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Second National Scientific Conference on "Atypical Employment Relations"

edited by
Tomasz Duraj

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COLLECTIVE RIGHTS OF PERSONS ENGAGED IN GAINFUL EMPLOYMENT OUTSIDE THE EMPLOYMENT RELATIONSHIP – AN OUTLINE OF THE ISSUE[1]

Abstract. The main objective of the following study is to introduce readers to the issue of the 2nd National Scientific Conference in the series "Atypical Employment Relations" organized on 3 October 2019 by the Centre for Atypical Employment Relations of the University of Lodz. The consequence of extending the right of coalition to persons performing paid work outside the employment relationship was that they were guaranteed important collective rights, which until 1 January 2019 were reserved primarily for employees. The rights which Polish legislator ensured to non-employees include the right to equal treatment in employment due to membership in a trade union or performing trade union functions; the right to bargain with a view to the conclusion of collective agreement and other collective agreements; the right to bargain to resolve collective disputes and the right to organize strikes and other forms of protest, as well as the right to protect union activists. The author positively assesses the extension of collective rights to people engaged in gainful employment outside the employment relationship, noting a number of flaws and shortcomings of the analyzed norms. The manner of regulating this matter, through the mechanism of referring to the relevant provisions regulating the situation of employees, the statutory equalization of the scope of collective rights of non-employees with the situation of employees, the lack of criteria differentiating these rights, as well as the adopted model of trade union representation based on company trade unions, not taking into account the specific situation of people working for profit outside the employment relationship, are the reasons why the amendment to the trade union law is seen critically and requires further changes.

Keywords: right of coalition, persons engaged in gainful employment outside employment relationship, non-employees, collective employment law, trade union.

UPRAWNIENIA ZBIOROWE OSÓB WYKONUJĄCYCH PRACĘ ZAROBKOWĄ POZA STOSUNKIEM PRACY – ZARYS PROBLEMATYKI

Streszczenie. Głównym celem opracowania jest wprowadzenie czytelników w problematykę II Ogólnopolskiej Konferencji Naukowej z cyklu „Nietypowe stosunki zatrudnienia" zorganizowanej dnia 3 października 2019 r. przez Centrum Nietypowych Stosunków Zatrudnienia Uniwersytetu

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Łódzkiego. Konsekwencją rozszerzenia prawa koalicji na osoby wykonujące pracę zarobkową poza stosunkiem pracy było zagwarantowanie im ważnych uprawnień zbiorowych, które do 1 stycznia 2019 r. były zastrzeżone przede wszystkim dla pracowników. Polski ustawodawca zapewnił niepracownikom: prawo do równego traktowania w zatrudnieniu z uwagi na przynależność związkową lub pełnienie funkcji związkowych; prawo do rokowań mających na celu zawarcie układu zbiorowego pracy i innych porozumień zbiorowych; prawo do rokowań w celu rozwiązywania sporów zbiorowych oraz prawo do organizowania strajków i innych form protestu oraz prawo do ochrony działaczy związkowych. Autor pozytywnie oceniając przyznanie uprawnień zbiorowych osobom pracującym zarobkowo poza stosunkiem pracy, dostrzega szereg wad i mankamentów analizowanych unormowań. Sposób uregulowania tej materii, poprzez mechanizm odesłania do odpowiednich przepisów regulujących sytuację pracowników, ustawowe zrównanie zakresu uprawnień zbiorowych niepracowników z sytuacją pracowników, brak kryteriów różnicujących te uprawnienia, a także przyjęty model reprezentacji związkowej oparty na zakładowych organizacjach związkowych, nie uwzględniający szczególnej sytuacji osób pracujących zarobkowo poza stosunkiem pracy, każe krytycznie podchodzić do nowelizacji prawa związkowego, które wymaga dalszych zmian.

Słowa kluczowe: prawo koalicji, osoby pracujące zarobkowo poza stosunkiem pracy, niepracownicy, zbiorowe prawo zatrudnienia, związki zawodowe.

The following book is the summary of the 2nd National Scientific Conference in the series "Atypical Employment Relations" organized on 3 October 2019 by the Centre for Atypical Employment Relations at the Faculty of Law and Administration of the University of Lodz. The theme of the conference was *Collective labour law or collective employment law? Protection of the rights and collective interests of persons engaged in gainful employment outside the employment relationship.* The decision of the organisers on choosing such topic was influenced by the adoption on 5 July 2018 of the law amending the Trade Union Act and certain other laws (Journal of Acts 2018, item 1608). This act has been in force in Poland since 1 January 2019 and extends the right to form and join trade unions to persons engaged in gainful employment outside the employment relationship, including the self-employed if they do not employ other people for this type of work. This is a very important regulation that is a breakthrough in the collective employment relationship. Taking into account the great importance of the amendment to the trade union law, as well as the doubts and controversies in the legal doctrine and in practice arising from the extension of the right of coalition, the choice of the conference topic should be considered fully justified. The importance of this scientific event is raised by the fact that the conference was attended by many distinguished guests from the world of science, jurisprudence and practice, and the role of speakers and commentators was played by such eminent specialists in the field of collective labour law as Prof. Ludwik Florek (University of Warsaw); Prof. Zbigniew Hajn (University of Lodz); Prof. Jakub Stelina (University of Gdansk); Prof. Iwona Sierocka (University of Bialystok); Prof. Łukasz Pisarczyk (University of Warsaw); Prof. Artur Tomanek (University of Wroclaw); Prof. Monika Gładoch (The Cardinal Wyszyński University in

Warsaw); Prof. Krzysztof Walczak (University of Warsaw); Dr Magdalena Rycak (The Lazarski University in Warsaw) and Dr Jakub Szmit (University of Gdansk). It was a great honour for me to be able to present in front of such a noble group a lecture entitled *The rights of persons performing gainful employment outside the employment relationship in the light of collective labour law (employment) – selected problems*. The importance, complexity, multithreading and topicality of the issues undertaken at the conference are confirmed by the set of articles that make up the publication that we are handing over to you. They concern fundamental issues such as: *The concept of employer and the extension of the subjective (ratione personae) scope of collective labour law* (prof. Zbigniew Hajn); *The issue of representativeness in the lights of the amended Trade Unions Act* (prof. Irena Sierocka); *The right to strike and other forms of protest of persons performing gainful employment under civil law* (prof. Artur Tomanek); *Powers of trade union activists engaged in self-employment – assessment of Polish legislation* (prof. Tomasz Duraj). In addition to the broad perspective of the matter under scrutiny provided by the articles: *Open coalition law, necessity or threat?* (dr Błażej Mądrzycki); *Collective labour rights of self-employed persons on the example of Spain: is there any lesson for Poland?* (dr Aneta Tyc); *Come together now! New technologies and collective representation of platform workers* (prof. Joanna Unterschütz), the post-conference publication also includes studies on specific issues relating to the functioning of collective employment law: *Will 'yellow' unions disappear after the amendment to Act on trade unions?* (dr Magdalena Rycak); *The legal nature of remuneration for periods of release from the obligation to perform work for trade union activists* (dr Małgorzata Mędrala); *Whistleblower rights and protection in the workplace: The role of trade unions in Poland. Selected issues* (dr Łucja Kobroń-Gąsiorowska); *Staff representation rights related to the creation of employee capital plans – PPK* (dr Marcin Krajewski).

A breakthrough moment for the revision of the Polish trade union law was the announcement of the judgement of 2 June 2015 (K 1/13, OTK 2015, No. 6, item 80), in which the Constitutional Tribunal found that Article 2(1) of the Trade Union Act of 23 May 1991 (i.e. Journal of Acts 2019, item 263 hereinafter: UZZ) in so far as it restricts the freedom to form and join trade unions of persons engaged in gainful employment not mentioned in that provision, is incompatible with Article 59(1) in connection with Article 12 of the Polish Constitution of 2 April 1997 (Journal of Acts 1997, No. 78, item 483 as amended), as well as international agreements binding Poland (more broadly: Grzebyk 2016, 199 and next; Duraj 2018, 129 and next). According to the Constitutional Tribunal, the defectiveness of the current statutory regulation resulted from its too narrowly defined subjective scope, which prevented the freedom of association in trade unions of a certain group of persons who were addressees of freedom, as referred to in Article 59(1) in connection with Article 12 of the Constitution. Article 59 of the Constitution

guarantees the right of the coalition to all working people who have been granted such a right under international agreements ratified by Poland, to the extent established by those agreements, regardless of the basis of employment. It is granted to anyone who, while performing work, has specific economic or social interests directly related to professional activity, which require trade union protection. The basis for the adoption by the Constitutional Tribunal of a broad approach to the right of coalition was the examination of acts of international law, in particular the International Labour Organisation Convention No. 87 of 9 July 1948 on freedom of association and the protection of trade union rights ratified by Poland on 25 February 1957 (Journal of Acts 1958, No. 29, item 125). The act indicates that the essence of the right of coalition is that all working people can freely form trade union organisations, according to their will, without the need for the consent of state bodies. In accordance with Article 2 of ILO Convention No. 87, contractors (in the original version of the act: *workers*, *travailleurs*) and hiring entities, without any distinction, have the right, without prior authorisation, to set up organisations at their discretion and to join those organisations, subject to the necessary compliance with their statutes (more broadly: Grzebyk, Pisarczyk 2019, 83).

The Constitutional Tribunal, recognizing the unconstitutionality of the Polish Trade Union Act, introduced the constitutional concept of "employee" understood much broader than the one occurring in the provisions of the Labour Code (Article 2 and 22 of the Labour Code – law of 26 June 1974, i.e. Journal of Acts of 2020, item 1320 as amended – hereinafter referred to as KP). In the opinion of the Tribunal, the status of an employee as a constitutional subject of the freedom of association in trade unions – pursuant to Art. 59 sec. 1 of the Polish Constitution – should be assessed through the prism of three basic criteria: performing paid work; remaining in a legal relationship (regardless of its type) with the entity for which the work is provided; and having professional interests related to the performance of work that can be protected in groups (see polemically: Świątkowski 2016, 11, 14; Musiała 2015; Kapusta 2016, 127 and next).

Taking into account the judgment of the Constitutional Tribunal of 2 June 2015, which recognized the unconstitutionality of the UZZ provisions as to the subjective scope of the of coalition, the Polish legislature decided to extend this right to persons performing gainful work outside the employment relationship. Pursuant to Art. 2 clause 1 in conjunction with art. 11 point 1 UZZ, the right to create and join trade unions is granted to persons who are engaged in paid work on a basis other than an employment relationship if they do not employ other persons for this type of work, irrespective of the basis of employment, and have rights and interests relating to the performance of work which may be represented and defended by the trade union. The decision of the Polish legislature to extend the right of coalition to persons engaged in gainful employment outside the employment relationship (including the self-employed) should be assessed

positively. This solution offers a good opportunity to improve their legal situation, in particular their working conditions. From 1 January 2019, persons engaged in gainful employment outside the employment relationship may both join existing trade union organisations which bring together workers (mixed unions) and set up their own trade union organisations bringing together only non-employees. Following an amendment to trade union law, in accordance with Article 7 of the UZZ, trade unions are required, in respect of collective rights and interests, to represent all the aforementioned persons, irrespective of their trade union affiliation. On the other hand, in individual matters relating to the exercise of gainful employment, trade union organisations represent, in principle, the rights and interests of their members. In accordance with Article 26(1) of the UZZ, it is for trade union organisations to take a position on individual matters of persons engaged in gainful employment in the field of the performance of that work. Furthermore, granting persons working outside the employment relationship the right of the coalition strengthens the effectiveness of the control of compliance by the entity organizing the work of those persons with the rules governing the conditions under which they are to provide the services assigned to them. Pursuant to Article 8 of the UZZ, in accordance with the principles laid down in this Law and in separate laws, trade unions shall monitor compliance with the rules on the interests of those persons and the interests of their families. In particular, this concerns control over compliance at work with the rules and rules on health and safety at work, to which the trade union organisations are required under Article 26(3) of the UZZ. Following the amendment of trade union law, trade union organisations representing persons working outside the employment relationship are also obliged to defend their dignity, rights and material and moral interests, both collective and individual (Article 4 UZZ). Pursuant to Article 5 of the UZZ, those persons, through trade unions, have the right to represent their interests internationally.

A significant disadvantage of the amendment to Trade Union Act is the imprecise personal scope of the right of coalition defined in the UZZ resulting from the unclear definition of persons engaged in gainful employment outside the employment relationship included in Article 1^1(1) of the UZZ. In particular, the reservations concern the condition that there are rights and interests relating to the performance of work which may be represented and defended by the trade union. The doctrine of labour law (see, for example, Stelina 2018, 26) raises the difficult verifiability of this criterion, given that everyone who provides work (services) most often has some interest in the economic conditions of the performance of work (living or social). It is easy to circumvent this condition by skilfully defining in the statutes the objectives and tasks of the trade union concerned. *De lege lata* there are also no instruments to effectively verify whether a group of entities forming a trade union organisation has rights and interests relating to the performance of work

which can be represented and defended by a trade union. There is also no entity to verify this. Neither the hiring entity with which the trade union is formed nor the court at the registration stage of the trade union has such capacity.

The aforementioned shortcoming raises legitimate doubts about the precise definition of persons engaged in gainful employment outside the employment relationship who can enjoy the privileges of collective labour law immanently connected with the right of coalition. It must be realised that the consequence of granting non-employees the right to join trade union organisations is to guarantee them additional collective rights. In that regard, Polish legislature granted persons engaged in gainful employment outside the employment relationship the right to equal treatment in employment. *Expressis verbis* any unequal treatment of the self-employed persons on grounds of their membership or remaining outside the trade union or performing any trade union functions resulting in particular in the refusal to establish or terminate a legal relationship, the unfavourable formation of remuneration for gainful employment or other conditions of employment, being overlooked for a promotion, being refused other benefits relating to gainful employment, as well as being overlooked for any professional development training, shall be prohibited, unless the hiring entity proves that it was guided by objective reasons. Moreover, Polish legislature introduces a mechanism similar to the one applied in case of regular employees, according to which any provisions of civil law contracts under which non-employees provide their services infringing the principle of equal treatment in employment shall become null and void. In such a case, the relevant legal provisions governing the legal relationship between those persons and the hiring entity shall apply instead of such provisions and, in the absence of such provisions, those provisions shall be replaced by appropriate non-discriminatory provisions (Article 3 UZZ). This is therefore a far-reaching interference by the legislature in the principle of freedom of contract in force under Article 353^1 of the Civil Code (Act of 23 April 1964, i.e. Journal of Acts 2020, item 1740 as amended – hereinafter KC), which in this case must nevertheless be regarded as fully justified. In the event of a breach by the hiring entity the principles of equal treatment of persons engaged in gainful employment outside the employment relationship, the right to compensation of not less than the minimum wage, determined on the basis of separate provisions, shall be guaranteed. In this respect, Polish legislature, unfortunately, by taking 'shortcuts', refers to the proper application of the provisions of the Labour Code. On the other hand, the solution that should be positively assessed is the one according to which the provisions of the Act of 17 November 1964 – Code of Civil Procedure on Labour Law Proceedings (i.e. Journal of Laws of 2020, item 1575, as amended – hereinafter referred to as the KPC) apply mutatis mutandis to proceedings concerning infringement of the prohibition of unequal treatment in employment on grounds of membership of a trade union or due to the exercise of a trade union function. Since the court

with jurisdiction to hear these cases is the labour court, it will undoubtedly make it easier for non-employees to assert their claims, especially since, as in the case of employees, the burden of proof is passed onto the hiring entity. A person engaged in gainful employment outside the employment relationship must merely establish before the court the fact of unequal treatment in employment, and then the hiring entity will have to demonstrate that, by differentiating the situation of the employees, he was guided by objective reasons.

An important change introduced by the legislature from 1 January 2019 is to guarantee for the people engaged in gainful employment outside the employment relationship the right to conclude collective labour agreements and other collective agreements that will be dedicated exclusively to these people. Until then, non-employees could only benefit from collective agreements which had previously been concluded for the employees of the entity organising their work. According to the previous wording of Art. 239 § 2 of the Labour Code, the agreement could cover persons performing work on a basis other than an employment relationship. The amendment to the trade union law opened up to people who perform paid work outside the employment relationship, as well as trade union organisations bringing them together, the possibility of conducting negotiations and concluding collective agreements which will set certain minimum safeguard standards in respect of all non-employees falling within the scope of the agreement. This is important as they are not covered by such statutory guarantees as employees. Due to the principle of freedom of contract in civil law (Article 353^1 of the Civil Code) and the low negotiating potential of people working for profit outside the employment relationship, it often occurs that the employing entity unilaterally imposes unfavourable contract conditions on them, and the equality of the parties in this case is only apparent. The amendment of trade union law in this area therefore gives non-employees a great opportunity to strengthen their protection on an individual level, in particular as regards: remuneration and other benefits related to the services they provide, protection of life and health, working time and organisation of work, annual and parental leaves and other paid time off from work or protection of the sustainability of employment. Thanks to these solutions, persons working outside the employment relationship will be able to have a real impact on the formation of the company's labour law applicable to the entrepreneur with whom they are bound by a civil law contract. A significant drawback of the regulations analysed here is the way in which they are introduced for people engaged in gainful employment outside the employment relationship through the mechanism of appropriate application of regulations concerning employees. Pursuant to Art. 21 UZZ, the provisions of section XI of the Act – The Labour Code shall apply accordingly to persons, other than employees, engaged in gainful employment and to their employers, as well as to organisations representing them.

The amendment to trade union law guaranteed persons working outside the employment relationship the right to participate in the resolution of collective

labour disputes. Until 1 January 2019, non-employees were, in principle, not able to organise strikes and other forms of protest to resolve collective disputes arising from their employment. The amendment granted them the right, through trade unions, to enter into a collective dispute with the hiring entity in order to protect their rights and collective interests on the same basis as workers. Pursuant to Article 6 of the Law of 23 May 1991 on the resolution of collective disputes (i.e. Journal of Acts 2020, item 123, hereinafter: URSZ), the provisions of that act, which refers to employees, shall apply mutatis mutandi to persons engaged in gainful employment. This means that *de lege lata* non-employees are guaranteed the right to formulate, through the trade unions representing them, demands aimed at satisfying their collective interests and to take legal forms of resolving collective disputes, in particular the right to co-decide on organizing a strike and the right to take active participation in it, including the ability to conclude post-strike agreements. Under Art. 1 URSZ, collective disputes may concern working conditions, pay or social benefits as well as the trade union rights and freedoms of people engaged in gainful employment outside the employment relationship. The interpretation doubts arising from the application of Art. 6 of the URSZ are more broadly analysed by prof. Artur Tomanek in his article which you can find in this post-conference publication.

Granting persons enaged in gainful employment outside the employment relationship the right of coalition means in consequence that they have the ability to function in trade union structures. This, in consequence, means that the Polish legislature guarantees trade union activists (having a non-employee status) the right to equal treatment in the course of their trade union function; the right to paid time off from work, both on an ad hoc basis (for the purpose of carrying out current activities resulting from their trade union function) and permanently; as well as the protection of the sustainability of civil law contracts constituting the legal basis for the services provided. In accordance with Article 32(1) UZZ, the hiring entity, without the consent of the management board of the enterprise trade union organization, may not dissolve or terminate the legal relationship with a non-employee designated by the resolution of the management board who is a member of a given enterprise trade union, authorized to represent this organization before the employer, and may not unilaterally change the working conditions or remuneration to the detriment of this person, with the exception of the declaration of bankruptcy or liquidation of the employer, and also if it is permitted by separate regulations. If the hiring entity breaches the above protection, a trade union activist employed outside the employment relationship has the right, irrespective of the amount of the damage suffered, to compensation in the amount equal to the 6-month remuneration to which that person was entitled in the last period of employment, and if the remuneration of that person is not paid on a monthly basis – in the amount equal to 6 times the average monthly salary in the national economy in the previous year, announced by the President of the

Central Statistical Office. Moreover, this person may claim damages or redress exceeding the amount of such compensation (Art. 32 (1^3) UZZ). I believe that the scope of powers granted to union activists employed outside the employment relationship is too far-reaching. The legislator, by equalizing their legal situation with that of trade unionists having an employee status, does not take into account the specificity of people working for profit under civil law contracts. *De lege lata*, the scope of rights guaranteed to trade union activists employed outside the employment relationship constitutes an excessive and unjustified interference with the fundamental principle of freedom of contract on the basis of civil law employment relations. My doubts and the assessment of the legal regulation of the rights of trade union activists engaged in gainful employment outside the employment relationship have been presented by me on the example of self-employed persons in a separate article in this post-conference publication.

