellished in other areas of life, mainly politics, inevitably come to surface in industrial relations. In other words, a suitable adage that applies to these matters is – *tell me about the industrial relations of the society and I shall tell you what kind of society you live in*.

2. The notion of a strike

The term "strajk" in Serbian language derives from the English term "strike", which itself appeared (in the sense of ceasing work) near the end of the eighteenth century and in the beginning was an illegal practice of solving collective labour disputes, which resulted in criminal and civil liability for those who participated in strike[1]. With the recognition of the right to form trade unions and the collective bargaining rights, the first necessary step was the abolition of criminal, and later civil and pecuniary liability for participation in strike[2]. In the wake of the freedom to strike came the recognition of the right to strike, which was eventually elevated to the rank of a constitutional right, and today, in the international instruments on human rights, the right to strike is classified within the body of fundamental human rights.

Today, the right to strike is regarded as a basic social right of workers and their organisations enabling them to promote and defend their economic and social interests, and in this sense it ranks among such fundamental rights as the right to work, right to own property, or the freedom of entrepreneurship. At international level, it is explicitly or implicitly recognised in international treaties, both

[1] For example, in France, The Le Chapelier Law of 1791 characterised the strike as a crime of conspiracy, which was rationalised by the individualist philosophy of liberalism. See more in: N. Communod, M. Feron, *Le nouveau droit de la législation sociale*, Paris 1983, p. 248.

[2] Thus, for example, in Italy in 1889, after the abolition of criminal sanctions for strikes, strikes qualified as a breach of employment contract, i.e. obligation to perform at work, in terms of civil law. See: T. Treu, *Labour Law and Industrial Relations in Italy*, The Netherlands: Kluwer, 2007, p. 22.

universal and regional, and in national legislations it is explicitly or implicitly recognised on the constitutional level. Thus, the right to strike is explicitly recognised by the constitutions of France, Sweden, Spain, Serbia, Montenegro, and it is implicitly recognised constitutionally in Germany, Belgium and Luxembourg, while in the UK, Denmark and Austria one can speak of the freedom to strike, but not the right to strike[3].

Thus, different definitions of strike result from the differences in terms of the concept of the right to strike, as well as the differences regarding the object and purpose of strike which can be understood in a narrow or a broader sense.

In the labour law theory in Serbia, there are several definitions of strike. Most often the term strike refers to a temporary collective termination of work by employees in order to exert pressure on the employer to comply with workers' demands in the subject matters of the dispute[4]. In addition to this one, there are other, very similar definitions of strike. For example, strike represents an industrial or aggressive action to resolve a collective labour dispute or to protect social and economic rights[5], or strike represents a collective work stoppage by employees in order to exert economic pressure on the employer or the state, regarding the economic or social interests and rights of workers or the collective rights of trade unions[6]; or strike represents an organised action to exert economic or other pressure on the employer, enhanced by work stoppage, in order to increase the employer's tolerance towards the demands of the strikers[7]. As a rule, strike is a means of workers struggle to achieve their work-related and economic goals.

Of all the methods of industrial action designed to resolve collective labour disputes, the state has primarily focused on strike and, in some countries, comprehensively institutionalised it, which means that strike can only be used within the established legal rules, whether the same are laid down through the laws, by-laws, or court decisions. Only lawful strikes are permissible means of labour struggle that do not entail negative consequences for its organisers and participants.

3. The concept of the right to strike in international law

Winston Churchill presented his vision of Europe in Zurich in 1946, and the first step towards this vision was the establishment of the Council of Europe. The Council of Europe was founded in 1949, and the preamble of the treaty

[3] B. Bercusson, *European Labour Law*, Cambridge University Press, 2009, p. 328.

[4] A. Baltić, M. Despotović, *Osnovi radnog prava Jugoslavije* [*Foundations of Labor Law in Yugoslavia*], Belgrade 1978, p. 323.

[5] P. Jovanović, *Radno pravo* [*Labor Law*], Novi Sad 2012, p. 391.

[6] B. Lubarda, *Leksikon industrijskih odnosa* [*Lexicon of Industrial Relations*], Belgrade 1997, p. 190.

[7] Ž. Kulić, *Kolektivni radni sporovi* [*Collective Labor Disputes*], Belgrade 2001, p. 200.

establishing it refers to the proclamation of certain principles, and in particular the following: the quest for peace through international cooperation and the moral inheritance of the European citizens, political freedoms and the rule of law. Article 1 of the Treaty Establishing the Council of Europe states that the aim of the Council of Europe is to consider issues of common interest and take certain actions on the economic, social, cultural and administrative level, as well as preserve and exercise human rights as well as fundamental freedoms[8].

The Council of Europe could influence the European labour standards via two instruments. The first was the European Convention on Human Rights of 1950, and the second was the European Social Charter of 1961, which explicitly recognises the right to strike. Unlike the convention, the charter is little known and often ignored in practice[9]. Although the European Social Charter did proclaim the right to strike, its provisions on the control of this right were insufficient[10]. In terms of EU legislation, neither the freedom of association, nor the right to strike are explicitly protected. In other words, this means that the European Court of Justice has neither a particular role in this area, nor the power to act similarly to the Committee for Trade Union Freedom of the International Labour Organisation. This leaves the right to strike for the most part in the competence of the Member States to regulate its protection, respecting the principle of market integration[11]. Therefore, one can only conclude that, predominantly for economic reasons, especially due to the effects that strike has on competition, the right to strike has not been properly regulated in European law[12].

On the other hand, the ILO has regulated the right to strike indirectly, through conventions collectively known as the Conventions on Freedom of Association[13]. Considering the fact that the provisions of these conventions are quite general, and that they do not explicitly recognise the right to strike, the claim of implicit recognition of the right to strike came about by a broader interpretation of international" labour standards contained in these conventions[14].

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[8] T. Novitz, *International and European Protection of the Right to Strike*, Oxford 2003, p. 127.

[9] B. Hepple, *Labour Laws and Global Trade*, Hart Publishing, Oxford and Portland Oregon, 2005, p. 197.

[10] *Ibid.*

[11] B. Urdarević, *Definisanje prava na štrajk u međunarodnom i evropskom pravu* [*Defining the Right to Strike in International and European Law*], Pravna riječ [Legal World – a journal for legal theory and practice], Banja Luka 2004, p. 554.

[12] See more: B. Lubarda, *Konkurencija u radnom pravu*, [Competition in Labor Law], "Pravo i privreda" ["Law and Economy"], No. 5–8/2002, p. 897–902.

[13] They include: Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948); Convention No. 98 on Right to Organise and Collective Bargaining (1949); Convention No. 151 on Freedom of Association and the procedures for determining conditions of work in the public sector (1978) and Convention No. 154 on Collective Bargaining (1981). See more: D. Paravina, *Međusobna uslovljenost obaveza i prava iz radnog odnosa* [*Mutual Dependence of Obligations and Rights in Employment*], "Časopis za radno i socijalno pravo" ["Journal of Labor and Social Law"], Belgrade, No. 3–6/1998, p. 22.

[14] B. Lubarda, *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu* [*Labor Law – a Discussion on Dignity at Work and Social Dialogue*], Belgrade 2012, p. 995.

However, in 1998, the International Labour Organisation finally adopted the Declaration on Fundamental Principles and Rights at Work to uphold the "fundamental principles at work" or the "basic rights at work" which include: freedom of association and the effective recognition of the collective bargaining right, elimination of all forms of forced or compulsory labour, effective abolition of child labour, and elimination of discrimination in terms of employment and occupation. The Declaration was adopted unanimously, nevertheless the question arises whether this proves to be the beginning or the end of labour standards. It is also debatable whether the Declaration has any positive long-term effects on work and labour standards, except that it provided a perfect route for the United States to escape from the problem of not having ratified the key conventions herself, while applying sanctions in her domestic legislation and seeking them against other countries for their violations of core labour standards[15]. Two basic problems with the Declaration seem to arise. Firstly, the preamble to the Declaration on Human Rights adopted by the United Nations in 1948 declares that all human beings are born with equal and inalienable rights and, therefore, the mere division and classification into fundamental or essential standards implies that standards which are "less fundamental" or "less essential" also exist. What is the logic behind the claim that the elimination of discrimination is more important than the right to have social insurance, safe working conditions, maternity leave, *etc*.? What does the guarantee of the freedom of association represent without a range of socio-economic rights to put this freedom into practice[16]? Secondly, the Declaration on the Fundamental Principles and Rights at Work considerably neglects workers' actual economic and social rights and mainly deals with the negative aspects of some rights. For instance, individuals, groups and states are requested to "prohibit" discrimination, "abolish" forced labour and "eliminate" child labour.

Brought to the foreground is the issue why it was necessary for the International Labour Organisation to adopt such a Declaration, considering its very limited range of impact. If the goal had been to force states to take on its obligations without the act of ratification and prove that universality is still its characteristic, it failed to accomplish this. It is well-known that the mere act of ratification does not necessarily entail the application of provisions of the convention. In fact, recent studies have indicated little evidence of statistical correlations between ratifications of ILO conventions and actual working conditions. Grave violations of the International Labour Organisation's norms also include acts of non-abiding by the basic principles and fundamental conventions, which are nowadays considered basic rights at work. By accepting the organisation's Constitution all ILO member states have committed themselves to respect, promote and realise the con-

[15] P. Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, "European Journal of International Law" 2004, Vol. 15, No. 3, p. 467.

[16] See more in: B. Urdarević, *Creation and Development of International Labour Standards, New Perspectives of South East European Private Law*, Skopje 2012, p. 139–150.

ventions in good faith, regardless of their ratification. In a large number of cases it is the fundamental provisions that are violated, mostly through non-recognition of Union rights, discrimination, harassment, persecution and political campaigns against union members, existence of forced labour and extensive use of child labour. The social standards are not met, and this thesis is supported by the high numbers of unemployed and inadequately employed workers, low or unpaid wages, minimum social security of the population as a whole, high percentage of injuries in the workplace, occupational diseases and other deficiencies in what the International Labour Organisation called "decent work"[17].

4. Legal aspects of the right to strike in the Republic of Serbia

If the right to strike is viewed in terms of its role in collective bargaining it is often seen as a collective right to be exercised by trade unions[18]. This, however, assumes that the trade unions are sufficiently representative of all the parts of the workforce that may wish to take industrial action, or that there are no insuperable barriers to a swift formation of a trade union by workers in order to exercise such a right effectively, should they wish to do so. Where these conditions are not met, or if the right to strike is regarded as a legitimate means of voicing political protest, then it may make more sense to regard this as an individual right linked to a person's conscience. After all, different States have taken different views on this matter. Germany, for example, treats the right to strike solely as a collective right to be exercised by trade unions for collective bargaining purposes. Italy, on the other hand, recognises workers' entitlement to have protest strikes in matters concerning economic and social policy.

As a consequence of an insufficient development of collective bargaining and unharmonised jurisprudence, principally it is the laws that regulate the right to strike and are the main source of this right. The primary legal document that regulates the right to strike in Serbia is the Law on Strike (1996). Article 1 of the Law on Strike defines strike as a disruption of work process, organised by employees in order to protect their professional and economic interests based on employment. Such a definition has its consequences. Firstly, the types of work-related interests of employees that can lead to a strike are not specified. Secondly, the extent of violation is determined in the broadest possible way, so that even a strike organised due to a one-day delay in payment of wages can be considered legal. The third, and probably the most significant, issue is the concept of strike as an employee right in light of the Constitution of Republic of Serbia. In terms of Art. 3

[17] International Labour Organisation, Reducing the decent work deficit: A global challenge, last modified January 23, 2010, http://www.ilo.org/public/english/employment/recon/eiip/download/dw_deficit.pdf.

[18] T. Novitz, *op. cit.*, p. 275.

of the Law on Strike, the majority of employees and trade unions are entitled to strike or to organise token strikes against the employer, whereas a strike within an industry or trade, as well as general strike, are exclusive rights of trade unions. Such legal provisions grant ample rights to organise strikes, placing Serbia in the group of countries that allow both employees and trade unions to organise strikes[19].

Although this broad legal freedom to organise strikes appears to be an employee privilege, in practice it leads to a culmination of senseless strikes with no chance of success. Unfortunately, there is no information on the number of strikes in Serbia, mainly because no state agency or ministry keeps such records. Some information is available on the most representative trade unions' web sites, but it is only limited to the strikes organised by those unions themselves. Therefore, records of any strikes organised by the majority of employees working for the same employer, who are not members of a trade union, indeed are a contentious issue[20].

The new Law on Strike, now being drafted (June 2014), was expected to establish an acceptable level of social dialogue in the Republic Serbia, as well as to regulate strike in a manner which is modern and acceptable to social partners, after almost 20 years. Instead, only few corrections have been made along with some terminological clarifications, with very few substantial changes. For example, Art. 2 of the Draft Law on Strike defines a strike as a work stoppage by employees, aimed at exercising and protecting their socio-economic interests and rights at work and based on employment. In addition, Art. 8 envisages that the decision to go on strike is made either by the responsible body of the trade union or the majority of employees working for the same employer. Therefore, we may agree that the definition of the right to strike is more precise in the Draft Law on Strike compared to the former legislation, and that strikers' autonomy is partly restricted in terms of deciding on why and how they stage a strike. However, the concept of strike as a right of the majority of employees and trade unions still remains.

The key question that is still very relevant, and solutions to which vary from state to state, is whether only trade unions, only employees or both have the right to strike[21].

If we take a brief look at the revised European Social Charter, particularly Part II Article 6 Item 4, we will notice that both workers and employers have a guaranteed right to take collective action in case of a conflict of interests, including the right to strike, in compliance with the obligations that may arise from

[19] The latest draft of the Law on Strike, scheduled for parliamentary proceedings in late June 2014, contains no conceptual changes, defining strike more precisely. In fact, Art. 2 of the Draft Law on Strike, defines strike as employees' work stoppage aimed at exercising and protection of their economic and social interests, workers' rights and the rights based on employment.

[20] http://www.sindikat.rs/protesti.html the SSSS link on the number of strikes [5.08.2014].

[21] O. Kahn-Freund, *The Right to Strike: Its Scope and Limitations*, Council of Europe, Strasbourg 1974, p. 5.

previously concluded collective contracts[22]. This further implies that the right to strike must be understood as an individual right of all workers, and not only of those who are trade union members. That is exactly why the European Committee for Social Rights has taken a clear standpoint in its conclusion that every state which limits the right to strike by allowing only trade unions to organise a strike is actually in breach of the European Social Charter[23].

Despite the significant influence of the EU *acquis communautaire* on national legislations, it is still not possible to say that Serbian labour legislation is "harmonised" with the EU regulations, but rather that it is a case of a lesser or greater extent of initial harmonisation[24]. The same goes for legislation governing the right to strike. Transition in Serbia is remarkably conflictive. The conflictive nature of the transition processes in Serbia is manifested, *inter alia*, by the increased number of conflicts in the area of work, usually taking more radical forms – strikes, protests, demonstrations in front of state or local authorities' buildings, roads and railroads blockades, self-inflicted injuries, *etc*. At the same time, the effectiveness of solving industrial and social conflicts is obviously decreasing. This inefficiency of resolving disputes by use of violence is a warning factor to all stakeholders – employers, trade unions and the political establishment, pointing to a very high price paid by everyone, reminding them that their relations cannot be built on escalating the conflict, but rather on mechanisms of peaceful dispute settlement based on the idea of social peace. Serbia today can waste no time to initiate an intensive, dynamic and systematic process of harmonisation of labour and social legislation, also in the areas that relate to the mechanisms, instruments and the real functioning of social dialogue. This process includes two important and mutually related aspects: internal harmonisation, when it comes to harmonisation of the existing and new laws in Serbia, and external harmonisation related to international standards, especially the ones of the ILO and European Union.