A serious threat to the effectiveness of the solutions adopted after the amendment to the trade union law regarding the collective rights of persons engaged in gainful employment outside the employment relationship is the maintenance of the model based on company trade unions, which are granted the most far-reaching competences in the field of representation and defense of the rights as well as professional and social interests of working people. This is a large inconsistency on the part of the Polish legislature, because this model is adapted only to employee employment relationships, where we are dealing with voluntarily subordinated work for one employer. The special situation of people who perform paid work outside the employment relationship (especially on the basis of civil law contracts) is that they are not bound by one (specific) workplace (usually there are several jobs). This requires a reconstruction of the current model of trade union representation, which is currently based on company trade unions for the purpose of the statutory strengthening of supra-company trade union structures, which take into account the specificity of non-employee employment relations much better.

Another aspect that leaves much to be desired is the way in which Polish legislature has regulated the collective rights of persons working outside the employment relationship. By adopting a "shortcut" Polish legislature does not introduce separate regulations taking into account the specificities of persons working outside the employment relationship and uses a dubious mechanism of referring to the relevant provisions regarding the situation of employees. In this way, the Polish legislator regulates both the right to equal treatment in employment on the basis of trade union membership or the performance of trade union functions in the scope of claims, and the right to bargain for the resolution of collective disputes, including, in particular, the right to organise strikes. Such a way of regulating this issue raises many interpretative problems, making the legal situation of people engaged in gainful employment outside the employment relationship unclear and uncertain in the context of the practical application of the above-mentioned

collective rights. This can be clearly seen in the appropriate application of the provisions of the URSZ to non-employees. There are numerous doubts brought by the regulation as to whether these people are granted all the rights guaranteed to employees in the field of settling collective labour disputes and, for example, what is their responsibility for participating in an illegal strike? (see more broadly Duraj 2020, 73–75). While I disapprove of the above-discussed method of regulating the collective rights of people working outside the employment relationship through the mechanism of referring to the relevant provisions regulating the situation of employees, I believe that the legislator should attempt to create separate regulations in this respect (modelled on the provisions of the labour law), which will be adjusted to to the specific conditions under which these persons provide services to the employing entity. This would eliminate a number of interpretative doubts that arise *de lege lata* under existing trade union law.

Finally, it should be noted that the way in which the Polish legislature has regulated the guarantees under coalition rights regarding collective labour law for persons engaged in gainful employment outside the employment relationship leads in in many cases to equality (significant approximation) of the level of their protection with that of employees. This is reflected in: the right to equal treatment in employment on grounds of trade union membership or the exercise of trade union functions; the right to bargain with a view to the conclusion of a collective labour agreement and other collective agreements; the right to bargain for the particular purpose of the resolution of collective disputes, as well as the right to organise strikes and other forms of protest and the right to protect trade union activists. While this tendency does not raise any objections with regard to the exercise of the right to equal treatment or the right to conclude collective labour agreements and other collective agreements, it is very questionable with regard to the rights of trade union activists (especially with regard to paid leaves from work and the requirement of consent to terminate a civil law contract), or the right to strike or other forms of protest. It is a mistake to equate the level of collective entitlements of people engaged in gainful employment outside the employment relationship with the entitlements of employees. Firstly, there is no justification for this in the international standards in force in Poland. Secondly, such an approach of the Polish legislature does not sufficiently take into account the differences resulting from non-standard forms of employment. The scope of collective rights guaranteed *de lege lata* to persons engaged in gainful employment outside the employment relationship (primarily on the basis of civil law contracts) constitutes an excessive and unjustified interference with the fundamental principle of freedom of contract in terms of civil law employment relations. This regulation does not take into account the specificity of non-employees, who most often do not have such a strong legal relationship with the hiring entity as employees.

Another serious drawback of the regulation at issue is also the fact that the Polish legislature does not differentiate in any way the scope of collective

rights guaranteed to people working for profit outside the employment relationship, ensuring the same level of protection to all, regardless of their actual and legal situation. It seems that in this area *de lege ferenda* the scope of these rights should be diversified, for example by referring to the criterion of economic dependence on the hiring entity for whom work is provided outside the employment relationship. This means that the broadest range of privileges (the most similar to the situation of employees) should apply only to those non-employees whose income is wholly or predominantly derived from the employing entity where a given trade union organization representing their interests operates. Such a criterion for the application of rights (also of a collective nature) to non-employees is found in the legislations of certain European countries, which I am more broadly describing in the second article in this publication (see also the article by Dr Aneta Tyc). The criterion of hourly dependence on the hiring entity, as proposed in the draft of Individual Labour Code of 2018[2] is also worth considering.

Encouraging you once again to read the publication summarizing 2nd National Scientific Conference in the series "Atypical Employment Relations", I would like to positively assess the decision of the Polish legislature extending the right of coalition to persons performing gainful employment outside the employment relationship. As a consequence of this move, self-employed persons were granted additional collective rights from 1 January 2019, which until now were reserved primarily to employees. This solution paves the way for non-workers to improve their legal situation (to strengthen their protection on an individual basis), in particular working conditions, by the possibility of raising protection standards through systemic regulation. This is so important that persons who work for a profit outside the employment relationship are generally not covered by the legislature, like workers, by a minimum level of protection. This is even more important as the people working outside the employment relationship are generally not covered by the legislature, like employees, with the minimum scope of protection. Unfortunately, the way this matter is regulated through the mechanism of reference to the relevant provisions regulating the situation of employees, the statutory equalization of the scope of collective rights of non-employees with the situation of employees, the lack of criteria differentiating these rights, as well as the adopted model of trade union representation based on company trade unions, not taking into account the specific situation of people engaged in gainful employment outside the employment relationship, contribute to the critical perception of the amendment to the trade union law, which requires further changes. The shortcomings of this regulation are also confirmed by the

[2] Pursuant to Art. 177 § 1 of this project, an economically dependent self-employed person is a person who provides services performing them independently for a specific entrepreneur or organizational unit that is not an entrepreneur or a farm (contractor), directly, on average for at least 21 hours per week, for a period of at least 182 days.

practice of implementing these provisions. After one and a half years of the new union law being in force, this group of people shows little interest in the right of coalition. Even in industries where civil-law employment dominates and there are strong union structures (e.g. health service), no actions aimed at creating non-employee trade unions have been observed, and joining the existing labour unions for people engaged in gainful employment outside employment relationship is also rare. Answering the question posed to the conference participants in its title, there is no doubt that the amendment to the trade union law of July 5, 2018 opens a new chapter in the history of collective labour relations regulations, providing clear grounds for formulating the thesis on *de lege lata* of collective employment law (see also Baran 2018, 4).

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THE CONCEPT OF EMPLOYER AND THE EXTENSION OF THE SUBJECTIVE (*RATIONE PERSONAE*) SCOPE OF COLLECTIVE LABOUR LAW

Abstract. In accordance with the changes in the provisions of the collective labour law in force since January 1, 2019, an employer within their meaning is also an organizational unit without civil law subjectivity, if it employs work contractors engaged in paid work engaged in paid work other than employees. This leads to the dualism of the notion and legal construction of the entity employing non-employee contractors on the basis of individual and collective relations. In individual legal relations, the entity employing contractors on the basis of civil law contracts may only be a civil law entity. On the other hand, in collective labour relations, organizational unit without civil law capacity may be regarded as their employer. The purpose of this study is to give the reasons for the thesis that such regulation leads to legal confusion, and the most appropriate way to remove it is to link the employer's subjectivity with civil law subjectivity in individual and collective labour law.

Keywords: employer, employee, work contractor, civil law capacity, paid work performing relations, collective labour relations.

POJĘCIE PRACODAWCY A ROZSZERZENIE ZAKRESU PODMIOTOWEGO ZBIOROWEGO PRAWA PRACY

Streszczenie. Zgodnie ze zmianami przepisów zbiorowego prawa pracy obowiązującymi od 1 stycznia 2019 r., za pracodawcę w ich rozumieniu uznaje się także jednostkę organizacyjną niemającą podmiotowości cywilnoprawnej, jeżeli zatrudnia innych niż pracownicy wykonawców pracy zarobkowej. Prowadzi to do dualizmu pojęcia i prawnej konstrukcji podmiotu, który zatrudnia wykonawców pracy niebędących pracownikami, na gruncie indywidualnych stosunków świadczenia pracy i zbiorowych stosunków pracy. W stosunkach indywidualnoprawnych podmiotem zatrudniającym wykonawców cywilnoprawnych może być bowiem wyłącznie podmiot prawa cywilnego. Natomiast w zbiorowych stosunkach pracy za ich pracodawcę będzie można uznać także jednostki organizacyjne niemające zdolności cywilnoprawnej. Celem niniejszego opracowania jest wykazanie, że taka regulacja prowadzi do zamętu prawnego, a najwłaściwszą drogą do jego usunięcia jest powiązanie podmiotowości pracodawcy z podmiotowością cywilnoprawną w indywidualnym i zbiorowym prawie pracy.

Słowa kluczowe: pracodawca, pracownik, wykonawca pracy, zdolność cywilnoprawna, indywidualne stosunki świadczenia pracy zarobkowej, zbiorowe stosunki pracy.

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1. INTRODUCTORY REMARKS

The Act of 5 July 2018 amending the Act on Trade Unions and Some Other Acts (*Journal of Laws* 2018, item 1601; hereinafter referred to as the "Amending Act 2018") significantly expanded the subjective scope of collective labour law. In particular, from the date of its entry into force, the right to associate in trade unions is vested in persons performing paid work, i.e. employees and other persons who provide work for remuneration on a basis other than an employment relationship, if they meet the requirements set out in art. 1^1 point 2 of the Trade Unions Act 1991 (Act of 23 May 1991; consolidated text: *Journal of Laws* 2019, item. 263). To these persons, hereinafter referred to as "work contractors", the provisions of Chapter Eleven of the Labour Code regarding collective labour agreements as well as the provisions of the Collective Disputes Settlement Act 1991 (Act of 23 May 1991; consolidated text: *Journal of Laws* 2019, item. 123) apply accordingly. Due to the indicated extension of the subjective scope of collective labour law, the legislator decided that a new regulation of the group of entities using the work of contractors is also necessary. Hence, the concept of creating an autonomous notion of employer for this field of labour law was adopted.

The purpose of this study is to consider whether this change in the shape adopted by the Amending Act has been the right solution.

2. EVOLUTION OF THE CONCEPT OF EMPLOYER IN COLLECTIVE LABOUR LAW

2.1. The period before the Second World War

At the beginning, it should be noted that for a long-time entities employing work contractors on grounds other than the employment relationship were to a greater or lesser extent covered by the provisions governing collective labour relations. In the interwar period, and in some countries even before World War I, the work of cottage workers was covered by legal protection. This protection was not limited to individual relations and labour administration, but also concerned collective relations. Associations of cottage workers were granted the ability to conclude collective labour agreements. Also in Poland in regained areas previously annexed by Prussia and covered by German collective bargaining law before the introduction of new Polish provisions, the ability to conclude collective agreements was granted to such associations. Associations of agricultural workers and employers whose legal relations related to the performing of work were not based on an employment contract, but on contracts governed by civil law or relations of service regulated in the regulations for servants, also had a specific capacity to conclude collective agreements (the right to collective bargaining, see: Raczyński 1930, 40, 247 *et seq.*, 255–256). Assigning entrepreneurs employing

cottage workers or agricultural workers the ability to take legal action in the field of collective employment relations, as well as employers employing employees, did not pose legal problems at that time, because they were simply entrepreneurs employing contractors on various legal titles based on uniform legal capacity resulting from being a legal person or a natural person.

2.2. The years 1945–1991

In the period after World War II, until the political transformation of 1989, due to the lack of trade union freedom, there was in fact no collective labour law in the strict sense. Nevertheless, collective labour relations were regulated by law, "socialist trade unions" operated, agreements called collective labour agreements and having some of the key features of those acts were concluded. However, employing contractors other than employees was not a problem at the time in collective labour relationships. Admittedly, since 1985, cottage workers and agents, if they were not employers, had the right to belong to trade unions operating in workplaces but collective labour agreements, in accordance with the pre-war Act on Collective Agreements of 1937 and later with the Labour Code, included only employees. Collective agreements were sectoral. It was only at the end of this period that the so-called company collective agreements and payroll arrangements were allowed.

During this period, a specific legal construction of the employer was also formed, the essence of which was the recognition that organizational units without civil-law subjectivity were also able to employ employees. According to this construction employers can also be internal organizational units of a legal person, if they have been separated organizationally and financially, and the provisions governing the system of that person authorize such unit to employ employees. This legal construction defined in the legal writing as the managerial concept of the employer, as opposed to the so called "ownership concept" (Hajn 2018, 175–180), was finally adopted in 1974 in the Article 3 of the Labour Code and confirmed by subsequent regulations and their judicial interpretation.

It is worth pointing out however, that the aforementioned company agreements and payroll arrangements could only be concluded by entities with legal personality (Art. 241 § 1 of the Labour Code in the wording established by the Act of November 24, 1986 amending the Act – Labour Code, Journal of Laws No. 42, item 201). This proves that the legislator at that time was aware of the impossibility to enter into and perform property obligations arising from collective agreements without having civil-law subjectivity.

2.3. The years 1991–2018

A new situation arose in 1991 in connection with the entry into force of the laws constituting the collective labour law after the political transformation of 1989. According to the original text of the Trade Union Act 1991, the right of

association in these organizations was granted not only to employees, but also for members of agricultural production cooperatives, cottage workers and agents if they were not employers. The provisions of this Act were applicable to these groups of work contractors. Importantly, in accordance with the provisions of the Labour Code as amended in 1994, collective agreements could also cover persons providing work on a basis other than an employment relationship (Article 239 § 2). However, because of that the principle of the most favourable provision and the principle of employee's privilege were not extended to these persons, this did not mean that they were guaranteed the minimal nature of the negotiated services.[1]

The Trade Union Act did not contain a separate definition of the employer at that time, therefore the entity defined in Article 3 of the Labour Code should be considered as the employer. This was also confirmed by the Employers' Organizations Act 1991 (The Act of May 23, 1991, Journal of Laws 2015, item 2029) and the Collective Disputes Settlement Act 1991 which after a certain period of recognition that employers in their understanding were only employers conducting business activity, finally assumed that employers in their understanding are entities defined in Article 3 of the Labour Code. At the same time, the Trade Unions Act ordered to apply its provisions to persons other than employees entitled to associate in trade unions (Article 2 parts 6 and 7). The Collective Disputes Settlement Act (Article 6) regulated the scope of its application to members of agricultural production cooperatives, agents and cottage workers in an analogous manner. This justified the interpretation according to which entities employing mentioned above non-employee contractors should be treated as employers in the sphere of their rights and obligations to the extent that the provisions of the Trade Unions Act Trade Unions Act and the Collective Disputes Settlement Act were applicable to this group of work contractors. However, this could only apply to employers with legal capacity within the meaning of Articles 30 and 33^1 of the Civil Code, without which they could not establish employment relationships based on civil law contracts. In this sense the concept of employer in collective law was broader than in individual law, since it also included entities employing non-employee work contractors in the scope of collective labour relations (see: Hajn 2013, 106).

[1] The exception was the remuneration of cottage eworkers, who since 1996 have been guaranteed the right to components of remuneration and benefits related to work, such as for employees, if this right and the scope of its application to contractors were specified in the collective labour agreement, see § 12 of the Regulation of the Council of Ministers of 31 December 1975 on the employee rights of persons engaged in cottage work, Journal of Laws 1976.3.19 as amended. in the wording determined by § 1 point 15 of the Regulation of 28 May 1996 (Journal of Laws 1996 No. 60, item 280) amending the above-mentioned Regulation of June 2, 1996.

2.4. The concept of employer in the first version of the draft act of the Amending Act 2018

Interesting definitions of the employer and work contractors have been presented in the first version of the draft act of the Amending Act 2018 in the Sejm Print No. 1933. According to it, the employer should be understood as an employer within the meaning of art. 3 of the Labour Code, as well as a natural person, legal person or an organizational unit that is not a legal person, to whom the Act confers legal capacity and to whom the provisions on legal persons apply, if they employ a person other than an employee who performs paid work (more: Tomanek 2019, 20). The definition of employer therefore considered the civil law nature of some of the paid work performing relations which collective protection was broadly introduced by the project as well as the consequences of such relationships for the legal construction of the parties. As it was emphasized in the explanatory statement to the bill, the proposed change of the definition of the employer meant that the employer was a party to the contract concluded with the person performing paid work, i.e. both employment contracts and civil law contracts. Unfortunately, at the same time, the weakness of the project was the adoption of various subjective constructions of the employer in labour and civil law relations. As a result, for part of the staff employed under civil law contracts the employer meeting the definition in art. 3 of the Labour Code, but not having civil-legal capacity, would not be an employing entity (see however, the opinion of Baran 2018, 8[2]). To exercise specific rights and obligations towards such contractors the body of such a unit would have to be authorized to do so by appropriate civil law actions. It would also cause significant difficulties in collective labour relations because employees and contractors employed under civil law contracts would not constitute the same staff. For example, for the purposes of the numerical requirements related to the establishment of a trade union organization, results of a strike referendum, and determination of the representativeness of a trade union organization, this could be a different unit for employees than for other persons engaged in paid work. A collective agreement would have a different scope for both. The only solution in such a situation could be the application of Article $24^{1}{}^{28}$ of the Labour Code allowing for the conclusion of one agreement for employers being part of one legal entity.

The original draft described above was finally changed by the Senate because of amendments contained in its resolution of June 29, 2018 (print number 2682) and subsequently adopted by the Sejm (lower house of parliament). As a result, it adopted the current concept of employer in Article 1^{1} point 2 of the Trade Union

[2] According to this opinion, as an employer of non-employee contractors the project also considered an internal organizational unit with no civil law capacity, if it had appropriate organizational and financial separation.

Act, as amended by the Amending Act 2018. In the course of the preparatory work for this project, the original definition of the person performing paid work was also changed. In particular, the condition of not taking economic risk associated with such work was eliminated from the list of such person's characteristics.

3. THE CONCEPT OF AN EMPLOYER IN THE CURRENT PROVISIONS OF COLLECTIVE LABOUR LAW

According to Article 1^1 of the Trade Union Act in the wording specified in the Amending Act 2018, the employer should be understood as an employer within the meaning of Article 3 of the Labour Code and the organisational unit even if it does not have legal personality, as well as a natural person, if they employ a person other than an employee who performs paid work, regardless of the legal basis of this employment. An employer in the light of this provision is therefore an organizational unit, even if it has no legal personality or a natural person, if it employs: (-) employees, or (-) other than employees persons performing paid work or (-) employees and persons other than employees performing paid work. This concept of the employer has also been adopted in the provisions on collective agreements (Article 21 part 3 of the Trade Union Act), in the Collective Disputes Settlement Act 1991 (Article 5) and the Employers' Organizations Act 1991 (Article 1 part 2).

The above definition leaves no doubt as to the intention of the legislator. It clearly indicates that the employer within the meaning of provisions of the collective labour law after the amendments introduced by the Amending Act 2018 is the employer defined in Article 3 of the Labour Code, and moreover, a natural person or organizational unit, with or without legal personality, employing a person other than an employee performing paid work. Therefore, the legislator clearly expressed its intention to recognize as an employer also an entity employing contractors on the basis of civil law contracts, despite the lack of the civil law capacity. Such a conclusion is additionally confirmed in the motives to the Senate resolution of June 29, 2018 above described, where it was clearly stressed that the new definition of the employer in the Trade Unions Act should be consistent with the definition of the employer contained in Article 3 of the Labour Code. From all this it follows that in the legislator's intention for the use of collective labour law an organizational unit without civil law capacity should be treated as if it were a party to civil law contracts like contracts of mandate, agency, cottage work and others, despite the fact that in the individual legal sphere it has no legal capacity to enter them.