5. The right to strike in the practice of serbian courts

The legal system developed in the Republic of Serbia belongs to the continental European category. Most of the legally relevant relations are regulated by the norms passed by legislative and executive bodies in the form of laws and other general regulations. In line with the principle of division of powers estab-

[22] http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/escrbooklet/SerbCyrillic, pdf [21.08.2014].

[23] ECSR, Conclusions I, 185; Conclusions II, 28–9; Conclusions IV, 48–51; Conclusions VIII, 96, Conclusions XIII–1, 155–6; Conclusions XIV–1, 301.

[24] S. Jašarević, *Harmonizacija prava i prakse u oblasti participacije zaposlenih – Srbija i EU* [*Harmonisation of rights and practice in the area of participation of employees – Serbia and EU*], "Zbornik radova Pravnog fakulteta Novi Sad" ["Proceedings of the Faculty of Law in Novi Sad"] 2011, Vol. 45, No. 3, p. 380.

lished by the constitution, courts are obliged to consistently apply the general rules. Judges are expected to apply the law, and not to create it. In other words, case law is not considered a formal source of law. However, in reality, courts have always had a much more significant role in the process of shaping the legal system. It ranged from very broad interpretations of legal rules to creating individual rules that filled the gaps in the law, even to the point of creating general legal rules[25].

Regarding the exercise of the right to strike, the Constitutional Court of Serbia has the most significant role. This court has, *inter alia*, ruled in cases dealing with restricting the right to strike to certain professional groups. One such case was the Bylaw on Strike of Police Officers[26] which envisaged the minimum of the working process to be provided by at least 90% police officers employed in the organisational unit in which the work stoppage is organised for 30 minutes at the maximum. The request to judge whether the Bylaw on Strike of Police Officers complies with the Constitution and the law (constitutionality and legality) was brought forward to the Constitutional court by the Independent Police Trade Union from Belgrade, the Branch Trade Union of a Administration, Judiciary and Police Employees *Nezavisnost* and the Police Trade Union of Serbia. When judging the constitutionality and legality of the Bylaw, the Constitutional Court determined that the Government had transgressed its constitutional and legal powers by stipulating relations which are under the purview of the legislative authority. The explanatory note to the Decision on the Bylaw's Noncompliance with the Constitution or the Law refers to Art. 61 of the Constitution of Serbia which reads that it "guarantees the employees the right to strike, in compliance with the law and collective contracts". The Constitution stipulates that the right to strike can be restricted only by law, depending on the nature and type of activity; therefore the bylaw, as a regulation governing the implementation of the law, cannot regulate the conditions for exercising the right to strike[27]. By the provision of Art. 135 of the Law on Police, which stipulates the possibility of exercising this right and defines its limitations, the Government is not permitted to further regulate the relations in this field. Considering these facts, the Constitutional Court found that the Government, by enacting the Bylaw challenged, had overstepped its constitutional and legal mandate by regulating the relations which are under the purview of the legislative authority. The Constitutional Court also based this standpoint on the provision of the European Convention for the Protection of

[25] D. Nikolić, *Elementi sudskog prava u pravnom sistemu Srbije i EU* [*Elements of judicial law in legal system of Serbia and EU*], "Zbornik Matice srpske za društvene nauke" ["Collection of Matica Srpska for Social Sciences"], Vol. 126, Novi Sad 2009, p. 7.

[26] "Bylaw on Strike of Police Officers", No. 110–4534/2007 ["Official Gazette of the RS", No. 71/07].

[27] D. Stevandić, *Уредбе о правном поретку Србије* [*Bylaws in the legal system of the Republic of Serbia*], "Pravni zapisi – casopis Pravnog fakulteta Univerziteta Union", Vol. 3, No. 2, Belgrade 2012, p. 422.

Human Rights and Fundamental Freedoms, which allows the signatory states to legitimately restrict the right to freedom of gathering and association to certain categories of employees, such as army officers, police officers and civil servants. However, restrictions are legal only if certain conditions are met, the first one being that the restrictions are prescribed by the law.

Nevertheless, the most significant decision of the Constitutional Court of Serbia is the granting of the right to strike to civil servants. The Constitutional Court judged the constitutionality of Article 18 Item 1 of the Law on Strike, in terms of which civil servants, after being proved to have either organised a strike or participated in one, shall have their employment contract terminated. In the proceedings, the Constitutional Court found that the Law on Strike had been passed based on the then valid Constitution of the Federal Republic of Yugoslavia, which envisaged that: employees have the right to strike in order to protect their work-related and economic interests, in compliance with the federal laws; that the right to strike can be limited by provisions of the federal law, in cases when the nature of activity or public interest so requires; that public administration employees have no right to strike. Since the effectiveness of the Constitutional Charter of Serbia and Montenegro State Union[28], this law continued to be applied as a republic level law, based on Article 64 Item 2 of the Constitutional Charter. The Constitutional Court concluded that the Constitution of the Republic of Serbia (1990), upon which the judgement of the constitutionality of the formerly adopted federal laws which continued to be applied as the Republic laws was based, ceased to have effect as of 8th November 2006, when the new Constitution of the Republic of Serbia came into force. Due to the fact that the timeframe within which to harmonise the Republic laws with the Constitution of the Republic of Serbia of 2006 has expired, the constitutionality of Article 18 Item 1 of the Law on Strike is being reviewed based on the Constitution from 2006. The valid Constitution grants the right to strike to all employees, including police officers, civil servants and public appointees. This right can be restricted only by the law. The Law on Civil Servants, the particular law which regulates the rights and duties of civil servants, as well as some rights of public appointees based on employment, contains no provisions on the right to strike for these categories. However, in terms of Article 4 of the Law on Civil Servants, general regulations on labour and collective contracts for civil servants and appointees apply, if this law or another particular law does not regulate the rights and duties of civil servants, unless stipulated otherwise by the law. In relation to this, the Constitutional Court has found that the Law on Labour, as the general labour regulation, has no provisions on the employees' right to strike. Nevertheless, Article 35 Item 1 of the Special Collective Agreement for State Administration stipulates that

[28] *Constitutional Charter of Serbia and Montenegro State Union*, "Official gazette of Serbia and Montenegro", No. 1/03 and 26/05.

civil servants may organise a strike or a token strike, under the conditions and in the manner regulated by the law. From the above, it can be concluded that civil servants and appointees have the right to go on strike which must be organised in compliance with the Law on Strike. This example clearly shows how necessary it is to pass a new Law on Strike as soon as possible, since certain provisions of the still applicable law do not comply with either the Constitution of the Republic of Serbia or the already ratified international treaties. The responsibility for this lies both with the state and its social partners, who have not succeeded in establishing the guidelines for social dialogue in Serbia.

6. Social dialogue as an instrument of balancing market economy

The ability to exercise the right to strike within a legal system depends largely on the established level of social dialogue. A system with a developed and institutionalised social dialogue is a filter for resolving a large number of work-related conflicts which would otherwise lead to a strike. On the other hand, countries with an unenviable level of social dialogue face the problem of a great number of strikes and other forms of workers' protests, largely inefficient and poorly organised, which more often further deepen the initial problems rather than resolve them, and very often create new ones. Low level of social dialogue increases the number of strikes, which further impedes social dialogue, thus creating a vicious circle of industrial conflict which is difficult to break through.

Social dialogue, as a principle, as a new and completely different method of regulating relations in the sphere of work, has become a vital characteristic of social conditions and relations on both global and national levels. The fundamental goals of social dialogue are formulated and concretised mainly through the process of collective bargaining, by harmonising the standpoints of social partners and by concluding collective contracts. The purpose of collective bargaining is to provide protection of social partners' interests in a market economy environment and to consequently diminish the probability of conflict situations with adverse effects on economic and social trends as a whole.