This kind of regulation leads to legal confusion, which it seems the legislator when drafting the definition of the employer in the Amendment Act 2018 did not notice. It should be noted that regulating in other acts the individual protection

of contractors who are not employees, the legislator uses terms consistent with the Civil Code, without questioning the need for entities employing such persons to have civil law capacity. An example would be the provisions of the Act on trade restrictions on Sunday and public holidays (Act of 10 January 2018, Journal of Laws 2018 item 305) or the Act on the minimum remuneration for work (Act of 10 October 2002 on the minimum remuneration for work, Journal of Laws 2018 item 2177) which specify entities employing such persons using terms such as an entrepreneur, a non-entrepreneur organizational unit, without indicating that they do not need to have legal personality. Also, the Labour Code itself, the entity using the work performed by natural persons on a basis other than the employment relationship calls in the Article 304 § 3 an entrepreneur who is not an employer (see also Tomanek 2019, 23). As a result, all this leads to the dualism of the notion and legal construction of the entity employing non-employee contractors on the basis of individual and collective relations. In individual legal relations, the entity employing work contractors on the basis of civil law contracts may only be a civil law entity (see Hajn 2018, *passim*; Tomanek 2019, 25). On the other hand, in collective labour relations, organizational units without civil law capacity ought to be regarded as their employer. Thus, in individual legal relations, the employer for a part of the staff composed of employees may be an employer who has no civil legal capacity within the meaning of Art. 3 of the Labour Code, but for a part of this staff consisting of civil law contractors, a legal person in whose structure the employer operates. In turn in collective relations, a subject who has no civil-law subjectivity will be considered an employer for the entire staff. But then it is not known on what basis the collective actions of such an employer, such as the conclusion of a company collective labour agreement, are to have effects in terms of the individual rights of contractors employed by another legal entity (see also Tomanek 2019, 24–25). It seems that this situation cannot be defended from the point of view of the basic constructions of civil and labour law, correct legislation, logic as well as the needs of proper conduct of legal transactions and proper protection of the work contractor.

4. *DE LEGE FERENDA* CONCLUSIONS

The basic problem that emerges from the above comments is finding a way out of the legal confusion described in the previous section of this study. I believe that two goals should be assumed when looking for such a way out. Firstly, since the legislator wants to use the term employer in the provisions of collective labour law to describe entities employing contractors on various legal grounds, the legal construction of this concept should ensure that the entity has the ability to establish both employment relationships and civil law work-based relationships. Secondly, this entity should be able to take legal actions in the field of collective

labour relations for the entire staff, i.e. its members who are employees as well as members performing work on the basis of civil law contracts and administrative acts.

These goals can only be achieved by changing the law by accepting that the employer within the meaning of the Article 3 of the Labour Code and within the meaning of the provisions of the collective labour law is an entity having the capacity under civil law within the meaning the Article 33 and art. 33^1 of the Civil Code. According to this assumption, the Article 3 of the Labour Code should state that: The employer is a natural person, a legal person or an organizational unit which is not a legal person, to whom the law confers legal capacity and to which the provisions on legal persons apply, being a party to the employment relationship. In turn, the definition in collective labour law could be as follows: An employer within the meaning of this Act is a natural person, a legal person or an organizational unit that is not a legal person, to whom the law confers legal capacity and to which the provisions on legal persons apply, employing persons engaged in paid work. If this proposal is adopted, the definition of an employer in collective labour law will include both the employer in the strict sense – the party to an employment relationship as well as the orderers in contracts of mandate and in agency contracts, entrepreneurs in cottage industry and other entities entering into civil-law dependent work-based relations or administrative-law employment relations.

Arguments for adopting such an "ownership concept" in individual and collective labour law have already been repeatedly presented in the doctrine, hence there is no need for extensive repetition. Summing up this argumentation, it should be stated only that the proposed concept:

− consolidates the entity employing employees and other work contractors in individual work-based relations, basing it on the same concept of legal capacity and allowing the same natural person or organizational unit to be simultaneously a party to various dependent work-based relationships;

− consolidates the employer's subjectivity in individual and collective labour law;

− consolidates the subjectivity of the employer with his/her/its subjectivity as an entrepreneur and more generally with his/her/its subjectivity in civil law relations;

− makes the legal construction of the employer real, combining it with an entity disposing property and capable of making property disposals and accepting property increments, which is necessary for the realization of rights and obligations arising from the employment relationship and other relations connected therewith, other relationships of dependent work and relations connected thereto as well as collective labour relations;

− harmonizes the Polish concept of employer with its standard understanding in other countries and in EU law.

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OPEN COALITION LAW, NECESSITY OR THREAT?

Abstract. From January 1, 2019. Amendments to the Act of July 5, 2018 amending the provisions on trade unions and some other acts apply (almost in full). Amendments to the Polish act are a consequence of the Committee for the Freedom of Association, Labor Law Organizations and the judgment of the Polish Constitutional Tribunal. The main and expected effect of the amendment is the extension of coalition freedom in trade unions. This issue is important not only for the consistency of the legal system with international law, but also for social reasons. Concluding civil law contracts in the place of employee forms of employment is a common practice in Polish conditions. The main problem is that the civil law contract has a purpose other than the employment contract. Contracts of mandate and provision of services are the basis for the implementation of actual and legal activities. Besides, the legislator does not have any real actions aimed at eliminating the defective practice. The text is an attempt to synthetically summarize the motives of the amendment, as well as its effects and tests.

Keywords: employment, non-employee employment, trade unions.

OTWARTE PRAWO KOALICJI, KONIECZNOŚĆ CZY ZAGROŻENIE?

Streszczenie. Od 1 stycznia 2019 r. obowiązują (niemal w całości) zmiany wprowadzone ustawą z dnia 5 lipca 2018 r. o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw. Zmiany w Polskiej ustawie są następstwem zaleceń Committee on Freedom of Association Labour Law Organizations i wyroku Polskiego Trybunału Konstytucyjnego. Zasadniczym i oczekiwanym skutkiem nowelizacji jest poszerzenie wolności koalicji w związkach zawodowych. Kwestia ta jest istotna nie tylko ze względu na spójność krajowego systemu prawnego z prawem międzynawowym, ale także ze względów społecznych. Zawieranie umów cywilnoprawnych w miejsce pracowniczych form zatrudnienia jest częstą praktyką w polskich warunkach. Zasadniczy problem wiąże się z tym, że umowy cywilnoprawne mają inne przeznaczenie i cel niż umowa o pracę. Umowy zlecenia i świadczenia usług są podstawą realizacji czynności faktycznych i prawnych. Pomimo to, ustawodawca nie podejmuje żadnych realnych działań zmierzających do wyeliminowania wadliwej praktyki. Tekst jest próbą syntetycznego omówienia motywów nowelizacji, a także jej skutków. W prowadzonych badaniach zostanie wykorzystany dorobek literatury i orzecznictwa. Analiza obejmie projekt nowelizowanej ustawy i materiały legislacyjne, a także źródła prawa międzynarodowego.

Słowa kluczowe: zatrudnienie pracownicze, zatrudnienie niepracownicze, związki zawodowe.

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1. INTRODUCTION

By the Amendment Act of July 5, 2018 (amendment act, 2018. Dz.U.2018.1608), the existing provisions of the Act on Trade Unions were changed. The change consisted in extending the coalition law by allowing a wider group of entities to form and join trade unions than was previously possible. A synthetic description of the introduced changes is presented in the justification to the draft amendment act, which explains that:

> The draft regulation changes the provision of Art. 2 clause 1 u.z.z. Pursuant to the new wording of this provision, the right to establish and join trade unions will be vested in persons performing gainful work. As a consequence, a definition of the concept of a person performing gainful work was introduced to the Act on Trade Unions (justification of the bill, 2018).

According to the added definition, a person performing gainful work is

> an employee within the meaning of Art. 2 of the Labor Code or a person providing work for remuneration on a basis other than an employment relationship, if he or she does not employ other people for this type of work, regardless of the basis of employment, and has such rights and interests related to the performance of work that may be represented and defended by a trade union.

The introduced changes result in the fact that the trade union will be able to belong to or create such a union (apart from employees within the meaning of Labour Code), e.g. persons fulfilling the obligation on the basis of a mandate contract, provision of services or the so-called self-employment (justification of the bill, 2018).

The amendment, in its own way, is groundbreaking, extending the freedom of the coalition to non-employee entities allows to recognize that in the sphere of collective labor law we already deal with employment law. Another issue is that the application of trade union protection to civil contracts means another approximation of this type of contracts to employee employment.

The amendment is a good opportunity to consider the use of civil contracts as alternative forms of entrusting work. Practical experience as well as analysis of sources indicate that the so-called "Civil law employment" is already (despite the accompanying controversy) a kind of common practice on the Polish labor market. For these reasons, it is worth noting whether the inclusion of civil law contracts in the coalition law is a natural consequence of their application, or only increases the chaos that accompanies them.

2. POLISH COALITION LAW

The subjective scope of trade union membership, until the time preceding the entry into force of the amendment in question (i.e. before January 2019), was in fact a repetition of the status in force in the Act of October 8, 1982 – the

non-binding act on trade unions (trade union act, 1982). As a consequence, it meant that the national legislator, despite numerous changes taking place on the labor market, still in fact lasted in the reality of 1980s, of the previous century, thus limiting the freedom of creating and joining trade unions to selected groups of entities (Pisarczyk 2019, 125). Already during the effective date of the Act of 1982, it was pointed out that the belief that "there was a need to ensure the right to form trade unions, also the so-called non-employement professional groups, which include self-employed persons working on their own account who do not themselves employ workers" (Zieliński 1986, 282). Nevertheless, in Art. 2 of the Act of 1991, union freedoms (the right to create and belong to trade unions) were vested in employees within the meaning of the Labor Code, as well as members of agricultural production cooperatives, people working under an agency contract, homeworkers, pensioners, unemployed persons, persons ordered to perform alternative service and officers (trade union act, 1991. Dz.U.2015.1881).

The scope of regulation thus established has often been the subject of interest in the literature. There are opinions in the literature according to which the method of granting the right to belong to trade unions in force until the amendment was a kind of *legislative discretion* of the legislator (Hajn 2010, 176). From the content of the regulations in force at that time, it was difficult to derive an axiological justification for a specific "dosing" of the coalition law to selected entities. In the method of regulation adopted by the legislator, it was also difficult to find clear intentions and explain how to justify the division into full and limited coalition law (Hajn 2010, 176).

3. THE STATE OF POLISH REGULATIONS AND INTERNATIONAL STANDARDS

The state of the applicable regulations also gave rise to doubts against the background of international standards (Zieliński 1986, 276–284), namely the Conventions 87 Labor Law Organization (ILO) of 1948 (ILO Convention No. 87). The convention creates the possibility of trade union membership for a wider group of entities than employees within the meaning of Art. 2 Polish Labour Code. An analysis of its provisions may lead to such conclusions. The original versions of the convention also used terms such as 'workers' in the English version and 'travailleurs' in the French language. This fact served as the main argument in the discussion on the compliance of national regulations with international standards. While justifying the need to change the Polish law, it was emphasized that this concept should be interpreted more broadly than the concept of an employee within the meaning of Art. 2 of the Polish Labor Code. Based on this argumentation and accusing the incompatibility with regard to the adjustment of national regulations to international standards, in 2011 the Committee on Freedom of Association Labor Law Organizations (Committee) received a complaint (NSZZ

Solidarność, complaint) against the Government of the Republic of Poland. It indicates violations of trade union freedoms in Poland consisting in the restriction of trade union freedoms for non-employees. The arguments presented in the complaint met with recognition in 2012, the Committees issued a recommendation according to which:

> The Committee requests the Government to take the necessary measures in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87 (Reports of the Committee on Freedom of Association. Geneva 2012).

4. WORKER, THAT IS WHO, PARTY OF CIVIL CONTRACT?

The growing popularity of non-employee forms of employment, at least prima facie, justifies the efforts to extend the coalition law to a wider group of entities than just employees within the meaning of Art. 2. The Labor Code. It becomes problematic whether this scope should cover civil law employment known in Poland – contracts of mandate and provision of services. The different nature of civil contracts than the employee ones may raise doubts in this respect. For these reasons, it is worth devoting a moment more attention to the Committee's recommendations, the more so as they were of interest in the literature.

During the conference Recodification of labor law, which took place in the Polish Senate, the subject of ILO recommendations was discussed. It was then stated that:

> The Committee is wrong because conventions no. 87 and 98 use the word "employee" in the authentic English and French texts and this word has the same connotation in these legal systems as in Poland – a person employed on the basis of an employment relationship. The Committee would like to support the scope of freedom of association in a new situation that was not the case fifty years ago, and this requires a decision by the ILO General Conference, not just the interpreting body (Podgórska-Rakiel 2013, 71).

Regardless of the formal comments, there were also doubts about the conclusions of the Committee, and more specifically the scope of analyzes preceding the conclusions about the contradiction of Polish regulations with the Convention (Sobczyk 2018, 214). As already mentioned, it is problematic to include entities employed under civil law contracts with the right to form and belong to trade unions. In its considerations, the Committee came to the conclusion that on the basis of Polish legal regulations the concept of *workers* is understood too narrowly, which means that persons employed on the basis of civil contracts cannot join and form trade unions. As a consequence, the Committee assumed that the right to belong and establish trade unions should apply to all employees, including those employed under civil contracts.

The intention to extend trade union protection to broad groups of the employed is indisputable. Only the issue of legal standards is problematic. It cannot be determined from the recommendations how it was concluded that the civil law employment model applied in Poland should fall within the scope of the term *worker*. It is all the more troublesome as entrusting work under the terms of civil law contracts is specific in Poland. The problem is that the concept of worker is not defined in the Convention and in the recommendations (Sobczyk 2018, 214). Against the background of these circumstances, there is a doubt whether the position of the Committee is too hasty and whether the Committee has sufficient knowledge about the so-called civil law employment (Sobczyk 2018, 214). It seems that the inclusion of civil contracts in the scope of the term *worker* – contracts of mandate, provision of services – should be preceded by a confrontation of assumptions resulting from the construction of a *worker* and Polish civil contracts.

Based on the literature, it can be established that the concept of *worker* comes from Anglo-Saxon doctrine (Musiała 2018, 7–13). In fact, its scope seems to be broader than the concept of an employee as defined by the Polish Labor Code. The only thing is that the *workers* perform work in conditions similar to those of the employees, and this applies mainly to their entitlements. The literature emphasized that:

> The reason for using this extended definition of dependent status is the need to apply protection standards to people who work in conditions similar to employees. The first package of these regulations concerned the application of basic employee standards in relation to: minimum wage, protection against dismissal, protection against exceeding the norms of working time (Musiała 2018, 14).

Consequently, unlike the Polish contractor, the *worker* has employment rights and performs work under the direction of the principal (Sobczyk 2018, 212). Transferring the meaning to the Polish legal order, it can be assumed that it includes apprentices and volunteers. However, it is not so obvious as for the self-employed (Musiała 2018, 10).

Doubts as to identifying these concepts become all the more justified when we realize that the use of civil contracts as alternative forms of employment to an employment contract is a specific distortion of the Polish legal system as a cheap form of employment favoring combating unemployment (Kostrzewski, Miączyński 2015). As practice shows, this ad hoc solution has entered the legal system for a long time. Currently, entrusting work under the terms of this type of contract is even provided for in generally applicable acts (act on employment promotion and labour market institution, 2004. Dz.U.2019.1482). Nevertheless, there is no doubt that civil law employment in relation to employment contracts is a much less favorable form for the employee. The character of civil contracts differs in terms of axiology and purpose from employment contracts. Besides,

limiting the exploitation connected with the use of civil contracts was one of the main reasons for the birth of labor law. Civil law, unlike labor law, does not know such structures as working time standards, rest breaks (daily and weekly), holidays, or general or special protection of employment durability. For these and many other reasons, "work" under a civil contract is much less favorable from the perspective of an "worker" than it is under a contract of employment. Nor is it possible to lose sight of the fact that these employment characteristics are often reflected in ILO Conventions and Recommendations. The essence of the ILO is to establish international labor standards, which should be reflected in the national law of the member states. Despite the significant discrepancies, the Committee almost unreasonably proposed to include the term *worker* in Polish civil contracts. This type of action may result in the alleged omission of ILO standards, which has already been pointed out in the literature (Sobczyk 2018, 212).

5. JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL

Despite the recommendations of the ILO, the Polish legislator did not take any steps to extend the coalition law (Podgórska-Rakiel 2013, 70**)**. As a result of his inactivity, the All-Poland Alliance of Trade Unions (OPZZ), based on the provisions of the ILO Convention, requested the Polish Constitutional Tribunal to review the constitutionality of the provisions of the Polish Act on Trade Unions in the scope limiting the possibility of a union coalition (Zalewski 2012). In its extensive argumentation OPZZ pointed out that "the Committee for Freedom of Trade Union emphasized in many reports that the employment relationship was not a criterion for determining the persons entitled to establish a trade union organization and to act within them". As a result of the submitted application, in 2013 the Constitutional Tribunal shared the position of the OPZZ, finding that the existing restrictions contained in the Act on Trade Unions were incompatible with the Constitution of the Republic of Poland (judgement, 2015. K 1/13). Importantly, neither the judgment nor the justification stated that all employees, including those employed under civil law contracts, should be covered by the coalition law. In the justification of the judgment it was only emphasized that

> the unconstitutionality of Art. 2 clause 1 of the Act on Trade Unions consists in restricting the freedom of association in unions for persons performing paid work who do not fall into one of the three categories of entities mentioned in this provision. Therefore, the defectiveness of statutory regulation results from its too narrowly defined subjective scope. It prevents the exercise of the freedom of association in trade unions for a certain group of people who are addressees of the freedom referred to in Art. 59 sec. 1 in connection with Art. 12 of the Constitution (judgement, 2015. K 1/13 point 11).

It was also emphasized that

> the Employee, as the subject of freedom of association in trade unions (Article 59 (1) of the Constitution), cannot be identified solely through the prism of the type of legal relationship between him and the employer. In the opinion of the Tribunal, the status of an employee should be – on constitutional grounds – assessed by reference to the criterion of paid work. Against this background, the Tribunal has indicated three premises that define the legal framework for the constitutional understanding of the term employee referred to in Art. 59 sec. 1 of the Constitution. This concept covers all persons who – firstly – perform a specific gainful activity, secondly, have a legal relationship with the entity for which they perform it, and – thirdly – have professional interests related to the performance of work, which may be collectively protected.

The Court's findings are an important source for the analyzes made. The essence of the judgment boils down to characterizing the set of features of an employed person who acquires the right to join a trade union. Thus, it is not the basis of employment but the terms of employment and the scope of the right and interests that should determine the right to belong. The position formulated in this way is in line with the content of the application, as well as the views of the Committee on Trade Union Freedoms of the Administrative Council of the International Labor Office, which stated that the right to freedom of association under Convention No. 87 should be granted not only to employees, but also to persons who have a different relationship with the employer employment relationship (*Freedom of Association.* Geneva 2006).

At the same time, a reading of the findings gives grounds to argue that the previously expressed concerns regarding the extension of the coalition law to civil contracts are justified.

6. THE FORMAL NATURE OF THE REGULATION

In the context of the introduced changes, the thread of representing members by the union cannot be omitted.

According to Art. 1 of the Act on Trade Unions, "a union is an organization of working people established to represent and defend their rights, professional and social interests". The provision states that membership in a trade union is connected with a sense of security and protection. The scope of trade union rights is individual and collective. Collective interests are realized irrespective of membership, this will be confirmed by regulations and collective labor agreements that apply to all employees, regardless of their affiliation. However, the area of individual representation is different. According to Art. 23 (2) of the Labor Code:

> If the provisions of labour law provide for an employer to co-operate with an enterprise trade union in individual cases related to an employment relationship, the employer is obliged to co-operate in such cases with the enterprise trade union representing the employee in respect of

his membership in the trade union, or in respect of the consenting to the protection of the rights of an employee not covered by the trade union in accordance with the Act on Trade Unions.

In the individual sphere, there is no question of representing the interests of people who provide paid work, who are not employees. The purpose of union membership of non-employees is specified in the Trade Union Act itself. In the amended Art. 1 (1) point 1, defining the concept of a person performing gainful work, the legislator indicated the possession of such rights and interests related to the performance of work that may be represented and defended by a trade union (trade union act, 1991. Dz.U.2019.263). However, careful reading of the regulation raises doubts as to its practical meaning. At the outset, the question arises what types of rights and obligations can be represented and defended by trade unions (Wujczyk 2019, 195). What may be the source of these rights and interests, and who is to evaluate their potential. The analysis of the provision from the perspective of union rights also raises doubts. It is difficult to imagine what actions a company trade union organization will be able to take towards, for example, the principal, in connection with the implementation of a civil contract, by its member-contractor. While in the sphere of individual interests, the Labor Code indicates such regulations, they are absent from the Civil Code.