In East and Central European countries the beginning of the economic and social transition also marked the initial appearance of social dialogue, the process unknown in the former socialist system, according to many unnecessary, as well. However, the transition process in Serbia was to a great extent different to the same process in other countries with the same political system. It is well known that the transition in Serbia came rather late, especially in comparison with the level of transition achieved by other former socialist countries. The almost a decade-long delay of the reform processes inevitably affected the profile, pace,

and results of Serbian transition. Although Serbia had a better starting position, because of a more flexible economy, higher living standard and a certain level of individual rights and freedoms, a number of factors have contributed to Serbia's present-day position behind other countries in transition. The consequence is a high tendency towards conflict in our society. The very process of establishing the social consensus is essentially conflict-prone as well. That is conditioned by the nature of this process in which all stakeholders start with their own interests, but in the process of harmonisation have to waive some of their demands and interests, so as to achieve consensus about what the common interest is. In the absence of such consensus, social dialogue is most frequently reduced to a dead letter. At the core of a successful social dialogue lies the need to establish social partnership, to bring about democratic changes and development, an awareness that "we are on the same boat", and that therefore, despite all the differences, there is an area of common interest of employers, trade unions and the Government to reach a stable and dynamic economic and social development. Therefore, social dialogue presumes clearly defined roles of all participants. Due to the delayed transition we in fact have stakeholders out of whom only the representatives of the state have a more or less shaped physiognomy. Employers by definition should be the owners of assets – stakeholders with sovereign disposal over their property, which is not the case with Serbia, and thus there are no employers with clearly defined interests. On the another hand, the trade unions, as the third stakeholder, mainly represent themselves, rather than clearly defined work-related interests of employees.

Finally, we can conclude that social dialogue refers to all types of bargaining, consultations and information exchange among the representatives of employers, workers and the government on social or economic policy issues relating to their common interest[29]. The overarching objective of social dialogue is to balance the effects of market economy and create an environment for citizens' life and work[30]. It is, therefore, a powerful tool which, if efficiently used, can enable a society to overcome countless problems and build social cohesion. During the periods of economic changes and uncertainties, social dialogue can play a key role in preserving the existing and creating new work places, which is an economic and social priority[31].

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[29] R. Delarue, *Role of social partners in promoting sustainable development, inclusive growth an development*, ILO, Brussels 2012, p. 5.

[30] D. Stajić, *Privatizacija u Srbiji između neoliberalizma i socijalne države* [*Privatisation in Serbia between neoliberalism and welfare state – meaning of social dialogue in lical community – example of privatisation in Vranje*], "Politička revija" ["Political Review"] 2008, Vol. 7, No. 3, p. 971.

[31] A. Cardoso, *Industrial relations, social dialogue and employment in Argentina, Brazil and Mexico*, ILO "Employment and Strategy Papers", No. 7, Geneva 2004, p. 3.

7. Conclusion

The current situation in the industrial relations in Serbia is characterised by inconsistency between the theoretical basis and the exercise of the right to strike in practice. Employees' and employers' associations can hardly take care of themselves, let alone their members' interests. The Socio-Economic Council exists only formally because in practice its meetings are rare, and the main decisions relevant to the status of employees (and employers) are made without the Council's influence. The Authority for Safety and Protection at Work, as well as the Republic Agency for Peaceful Settlement of Work Disputes are both in their initial phase of work and they operate without sufficient support from the state. The Labour Inspectorate is constantly struggling with the ever growing responsibilities, on one hand, and the decrease in staff and funding, on the other. All this means that the right to strike in Serbia has no adequate base for further development.

The legal system of the Republic of Serbia falls into the category of legal systems with a particular law regulating the right to strike. This law has a number of weaknesses. The definition of strike is imprecise and comes with an insufficient number of legal guidelines regarding legal demands of strikers. There are also plenty of illogical decisions regarding the conditions required to fulfil the right to strike – all leading to the conclusion that the Law on Strike should have been changed a long time ago.

Undoubtedly, the biggest deficiency of the current Law on Strike are considerable restrictions relating to the stipulated obligation to preserve the minimum working process. Firstly, the list of activities where this restriction applies is too long. De facto, what should be an exception to the general rules relating to strike has been made a rule, because more than 50% of the total work force in the Republic of Serbia is employed in these areas. Even less logical are the provisions pertaining to the manner of determining the minimum of working process, since they give almost all power to the employer or the founder. All these provisions need to conform with the needs in Serbia, as well as the ILO principles on exercising the right to strike. For four years now, the process of drafting the new Law on Strike has been underway in Serbia, which is highly conducive to Serbia being placed, at least in terms of legal regulations, among the countries where the rights and interests of the working class can be efficiently protected by organising a strike or by threat of strike. Of course, passing a new law with better solutions would largely improve the prospects of the right to strike regulation in Serbia. However, that is not sufficient in itself. Without strengthening social dialogue, the prerequisite for which are strong and independent trade unions and employers' associations, without a stronger Socio-Economic Council and collective bargaining

practice, without improved judicial and alternative methods of work dispute resolution – which ought to be the final filter before a strike is organised, the right to strike in Serbia remains like a house without the foundations or the roof. At the same time, the inappropriately articulated dissatisfaction of the working class continues and increasingly expresses itself through radical and destructive protests with no chance of success, while the means that are tested, planned, very effective and globally recognised are replaced with strikes.

Zbigniew Góral[*], *Ewa Staszewska*[**]

POLISH LABOUR LAW 10 YEARS AFTER THE ACCESSION TO THE EUROPEAN UNION (CERTAIN ISSUES LINKED TO THE DETERMINATION OF THE DIRECTION OF CHANGE)

1. The key events which in the recent decades have had an impact on the development of Polish labour law certainly include the break-up with the communist past and the ensuing political and economic system transformation, and integration with the European structures, in particular Poland's accession to the European Union. Particularly significant at the time was the choice of the axiological foundations of this branch of law. It went without saying that it was requisite to discard the underlying values of socialist labour law informed by purely ideological criteria. Primarily, this applied to the egalitarian formula of equality coupled with the precedence of collective interest (to a large extent defined by the ruling party and respecting the system of state ownership) over individual interest. In this situation, the change of the vector to individual freedom could not have raised more serious doubts. This was reflected both in the Constitution adopted in 1997 and, to a certain extent, in the fundamental amendment to the Labour Code a year before. One proof of that axiological revaluation, in the first place, were the regulations, where the right to work, previously prominent and of socialist provenance, was replaced with freedom to work. This, however, did not mean that freedom became the sole value that informed the nature of the institution of labour

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law. A return to the completely unrestrained freedom of contract, characteristic of the early capitalist era, would have consequently shattered the raison d'être of this branch of law, i.e. its protective function based on the stipulation – in traditional approach – that the interests of the weaker party to the employment contract need to be protected. Labour law, therefore, cannot unreservedly respect the legal maxim "*volenti non fit iniuria*". While granting individuals the freedom to decide of their professional careers, it should concurrently guarantee their freedom from the threats to other values, such as fair social security, safety and health, dignity at work, privacy, and family development. Hence, the axiological determinant of the directions of labour law development should be the universal human rights that today represent an unquestioned standard of international law and the laws and regulations of the European Union. It is worth underscoring that another standard of the kind is equality, understood – to put it simply – as the freedom from discrimination. For it is doubtless that from the point of view of justice it is improper to consider equality of treatment as an intrinsic value, in as much as it is inappropriate to use unreasonable discrimination which stands in complete opposition to equality. At this point it would be possible to provide numerous examples confirming that in the recent years these values have been top priority for Polish legislature. This can be seen in the regulations concerning the principles of labour law, e.g. the principle of protection of dignity and other personal interests of employees, and the principle of non-discrimination, in the regulation on mobbing, or in the highly elaborate occupational safety and health regulations. Their current shape is certainly and to a large extent the result of implementation of the legal acts adopted by the European Union, which obviously does not settle that the legislation adopted in this respect is fully correct.