The above is important because the aforementioned rights and interests (potentially covered by trade union protection) are elements that define the entity entitled to a coalition, therefore it should be assumed that only entities with rights and interests that are subject to protection are covered by the coalition law. In the event of a different inference, the essence of belonging would be a fiction. The lack of real support for the individual interests of non-employees basically rules out the legitimacy of joining trade unions. As a consequence, depriving trade unions of tools enabling the protection of the rights and interests of entities other than employees, but associated in trade unions, limits the willingness to engage in trade union activities (Pisarczyk 2019, 458).

Therefore, the analysis of the regulations gives grounds to claim that it is only a formal basis that requires material implementation through appropriate forms of employment. The legitimacy of such an opinion is confirmed in the legislative process. The draft amending act (justification of the bill, 2018) indicates group interests that are subject to trade union protection. Such content is consistent with the justification of the judgment of the Constitutional Tribunal cited above, where the legal framework for the constitutional understanding of the term employee has been established. Therefore, the wording of the judgment was repeated in the draft. During the legislative process, a change in this respect was introduced. The legislator decided that trade union protection could not be limited only to the protection of rights and interests protected collectively, and finally a structure was adopted according to which it is about rights and interests that "can be represented and defended by a trade union". The justification of this amendment is of great

importance, as it was emphasized that the proposed content of Art. 1 (1) point 1 (content before introducing the amendment – author's note) "suggests that only collective (group) interests of people performing gainful work were represented and defended by trade unions, while in the light of Art. 4 unions defend both collective and individual interests" (Polish Senat Resolution, 2018). It follows that the deliberate action of the legislator is to provide entities with such rights that may be the subject of individual protection. This, in turn, may suggest that the national legislator should take steps to grant non-employees rights that will be subject to trade union protection. Otherwise, the real goal of the change will never be achieved, because there are no material possibilities to protect the rights of, for example, the contractor by a trade union, even if he is a member of this union.

7. CONCLUSION

It was necessary to make changes. The growing popularity of the use of non-employee forms of employment is a phenomenon visible not only in Poland. Proof of this may be, among others the division into *employee* and *workers*. In terms of national legislation, it is all the more important as Poland ranks high among the countries with inflexible forms of employment in the OECD ranking (Matłacz 2017). The effect of this is the growing use of civil contracts – orders, provision of services, often referred to as junk contracts, which adequately reflects their assessment (Grzebyk 2015). In such circumstances, the inclusion of civil contracts in the law should be assessed positively. The problem is that the legislator still does not take any real steps to organize the forms of employment. Over the years, the activities of the legislator, in this respect, could be called cyclical, the changes were mainly limited to imposing social security contributions for civil contracts. At the same time, employees have easier access to health insurance than non-employees. A socially significant change was the setting of the hourly rate for civil contracts, and this solution is not without criticism (Barański, Mądrzycki 2017, 23–30).

From the perspective of trade unions, the amendment may be an opportunity. Trade unions have acquired an authorization to speak in matters relating to non-employees, persons employed under civil contracts. It seems that in terms of precarious employment conditions it is an important move, even if it is not yet visible at present. Undoubtedly, this opportunity poses certain challenges for the unions and it is up to the organization to use it. It is important that unions seek to obtain powers to defend individual interests. The lack of real support for the individual interests of non-employees basically rules out the legitimacy of joining trade unions. As a consequence, depriving trade unions of tools enabling the protection of the rights and interests of entities other than employees, but

associated in trade unions, limits the willingness to engage in trade union activities (Pisarczyk 2019, 458).

Looking from the perspective of the legislator's many years of omissions, a certain concern must also be expressed. It cannot be ruled out that the legislator considers the changes to be sufficient. On the other hand, the recommendation of the Committee to oblige all employees, including those employed under civil contracts, to be interpreted as implicit acceptance of the use of this form of "employment".

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THE ISSUE OF REPRESENTATIVENESS IN THE LIGHTS OF THE AMENDED TRADE UNIONS ACT

Abstract. The subject of the deliberations are issues regarding the representativeness and size of workplace trade union organisations after the changes introduced in the Trade Unions Act in 2018. According to the obligatory provisions, the "representativeness" of a trade union organisation is traditionally conditional on its size, but not only the employees, but also other categories of the employed are taken into account. It is, inter alia, about persons providing work under a contract of mandate or a specific work contract and sole proprietors. By expanding the full rights of coalition onto persons performing work on the basis other than employment relationship, the legislator increased the percentage limits decisive in the matter of representativeness. At present, the representative trade union organisation above the workplace level is also an organisation uniting at least 15% of all people performing gainful work under the articles of association, not fewer, however, than 10,000 persons performing gainful work. It works similarly at the workplace level. With reference to workplace trade union organisations which belong to organisations above the workplace level which meet the criteria for representativeness as specified in the Social Dialogue Council Act, at least 8% of the staff of the given employer is required. In the case of workplace trade union organisations which do not participate in such structures, the representativeness is conditional on uniting of at least 15% of persons performing gainful work for the given employer (7% and 10%, respectively, were required earlier). Determining the number of the staff, the employees and persons providing gainful work under other bases being employed for at least 6 months before the commencement of negotiations or arrangements must be included. A significant novelty is the necessity to select a joint representation of the representative organisations at the workplace level that belong to the same Trade Union Federation or National Trade Union Confederation in matters regarding collective rights and interests of the persons performing gainful work.

Keywords: trade union, representativeness above the workplace level, representativeness at the workplace level, the size of the trade union.

PROBLEMY REPREZENTATYWNOŚCI W ŚWIETLE ZNOWELIZOWANYCH PRZEPISÓW USTAWY O ZWIĄZKACH ZAWODOWYCH

Streszczenie. Przedmiotem rozważań są kwestie dotyczące reprezentatywności oraz liczebności zakładowych organizacji związkowych po zmianach wprowadzonych w ustawie o związkach zawodowych w 2018 r. W świetle obowiązujących przepisów o „reprezentatywności" organizacji związkowej tradycyjnie decyduje jej liczebność, z tym zastrzeżeniem, że uwzględnia się nie tylko pracowników, ale także inne kategorie zatrudnionych. Chodzi tu o m.in. osoby świadczące

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pracę na podstawie na umowy zlecenia, umowy o dzieło, prowadzących jednoosobowo działalność gospodarczą. Rozszerzając pełne prawo koalicji na osoby wykonujące pracę na innej podstawie niż stosunek pracy, ustawodawca podwyższył limity procentowe decydujące o przymiocie reprezentatywności. Obecnie na szczeblu ponadzakładowym za reprezentatywną uznaje się m.in. ponadzakładową organizację związkową, która zrzesza co najmniej nie 10%, ale 15% ogółu osób zatrudnionych objętych działaniem statutu, co powinno stanowić co najmniej 10 000 osób wykonujących pracę zarobkową. Podobnie na szczeblu zakładowym. W odniesieniu do zakładowych organizacji związkowych, które należą do organizacji ponadzakładowych spełniających przesłanki reprezentatywności określone w ustawie o Radzie Dialogu Społecznego, wymaga się zrzeszania co najmniej 8% załogi danego pracodawcy. W przypadku zakładowych organizacji związkowych nieuczestniczących w tego rodzaju strukturach o uzyskaniu przymiotu reprezentatywności, decyduje zrzeszanie co najmniej 15% wykonujących pracę zarobkową na rzecz określonego pracodawcy (uprzednio przewidywano odpowiednio 7% i 10%). Przy ustalaniu liczebności załogi należy wliczać pracowników i osoby świadczące pracę zarobkową na innej podstawie nieprzerwanie przez okres 6 miesięcy przed podjęciem rokowań lub uzgodnień. Istotnym *novum* ustawy jest konieczność wyłonienia przez reprezentatywne organizacje zakładowe, które wchodzą one w skład tego samego zrzeszenia (federacji) związków zawodowych lub ogólnokrajowej organizacji międzyzwiązkowej (konfederacji) wspólnej reprezentacji w sprawach dotyczących zbiorowych praw i interesów osób wykonujących pracę zarobkową.

Słowa kluczowe: związek zawodowy, reprezentatywność na szczeblu ponadzakładowym, reprezentatywność na szczeblu zakładowym, liczebność związku zawodowego.

1. INTRODUCTION

The expansion in the Trade Unions Act of 23 May (Consolidated text: Journal of Laws of 2019, item 263, hereinafter as "TUA") of the full right of coalition to persons performing gainful work not under an employment relationship – being the result of the judgment of the Constitutional Court of Law of 2 June 2015 (K 1/13, Journal of Laws, item 791) – entailed the need for amendment also to other regulations on trade unions, including the issue of representativeness of trade unions.

The "representativeness" providing the trade union with a special position in the union structures has been seen as one of the principal rules of collective labour law for long. It is accepted that an organisation with certain properties, notably the number of certain categories of people united in it, deserves special treatment and use of prerogatives which other trade unions do not enjoy (Goździewicz 2000, 63; Lekston 2019, 141; Sanetra 1994, 234–235). Moreover, the representativeness is regarded as a collision principle which allows selection from among the operating trade union organisations an entity most predestined for special activities, to which other (non-representative) trade union organisations are not authorised (Hajn 2013, 84; Pliszkiewicz, Seweryński 1995, 3–4). This is, for instance, about the rights provided for in Art. 19, 20 of TUA. Bearing in mind that the representativeness allows breaking the impasse between competing trade union organisations, it is generally accepted in the field of international labour law as well (Świątkowski 2013, 100; Świątkowski 2014, 388; International Labour Office 2018, par. 1382).

The "most representative organisations of employees" is discussed e.g. in the Constitution of the International Labour Organisation of 1919 (Journal of Laws of 1948, No. 43, item 308, as amended; art. 3.5), ILO convention no. 144 of 1976 on tripartite consultation in the scope of introducing international labour standards.[1] It is underlined that the representativeness does not challenge the principle of equal treatment of trade union organisations provided that it is based on objective and predetermined criteria. This feature is also not in opposition to the principle of freedom of association (International Labour Office 2018, par. 515; par. 1351).

Further on, the deliberations will focus on the criteria of representativeness of trade union organisations above the workplace level and at the workplace level after the amendments to the Trade Unions Act of 2018 (Amendments introduced by the Act of 5 July on amendment to the Trade Unions Act and other statutes, Journal of Laws, item 1608).

2. REPRESENTATIVENESS ABOVE THE WORKPLACE LEVEL

Under Art. 25^2(1) of TUA, the following is the representative trade union organisation above the workplace level: 1) a representative trade union organisation above the workplace level under the Act of 24 July 2015 on Social Dialogue Council and other social dialogue institutions (Journal of Laws of 2015, item 1240, as amended; hereinafter "SDCA"); 2) an organisation uniting at least 15% of all people performing gainful work under the articles of association, not less, however, than 10,000 persons performing gainful work; or 3) an organisation uniting the highest number of people performing gainful work for whom a specific collective bargaining agreement above the workplace level is to be concluded. The content of the provided provisions evidently indicates that the "representativeness" of the trade union organisation is traditionally conditional on its size, but not only the employees, but also other categories of the employed are taken into account (Art. 1^1(1) of TUA). It is, inter alia, about persons providing work under a contract of mandate or a specific work contract and sole proprietors. However, the persons united in a trade union are excluded if they do not perform gainful work, particularly old-age pensioners, disability pensioners, the unemployed and volunteers. In the case of complex structures – federations and confederations – included should be not only persons directly united in the given trade union, but also persons belonging to trade union organisations being a member of the given structure (Sanetra 2011, 1264).

Invariably, under Art. 25^2 of TUA two types of representativeness can be distinguished: general (absolute – points 1 and 2) and specific (special, relative

[1] http://www.mop.pl/doc/html/konwencje/k144.html [Accessed: 21 September 2019].

– point 3). In the first case, representative organisations have an advantage over smaller (non-representative) organisations in relation to all rights in the sphere of collective labour law; in the latter case, a privileged position is ensured in the scope of an collective bargaining agreement above the workplace level. Therefore, selecting a representative organisation meeting this criterion requires exact determination of the addressees of a future collective bargaining agreement.

Under Art. 23(2) of SDCA, the name of the representative organisation is given to nationwide trade unions, nationwide associations (federations) of trade unions and nationwide inter-trade-union organisations (confederations) which unite more than 300,000 members being persons performing gainful work and which operate in national economy entities the basic objects of activity of which is specified in more than a half of the section of the Polish Classification of Activities as specified in the regulations on public statistics. When determining the criterion of size, no more than 100,000 members being persons performing gainful work who are persons performing gainful work in national economy entities the basic objects of activity of which is specified in one section of the Polish Classification of Activities as specified in the regulations on public statistics. A trade union organisation applying for classification as a representative organisation when determining the number of persons performing gainful work does not consider persons performing gainful work which are united in the member organisations which are – or were over the year before the submittal of an application for representativeness – united in a representative trade union organisation having representatives in the Council (section 3).

The feature of representativeness is also enjoyed by a trade union organisation above the workplace level, meeting jointly two conditions: it unites at least 15% of all employed covered by the articles of association, which is at least 10,000 persons performing gainful work (See decision of the Supreme Court of 8 October 1996 (I PRN 91/96, OSNP 1997, no. 8, item 132).

Features regarding the representativeness of trade union organisations above the workplace level have been modified to little extent *prima facie.* Along with the expansion of the right of coalition onto persons providing work under non-employee employment relationships, the legislator accordingly increased the requirements regarding the size of a trade union organisation above the workplace level from 10% to 15% of all employed covered by the articles of association (Walczak 2018, 234; Szmit 2019, 28–29). Bearing in mind that the persons providing work under a contract of mandate or a specific work contract or sole proprietors are not interested in participation in trade union structures, increasing the requirements for the size of the trade union may lead to the organisations meeting the criteria for representativeness in 2019 will lose their privileged position.[2] Without doubts, such concerns are not shared by the largest trade unions

[2] A drop of interest in a trade union membership has been observed in Poland for long. In 2018 over 1.5 million people were trade union members, by 16.6 thousands (1.1%) less than in

such as Independent Self-governing Trade Union "Solidarity", the All-Poland Alliance of Trade Unions (OPZZ) or the Trade Unions Forum (Masewicz 1993).

The representativeness of a trade union above the workplace level has to be found in court. Under Art. 25(1) of SDCA, the applications of nationwide trade union organisations for determination of representativeness are examined by the Regional Court in Warsaw, which issues a ruling in the matter within 30 days from the submittal of an application. Upon the lapse of 4 years from the ruling on determination of representativeness becoming final and non-appealable, a trade union organisation loses its rights of a representative organisation unless it proves to Presidium of the Council that it applied for determination of representativeness again. In such a case, the organisation keeps the status of a representative organisation until the court ruling on new determination of representativeness becomes final and non-appealable (Art. 25(3) of SDCA). Therefore, representative organisations are obliged to confirm its representativeness every 4 years. The period begins to run from the day on which the latest ruling in the matter becomes final and non-appealable.

Similarly to trade union organisations above the workplace level specified in 25^2(1)(2) and (3) of TUA, the ruling on determination of representativeness is issued within 30 days by the Regional Court in Warsaw in a non-contentious proceedings instigated upon application of the given trade union.

The determination of representativeness of a nationwide inter-trade-union organisation (confederation) is significant for the nationwide trade unions and associations (federations) of trade unions being its members. Member organisations become representative by operation of law, regardless of the number of persons performing gainful work united in those entities (Art. 25^2(3) of TUA).

3. REPRESENTATIVENESS AT THE WORKPLACE LEVEL

Under Art. 25^3 (1) of TUA, the following is the representative trade union at the workplace level: 1) an organisation being an organisational unit or a member organisation of a trade union organisation above the workplace level regarded as representative under the Social Dialogue Council Act, which unites at least 8% persons performing gainful work under the employer; or 2) an organisation uniting at least 15% of persons performing gainful work under the employer. If none of the workplace trade union organisations meet the requirements specified in section 1, the representative workplace trade union organisation will be the organisation uniting the highest number of people who perform gainful work under the employer – section 2 (Wratny 2012).

2014, Social dialogue partners – organisations of employers and trade unions in 2018 (preliminary results), data compiled by Statistics Poland, https://stat.gov.pl/obszary-tematyczne/gospodarka-spoleczna-wolontariat/gospodarka-spoleczna-trzeci-sektor/partnerzy-dialogu-spolecznego-zwiazki-zawodowe-i-organizacje-pracodawcow-wyniki-wstepne,16,1.html [Accessed: 16 June 2020].

The feature of representativeness at the workplace level, as above the workplace level, is conditional solely on the membership count of the given trade union. With reference to workplace trade union organisations which belong to organisations above the workplace level which meet the criteria for representativeness as specified in the Social Dialogue Council Act, at least 8% of the staff of the given employer is required. In the case of workplace trade union organisations which do not participate in such structures, the representativeness is conditional on uniting of least 15% of persons performing gainful work for the given employer (7% and 10%, respectively, were required earlier). As in the case of representativeness above the workplace level, raising the requirements for size of a trade union organisation to 8% and 15% combined with no interest on the part of persons performing work under non-employee civil law employment can lead to many trade union organisations losing their representativeness.

In the literature, the criteria for representativeness – 8 and 15% (previously 7 and 10%) – evoke serious doubts as to whether they comply with the principle of equal treatment (Latos-Miłkowska 2007, 146; Rączka 2008, 882). The Constitutional Court of Law evaluates those regulations differently. In the judgment of 11 December 1996 (K 11/96, OTK-ZU 1996, no. 6, item 54), the Constitutional Court of Law found that the fulfilment of the constitutional principles of equality and social justice does not mean that it is necessary to grant the same rights and obligations to all categories of citizens (groups of entities). Individual categories of entities should be treated equally, i.e. according to the same measurement, without favouring and discriminating diversifications, only if the factual standing of those categories of entities underlies certain provisions of law. The Constitutional Court of Law expressed a similar opinion in the judgment of 23 October 2001 (K 22/01, OTK 2001, no. 7, item 215) deciding that the representativeness of a trade union is conditional not only on the percentage of the employees of the given workplace (currently employed), but also on its social profile and the number of represented employee groups. Trade unions united in larger structures above the workplace level integrate interests of various employee groups, including weaker professional groups, which cannot effectively defend their interests by way of independent action. The adopted criterion for representativeness at the workplace does not differentiate trade union organisations having a common feature. In consequence, the regulation in question does not impose unjustified differences.

When determining the number of persons performing gainful work who are members of a trade union, only those employed are considered who have belonged to the given trade union organisation for at least 6 months before the commencement of negotiations or arrangements (Art. 25^3(6) of TUA). In turn, when calculating the number of the employed, one that is the basis for calculation of said percentages, or when determining the highest number of persons performing gainful work employed at the employer's site, solely the employees are taken into consideration who have been employed by the given employer for at least 6 months

before the commencement of negotiations or arrangements. The condition for at least 6 months of employment aims to prevent a trade union from becoming representative in the case of an organisation unites persons who – performing work under short-term civil law contracts – do not form strong bonds with the employer.

The provision of 25^3(6) sets forth a repetition of the principles previously provided for in 241^{25a}(3) of the Labour Code, where it was specified that when counting employees united in a trade union, only employees belonging to the given trade union organisation for at least 6 months before the commencement of negotiations regarding the conclusion of a collective bargaining agreement. As in the revoked provision of the Labour Code, the size of a trade union organisation depended on the number of its members being in employment relationships, which by essence are characterised by continued nature, it needed to be assumed that it is about a continued period of 6 months before the commencement of negotiations. The Constitutional Court of Law expressed a similar opinion in the judgment of 23 October 2001 (K 22/01, OTK 2001, no. 7, item 215), where it was found that representative trade union organisations can include only such organisations which can prove certain stability in their size over a certain period of time. The capacity of trade unions to represent employee interests is conditional not only on the number of their members at the given time, but also on certain minimum stabilisation of the number of the associated employees. In particular, the feature of representativeness cannot be bestowed on a trade union organisation which has only transiently achieved the size required in the statutory law by way of intensive recruitment of new members in order to participate in negotiations.

Currently as well, despite the fact that Art. 25^3(6) of TUA does not contain an express provision in this respect, the size of a trade union organisation consider the members who have been united in it for at least 6 consecutive months before the commencement of negotiations or arrangements. A person performing gainful work who at the same time belongs to more than one workplace trade union organisation can be regarded as a member of only one of such organisations when calculating the size of them (Art. 25^1(5) of TUA).