Having identified the foregoing axiological foundations of Polish labour law, it also takes to consider whether it should be exclusively oriented around the values associated with just one party to the employment contract, i.e. the employee. It would be wrong if regulations in this branch of law ignored the values attributed to the other party, the employer. This cannot be justified by the usually stronger position of the employer, both in the phase preceding the employment contract and in the phase of its performance. Protection of the interests of employees does have its limits, and going beyond these borderlines might also harm those who are meant to be protected. Labour law, therefore, should not stand in opposition to ownership rights and economic freedom. Any and all protective norms are meaningful in as much as employers pursuing their business objectives are willing to employ staff. It is difficult to assume that this willingness is informed by a moral imperative, rather than by economic conditions. One should not miss in the field of attention the patent conclusion that employment contracts have an instrumental dimension, for they serve entities other than employees to achieve certain goals. Excessive employment costs, too big hindrances to the management of human

resources policies, and insufficient flexibility of the legal solutions concerning employment contracts may lead to such consequences which, from the perspective of labour law, are adverse, e.g. escaping employment contracts and replacing them with other legal or even illegal substitutes, or employment downsizing. The symptoms of this phenomenon are visible in Poland. High employment costs (especially insurance and parainsurance contributions), high social risk carried by employers, excessive job stability, and a plethora of prohibitions from terminating employment contracts are the reasons why the practice of entering into civil law contracts instead of employment contracts is becoming commonplace, and employment in the so-called grey zone is growing. This said, it appears that Polish labour law, while it has never ceased to protect employees, must increasingly promote employment, and this requires a greater focus on the values of importance to employers[1].

2. In the ongoing debate in Poland on the future of labour law of late more and more attention has been paid to its scope of application. Above all. Increasingly popular is the view that regulations in this branch of law need to go beyond the conventional perception of employment contracts which assume subordination of the employee to the employer, hence it is claimed that labour law, whose significant part is social law, as it is linked to satisfying human needs through work, "is the law for working people, not the law for employees"[2]. Some authors suggest the need for change of its name from labour law to employment law[3]. This obviously refers to the afore-mentioned tendency to replace employment contracts with civil law contracts or self-employment, both considered to be less costly for employers and more convenient in terms of the opportunity to respond to the variable demand for labour in the market. In any discussion on this subject, the starting point must be that it takes to respect two principles: the principle of freedom of contract, as set forth in Art. 353[1] Civil Code ("the contracting parties may arrange the legal relationship between them at their discretion") and the principle of economic freedom, the foundations of which are laid down in the Constitution of the Republic of Poland (Art. 20) and in the Economic Freedom Act of 2 July, 2004 (cf. Art. 6 in particular)[4]. Any restrictions on the options of choosing the legal basis of performing work, therefore, must be considered disallowable, unless the legal basis chosen is intended to conceal the actual nature of employment,

[1] This subject is broadly discussed by M. Skąpski, *Ochronna funkcja prawa pracy w gospodarce rynkowej* [*Protective Function of Labour law in Market Economy*], Kraków 2006, p. 139 and following.

[2] A. Sobczyk, *Prawo i człowiek pracujący – między ochroną godności a równości* [*Law and A Working Man – Between Protection of Dignity and Equality*], [in:] M. Skąpski, K. Ślebzak (ed.), *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych* [*Axiological Foundations of Labour Law and Social Insurance*], Poznań 2014, p. 46.

[3] In particular M. Gersdorf, *Prawo zatrudnienia* [*Employment Law*], Warszawa 2013.

[4] OJ 2004, No. 173, item 1807, as amended.

which most often boils down to simulating civil law contracts. Hence, if the dissimulated contract were an employment contract, in no way would it be possible to classify, in terms of a breach of the freedom of contract, a challenge to the validity of the contract disclosed by the parties thereto on the grounds that it bears the characteristics of ostensibility. This is acknowledged by the existing Art. 22 section 1^1 and section 1^2 of the Labour Code which provides that the disclosed contract must be compared with the definition of employment contract. It would be difficult to reconcile with this principle the thesis that the Labour Code establishes a presumption of conclusion of an employment contract, as is now and then claimed in the literature on the subject. In terms of the prospects of labour law's development much more important is the conclusion that civil law contracts and employment contracts in a significant proportion of cases may be lawful alternatives, therefore they may compete with one another. The attractiveness of civil law contracts certainly can be and is (as proven by the statistical data) a challenge to labour law. The upturn tendency to depart from employment contracts in favour of civil law contracts, motivated by economic factors, would run the risk of creating a situation in which labour law would regulate employment mainly in the non-economic sphere. This provokes the question what needs to be done so as to prevent this branch of law from shrinking. Different options are possible here. The first one is to identify the need for a specific expansion of labour law so that it covers the civil law bases of employment. This would entail a change to the nomenclature, as mentioned herein above. The legal regulation so expanded and reaching beyond employment contracts would be named "employment law". One part of it, though not its sole component, would be the right to employment contract[5]. Another consequence of this proposition, if accepted, might be – as is predicted – the enactment of the employment code[6]. Characteristically, this concept preserves the structural severance of employee and non-employee work agreements and concurrently recognises certain common characteristics between them that justify their encapsulation within a single branch of law, i.e. employment law. Interesting as this concept is, it does have some material flaws. First of all, these include highly unclear relations with civil law. Hence, the doubt arises whether civil law contracts included within the scope of employment law cease to be an institution of civil law. Contracts of service, or more precisely contracts for provision of services, which are subject to the regulations applicable to contracts of service, contracts for service or other civil law agreements do not cease to be regulated by the Civil Code, no matter to what extent they determine the social status of the party working on those contracts, while they represent an alternative

[5] This subject is more broadly discussed by M. Gersdorf, *op. cit.*

[6] M. Gersdorf, *Kodeks zatrudnienia wyzwaniem przyszłości* [*Employment Code As A Future Challenge*], [in:] M. Gersdorf, M. Raczkowski, R. Wyziński, *Zatrudnieni i zatrudniający na aktualnym rynku pracy* [*Employees and Employers On the Current Labour Market*], M. Gersdorf (ed.), Warszawa 2012.

form of employment to employment contracts. A completely different issue is whether in respect of the persons working on such contracts, exactly for the reason of the role such contracts play, which is similar to that fulfilled by employment contracts, it would be reasonable to apply certain regulations applicable to employees. It appears that this is the right direction of change to the existing law. Such changes could prevent the escape from employment contracts while respecting the principle of freedom of contract. Importantly, such measures of the legislature are supported by the Constitution which in Art. 24 provides that work is under the protection of the Republic of Poland. It would be wrong to assume that this only applies to work done on the employment contract[7]. This provides the grounds for extending at least some of the labour law regulations so that they also cover non-employee work agreements. In certain cases this would even help Poland to meet its international obligations. The right to form trade unions granted to persons working on civil law contracts should be assessed exactly in these terms[8]. Also, it would be difficult to question the reasonability of extending to non-employees such legal regulations which, to date, have been primarily and exclusively addressed to employees and which typically have the social dimension (fair pay, safety and health protection, protection of family life, the right to rest and leisure)[9]. This must be concomitant with the extension of the subjective scope of the social security law so as to prevent diversification of the ensuing employment costs relative to the legal relationship based on which work is performed.

With this outlook it is unnecessary and unreasonable to create a new branch of law (employment law) or to designate a subjective scope of labour law other than the existing one. This law should continue to cover employment contracts and the ensuing legal relations. However, a far reaching revision is required with regard to the outlooks on the taxonomic characteristics of the employment contract, in particular the perception of the employee's subordination to the employer, which still is the fundamental criterion that delimits employment contracts and civil law contracts. The point of reference here cannot be the subordination paradigm characteristic of the employment relationships existing in the early formative period of labour law and consisting in subordination to the employer's directions in all aspects of the performance of the agreed work[10]. In this state

[7] A. Sobczyk, *Prawo pracy w świetle Konstytucji RP* [*Labour Law in the Light of the Constitution of the Republic of Poland*], Vol. I: *Teoria publicznego i prywatnego indywidualnego prawa pracy* [*Theory of Public and Private Individual Labour Law*], Warszawa 2013, p. 68.