Doubts arise as to the manner of calculation of the 6 months' period of employment before the commencement of negotiations or arrangements. According to M. Latos-Miłkowska, "the required period does not have to be continuous". However, it is required that the given person be employed directly before the commencement of negotiations or arrangements (Latos-Miłkowska 2019, 31). In effect, it would be enough to employ a person who has worked under the given employer for the required period of 6 months a day before the commencement. A contrary opinion is held by M. Lekston, who claims that it is about a period of consecutive 6 months preceding the activities provided for in the statutory law (Lekston 2019, 154).

The *Ratio legis* of Art. 25^3(7) of TUA was to ensure the feature of representativeness to an organisation having an established and robust position

in the given workplace, one is – therefore – particularly predestined for taking specific action in the area of individual and collective employment relationships. Bearing in mind the above circumstances, the latter stance should be agreed with and it should be assumed that when determining the size of the staff, only the employees and persons providing gainful work under other bases being employed for at least 6 months before the commencement of negotiations or arrangements.

In the eyes of 25^3 of TUA, the representativeness of a workplace trade union organisation which can be classified as general at the workplace level – as a rule – is conditional on the number of the employees and persons performing gainful work under other basis being members of it. The proportions between those two categories of the employed do not matter. As a result, an organisation uniting e.g. 15% of contractors providing work for the benefit of the given employer is an equal partner of an organisation uniting 15% of the employees of the given employer. Special representativeness, allowing action on matters enumerated in Art. 30(6) of TUA, is tackled differently. Under the said provision, in the negotiations leading to determination, inter alia, the rules of remuneration, the rules of prizes, the rules of work, a representative organisation can be a trade union which meets the criteria specified in Art. 25^3(1) or (2) and which unites at least 5% of the employees under the employer. With references to autonomic sources of law, to the exclusion of collective bargaining agreements, the general representation as per 25^3(1) or (2) is supplemented by the requirement of uniting the proper number of employees. In consequence, a trade union covering over 15% of persons employed under the given employer, out of which the percentage with at least 6 months of seniority is less than 5% of the staff, is treated as a representative organisation once and on other occasions it does not use this feature. The differentiation of the legal status of a trade union organisation on the basis of the category of matters may in practice lead to a lot of doubts and commotion. The reservation as to the level of involvement of employees aim to prevent a situation where in negotiations regarding institutions tightly related to the labour market, notably the rules of remuneration, the rules of prizes and bonuses, the rule of the workplace social benefit fund, the annual leave plan or the rules of work, will be held by trade unions not representing the addressees of the above or representing them to little extent. Therefore, on this background serious reservations are evoked by the solutions adopted in the sphere of collective bargaining.

Under Art. 21(3) of TUA, the provisions on collective bargaining agreements apply accordingly to persons performing gainful work other than employees and to their employers as well as to organisations uniting those entities. The content of the quoted provision indicates that apart from collective bargaining agreements regulating the rights and obligations of employees and employers, there can be collective bargaining agreements covering persons remaining in non-employee civil law relations and hybrid collective bargaining agreements addressed to both categories of the employed. Omission in the regulations on collective bargaining

agreements of minimum requirements for percentage participation of employees in trade union organisations enjoying the bargaining capacity may in practice lead to the situation where a collective bargaining agreement regulating the rights and obligations of the parties to the employment relationship is concluded by representative organisations uniting only persons providing work outside an employment relationship or with little participation of employees.

Of course, it might be that a collective bargaining agreement covering only persons providing work under civil law relations will be concluded by employee trade unions. In both situations, the content of a collective bargaining agreement will depend on the entities little interested in the scope of rights and obligations of the persons for whom the agreement is to be negotiated.

Under the provisions on representative organisations at the workplace level, a significant novelty is the necessity to select the joint representation in matters regarding collective rights and interests of the persons performing gainful work. Under the provision of $25^3(3)$ of TUA, the obligation in this respect rests with representative organisations as per section 1 point 1 if they are members of the same association (federation) of trade unions or a nationwide inter-trade-union organisation (confederation). If a joint representation is not selected, the feature of representativeness is enjoyed by the organisation with the highest number of the people employed under the given employer or the organisation uniting at least 15% of the staff (section 4). The latter is authorised to represent collective rights and obligations of the employed if two or more organisations belonging to the same federation (confederation) include the same percentage of the staff and, in consequence, it is not possible to determine the largest one. Therefore, it can happen that e.g. two federated organisations uniting 20% of the employed under the given employer each will lose the status of representativeness, which will be gained by a trade union uniting only 15% of the staff.

Negative effects in the form of losing the feature of representativeness pertain only to matters revolving around collective rights and obligations of the employed. These organisations keep the privileged position in other aspects, e.g. indication of persons covered by special protection (Art. 32(3) and (4) of TUA).

The requirement of creation of joint representation is, without doubt, dictated by the willingness to streamline negotiations concerning for instance autonomous legal acts. This is so as it eliminates the phenomenon of multiplication of trade unions. It must be stressed that the obligation of workplace trade union organisations being organisational entities or member organisations of trade union organisations above the workplace level regarded as representative as per SDCA to select a joint representation under pain of loss of representativeness undermines the principle of autonomy of trade unions and of freedom of negotiation.

As a rule, at the workplace level it is not required to determine the representativeness of the given trade union in court proceedings. Such proceedings become necessary if the employer or other trade union organisation raises

objections as to the size of a trade union willing to guarantee itself a privileged position (Art. 25^1(7) of TUA). The time limit for pressing charges in this matter is 30 days from the time when the trade union provides information on its size. A workplace trade union organisation the popularity of which among the staff of the given workplace evokes doubts may: 1) before the district court – the labour court of proper venue serving the address of the employer: prove that it meets the criteria provided for in Art. 25^3(1) or (2) of TUA and so that it is fully legitimate to treat it in a privileged manner in terms of collective and individual labour law; or 2) "tacitly" acknowledge the stance of the entity challenging its representativeness. In the latter case, the organisation will be authorised to act in the area of collective rights and interests at the level equal to that of non-representative trade union organisations. In effect, resignation from the judicial avenue leads to the loss of the feature of representativeness.

The court proceedings for determination of the number of members can also be instigated out of the own initiative of the workplace trade union organisation. In both situations, the court issues a ruling in the mode of non-contentious proceedings as per the Code of Civil Procedure within 60 days from the time of submittal of the application (Książek 2019, 137–139).

The mode of examination of the representativeness of the given trade union at the workplace level is convergent with the principles on the size of the workplace trade union organisation

4. THE SIZE OF THE WORKPLACE TRADE UNION ORGANISATION

Under 25^1(1) of TUA, the rights reserved for the workplace trade union organisation are enjoyed by an organisation uniting at least 10 members being: 1) employees under the employer covered by the operations of that organisation or 2) non-employees performing gainful work, who has performed work for at least 6 months for the employer covered by the operations of that organisation. Despite the fact that the legislator uses the expression of "or", it goes without doubt that both trade unions including only employees or only persons in civil law relations and organisations uniting persons with a diverse legal status can operate without any limitations. Bearing in mind that in the case of employees no requirements as to the time of employment in the given workplace are introduced, in a group of at least 10 members all trade union members remaining in an employment relationship with the given employer are taken into account. A situation is different in the case of persons performing work under non-employee civil law relations, who have to have worked at least 6 months in the given workplace. In Art. 25^1(1), the legislator yet again underscored the necessity of stronger bond between the employed and the employer, one which justifies including e.g. a contractor in the general number of members of the given trade union organisation.

As a rule, a trade union organisation is obliged to present to the employer every 6 months – as at 30 June and 31 December – by the 10th day of the month following that period, information on the number of members meeting the criteria under Art. 25^1(1) of TUA. In the light of the regulations in effect, the size of a trade union organisation is verified twice a year. The size determined as at 30 June or 31 December is effective by the next verification even if the membership shrinks after that date. In this scope, fully topical is the stance of the Supreme Court specified in the judgment of 19 August 2015 (II PK 208/14, OSNP 2017, no. 7, item 82), where the concept that a drop of the number of members of a trade union below 10 person leads to the loss of the competences of the trade union organisation and protection of a trade union member right away was regarded as too strict and disproportionate to the effects and intentions of the legislator. Therefore, it was found that the legal functioning of a trade union is affected not by a short-term drop in the number of members, but by the size of a trade union organisation as at the end of a quarter (currently a half-year).

An organisation created during a 6-month period provides the first information on the number of members within 2 months from establishment and then – within the time limits effective for all other trade unions. A trade union organisation towards which the employer or another trade union raises reservations as to its size can assert its rights in court by the principles stipulated in Art. 25^1(8) of TUA.

5. CONCLUSIONS

By its essence, the expansion of the full right of coalition onto persons providing work under non-employee civil law relations had an impact on the criteria for representativeness of a trade union organisation, particularly at the workplace level. Raising the quantitative requirements may deprive many trade unions of the status of a representative organisation.

With reference o some categories of cases, particularly the rules of work and remuneration, the legislator requires fulfilment not only of criteria determining the representativeness of the given trade union, but also those referring to the number of employees. However, the level of involvement of the employees does not matter in negotiation of collective bargaining agreements. In effect, one cannot exclude a situation where a collective bargaining agreement defining the rights and obligations of parties to the employment relationship is negotiated by trade union organisations uniting mostly persons providing work under civil law contracts. The solutions adopted in this scope evoke serious doubts.

When determining the representativeness of a workplace trade union organisation, persons with a 6-month period of membership in the trade union and with proper seniority. The latter is also required from the hired persons who are

not employees. The *ratio legis* of the adopted solutions is that they ensure rights in the sphere of collective and individual employment relationships to workplace trade union organisations with a rather stable membership.

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WILL 'YELLOW' UNIONS DISAPPEAR AFTER THE AMENDMENT TO ACT ON TRADE UNIONS?

Abstract. The article aims to answer the question whether, after the amendment to the provisions of Act on trade unions, which entered into force on 1 January 2019, the phenomenon of creating and practical functioning of the so-called 'yellow' unions that, although developed as a workers' organisation but in fact function mainly for the purpose of protecting an employer's interests, will disappear. The article explains the concept of 'yellow' unions, discusses the most important recent amendments to the provisions of Act on trade unions, and analyses the binding provisions with regard to potential 'profitability' of the development of yellow unions from the point of view of employers' interests.

Keywords: trade unions, 'yellow' unions, company trade union, trade union representativeness.

CZY PO NOWELIZACJI USTAWY O ZWIĄZKACH ZAWODOWYCH CZEKA NAS KRES ŻÓŁTYCH ZWIĄZKÓW ZAWODOWYCH?

Streszczenie. Celem artykułu jest odpowiedź na pytanie, czy po zmianach przepisów ustawy o związkach zawodowych, które weszły w życie 1 stycznia 2019 r. zniknie zjawisko tworzenia i funkcjonowania w praktyce tzw. żółtych związków zawodowych, powoływanych wprawdzie pod szyldem organizacji pracowniczej, ale *de facto* działających głównie w celu obrony interesu pracodawcy. W artykule zostało przybliżone pojęcie żółtych związków zawodowych, omówione najważniejsze ostatnie zmiany przepisów ustawy o związkach zawodowych oraz przeanalizowane zostały obowiązujące przepisy pod kątem ewentualnej „opłacalności" tworzenia żółtych związków zawodowych z punktu widzenia interesów pracodawców

Słowa kluczowe: związki zawodowe, żółte związki zawodowe, zakładowa organizacja związkowa, reprezentatywność związkowa.

1. INTRODUCTION

Employees' participation in the management of an organisation is incorporated in a civilised and rationally operating company and constitutes an expression of empowerment of people in the process of labour. In addition, it allows resolving animosities between those who manage and those who are managed, and

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developing partnership based on compromise. In the Polish system of employment law, the idea of employees' participation is implemented at the institutional level mainly via trade unions and various types of non-union employees' representation such as works councils or European Works Councils.

Trade unions constitute the basic form of representation of employees. Fundamental trade unions rights and freedoms are laid down in numerous legal acts of international law and the Constitution of the Republic of Poland. The history of trade unions proves that no other representation of employees can equally efficiently represent workers within the scope of both individual and collective labour law. Trade unions definitely have the strongest expert backup and experience, which translate into efficient fulfilment of their role.

However, some employers and management staff do not perceive the activities of and cooperation with trade unions as useful and presenting no problems. It happens that company owners use various methods to prevent the foundation of trade unions in their businesses. Their fears concerning trade unions' activities mainly result from the fact that they perceive union activists as potential demagogues, who will be difficult to make redundant and with whom they will have to negotiate and come to an agreement. Trade union leaders are sometimes perceived as incompetent, demanding and inclined to cause destruction (Gardawski 2001, 126–128). Some employers are afraid of various negative aspects that can occur in connection with trade unions' activities, which include inter alia the increase in costs of operation because of the rise in remuneration, or difficulties in reduction of employment. The size of trade unions and their fragmentation in the workplace can contribute to the development of the so-called 'yellow' unions.

Yellow unions are trade union organisations created under the auspices of an employer and their main objective is to block the activity of a truly representative trade union or other trade union organisations in the company. The so-called yellow union is one that is planned by its founders to support the employer and not the employees. Its foundation is often inspired by an employer only in order to weaken all the trade unions or the only one founded and operating in the company, and as a result prevent the development of a common negative opinion on the introduction of or change in the rules and regulations for remunerating or awarding bonuses. Such a yellow union is able to destroy the unity of the trade union community, e.g. during negotiations on the rise in remuneration, and enable an employer to independently introduce changes in the rules and regulations for working without reaching an agreement on that with trade unions.

On 1 January 2019, amended provisions of Act on trade unions of 23 May 1991[1], hereinafter ATU, entered into force.

[1] Journal of Laws of 2015 item 1881; the statute was recently changed by the provision of Act amending Act on trade unions and some other acts of 5 July 2018 (Journal of laws of 2018 item

Due to the fact that the subjective scope of the rights of a trade union coalition was fundamentally changed, a question is raised whether it will continue to be 'profitable' for employers to initiate the creation of yellow unions in the new legal state, and whether a decrease in the interest in this form of hampering trade union activities can be expected.

There is a basic assumption that trade unions are created spontaneously as a rank-and-file initiative. In case of yellow unions, it is hard to speak about an initiative at grass roots level. In general, with no real problems, an employer is able to find a sufficient number of loyal and reliable employees in a company who, under the aegis of a trade union, will carry out his orders to destabilise the activities of other and legally established trade unions.

In practice, it is very difficult to prove that a given trade union was founded only for the purpose of destroying the activities of other trade unions in a company.

However, if it could be proved that a given trade union is a yellow one, it would be possible to hold the persons responsible for its creation, its leaders and members criminally liable. In accordance with Article 35 par. 1 (2) ATU, whoever uses their post or function to hamper trade unions' activities conducted in compliance with the provisions of the statute shall be subject to a penalty of a fine or limitation of liberty.

The author of the article primarily uses the formal-dogmatic method and analyzes the provisions of Polish law, taking into account the views expressed in the doctrine and jurisprudence.

It should be noted that there are no in-depth scientific studies on labor law on the subject of yellow trade unions in Poland.

2. THE CHANGE IN THE SCOPE OF THE SUBJECTIVE RIGHT TO TRADE UNION COALITION

Act on trade unions of 23 May 1991 was mainly aimed at broadening the scope of the subjective right to found and join trade unions in accordance with the Constitutional Tribunal judgement of 2 June 2015[2].

In the above-mentioned judgement, the Constitutional Tribunal indicated that depriving persons employed based on civil law contracts or freelancers of the right to join trade unions violates the Constitution of the Republic of Poland. The scope of the regulation stipulating admissibility of founding trade unions and joining them prescribed in Article 2 par.1 ATU is too narrow in relation to the

1608). The statute entered into force on 1 January 2019 with the exception of Article 1 par. 14 within the scope of Article 25(3) par. 6, which entered into force 12 months after the announcement.

[2] K 1/13, K 1/13, Journal of Laws, item 791.

constitutional guarantees laid down in Article 59 par. 1 in conjunction with Article 12 Constitution.

The freedom to create trade unions is guaranteed in Article 12 Constitution and, together with the trade unions' freedom to function, it constitutes one of the fundamental features of the political system of our State.

Article 59 Constitution, which ensures the freedom of association in trade unions (i.e. their creation and joining them), develops and specifies this guarantee, and stipulates the trade unions' fundamental rights as well as determines the rules of limiting the right to coalition.

Determining the group of entities having the right to establish trade unions and join them, the legislator used the criterion of the form of employment. However, this criterion was not envisaged in the Constitution of the Republic of Poland as a determinant of a group of entities having the right to associate in trade unions. According to the Constitutional Tribunal, the entities are mainly characterised by the fact that they do paid work and they have professional interests that can be collectively protected by a trade union. In this context, it is not important in what form and based on what type of contract a given person does paid work.

Moreover, the Constitutional Tribunal judged that the limitation consisting in granting cottage industry workers only the right to associate in trade unions (Article 2 par. 2 ATU) with no possibility of creating a union is groundless from the point of view of the function of such an organisation.

In the justification of the judgement, the Tribunal stated that the employer's obligation to implement the freedom of association in trade unions must consist in the provision of opportunities to create and join trade unions for all people who can be included in the category of employees in accordance with the Constitution. The legislator shall be obliged to distinguish, especially among freelancers, which of them match the features of employees and must have an opportunity to consociate in trade unions and which of them should be classified as entrepreneurs.

It should be noticed at the same time that as early as in 2012 the International Labour Organisation made similar recommendation to Poland after a complaint made by NSZZ "Solidarność". The ILO Convention No 87 uses a term 'worker', i.e. a person working/employed. According to ILO's Committee on Freedom of Association, all workers, except members of armed forces and police officers, have the right to establish and join organisations of their own choosing. In addition, the Committee states that the criterion for recognising the right to association does not depend on the employment relationship, which sometimes does not exist in case of agricultural workers, self-employed or freelancers who nevertheless should have the right to associate (par. 254).

In order to establish a trade union it is required that at least ten persons having the right to create a trade union adopt such a resolution (Article 12 par. 1 ATU).

However, since 1 January 2019 the right to establish and join trade unions has been granted to persons who do paid work (Article 2 par. 1 ATU).

A person doing paid work is an employee or a person working for remuneration on a basis other than an employment relationship provided that he or she does not employ other people to do the job, regardless of the basis of employment, and has such professional interests connected with this work that can be collectively protected (Article 1(1) par. 1 ATU).

The requirement of non-employment of other persons indicates that a job must be done in person, i.e. with no participation of other persons regardless of the legal relationship based on which they would work. The fact of employing other persons indicates the person involved has the features of an entrepreneur.

Non-employment of other persons "to do this kind of work" means that in order to recognise a person as one doing paid work within the meaning of ATU, it is inter alia required that the activities connected with that work (its type) are performed by a worker in person. The type of work shall be interpreted based on its nature and the nature of activities that a person other than an employee doing paid work should perform.

The adoption of such a definition of a person doing paid work means that, as a result, since 1 January 2019 trade unions have been able to associate persons who had no right to coalition before: those employed based on a commission contract regulated in Articles 734–751 Civil Code, a service provision contract to which the provisions on a commission contract are applied by analogy (as indicated in Article 750 Civil Code) and a specific task contract (regulated by the provisions of Articles 627–646 Civil Code), as well as the so-called self-employed (persons who have their own non-agricultural business and do it as sole traders).

3. CHANGES IN COMPANY TRADE UNIONS' REPRESENTATIVENESS VERSUS YELLOW UNIONS

The latest amendment to Act on trade unions was mainly aimed at applying the full right to trade union coalition, i.e. the right to establish and join trade union organisations, to all persons doing paid work regardless of the type of their employment basis. The aim was to be fulfilled inter alia by the establishment of relevant mechanisms protecting leaders and members of trade unions who are not employees against unequal treatment due to their membership of trade unions. The provisions concerning trade unions' representativeness were also amended and moved from Labour Code to Act on trade unions.

Trade unions' representativeness can be defined as a trade union's ability to represent employees in a situation when more than one trade union organisation seek this right (Goździewicz 2000, 63). The principle of representativeness is mainly applicable at a company level. It most often occurs as a collision norm in

a situation in which all company or inter-company trade unions cannot come to an agreement on establishing common representation. Then, representativeness is a criterion for taking a decision which trade union organisation should have the right to undertake particular activities.

As a consequence of the latest amendment to Act on trade unions, the legislator also strengthened the rights of a representative company trade union organisation in a situation when there is only one representative organisation functioning and one or a few smaller ones that want to have influence on the rules and regulations for remunerating and awarding bonuses.

In accordance with the amended Article 25(3) par. 1 and 2 ATU, a representative company trade union shall be the one that:

1) is an organisational unit or a member of a supra-company trade union organisation recognised as representative within the meaning of Act on the Social Dialogue Council consociating at least 8% of persons doing paid work for the employer, or

2) one that consociates at least 15% of persons doing paid work for the employer.

If none of the company trade unions meets the above-mentioned requirements, an organisation that has the largest number of members who do paid work for the employer shall be a representative trade union.

In order to establish the number of persons doing paid work who are members of a company trade union, only persons doing paid work who have been members of this organisation for at least six months before negotiations or bargaining start are taken into account. The six-month period of membership of a given trade union is applicable to all persons doing paid work, i.e. also employees (Article 25(3) par. 7 ATU).

The principle of representativeness is also applicable to the establishment of the rules and regulations for awarding bonuses, a company social benefits fund, and a plan of leaves in case there are more than one company trade union functioning in the workplace.

In accordance with Article 30 par. 4 and 5 ATU, in cases concerning collective rights and interests of persons doing paid work, company trade unions can establish common trade union representation. In cases requiring that a company's trade unions come to an agreement or agree on the stand, those organisations present their jointly agreed stand. The way in which the stand shall be negotiated and presented by an established common trade union representation shall be laid down in the agreement reached by the trade unions concerned.

If trade unions or representative organisations each of which consociates at least 5% of employees fail to present a jointly agreed stand within 30 days from receipt of a document from an employer, having considered different stands of a company's trade unions, an employer takes a decision concerning its adoption (Article 30 par. 6 ATU).

The 30-day period runs from the date when an employer presents a draft document, e.g. rules and regulations for remunerating (or an amendment to it). After its expiry, having considered a company's trade unions' stands, an employer can establish the content of the rules and regulations (e.g. for working or remunerating) independently. In case all trade unions present a unanimous negative opinion, an employer cannot introduce the rules and regulations for remunerating or awarding bonuses independently (the Supreme Court judgement of 12 February 2004, I PK 349/03, OSNP 2005/1, item 4, MPP – supplement 2005/8, item 15, PiZS 2005/4).

For the record, it should be indicated that, due to a considerable ideological diversity of trade unions at a company level and their frequent fight for influence, trade unions are not always interested in the creation of common representation or presentation of a common stand (Seweryński 2000, 131).

In the legal state before 1 January 2019, the above regulation (laid down in the former Article 30 par 4 and 5 ATU) supported the principle of trade union pluralism rather than the principle of representativeness. In a situation when a few trade unions functioned in a company and only one of them had the features of a representative one, it was sufficient to get consent of one organisation, even of the one that was not a representative trade union, to change or adopt rules and regulations for remunerating or working (in case of a negative stand of the remaining trade unions, including the representative one) to give an employer the right to introduce those new rules and regulations independently (Kozek 2016, 68–70).

The Supreme Court also confirmed this conclusion in its judgement of 8 September 2015 (I PK 234/14, LEX no. 2122365), in which it stated that in a company where more than one trade union function, an employer shall not be bound by one representative trade union's stand in order to introduce rules and regulations for remunerating (former Article 30 par 5 ATU).

In the Supreme Court's opinion, one cannot accept the stand that in the light of the provision of Article 77^2 § 4 Labour Code, in case there are many trade unions in a company, the opinion of one of them, provided that it is the only one having the feature of representativeness within the meaning of Article 241^{25a} LC, is sufficient and binding (in the negative or positive sense) in order to introduce the rules and regulations for remunerating in accordance with the employer's proposal. Firstly, the provision uses a plural form to speak about representative trade unions within the meaning of Article 241^{25a} LC, which indicates that it concerns more than one organisation. Secondly, it uses a phrase: "jointly agreed stand", which refers to trade unions as well as representative trade unions within the meaning of Article 241^{25a} LC. The linguistic (grammatical) interpretation of the phrase does not raise any doubts that it concerns such a stand that has been jointly developed by all trade union organisations in a company or at least representative trade unions within the meaning of Article 241^{25a} LC, i.e. such that has been developed

after reaching an agreement by those trade unions. The term 'jointly' means 'together with someone else, together with others', and the term 'agree' just means 'make things match, eliminate differences, give consent, standardise, coordinate, harmonise'. Thus, a 'jointly agreed stand' occurs in relations between at least two entities, which excludes the assumption that the stand of one trade union organisation is such as well.

The Supreme Court judgement indicated for sure did not contribute to curbing the practice of founding the so-called yellow unions.

In the light of Article 12 par. 1 ATU, a trade union shall be founded based on a resolution of its establishment adopted by at least ten persons having the right to establish trade unions. Although the normative regulations in force still do not allow blocking the establishment of a trade union well disposed towards an employer if the founders of the organisation have all rights of coalition, a considerable change was introduced in the form of Article 30 par. 7 ATU, in accordance with which the provision of Article 30 par. 6 ATU is applicable by analogy if there is only one representative trade union organisation consociating at least 5% of employees in a company. This means that if there is one big representative trade union organisation (which meets the additional requirement of at least 5% of employees in a company), it can on its own block the introduction or change in the rules and regulations for remunerating or awarding bonuses even if other unions or a union give their consent to it.

This means that in practice the creation of the so-called yellow unions can turn out to be not so profitable as before. However, it will still be profitable for employers where the biggest trade union organisation does not consociate at least 5% of the staff employed. In the light of the managerial concept of an employer, there are many big employers that are composed of divisions, branches or other organisational units countrywide (e.g. hypermarkets). In case of such employers, it is very difficult for one or a few trade union organisations to reach the threshold of at least 5% of all employees of the given employer. In such cases, the temptation to found yellow unions can be quite big because if there are a few company trade unions but none of them consociates at least 5% of all employees, they can effectively block the introduction of or changes in the rules and regulations for remunerating if they present their jointly agreed negative stand referred to in Article 39 par. 6 ATU. Then, one yellow union that has a status of a company trade union organisation is sufficient to destroy this unity and let an employer introduce such rules and regulations independently or amend them. Theoretically, it could even be a union that consociates persons who are not employees, i.e. other persons doing paid work who have worked for at least six months for an employer that is subject to this organisation's operations (compare Article 25(1) par. 1 (2) ATU).

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COME TOGETHER NOW! NEW TECHNOLOGIES AND COLLECTIVE REPRESENTATION OF PLATFORM WORKERS

Abstract. The purpose of this short discussion paper is to outline the problems faced by collective labour law in face of new forms of work organization such as digital platforms. The digital economy has brought automation of work, digitalisation of processes and coordination by platforms. In comparison to other companies there are significant differences in the way platforms are organized and managed using algorithms. Employment platform workers have gone a long way from initial form of organising in self-help communities, guilds to co-operatives and full participation in trade union structures. Nowadays it has to be considered how to use technologies and data collected by platform companies to the benefit of workers.

Keywords: employment platforms, trade unions, collective representation, algorithmic management.

CHODŹCIE Z NAMI! NOWE TECHNOLOGIE I REPREZENTACJA ZBIOROWA PRACOWNIKÓW CYFROWYCH PLATFORM ZATRUDNIENIA

Streszczenie. Celem niniejszego krótkiego opracowania jest zarysowanie problemów, z jakimi boryka się zbiorowe prawo pracy w obliczu nowych form organizacji pracy, takich jak platformy cyfrowe. Gospodarka cyfrowa przyniosła automatyzację pracy, cyfryzację procesów i koordynację przez platformy. W porównaniu z innymi przedsiębiorstwami istnieją znaczące różnice w sposobie organizacji i zarządzania platformami za pomocą algorytmów. Pracownicy platform zatrudnienia przeszli długą drogę od początkowej formy organizowania się we wspólnotach samopomocowych, cechach do spółdzielni i pełnego uczestnictwa w strukturach związków zawodowych. Obecnie należy się zastanowić, jak wykorzystać technologie i dane gromadzone przez firmy platformowe z korzyścią dla pracowników.

Słowa kluczowe: cyfrowe platformy zatrudnienia, związki zawodowe, reprezentacja zbiorowa, zarządzanie algorytmiczne.

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1. INTRODUCTORY REMARKS. CHARACTERISTICS OF EMPLOYMENT PLATFORMS

In the recent years the phenomenon of labour platforms has attracted a growing body of research. The analysis and comparison of literature demonstrates that there are still gaps, especially insofar as reliable data on the scale of platform work in Europe. New forms of work appear and along with them new ways of workers' organisation, methods and areas of collective bargaining. The collective aspect of platform work is the main focus of this brief synthesis.

Labour platforms are defined as digital networks that coordinate labour service transactions in an algorithmic way (Pesole et al. 2018). However, it is not possible to approach platform work as a single and separate branch of economy. The COLLEEM survey analysed the tasks performed by platform workers and showed their enormous diversity: from online professional services, clerical work, software development and technology work, interactive services, through online micro-tasks, transportation and delivery services and on-location services such as housekeeping, beauty services, on-location photography services and similar (Pesole et al. 2018; Wood et al. 2019).

Not only do the platforms specialise in different areas of activities but they also adapt their architecture and management models to the needs of their clients. Platforms differ among themselves in terms of their role in connecting workers and clients, assigning tasks, the extent to which they exercise control over the work performed and the way they establish the terms of performing services including payment (Adams-Prassl, Risak 2017; Berg et al. 2011). This diversity together with different management patterns applied by the platforms pose significant challenges for organising platform workers.

The development of labour platforms has fuelled the discussion about the dusk of labour law and the diminishing role of collective representation. Less than 5 years ago it was difficult to imagine that platform workers will have access to trade unions or traditional forms of collective bargaining or co-determination (Degryse 2016). Certainly, not all platform workers are equally interested in trade union participation. For example, those who use worker-initiated moderately skilled work platforms could rather perceive themselves as real independent contractors, while online contest workers might see each other as competitors rather than possible trade union colleagues. In these groups, trade union participation does not seem likely to increase even if obstacles stemming from the form of employment were overcome.

For some other groups of workers, traditional approach to collective bargaining focusing mainly on fixing minimum rates of pay may not be sufficient. These differences are not unique for platform workers but rather reflect tendencies in fragmented labour markers (Vandaele 2018).

Organising strategy can differ depending on a type of platform. Sometimes the platform acts rather as an intermediary, providing means that allow the conclusion of a contract between the person performing work on the platform or application and the client. Some platforms leave it up to the client and service provider to determine the amount of remuneration and transfer of payment, and may set minimum rates. Platforms may also allow direct contact between the client and the person carrying out the task (Eurofound 2015). This means that some platforms are organised in a way that resembles employment agencies or temporary work agencies (Adams-Prassl, Risak 2017). In Scandinavian countries, some platform companies register as temporary employment agencies (Chabber in Denmark and Instajobs and Gigstr in Sweden) and the workers are covered by collective agreements for temporary agency work, which helps to improve their pay and working conditions (Jesnes 2020).

2. EARLY FORMS OF SELF-ORGANISING

In case of online crowdworking platforms (such as Amazon Mechanical Turk) in the beginning workers organised themselves to achieve common goals by creating "first aid" communities and increasing the scope of available information, comparing entities for which they provide services, and as a result, gaining a better negotiating position (Aloisi 2016; Unterschütz 2019). One of the most successful example is the Turkopticon started by Lilly Irani and Six Silberman in 2009 (Irani, Silberman 2013; Degryse 2016). The platform allows people working for Amazon Mechanical Turk to organise and to protect their interests. It is interesting to note that the site uses a tool similar to these applied in algorithmic management practice of the platforms – the ratings. In Turkopticon the worker can install an overlay on the web browser, in order to follow the ratings given to service providers by previous contractors, and thus avoid performing work for those who have committed abuses (Irani, Silberman 2013; Degryse 2016). There are multiple other examples of online self-organisation of platform workers, including those carrying out microtasks. They range from online forum software chat channels, instant messaging software to private social media groups (Lehdonvirta et al. 2016). This also indicates the path that should be (and in many cases, is) adopted by trade unions in order to organise these workers.

3. STATUS OF PLATFORM WORKERS AS AN OBSTACLE TO ORGANISE

The main obstacle to organise in trade unions may be the legal status of platform workers. In crowdworking platforms, the tasks can be performed in a very short time (sometimes even a couple of minutes). The amount of time when

the worker engages with the platform (excluding the time devoted to searching for appropriate tasks) may be too short to fall within the scope of European autonomous definition of a worker developed by the CJUE, as such work can be classified as marginal and ancillary (Unterschütz 2019). In some jurisdictions a contract in order to be classified as employment should engage worker for a given number of hours per week or per month. Consequently, the legal status of a worker may constitute a legal obstacle in organising in some jurisdictions. However in some countries self-employed persons can join trade unions and the recent amendments to the Polish trade union law broadened its scope and allow workers employed on the basis of civil law contracts and self-employed to join and form trade unions.

Within some of the platforms, the contract is concluded between the person carrying out the task and the platform. The work is ordered via the electronic platform and delivered to entities managing it. Such platform also determines the conditions of work performance and the amount of remuneration (Saxton et al. 2013; Adams-Prassl, Risak 2017). Then, despite formal objections, cooperation agreements with the platform or application may contain strict and stringent guidelines on how to perform work, as well as a work quality control system usually implemented through a system of assessments issued by clients (Felstiner 2010). Long-term relationships based on subordination connecting the platform and people performing work indicate that the activity of persons providing services on platforms and applications may be qualified as subordinated work (Adams-Prassl, Risak 2017; Felstiner 2010).

In order to organise platform workers, trade unions also take the strategy to challenge workers' misclassification as self-employed. One of the well-known examples is the case supported by GMB, followed by similar cases in Italy and France (Kenner 2019; Johnston 2019; Unterschütz 2020). There are also smaller unions formed to represent precarious workers like the Independent Workers Union of Great Britain (IWGB) in the UK or the New York Taxi Workers Alliance – NYTWA (Johnston 2019).

An interesting solution was adapted in the collective agreement covering Danish Hilfr and 3F platforms: it allows platform workers that have worked more than 100 hours to decide themselves if they want to be self-employed or employees covered by the terms of the agreement (Jesnes 2020).

Even if the legal status of persons performing work on platforms or applications is difficult to determine, it should not be an obstacle to the freedom of association. First of all, it should be borne in mind that in international law, and in particular under the ILO Convention, the freedom of coalition does not only include employees within the meaning of national regulations, but also other groups of people engaged in paid work, including self-employed workers. In art. 2 of ILO Convention No. 87 was granted to employees without any distinction, the right to form and join organisation at their own discretion. As the Union

Freedom Committee points out, "determining who has the right to coalition is not based on the criterion of an employment relationship that often does not exist. This is the case, for example, for agricultural workers, self-employed workers or freelancers who can still exercise their right to associate in trade unions". This can certainly also be applied to people who work within digital platforms.

4. TRADE UNION INITIATIVES

Even though trade unions tended to primarily focus on standard employment, there are many that adapt their strategies and change their structures to reach out to non-standard workers, including platform workers (OECD 2018). Still, most initiatives cover workers doing on-location platform-determined tasks (such as food couriers and drivers) because this form of work facilitates organization of workers (Eurofound 2019). It is difficult to find initiatives aiming at on-location worker-initiated work or online contest work, therefore many platform workers still do not have collective representation (Eurofound 2019).

Numerous examples confirm that the traditional trade unions embrace atypical (including platform) workers or even adapt their structure to be able to serve this group of people (Aloisi 2019; de Groen at al. 2018; Akgüç et al. 2018). The German trade union IG Metall, inspired by Turkopticon, created the FairCrowdWork platform which has collaborators among many trade unions – not exclusively from Europe. This site goes further than Turkopticon, presenting not only ratings of the platforms, but also information on working conditions and remuneration offered by forums that use their services, as well as the exchange of views and experiences and use of legal assistance offered by the trade union. IG Metall is also open to self-employed members since January 1, 2016, with a focus on crowd- and platform-based workers (Eichhorst, Schoeder 2018). It is also one of the co-initiators of the Frankfurt Declaration on Platform-Based Work. The paper calls on the diverse stakeholders to "platform-based work" to work together to ensure basic labour rights and social protection as well as the right to organise.

Another example is Unione Italiana Lavoratori Turismo Commezio Servizi (UILTuCS) – an Italian trade union which offers individual support to platform and app workers as well as seeks the means to organise and represent them in negotiations with industry representatives. Couriers and Logistics Branch of the Independent Workers of Great Britain is defending the rights of workers in the British courier and logistics industry, including self-employed workers for major courier companies and food delivery companies such as Deliveroo and UberEats (Wordpress 2017; Wordpress 2019). Freelancers Union 118 signed a partnership with Lyft, offering the possibility for Lyft drivers to obtain such benefits as entering the pressure group's health plan (Aloisi 2016). All these unions use online

channels to reach out to platform workers and offer services designed especially for this group of members.

In order to fit within the Polish legal framework, trade unions need to operate at the employer's company. They can also create multi-establishment organisations. This means that workers of a particular platform (e.g. Uber Eats) need to establish trade union organisation and register it. Such an organisation needs to have its own statute, authorities seat etc. (Piątkowski 2008), which puts a large administrative burden on precarious workers. This type of organisation of trade unions better fits traditional Fordist model of production than contemporary companies. It seems that better results in organising platform workers are achieved in such countries as Sweden, Denmark, Germany or France, where trade union organisations are located outside the companies.

5. TECHNOLOGY – A FRIEND OR A FOE?

The same technology that plays predominant role in algorithmic management in platforms may be used to support freedom of association. In companies applying algorithmic management techniques an unprecedented degree of oversight and control is possible (Schildt 2017). As many activities leave a digital trace, these patterns can now be inexpensively collected and mined for insights into how people work and communicate, potentially opening doors to more efficiency and innovation within companies. In "traditional" work environments, decision implementation is the responsibility of human managers, but in many platform contexts, data-driven management decisions are made and enacted automatically on the basis of algorithm calculations with little or no human intervention (Möhlmann, Zalmanson 2017). In contrast to Taylorism, algorithmic management techniques enabled by platform-based rating and ranking systems facilitate high levels of autonomy, task variety and complexity, as well as potential spatial and temporal flexibility (Wood et al. 2019). Presumably automated decisions, contrary to the human ones are free of bias and as such prevent discrimination against workers based on factors such as ethnicity or disability status. However, much depends on the design of the algorithm. If it is programmed in an unfavourable way, it can increase discrimination or be so rigid in proposing tasks that the workers' flexibility and autonomy are severely limited (Mandl 2019).

Algorithms rely upon an explicit set of rules, so it could be relatively easy to increase the transparency of algorithmic management processes. However, companies are reluctant to disclose them, therefore, creating very low transparency for workers and customers to gain an information advantage (Möhlmann, Zalmanson 2017). Trade unions could also play a role in co-designing these algorithms just as they participate in creating other management procedures in companies. Such issues as the algorithm formula or necessary corrections

constitute an important subject for negotiations between the platform and workers' representatives. In this way, a lot of data collected form workers could be used to their advantage in the process of negotiating pay rates, organising working time, and in grievance mechanisms or even create new forms of workers representation (Choudary 2018). Trade union applications would be an easy solution for platform workers to see, compare and adhere to the offer of trade unions just by downloading and activating an application. The same tool could be used to calculate and collect trade union fees. Access to data collected by the platform opens the way for the trade unions and their representatives to use automated negotiation processes as well.

The technical solution that enables automatic negotiation is the API (Application Programming Interface). It could also be used for the benefit of workers in other ways. The fact that humans do not interact directly with the API and as a consequence do not have direct access to data on the server make this technology suitable for interactions between platforms and trade unions or their workers. In order to make this technology viable for the purpose, namely trade union interaction with the platform as well as conducting collective bargaining, the platform and workers' representatives should first of all agree what categories of data are to be shared and how they are going to be used by trade unions or workers directly.

Trade unions should make greater use of digital technology in order to meet the needs of workers whose working conditions are strongly determined by algorithmic management.

6. CLOSING REMARKS

Platform workers' collective activism has come a long way from single-platform oriented self-help initiatives, through various forms of co-operation with trade unions towards becoming members of traditional trade union organizations. This allows platform workers to benefit from experience, experts, organisational and financial resources of these organisations – just like other workers. Platform workers can also create their own forms of organisations perhaps better fitted to their needs or the way platforms operate, such as platform co-operatives.

Despite all obvious technical differences the route followed by platform workers in order to organise themselves bears some resemblance to early trade union movements. This is especially visible as we observe riders' protests organised in various countries.