[8] More broadly discussed by Z. Hajn, *Prawo zrzeszania się w związkach zawodowych – prawo pracowników czy prawo ludzi pracy* [*The Right to Form Trade Unions – the Right of Employees or Working People?*], [in:] A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (ed.), *Zbiorowe prawo pracy w XXI wieku* [*Collective Labour Law in the 21st Century*], Gdańsk 2010.

[9] A. Sobczyk, *Prawo i człowiek pracujący*… [*Law and A Working Man*…], p. 42–43.

[10] L. Mitrus, *Podporządkowanie pracownicze jako zmieniająca się cecha stosunku pracy* [*Employee Subordination as a Variable Characteristic of Employment Contract*], [in:] L. Florek,

of affairs it would be difficult to justify the possibility of demonstrating, within the framework of employment contract, money-earning activities characterised by a certain degree of self-reliance. In no way can it be denied that this stereotype has been established by the change of the definition of employment contract enacted in effect of the Labour Code amendment in 2002[11]. In as much as prior to the said amendment, while defining the employment contract the legislature generally indicated the directorial position of the employer in the course of the given work being performed for him by an employee, in the version currently in place the legislature adds that the employer also designates the place and time of that work. This kind of clarification of the definition of employment contract may help delimit the employment contract and civil law contract, but it certainly does not help to extend the scope of application of the former one. The effect appears to be opposite. Today employees are expected to be more and more creative and self-reliant in the fulfilment of their tasks. Consequently, the existing subordination formula becomes highly anachronistic. Therefore, one needs to be very cautious when assessing the nature of the employment contract being concluded by referring to the criterion of subordination/self-reliance. This is already demonstrated in the judicature, in particular in the doctrine which allows for the existence in employment relations of the so-called autonomous subordination, although the ensuing risks are recognised, too[12]. Apparently, each and every job done for another entity under the circumstance of any dependence of that entity (including economic dependence) may be performed on employment contract, whatever the degree of self-reliance in the fulfilment of the employee's tasks (especially if other characteristics typical of employment contract applied). In such a case significance should be attached to the mutual consent between the parties which, when selecting the type of the work agreement, also determine whether the same will be subject to labour law or civil law. Obviously, exclusion of self-reliance in the performance of work thwarts the option of concluding a civil law contract and is indicative – if such a contract has been concluded – of the intent to conceal employee employment. The voiced concerns that making the choice of the basis of employment dependent on the freedom of the parties in a situation where no classical subordination applies may encourage employers to impose the content of employment contracts and the applicable legal regime (labour law – civil law), are to a large extent reasonable. Nevertheless, they would lose their sharpness in the event when some of the norms, to date exclusively addressed to employees, are extended to civil law forms of employment.

Ł. Pisarczyk (ed.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych* [*Contemporary Issues of Labour Law and Social Insurance*], Warszawa 2011, p. 123 and following.

[11] OJ, No. 135, item 1146.

[12] Cf. M. Raczkowski, *O podporządkowaniu autonomicznym – krytycznie* [*On Autonomous Subordination – Critique*], [in:] L. Florek. M. Pisarczyk (ed.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, p. 131 and following.

While preventing the escape from employment contracts to civil law contracts it is also worthwhile to consider the need to deepen the differentiation of the legal status of employees in relation to the degree of their self-reliance in the fulfilment of their tasks. In the case of executives managing businesses for and on behalf of employers it may be seriously doubtful whether employment contract is the basis of employment that is adequate to their position. Nevertheless, it cannot be disregarded that the legislature itself allows for the option of applying employment contract to them (e.g. in relation to directors of state enterprises this is the obligatory basis of employment). Opinions are divided, too, in the matter of applying employment contracts to members of management boards of limited companies[13]. Even if we agreed that top managers may work on employment contracts, it should be deemed right that applying to them all the protective labour law regulations would be unreasonable. Their negotiating power in confrontation with the employer and their financial standing suffice to guarantee effective protection of their interests without the need for support from labour law regulations. The foregoing conclusion may also be extended to other categories of managers[14]. For similar reasons it is also justified to extend their scope of participation in the risks carried in principle by the employer (especially the economic risks).

Another example of the necessity of differentiating the application of labour law regulations that could increase the attractiveness of employment contracts over civil law contracts is the issue of the legal position of employees relative to the criterion of employer size. Doubtlessly, a significant proportion of employers in Polish economy is represented by small and medium entrepreneurs. Simultaneously, they are the employers who most often choose the forms of employment that are alternative to employment contracts to avoid the difficulties linked to employment contracts. This is the sphere which confirms the thesis that the excessively protective function of labour law turns against the beneficiaries of this protection. It is difficult not to notice that the need for differentiation of the legal norms binding employers who employ small groups of employees is already reflected in Polish labour legislation. One example may be, e.g. the exclusion of the regulations on the so-called economic redundancies in relation to employers who employ fewer than twenty employees. Notwithstanding the objections raised by such differentiation in view of the principle of equal treatment, it nevertheless needs to be considered whether its scope should be extended, given the special nature of the relations between employees and employers at small companies, as

[13] More broadly discussed by T. Duraj, *Podstawy zatrudnienia menedżerów najwyższego szczebla w przedsiębiorstwach* [*Bases of Top Managers' Employment by Enterprises*], Warszawa 2006, p. 204 and following.

[14] A. Sobczyk, *Prawo i człowiek pracujący…* [*Law and A Working Man…*], p. 43.

well as the economic potential of the employers. For instance, it is unreasonable to apply to them the regulations on reinstatement, or many other regulations reinforcing the protection of job stability[15].

3. Like in many other countries, also in Poland the question about the future of labour law is strictly linked to the position of trade unions. It is difficult not to admit that to date the development of this branch of law has been largely affected by trade unions' reclamations. This was so because trade unions appeared to be a great and well-organised force that was able to oppose employers by making use of the legion, and well-established over many years, rights and authorities (to bargain and enter into collective agreements, and take industrial actions, in particular including strikes). The power of trade unions was facilitated by the organisation of labour which relied on large industrial plants with numerous payroll. Currently, we are witnessing the reverse trend. Trade unions are losing much of their original attraction for working people. This is so for a variety of reasons. The first one to be indicated is the development of the tertiary sector. Certainly, this is not a trade union-friendly environment, if only due to the number of employees hired by service companies and a certain atomisation of workers' groups employed by such companies. Secondly, the gradual but already evident growth of the wealth levels in Poland and ever-increasing middle class are not conducive to popularity of traditional trade unions' slogans primarily addressed to the people working for large industrial plants. Thirdly, trade unions' popularity is not served well by the bureaucratisation of their headquarters and alienation of the trade union apparatus, whose objectives are not always convergent with those of the working people. Fourthly, as was the case with other post-communist states, following the system transformation Poland, too, has seen a rapid development of the private sector which is prevailing at the moment. In this sector, trade unions' formation and activities come up against serious obstacles of various natures. And fifthly, it is not favourable to trade unions that momentum has been gained by non-standard employment agreements, whose one characteristic is that the employee-employer relationship is never permanent. The existing experience, however, teaches that trade unions most strongly rely on employees with stable position in the workplace. Consequently, on the part of employees we can observe a decreasing interest in their membership of trade unions. Trade union members represent but a fraction of all employees, and in a significant proportion employers maintain no trade union organisations at all. Trade unions are only still powerful in certain segments of the economy, especially where privatisation processes and economic rationality are finding it most difficult to pave the way. This surely gives rise to the question how reasonable it is, if at all, to keep up trade unions' monopoly