Recent study by the ETUS has shown that regardless of technology applied to manage platforms there is still a need to act together and undertake the effort of collective bargaining. New technological developments create new areas of negotiations, such as transparency of data processing, workers' ratings, privacy,

etc. Still some traditional fields of negotiations, such as pay remain valid not only for platform workers but for the vast majority of precarious workers, and this can be achieved easier through collective effort.

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THE RIGHT TO STRIKE AND OTHER FORMS OF PROTEST OF PERSONS PERFORMING GAINFUL EMPLOYMENT UNDER CIVIL LAW

Abstract. This article deals with the issue of extending the right to conduct a collective labour dispute to persons performing paid work under civil law contracts, after the entry into force of the Act of 5 July 2018 amending the Act on Trade Unions and Certain Other Acts (Journal of Laws 2018, item 1608). The author considers the question whether and to what extent the right to strike and to take industrial action, provided for in the Act of 23 May 1991 on Resolution of Collective Disputes (consolidated text: Journal of Laws 2020, item 123), extends to civil lawful contractors. The position is presented that the proper application of the above mentioned law to the indicated circle of work contractors cannot mean the deprivation or limitation of their right to strike and to take industrial action. The solutions implemented by the Polish legislator with regard to persons performing work outside the employment relationship are more advantageous and far-reaching in comparison with the requirements resulting from the international labour law acts binding on Poland. However, there are specific problems with applying to these persons some of the regulations included in the Act on Resolution of Collective Disputes. These problems results from the fact that the individual legal relationship between these persons and the entities employing them is based on the provisions of civil law, and not on the Labour Code.

Keywords: collective labour dispute, trade union, right to strike, industrial action, civil law contract, employment relationship.

PRAWO DO STRAJKU I AKCJI PROTESTACYJNYCH OSÓB WYKONUJĄCYCH PRACĘ ZAROBKOWĄ POZA STOSUNKIEM PRACY

Streszczenie. Niniejsze opracowanie podejmuje temat rozszerzenia uprawnień do prowadzenia sporu zbiorowego pracy na osoby wykonujące pracę zarobkową na podstawie umów cywilnoprawnych, po wejściu w życie ustawy z 5 lipca 2018 r. o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw. Autor rozważa pytanie, czy i w jakim zakresie prawo do strajku i akcji protestacyjnych, przewidziane przez ustawę z 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych, rozciąga się na cywilnoprawnych wykonawców pracy. Prezentowane jest stanowisko, że odpowiednie stosowanie wymienionej ustawy do wskazanego kręgu adresatów nie może oznaczać de lege lata pozbawienia ani ograniczenia przysługującego im prawa do strajku i akcji protestacyjnej. Rozwiązania wdrożone przez polskiego ustawodawcę w odniesieniu do

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osób wykonujących pracę poza stosunkiem pracy są bardziej korzystne i dalej idące w porównaniu do wymagań wynikających z wiążących Polskę aktów międzynarodowego prawa pracy. Rysują się jednak szczegółowe problemy stosowania do tych osób niektórych regulacji zamieszczonych w ustawie o rozwiązywaniu sporów zbiorowych, co wynika z tego, że indywidualny stosunek prawny pomiędzy tymi osobami a podmiotami je zatrudniającymi jest oparty na przepisach prawa cywilnego, a nie na przepisach Kodeksu pracy.

Słowa kluczowe: spór zbiorowy pracy, związek zawodowy, prawo do strajku, akcja protestacyjna, umowa cywilnoprawna, stosunek pracy.

1. THE SUBJECTIVE SCOPE OF POLISH COLLECTIVE LABOUR LAW

The status of persons performing gainful employment under civil law contracts is one of the central issues of the contemporary Polish labour law. The collective labour law has been long considered an area of labour law which has not been dedicated to the workers performing their duties on civil law basis. In the recent period this situation has began to change as a result of an attitude of International Labour Organization towards the civil law workers. It gave rise to the process of an extention of collective labour law rights to the above-mentioned circle of persons.

This text is focused on the issue whether the right to strike and to take an industrial action may be extended to persons performing paid work on civil law basis. To this aim the formal-dogmatic method of an analysis of legal text is used. This method has to be supplemented by the axiological analysis of the purpose of legal regulation. It is also of a key importance to take into account an international law context of Polish regulation.

The essential part of considerations must be preceded by the remarks on the scope of collective labour law regulations, with particular reference to persons employed on civil law basis. According to the legal status effective before the enforcement of the Act of 5 July 2018 amending the Act on Trade Unions and Certain Other Acts (Journal of Laws 2018, item 1608), the subjective scope of the coalition rights covered only certain categories of persons performing gainful employment outside the employment relationship. The aforementioned amendment brought about a breakthrough change. The newly added provision of Article 1^1(1) of the Act on Trade Unions of 23 May 1991 (consolidated text: Journal of Laws 2019, item 263 as amended; hereinafter: ATU) has shaped the definition of a person performing gainful employment. Coalition rights were given to a significantly expanded circle of persons covered by this definition. Other regulations that make up the collective labour law framework were also applied to these persons. In the area of collective labour disputes, this is determined by Article 1 of the Act of 23 May 1991 on Resolution of Collective Labour Disputes (consolidated text: Journal of Laws 2020, item 123; hereinafter: ARCD), according to which a collective dispute between employees and their employer(s) may relate to the

working conditions, pay or social benefits of employees or other groups who have the right to join a trade union. According to the amended Article of 6 ARCD, the provisions of this act, which refer to employees, are applicable to persons other than employees who perform gainful employment, as referred to in Art. 1^1(1) of ATU.

The circle of persons performing paid work who are beneficiaries of the collective labour law solutions (collective employment law) is defined very broadly in Article 1^1(1) of ATU. Apart from employees (Article 2 of the Labour Code; hereinafter: LC), this provision includes persons meeting the following conditions: 1) providing paid work for remuneration on a basis other than the employment relationship, 2) not employing other persons, regardless of the basis of employment, 3) having such rights and interests related to the performance of work that can be represented and defended by a trade union.

Undoubtedly, the standard of Article 1^1(1) of ATU covers persons performing "work" for the benefit of other entities on the basis of named and unnamed civil law contracts of payable nature, regardless of whether it is a result agreement or a service contract. In the light of the above provision, the circle of subjects benefiting from coalition rights also include natural persons conducting business activity within the meaning of the Act of 6 March 2018 on the Law of Entrepreneurs (consolidated text: Journal of Laws of 2019, item 1292, as amended), unless they employ other persons as part of this activity. It should be noted that the conduct of business activity by natural persons is manifested by the performance of work (services), on the basis of civil law contracts concluded with other persons (mandators, ordering parties, etc.). Similar contracts are concluded by service providers who are not entrepreneurs with the difference that the business activities of natural persons are organised, performed in their own name and on a continuous basis (Article 3 of the Law on Entrepreneurs). Therefore, performance of services or other activities under contracts concluded as part of the business activity falls within the concept of "paid work" of natural persons referred to in Article 1^1(1) of ATU.

Article 1^1(1) of the above-mentioned act contains a criterion referring to the professional interest of the natural person that can be represented and defended by a trade union. A certain usefulness of this requirement for the clarification of the circle of the protected persons cannot be excluded. While an entrepreneur being a natural person has only an economic interest, he should not be an addressee of collective labour law solutions modelled on the rights of employees. However, some authors have aptly questioned the practical usefulness of this criterion, indicating that its introduction proves that the legislator was concerned with the broadest possible definition of the subjective scope of the coalition (Stelina 2018, 26). In particular, it does not seem difficult for an individual entrepreneur to plausibly ensure that his (her) professional interest protected by collective labour law is linked with the level of remuneration or guaranteeing safe and hygienic working conditions in the workplace (see Article 304[3][2] LC).

It should be emphasized that the legislator has resigned from introducing further criteria, apart from personal performance of work, which would limit the subjective scope of application of Article 1^1 point 1 of ATU. Therefore, the solutions of the collective labour law are addressed to the dependent and independent performers of gainful work, reserving in both cases the negative condition that a person does not act as an employer. It should be noted that a dependent contractor (dependent self-employed person) is defined in the literature as a person who earns all or most of his income from work (services) performed for a specific entrepreneur (Boruta 2005, 3; Gersdorf 2012, 28; Duraj 2019, 11).

This paper, due to its scope, focuses on the status of civil law contractors, omitting those who provide paid work on other grounds, including officers of the militarised services, covered by autonomous regulations of service pragmatists.

2. ARE PERSONS PERFORMING GAINFUL EMPLOYMENT OUTSIDE THE EMPLOYMENT RELATIONSHIP ENTITLED TO STRIKE?

In the judgment of 2 June 2015, K 1/13 (Constitutional Tribunal Case Law – Series A 2015, No. 6, item 80), the Constitutional Tribunal ruled that persons performing gainful employment outside the employment relationship should have the right to associate in trade unions. However, it did not declare whether these persons should be granted the right to assert their rights and interests by way of a collective dispute, including the right to initiate its confrontational stages in the form of a strike or industrial action; this issue was outside the scope of the Tribunal's consideration. The international law regulations in force in Poland do not provide a direct answer to this question either. The right to strike has not been explicitly stated in the International Labour Organization (ILO) conventions. However, it is considered that it results indirectly from Article 3 of ILO Convention No. 87 (Journal of Laws 1958, No. 29, item 125), which grants employees' organisations the right to organise their own activities. Similar importance is attached to the provisions included in some other ILO conventions. The right to strike is also expressly granted in other international labour law acts (see closer Żołyński 2013, 200–203). For instance, Article 6(4) of European Social Charter (Journal of Laws 1999, No. 8, item 67) states that the contracting parties recognize the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into. This right shall not be subject to any restrictions and limitations, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals (Article 31[1] of ESC, Part II).

Article 9(1) of ILO Convention No. 87 grants the national legislator the option to restrict the trade union rights of officers of the armed forces and the police. This provision would indicate that restrictions cannot be imposed on other categories of workers. It seems, however, that such a proposal would lead to an improper simplification of the discussed problem. Firstly, as noted above, the Convention does not speak of the right to strike (but only the right of coalition). Secondly, it is not irrelevant whether we are dealing with workers in the strict sense of the word (performing subordinate work), who remain in the primary circle of interest of the Convention's standard-setter, or with other persons providing gainful activity who are covered by the Convention through an inclusive interpretation of the term worker, made at a later stage of application of the Convention.

In my opinion, it is unacceptable, in the light of the provisions referred to above, to generally deprive civil law contractors of the right to initiate and conduct a collective labour dispute. It would be difficult to accept granting the right of association while excluding the basic tools enabling the defence of the rights and interests of the associated persons. On the other hand, it seems that the national legislator has more flexibility as far as confrontational methods of collective labour dispute are concerned.

The issue of collective disputes was not directly addressed by the recommendation of the ILO's Committee on Freedom of Association of 15–30.03.2012 (ILO Report of 313th Session, Geneva 15–30.03.2012, Case No. 2088, ilo.org.pl, accessed: 15.10.2019), which became a motive for the OPZZ (National Trade Union Agreement) to submit an application to examine the constitutionality of the provisions of the Act of Trade Union, decided by the judgment of the Constitutional Tribunal of 2 June 2015, K 1/13. On the contrary, the ILO experts' report summarizing the so-called Technical Assistance (Mission Report), conducted on 14–16 May 2014 on the initiative of the Polish government, with the consent and participation of representatives of trade unions and employers' organizations (http://www.solidarnosc.org.pl/images/files/zalaczniki/Pomoc techniczna MOP.pdf., accessed: 15 October 2019; see closer Podgórska-Rakiel 2014), may be helpful for considerations of this paper. The report refers to the situation of contractors of "genuine" civil law contracts, distinguished from the apparent contracts, which are in fact a form of concealment of employment of a labour nature. Genuine civil law contracts with very different circumstances would be, in the opinion of ILO experts, difficult to regulate under the Act on Trade Unions. It was observed by ILO experts that many sections of the above act would be amended to adapt to these different circumstances and this process would be very time-consuming. Hence, it would be preferable and simpler to grant broadly to all workers the right to organize in a global provision of ATU and let the social partners and the courts address application issue (cf. Jończyk 1984, 348). A provision of this act could also acknowledge that all trade unions had the right to enter into collective disputes, since it would be difficult to apply the entire

ARCD to relations other than employment relationships (ILO Mission Report, point 11).

The above report also stresses that all workers in broad sense of the term should have the right to organize, enjoy protection of their organizational rights and have a collective voice. However, the ILO supervisory bodies do not necessarily expect that this rights be granted through the Act on Trade Unions to self-employed and persons working under civil law contracts. In particular there should be a possibility to exercise a form of industrial action in a collective way but not necessarily under ARCD. For example, the right to organize would allow musicians to engage collectively with the Government and the major players in this industry since they have not a single employer (ILO Mission Report, point 7).

Nevertheless, the Polish legislator decided to include in ARCD a regulation relating to non-employee performers (see Grzebyk, Pisarczyk 2019, 95, who assessed this solution as 'fairly bold', indicating that the legislator did not attempt to introduce any restrictions in this respect). The amending Act of 5 July 2018 amended Article 6 of ARCD by extending the existing scope of reference used in this Act to the term "employee". In accordance with the amended wording of Article 6, the provisions of ARCD, in which the employees are referred to, apply accordingly to persons other than employees who perform paid work referred to in Article 1^1(1) of ATU.

The "appropriate" application of the provisions of the ARCD to employees presupposes that the specificity of carrying out gainful employment on a basis other than the employment relationship must be taken into account. In my opinion, it should be ruled out that the proper application of the provisions of ARCD is understood as a permission to exclude the right to strike of certain categories of non-employees. It cannot be denied that the proper application of the provisions may also consist in a refusal to apply the rules falling within the scope of reference. However, due to the nature of the right to strike, which is given a free dimension, it would be necessary for the legislator to explicitly exclude the provisions on strike in relation to the group of employees which is distinguished by the legal form (basis) of performing paid work. This conclusion is supported by the aforementioned provisions of international law, which describe the exclusion of coalition rights in terms of derogation from the rule, justified by important reasons of a general social nature. The provision of Article 59(3), sentence 2 of the Constitution of the Republic of Poland has an even more categorical meaning. According to this provision, the act, for reasons of public interest, may restrict or prohibit a strike with respect to certain categories of workers or in certain areas. In the light of the constitutional norm referred to, the provision of an ordinary statute limiting the right to strike should meet two requirements. First, the provision should take the form of excluding or restricting the right to strike, and second, it should specify the category of workers covered by such restriction.

Therefore, taking into account the above considerations, the basis for exclusion of strike rights of persons who are not employees can only be the provision of Article 21 of ARCD, which constructs a catalogue of exclusions by the nature of the work performed (in specific industries or units or related to specific worksites), and not by the legal form of performing work.

3. THE PROBLEM OF AN EMPLOYER OF A PERSON WHO IS ENGAGED IN GAINFUL EMPLOYMENT OUTSIDE THE EMPLOYMENT RELATIONSHIP

The issue of the party of a collective dispute is undoubtedly within the "general part" of the collective labour law, going beyond the horizon of the deliberations about the confrontational stage of the dispute. Despite this reservation, the discussion of this issue within the framework of this study is purposeful, as the conditions related to the party of a collective dispute have an impact on the various stages of the dispute, also affecting the exercise of the right to strike.

Pursuant to the amendment act of 5 July 2018, there has been a change in the definition of a legal employer in Article 5 of ARCD. This change is a reflection of the full extension of coalition rights to persons performing work on a basis other than the employment relationship. The above-mentioned provision in its current wording refers when defining an employer to Art. 1^1(2) ATU, in force since 1 January 2019. The latter provision states that whenever this Act refers to an employer, it should be understood as an employer within the meaning of Article 3 of LC and an organizational unit, even if it has no legal personality, as well as a natural person, if they employ a person other than an employee who performs gainful employment, regardless of the basis of such employment.

The application of this definition to non-employee relations poses significant problems, especially with regard to self-employed persons (in particular carrying out economic activities), who are potential subjects of collective dispute and the right to strike on the employee side. On a general level, it should be noted that the earlier contexts of using the terms "employer" and "employment" referred to the party of employment relationship or to the entity to which the civil law contract is provided. The employing entity was in each case a person for the benefit of whom work is provided under a specific legal relationship. By contrast, a person conducting economic activity has no employer, as he or she performs this activity for their own benefit. The labour law literature has developed the term "self-employed", meaning the persons who "employ themselves" (see terminological remarks made by Jończyk 2000, 40). It means that they do not perform their activities for the benefit of a person who could be compared to an employer. This statement applies in particular to the independent self-employed person.

In the existing legal conditions, set out by Article 1^1(2) of ATU, it should be considered that employers of natural persons conducting individual activities

(entrepreneurs) are organizational units and natural persons with whom these entrepreneurs conclude named and unnamed civil law contracts, in order to provide them with services in the broad sense. Employers within the meaning of Article 1^1(2) of ATU (in connection with Art. 5 of ARCD) are, therefore, in fact, the contractors of these persons on the economic market. Since the definition of a person performing gainful employment (Article 1^1(1) of ATU) does not apply the economic criterion (e.g. by indicating that such a person is bound by a legal relationship with only one contractor), these persons may have as many employers as they have contractors, which may potentially result in organisational problems in conducting a collective labour dispute, not excluding strike action. A separate issue, which due to lack of space will not be developed in these deliberations, is the adoption by the legislator of the so-called management concept of an employer when formulating the definition of Article 1^1(2) of the above-mentioned act. This leads to the conclusion that the employer of a person conducting a non-employee gainful activity may be *in concret*o not a legal person, but an internal organizational unit of that person which is deprived of the status of civil law subject (see closer Tomanek 2019).

4. ADEQUATE APPLICATION OF THE PROVISIONS ON STRIKE AND INDUSTRIAL ACTION TO PERSONS ENGAGED IN GAINFUL EMPLOYMENT OUTSIDE THE EMPLOYMENT RELATIONSHIP

Pursuant to Article 6 of ARCD, the provisions of this act referred to as employees shall apply accordingly to persons other than employees who perform gainful employment referred to in Article 11(1) of the Act. The provision of Article 6 of ARCD belongs to the referral provisions of broad significance, as it does not contain, apart from the element of referral, the autonomous content necessary to build a legal norm. The reference is of an internal nature (as it concerns the provisions contained in the same legal act) and a descriptive one, as it does not indicate the scope of application by specifying the numbers of the editorial units of the act, but by using the term "employee". The reference scope includes the status of a person performing other paid work, referred to in Article 1^1(1) of ATU. The possibility to construct such a reference is provided for in § 156(4) of the Appendix to the Regulation of the Prime Minister of 20 June 2002 on the Principles of Legislative Technique (consolidated text: Journal of Laws of 2016, item 283).

A certain doubt may be raised by a narrow definition of the scope of application of the reference norm, which is fulfilled only if the applicable provisions use the term "employee", referring to persons performing gainful employment outside the employment relationship. A literal understanding of Article 6 of ARCD would mean that the provisions of that act which do not use the term "employee" are left out of the scope of the referral. As an example, we

can mention Article 18 of this act, which states that "Participation in a strike is voluntary" and Article 24, according to which "Trade unions decide on the creation and use of strike funds. These funds are not subject to execution". A purposeful interpretation, however, allows the above provisions to be included in the scope of reference, since they regulate the employee's right to strike or the consequences caused by the strike.

What is essential, however, is the fact that the provision of Article 6 of ARCD speaks of "appropriate" application of the provisions of this act, in which the employees are referred to, to persons other than employees who perform gainful employment.

In the legal theory literature it has been noted that the reservation of appropriateness used by the legislator is aimed at sensitising the interpreter of the provisions to the specific nature of the reference, i.e. that it is not a direct reference, but an indirect one. In the cases in question, the functional, purposeful and axiological interpretation must take precedence over the literal interpretation, which is somewhat secondary in the process of the clarification of the provisions speaking of appropriate applications of other provisions (Hauser 2005). It means that an interpreter should take into account the specific nature of legal relationships involving the performance of gainful employment outside the employment relationship.

In the literature, it is emphasized unanimously that the result of proper application of the provision may be: 1) the application of specific provisions directly; 2) their application after appropriate modification, taking into account the specificity of a given legal institution; 3) total inapplicability of a specific provision (Nowacki 1964, 370–371).

With regard to the situation ad 2), it should be agreed that the modification of a properly applied provision may require not only the necessary correction of its hypothesis, but also the adjustment of its disposition by making the necessary changes to it, depending on the specificity of the scope of the reference (Masewicz 1977, 836). However, the boundary of such changes should be the essence of the content of the reference provision and the function of the legal norm derived from it.