[15] Cf. A. Sobczyk, *Różnicowanie praw (ochrony) zatrudnionych – wybrane kryteria i ich ocena* [*Differentiation of the Rights (Protection) of the Employed*], [in:] M. Bosak (ed.), *Funkcja ochronna prawa pracy a wyzwania współczesności* [*Protective Function of Labour Law and the Contemporary Challenges*], Warszawa 2014, p. 11–12.

of representing the rights and interests of employees. It appears that in the future this monopoly is going to be increasingly broken. The symptoms are clear to see already. In a number of labour law regulations certain authorities are granted to employee representations other than trade unions and appointed in a manner approved by the given employer (this, however, usually takes place where no trade unions are present). For instance, employers can work closely with such representations in case of group lay-offs (the Act of 13 March, 2003 on special rules of terminating employment contracts for extraneous reasons[16]), or enter into agreements to suspend labour law regulations (Art. 9^1 Labour Code). One institutional expression of this trend are employee councils stipulated in the Act of 7 April, 2006 on providing information to and consulting employees[17]. It also seems necessary to review the existing organisational model of trade unions, as set forth in Polish laws and regulations. In particular, it is extremely dubious that this model is based on the stipulation that trade unions' tasks to represent employees' interests and defend employee rights should be fulfilled by organisation structures operating on the level of the workplace. Alternative solutions, e.g. outsourcing such trade union tasks, would be conducive to strengthening not only trade union activists' independence from employers, but their effectiveness in providing employee protection, as well. Concentrating trade unions' authorities on the level of the workplace carries a number of inconveniences, a part of which is sure to ensue from the amalgamation of the function of a trade union activist with the status of an employee employed by an employer, whom the trade union has to confront from time to time in various employee matters. It goes without saying that this configuration is inherently conflicting. It implies the necessity to protect the permanent nature of trade union activists' employment contracts. The scope of this protection laid down by Polish legislation (ban on terminating the employment contract without consent of the workplace trade union organisation, regardless of the reasons for termination), however, goes beyond any reasonable limits, as it is conducive to trade union members abusing their protection rights. In this light it could be considered whether it would suffice to indicate trade union activism as the prohibited motivation for terminating an employment contract and couple such termination with a reasonably high indemnity that would be adjudicated in the event of an employer breaching this ban. Other doubts relate to the various facilitations, granted by Polish legislation to workplace trade union organisations, which cause financial burdens to employers[18]. These must be acknowledged to

[16] OJ, No. 90, item 844, as amended.

[17] OJ, No. 79, item 550, as amended.

[18] More broadly discussed by Z. Góral, *Ułatwienia w działalności zakładowej organizacji związkowej – wybrane uwagi na tle przepisów ustawy o związkach zawodowych* [*Facilitations for Workplace Trade Union Organisations – selected comments against the background of the Trade Unions Law*], [in:] Z. Hajn (ed.), *Związkowe przedstawicielstwo pracowników zakładu pracy* [*Trade Union Representation of Employees in the Workplace*], Warszawa 2012, p. 459 and following.

pose a particular danger to trade unions' independence. Finally, it feels right to conclude that a workplace trade union organisation structure is not a model that could be applied to exercise the freedom of association of persons working on civil law agreement. This is essential, as the requirement to respect the freedom of coalition of this category of employees, as mentioned herein above, results from the provisions of international and constitutional laws.

4. One of the issues most vividly discussed in the recent years and concerning Polish labour law is its recodification. This year is the 40th anniversary of the Labour Code's enactment. This means that the Labour Code was enacted in entirely different political and economic conditions, when codification was perceived in definitely ideological terms, but was at the same time considered to bring the quality of law on a higher level. The enactment of the Labour Code was also viewed as an act which explicitly confirmed the severance, though not a complete split-up, of this branch of law from civil law. The later development of labour law, especially in the period of political and economic transformation – from the formal point of view – consisted in amending the Labour Code 1974 and adopting the acts concerning the matters not regulated by the Code, usually completely new and responding to the challenges of free market economy. A significant range of non-code regulations surely helped to reduce the meaningfulness of the code itself and rendered it difficult to convincingly claim that Polish labour law was fully codified. Which it had not been already at the time of the enactment of the Labour Code which was far away from meeting the requirement of completeness. The processes described above provide the basis for identifying two visions of Polish labour law's development. The first one is a specific kind of decodification, i.e. putting the emphasis on non-code norms included in other acts, but also (or especially, perhaps) in the acts negotiated by the public partners. The second proposition is to enact a new Labour Code, or in other words – recodify labour law in keeping with the requirements of free market economy and the standards applied within the European Union[19]. That the latter variant has been chosen may have been proved by the nomination of the Labour Law Reform Committee which prepared a draft new Labour Code. Committee members expressed their conviction that recodification was requisite in order to tidy up Polish labour law, and the obstructions in the way was not so much the subject matter itself, but rather the lack of political will[20]. Importantly, the draft Labour Code has not triggered any specific legislative work and this is unlikely to change any time soon.

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[19] Cf. M. Seweryński, *Problemy rekodyfikacji prawa pracy* [*The Issues of Labour Law Recodification*], [in:] M. Matey-Tyrowicz, L. Nawacki, B. Wagner (ed.), *Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego* [*Labour Law and the Challenges of the 21st Century. Jubilee Book of Professor Tadeusz Zieliński*], Warszawa 2006, p. 319 and following.

[20] W. Sanetra, *Co dalej z kodyfikacją (rekodyfikacją) prawa pracy?* [*What About the Codification (Recodification) of Labour Law?*], „Praca i Zabezpieczenie Społeczne" 2008 ["Labour and Social Security" 2008], No. 3, p. 8.

It seems that the issue of recodifying Polish labour law is by far more complex and material counterarguments of various nature may be raised against this proposition. First of all it is not by accident that in the decisive majority of states with well-established free market economy labour law has not been codified, notwithstanding a number of attempts to do so. Primarily it is raised that the subject matter of this branch of law materially varies from the subject matter of civil law or criminal law which are characterised by relative stability and founded on concepts of legal solutions boasting long traditions. It cannot be denied that labour law is specific because its shape is the result of a compromise between labour and capital, which compromise must be regularly updated, given the degree of economic lability and market volatility. In a sense the victim of this situation is the existing Labour Code which, since its enactment, has undergone legion amendments, where the frequency and profundity of those amendments visibly increased as the political and economic transformation progressed. It is difficult to expect that it would be otherwise in the case of the new codification, the outcome of which will always be affected by the lobbies of trade unions or employer organisations[21]. On the other hand, however, it appears that a full decodification of Polish labour law is rather unlikely. Given that the Labour Code is strongly rooted in public awareness, it can be expected that any attempts to abandon this law would come up against a far reaching protest of the world of labour. This said, it needs to be concluded that in the years to come the process of amending the Labour Code is likely to be continued with concomitant erosion of its significance due to the shift of the gravity of legislation to other legal acts.

5. For many years a major challenge for Polish labour law has been unemployment. Notwithstanding certain fluctuations it still has the characteristics of mass unemployment. The links between labour law and unemployment are multifaceted. It would be difficult to question the fact that the legal relations that define the unemployed status are within the scope of labour law, although it can be reasonably claimed that they are not limited to it. Essential in this matter also are the regulations of administrative law (in the part pertaining to the organisational sphere and functioning of employment services) and social security regulations (in the part relating to benefits)[22]. Given that the subject matter of labour law are employment contracts and other legal relations functionally linked to employment, it needs to be considered how this functional relationship presents itself in the case of

[21] M. Gersdorf, *Podstawowe dylematy związane z rozwojem prawa pracy w okresie transformacji ustrojowej* [*Primary Dilemmas of Labour Law's Development in the Transformation Period*], „Praca i Zabezpieczenie Społeczne" 2003 ["Labour and Social Security" 2003], No. 5, p. 7.

[22] More broadly discussed by Z. Góral, *Bezrobocie a prawo pracy (wybrane zagadnienia)* [*Unemployment and the Right to Work*], [in:] J. Stelina, A. Wypych-Żywicka (ed.), *Człowiek, obywatel, pracownik. Studia z zakresu prawa. Księga jubileuszowa poświęcona Profesor Urszuli Jackowiak* [*Man, Citizen, Employee. Studies in law. Jubilee Book dedicated to Professor Urszula Jackowiak*], Gdańsk 2007, p. 85 and following.

unemployment. This is easy to notice when we assume a broad (social) approach to the employee status. In this broad approach an employee is any person whose social position is determined by gainful work for another entity. Consequently, being temporarily out of work does not exclude a person from the category of employees, as defined above. The right to assistance in finding a job is the subject matter of nothing else but labour law regulations, and the legal relations covering the exercise of this right are referred to as "legal relations in the preparation for entering into an employment contract", or more broadly "employment relations and unemployment prevention". In view of their specific nature, high diversity and dynamics ensuing from the variable situation on the labour market, they must be covered by a separate legal act. Certainly, this is not the subject matter of the future Labour Code, unless it happens to be enacted. The dynamic and complex nature of unemployment, its entanglement in the economic context cause Polish legislature to continually search, with moderate success, though, for optimum legal solutions in this respect. At that it is worthwhile to observe that since the start of the political and economic transformation the Parliament has passed four acts referring to unemployment, each of which has already been amended more than once. The existing act of 20 April, 2004 (on employment promotion and labour market institutions)[23] has been frequently amended, too, and the latest extensive amendment was made on 12 May, 2014[24]. It feels that in the course of enacting these regulations, which are extensive content-wise, grossly casuistic and unclear to the unemployed (they are rather addressed to the employment bodies), it is forgotten that for the purpose of fighting unemployment the law should only be ancillary to market mechanisms. Even though the set of unemployment fighting measures laid down in the laws and regulations is ever richer and more diverse, in general this does not translate into their effectiveness[25].

Moderate hopes emerge from the afore-mentioned profound amendment to the existing act in reaction to the worrying situation on Polish labour market. After the favourable changes observed until the end of 2008, in 2009 those positive trends, i.e. the dynamic growth of employment and downfall of unemployment, slumped. At the end of 2009 the unemployment rate was 12.1%, while at the end of 2008 it had reached the level of 9.5%. In the following years the situation began to stabilise, with unemployment growth slowing down. In the years 2013–2014 the unemployment rate persisted at 13–14%. In the reasons for amending the bill it was highlighted that the objective of the amendment was to enhance the effect of the labour market policy on employment growth and alleviate the effects of structural incompatibility, in particular in terms of qualifications and competencies of

[23] Consolidated text in OJ 2008, No. 69, item 415, as amended.

[24] OJ 2014, item 598.

[25] More broadly discussed by E. Staszewska, *Środki prawne przeciwdziałania bezrobociu* [*Legal Measures to Prevent Unemployment*], Warszawa 2012.

the unemployed. Brought to attention was the need to take the relevant measures for the unemployed to recover the skill of permanently joining in the job market, and to improve effectiveness of the labour market policy, job centres' operations, standards of the services provided to job centre customers, and employment ratio by introducing new forms of work organisation and collaboration between job centres and non-public entities. Additionally, it was found requisite to increase job centres' flexibility by better adjusting their services to the needs of the given unemployed and employer, primarily by providing real assistance to long-term unemployeds, taking measures to facilitate the balance between work and family life, and helping young people (up to 30 years of age) and older unemployeds (over 50) to enter and stay on the job market[26]. Doubtlessly, it must be admitted that the objectives set forth by the legislation are right. As regards the legal instruments applied to achieve the foregoing objectives, in terms of the legislative experiences to date, here and there they deserve to be called innovative. The changes focus on a few essential areas. One of the priorities strongly emphasised by the legislation is to improve the quality of the services provided to the unemployed accordingly to their needs. For this purpose job centres have adopted a new practice or serving the unemployed, based on the concept of support profiling, and concurrently introduced the customer counsellor function. Basically, the idea is to adjust support to the individual needs of the given unemployed – formulate appropriate job seeking programmes and select such forms which are most likely to help an unemployed enter or return to the job market. Prior to the amendment some labour market instruments were only addressed to, as distinguished by the legislation, "individuals being in a special situation on the labour market" (e.g. emergency works, public works, work experience schemes). Currently, job centres are to flexibly apply the labour market instruments and services to individual unemployeds taking into account the results of support profiling. In order to enhance the active labour market policy and support job centres in their actions to improve the services provided to the unemployed introduced has been a solution that enables the unemployed to access job seeking actions provided by external entities (outsourcing of job seeking tasks). Trilateral training agreements, which functioned in Poland until 2005, have been restored, which should translate into greater employment effectiveness of this labour market service. The second area of change is the introduction of new tools meant to help create jobs and facilitate the unemployed's return to work – especially those returning to the job market after a childcare break (grant for teleworking, job seeking allowances, loans to create a job or start a business). Another area of change are the numerous labour market instruments supporting employment of youth up to 30 years of age. A system of vouchers has been introduced (so-called training vouchers, work experience vouchers,

[26] The rationale for the government bill amending the Act on Employment Promotion and Labour Market Institutions and certain other acts. Print No. 1949 available from www.sejm.gov.pl

employment vouchers, settlement vouchers), as well as the option of refunding national insurance contributions paid for the unemployed up to 30 years of age who are taking their first job. The new instruments supporting employers employing unemployeds who are over 50 years of age have been structured likewise (e.g. co-funding compensations for employment of unemployeds who are over 50 years of age). In view of the necessity to achieve the targets of the Europe 2020 strategy, i.e. to build a competitive knowledge-based economy and prevent social exclusion of persons with low qualifications or competencies that are incompatible with the labour market needs, established has been the National Training Fund whose funds will be assigned to finance the measures taken to provide continuing education of employees and employers.

Finally, the last area of change is intended to improve job centres' effectiveness by making the funds transferred from the Labour Fund to cover the salaries and wages of county job centres' employees dependent on their effectiveness, as well as by increasing the role of social partners in the process of managing the Labour Fund's finances, programming and monitoring the labour market policy.

The foregoing changes are expected to improve the national indicators of employment and cost effectiveness of the primary job seeking forms in relation to the indicators achieved in the previous years. The changes, whose objective is to improve the quality of the services provided to the unemployed accordingly to their needs, should consequently cause the unemployed's average time out of work to be cut short, increase the percentage of job centre employees directly serving the unemployed, and increase the employment effectiveness indicator. The new labour market instruments addressed to the given categories of the unemployed should cut short the average time such unemployeds are out of work. Finally, what is desired is the growth of new jobs, including self-employed jobs created with the support of the Labour Fund.

6. Defining the relations between labour law and unemployment it feels right to pose the question what legal regulation of employment relationships may have an impact on the size and structure of unemployment. Not infrequent is the view that labour law is an unemployment generating factor for being excessively protective, hardly flexible, and for causing employment costs to increase. Consequently, despite the adopted amendments, Polish labour law is perceived to be unconducive to pro-employment attitudes of employers. Oriented at the protection of employees, i.e. persons who are already employed, it not necessarily stimulates creation of new jobs for the unemployed. This said, it is possible to claim that there exists a certain conflict of interests between employers, employees and unemployeds. One fundamental dilemma is whether labour law regulations are meant to protect the existing employment relations, or rather generate employment opportunities at the cost of job stability, as is the case with the flexicurity model. It is this model which, if adopted in Poland, can be seen as a way to solve

at least some of the problems on the labour market in the nearest future. In this context it is also worthwhile to redefine the position of trade unions. Their organisational structure based on workplace organisations is sure to help represent the interests of the persons already employed by the company. To bring to trade unions' attention also the interests of the unemployed would require considering – as indicated herein above – the idea of setting up trade unions' operations outside the workplace.