5. CONDITIONS FOR EXERCISING THE RIGHT TO STRIKE BY PERSONS ENGAGED IN GAINFUL EMPLOYMENT OUTSIDE THE EMPLOYMENT RELATIONSHIP

According to above considerations, the provisions of ARCD do not authorize such limitations to the right to strike of persons performing work outside the employment relationship, which arise solely from the legal form of their employment. Recourse to strikearms may be a particularly dysfunctional solution in the case of self-employed persons who are not economically dependent

on a single contractor. An example would be a collective action of persons performing construction work or repair work under an individual housing project. The similar situations cannot be ruled out *a priori*. Therefore, the provisions of ARCD concerning the legality of the right to strike should be analysed in the context of the reference contained in Article 6 of ARCD, assuming appropriate application of these provisions to persons performing gainful employment outside the employment relationship.

This analysis leads to the conclusion that the regulations of Article 17–22 of ARCD will be applied to non-employee contractors directly or after the necessary scope of their modification. An example of direct application is the provision of Article 18 of ARCD, which provides for voluntary participation in a strike. However, the obligations of strike organizers, as set out in Article 21 of ARCD, require modification. If the strike is attended by persons performing work on other grounds than the employment relationship, there are no grounds for using the terms "employing establishment" and "manager of employing establishment" (Article 21(1) *in fine* of ARCD), with strictly employee-related connotations. Therefore, the striking party's partner in performing the necessary cooperation during the strike will be for instance manager of the undertaking or the manager of the construction site where the civil law contractors of the project went on strike.

The subjective and objective prohibitions on strike laid down in Article 19 of ARCD shall apply equally to civil law contractors employed in specific positions and in the institutions mentioned in that provision. Persons who are not employees, working for the benefit of the militarised formations referred to in Article 19(2), retain the right to strike, but it is not permitted to exercise this right in these formations.

The application of the provision of Article 23 of ARCD to civil law contractors is questionable. Paragraph 1 of this provision indicates that an employee's participation in a strike organised in accordance with the provisions of this act does not constitute a breach of their employment obligations. According to paragraph 2, during such a strike, an employee retains the right to social security benefits and rights stemming from the employment relationship, except for the right to remuneration. The period of break in the performance of work is included in the period of employment at the workplace.

This means that an employer has no grounds for applying sanctions against an employee who took part in a legal strike. However, the provisions of civil law do not know the concept of "breach of employment obligations". Violation of these obligations can only be the basis of an employee's liability if it is based on a guilty plea. On the contrary, civil law often uses the principle of absolute liability for non-performance or improper performance. This principle may result both from the contract (Article 353^1 of the Civil Code) and from the content of the provisions of the Civil Code, operating specific sanction constructions. As an example, Article 635 of the Civil Code may be invoked, which allows the orderer to withdraw

from the specific task contract if the performer delays the commencement or completion of the work to such an extent that it is unlikely to be completed within the agreed time. The orderer's exercise of the right to withdraw from the contract does not depend on the possibility of charging the party accepting the contract with a breach of due diligence. Therefore, the question arises whether the orderer is entitled to use the right of withdrawal if the reason for the contractor's delay was participation in a legal strike (cf. Baran 2019, 491, who indicates that participation in such a strike does not constitute a violation of civil law obligations). It shows that the proper application of Article 23 of ARCD to persons performing work under civil law contracts may encounter significant difficulties. It should be also noted that the second sentence of Article 23(2) of ARCD refers to the concept of employee's length of service, which calls into question the possibility of its reference to civil law contractors.

It should be added that the provisions of Articles 24 and 25 of ARCD, regulating the creation of strike funds by a trade union and the right of persons performing work on a basis other than an employment relationship to carry out an industrial action, may be applied without significant changes to persons performing work on a basis other than an employment relationship.

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POWERS OF TRADE UNION ACTIVISTS ENGAGED IN SELF-EMPLOYMENT – ASSESSMENT OF POLISH LEGISLATION[1]

Abstract. The objective of the foregoing article is an analysis of the rights which the Polish legislature granted to self-employed trade union activists after the extension of coalition rights to these persons. In this regard, the trade union law extended to self-employed persons working as sole traders protection, which until 2019 was reserved exclusively for employees. Pursuant to the amendment of July 5, 2018, self-employed trade union activists were granted – based on international standards – the right to non-discrimination on the basis of performing a trade union function, the right to paid leaves from work, both permanent and ad hoc in order to carry out ongoing activities resulting from the exercise of a trade union function, and the protection of the sustainability of civil law contracts which form the legal basis for the services provided. the exercise of a trade union function, and the protection of the sustainability of civil law contracts which form the legal basis for the services provided.

The author positively assesses the very tendency to extend employee rights to self-employed persons acting as union activists. However, serious doubts are raised by the scope of privileges guaranteed to non-employee trade union activists and the lack of any criteria differentiating this protection. Following the amendment of the trade union law, the legislator practically equates the scope of rights of self-employed trade union activists with the situation of trade union activists with employee status. This is not the right direction. This regulation does not take into account the specificity of self-employed persons, who most often do not have such strong legal relationship with the employing entity as employees. The legislature does not sufficiently notice the distinctness resulting from civil law contracts, which form the basis for the provision of work by the self-employed the separateness resulting from civil law contracts, which constitute the basis for the performance of work by the self-employed. According to the author, the scope of rights guaranteed *de lege lata* to self-employed union activists constitutes an excessive and unjustified interference with the fundamental principle of freedom of contract on the basis of civil law employment relations (Art. 353[1] of the Civil Code). From the point of view of international standards, it would be enough to ensure the right of these persons to non-discrimination on the basis of performing a trade union function; the right to unpaid temporary leaves from work in order to perform current activities resulting from the performed trade union function; the right to high compensation in the event of termination of a civil law contract with a self-employed trade union activist in connection with the performance of his functions in trade union bodies and full jurisdiction of labour courts in cases arising from the application of trade union law provisions.

The disadvantage of the regulation at issue is also that Polish collective labour law does not in any way differentiate the scope of the rights and privileges guaranteed to self-employed trade union

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activists, ensuring the same level of protection for all. In that area, it appears that the legislature *de lege ferenda* should differentiate the scope of that protection by referring to the criterion of economic dependence on the hiring entity for which the services are provided.

Keywords: self-employment, trade union activists, right of coalition, self-employment, trade unions.

UPRAWNIENIA DZIAŁACZY ZWIĄZKOWYCH WYKONUJĄCYCH PRACĘ ZAROBKOWĄ NA WŁASNY RACHUNEK – OCENA POLSKIEJ REGULACJI PRAWNEJ

Streszczenie. Przedmiotem artykułu jest analiza uprawnień, jakie polski ustawodawca zagwarantował samozatrudnionym działaczom związkowym po rozszerzeniu na te osoby prawa koalicji. W tym zakresie ustawa związkowa rozciągnęła na osoby pracujące zarobkowo na własny rachunek w ramach jednoosobowej działalności gospodarczej ochronę, która do 2019 roku była zastrzeżona wyłącznie dla pracowników. Na mocy nowelizacji z dnia 5 lipca 2018 roku przyznano samozatrudnionym działaczom związkowym – powołując się na standardy międzynarodowe – uprawnienia w przedmiocie niedyskryminacji ze względu na pełnienie funkcji związkowej, prawo do płatnych zwolnień od świadczenia pracy, zarówno o charakterze stałym, jak i doraźnym, w celu wykonywania bieżących czynności wynikających z realizowanej funkcji związkowej, a także ochronę trwałości kontraktów cywilnoprawnych stanowiących podstawę prawną świadczonych usług.

Autor pozytywnie ocenia samą tendencję co do rozszerzania uprawnień pracowniczych na osoby samozatrudnione pełniące funkcję działaczy związkowych. Poważne wątpliwości budzi jednak zakres przywilejów gwarantowanych związkowcom-niepracownikom oraz brak jakichkolwiek kryteriów różnicujących tę ochronę. Ustawodawca po nowelizacji prawa związkowego praktycznie zrównuje zakres uprawnień samozatrudnionych działaczy związkowych z sytuacją związkowców posiadających status pracowniczy. To nie jest właściwy kierunek. Regulacja ta nie uwzględnia w żadnym razie specyfiki osób pracujących na własny rachunek, które najczęściej nie pozostają w tak silnej więzi prawnej z podmiotem zatrudniającym, jak pracownicy. Ustawodawca nie dostrzega w wystarczającym stopniu odrębności wynikających z umów cywilnoprawnych, które stanowią podstawę świadczenia pracy przez samozatrudnionych. Zakres uprawnień gwarantowanych *de lege lata* samozatrudnionym działaczom związkowym zdaniem Autora stanowi nadmierną i nieuzasadnioną ingerencję w fundamentalną na gruncie cywilnoprawnych stosunków zatrudnienia zasadę wolności umów (art. 353^1 KC). Z punktu widzenia standardów międzynarodowych wystarczyłoby zapewnić tym osobom prawo do niedyskryminacji ze względu na pełnienie funkcji związkowej; prawo do nieodpłatnych doraźnych zwolnień od świadczenia pracy w celu wykonywania bieżących czynności wynikających z realizowanej funkcji związkowej; prawo do wysokiej rekompensaty na wypadek rozwiązania z samozatrudnionym działaczem związkowym umowy cywilnoprawnej w związku z wykonywaniem przez niego funkcji w organach związku zawodowego oraz pełną kognicję sądów pracy w sprawach powstających na tle stosowania przepisów prawa związkowego.

Wadą analizowanej regulacji jest również to, że polskie zbiorowe prawo pracy nie różnicuje w żaden sposób zakresu uprawnień i przywilejów gwarantowanych samozatrudnionym działaczom związkowym, zapewniając wszystkim ten sam poziom ochrony. Wydaje się, że w tym obszarze ustawodawca *de lege ferenda* powinien zróżnicować zakres tej ochrony, odwołując się do kryterium zależności ekonomicznej od podmiotu zatrudniającego, na rzecz którego świadczone są usługi.

Słowa kluczowe: samozatrudnienie, działacze związkowi, prawo koalicji, praca na własny rachunek, związki zawodowe.

1. INTRODUCTORY NOTES

Both in Polish legislation and in the regulations of many European countries, there has been a clear trend towards extending certain powers, until recently reserved exclusively to employees, to contractors of civil law contracts (Duraj 2018, 37 and the following). This group includes self-employed persons, by which I mean, for the purposes of this article, natural persons who personally provide services to one or more (multiple) contracting entities in the context of a sole economic activity as traders, under their own responsibility and risk, without being able to hire employees or use someone else's work under civil law contracts (Duraj 2009, 24 and the following). This trend is largely the result of adapting national legal systems to standards based on international and EU law standards, and in Poland also a consequence of adapting labour legislation to constitutional requirements. It is also the result of the spread of self-employment in the market economy, which is increasingly crowding out the classic employment relationship due to the possibility of significant reduction of employment costs (the self-employed is the one who bears all the burdens and risks associated with the work provided, especially social risks) and the pursuit of a rational employment policy (the contracting entity can relatively easily opt out of the services of a self-employed person). According to BAEL, in Poland, in the first quarter of 2020 the number of working people amounted to 16.4 million, of which more than 2.33 million were self-employed (more than 14%)[2] and this number is gradually increasing.

Until 2019, under Polish law, the self-employed could enjoy the rights of an individual nature only, especially in the field of life and health protection including the prohibition of discrimination and the requirement of equal treatment in employment; guaranteed minimum wage and protection of wages as well as protection of motherhood and parenthood (cf. Duraj 2019, 341 and the following). The turning point was 1 January 2019, when the law of 5 July 2018 amending the Trade Union Act and certain other laws (Journal of Acts 2018, item 1608) entered into force. According to the amendment, people who were personally engaged in gainful employment outside the employment relationship, and therefore also self-employed persons with a single-person economic activity, if they do not hire other persons for such work (services), were granted the right to form non-employee trade union organisations and to join existing workers' unions on the same basis as regular employees. This is a fundamental qualitative change, since membership of trade union organisations paves the way for collective labour law powers immanently linked to the right of coalition, under which they have the right not to be discriminated against on the grounds of union membership or lack

[2] https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5475/4/37/1/aktywnosc_ekonomiczna_ludnosci_polski_i_kwartal_2020_roku.zip.

thereof; the right to bargain with a view to the conclusion of a collective labour agreement and other collective agreements; the right to bargain for the particular purpose of the resolution of collective disputes, as well as the right to organise strikes and other forms of protest within the limits laid down by the law. Furthermore, the right of coalition enables self-employed persons to be active in trade union structures, which gives them the power of non-discrimination for their participation in any trade union activities, the right to paid time off (permanent or ad hoc) for the performance of the day-to-day activities resulting from the trade union function, and the protection of the durability of civil law contracts which constitute the legal basis for the services provided. It is precisely this entitlement of self-employed trade union activists that will be analysed in the foregoing article. While the trend towards extending the collective rights to persons carrying out gainful employment as sole traders should be positively assessed, the scope and criteria of this protection and its regulation leaves much to be desired and may give rise to a number of interpretative doubts in practice.

2. *RATIO LEGIS* OF THE PRIVILEGED POSITION OF TRADE UNION ACTIVISTS ENGAGED IN SELF-EMPLOYMENT

Until the amendment of Trade Union Act, under Polish law trade union membership was reserved only to employees, i.e. natural persons employed on the basis of an employment relationship. The primary objective of granting special privileges and protection to trade union activists, is, first and foremost, to guarantee the independence of trade unions as a social partner who, by representing and defending the rights and interests of economic operators and controlling the employer‘s compliance with labour law, runs the risk of retaliation on his part (cf. Dral 1997/1998, 285 and the following). The union activists must enjoy statutory privileges in order to be able to properly and effectively act as employees‘ representatives without exposing themselves to the negative consequences of the actions taken by the hiring entity. Such justification for the special powers and privileges of trade union activists has a strong position in the norms of international law. First of all, attention should be paid to the provisions of The International Labour Organisation (ILO) Convention No 135 ratified by Poland of 23 June 1971 concerning the protection and facilitation of workers‘ representatives in enterprises (Journal of Acts 1977, No. 39, item 178). In accordance with Article 1 thereof, trade union activists, as representatives of employees in an enterprise, should enjoy effective protection against any acts of harm, including dismissal, taken by reason of their nature or activity as employees‘ representatives, their trade union membership or participation in trade union activities, provided that they act in accordance with the legislation in force, collective agreements or other commonly agreed agreements. Detailed

guarantees in this regard are set out in Article 6 of ILO Recommendation No. 143 supplementing that Convention, indicating also the need to specify the reasons for dismissal, the obligation to obtain the opinion or consent of the relevant body for such dismissal or the possibility of claiming reinstatement or compensation by an unlawfully dismissed trade union activist (Kurzynoga 2019, 1091 and the following). Importantly, according to the guidelines of the ILO Committee on Freedom of Association, these guarantees should not be limited to employees only, but should cover all employees and their representatives, regardless of the legal basis for the provision of work (Podgórska- Rakiel 2013, 72; Podgórska-Rakiel 2014, 510–511). Similar provisions are included in the Revised European Social Charter of 3 May 1996, which Poland has not ratified to date. In accordance with point 28 of Part I of the Charter, workers' representatives in an enterprise have the right to protection against actions detrimental to them and should be provided with adequate facilities for the performance of their tasks. Article 28 of Part II of the Charter, on the other hand, contains more detailed obligations of the States – Parties to the Charter in this regard. In order to ensure the effective exercise of the right of employees' representatives to fulfil their duties, the Parties undertake to ensure that they enjoy effective protection against acts detrimental to them, including dismissals, which would be caused by their status or activities as employees' representatives in the enterprise, and shall be given adequate facilities to enable them to fulfil their duties quickly and effectively, taking into account the existing system of professional relations in the country, as well as the needs, size and capabilities of the enterprise concerned.

The legislature, introducing the amendment to the Trade Union Act of 5 July 2018, decided to broaden the scope of the right of the coalition to persons who personally perform gainful employment outside the employment relationship and, therefore, to grant self-employed persons who act as trade union activists a similar range of rights and privileges, ensuring that they effectively carry out the tasks of representation of the persons carrying out the work for the employment entity concerned. The explanatory memorandum to the draft amendment (8th term Parliament paper no. 1933) states that the primary objective of protecting a trade union activist is to guarantee his independence in the performance of his duties. There is therefore no basis for making that protection dependent on the existence of a certain type of legal link between the person engaged in gainful employment and the employer. Consequently, as a result of the extension of the law of the trade union coalition to new groups of entities, it was necessary to extend the aforementioned protection also to non-employee trade union activists within the meaning of the Labour Code (law of 26 June 1974, i.e. Journal of Acts of 2020, item 1320, as amended – hereinafter KP). Making this protection dependent on the type of legal link between a person engaged in gainful employment and an employer would lead to a diversity of legal guarantees for a certain category of people performing essentially the same social function and exposed to the same acts of retort or

repression by the employer.[3] Although I agree, in principle, with that argument, I am not convinced by the scope of that protection and of the privileges, which are practically the same as the ones granted to trade unionists having the status of employees. The legislature does not sufficiently notice the distinctness resulting from civil law contracts, which form the basis for the provision of work by the self-employed (service contract, contract to perform a specified task). These persons are governed by a completely different legal regime, which is based on the provisions of the Civil Code (Law of 23 April 1964, i.e. Journal of Acts 2020, item 1740 as amended – hereinafter KC). Their legal situation is governed by standards of dispositive nature, which apply unless the parties decide otherwise in civil law context.[4] This regime is therefore based on the principle of freedom of agreements (art. 353^1 KC), where there is a far-reaching autonomy in shaping the relationship between the parties to the agreement.[5] Guaranteeing pursuant to the provisions of the law of 23 May 1991 on trade unions (i.e. Journal of Acts 2019, item 263, as amended – hereinafter referred to as the Trade Union Act) self-employed union activists privilege and protection at a level almost identical to that of regular employees, constitutes excessive and unjustified interference with the fundamental principle of the freedom of employment under civil employment relations. This regulation also does not take into account the specificities of self-employed persons, who most often do not have such a strong legal relationship with the hiring entity as employees.[6] It is also worth noting that, for years, labour law has criticised the excessive level of protection and privilege that the legislature guarantees Polish workers in union functions (see, for example, Sanetra 1993; Sobczyk 2017, 178). It goes well beyond international standards, as is best seen in the example of the special protection of the durability of the employment of trade union activists, as will be mentioned later in the article (see, more broadly, Kurzynoga 2020, 176 and the following).

A significant disadvantage of the amended Trade Union Act is also the inaccurate description of persons engaged in gainful employment outside the

[3] The draft authors thus justify extending the protection of the durability of employment to non-union workers. However, the same argument concerns other employee entitlements granted to trade union workers who provide gainful employment outside the employment relationship.

[4] On the other hand, the employment relationship is governed primarily by semi-imperative standards, which can be modified in favour of the parties only one way, in favour of the employee. Sometimes there are also *ius cogens* norms, from which no derogations can be made.

[5] This is not the case under labour law, where the employee privilege principle applies. In accordance with Article 18 of the Labour Code, the provisions of employment contracts must not be less favourable to the worker than the provisions of labour law. Provisions less favourable to the worker than labour law are invalid and the relevant labour law provisions apply instead.

[6] Civil law contracts linking the self-employed to the contracting entity are usually not very stable (either party can terminate the contract at any time), make the payment of remuneration dependent on the results of work, and the self-employed in many cases provide their services in parallel to several contractors.

employment relationship included in Article1[1](1). This results in a not fully defined personal scope of right of coalition and, importantly for the subject under question, raises problems in clarifying which persons specifically can perform functions in trade union organisations. According to the abovementioned provision, those persons include, in addition to employees, persons who provide paid work on a basis other than an employment relationship if they do not employ other persons for that type of work, irrespective of the basis of employment, and have rights and interests relating to the performance of work which may be represented and defended by the trade union. In particular, the reservations concern the condition of *rights and interests*. The doctrine of labour law (see, for example, Stelina 2018, 26) raises the difficult verifiability of this criterion, given that everyone who provides work (services) most often has some interest in the economic conditions of the performance of work (living or social). It is therefore easy to circumvent that condition by skillfully defining in the statutes the objectives and tasks of the trade union concerned. *De lege lata* there are also no instruments to effectively verify whether a group of entities forming a trade union organisation has rights and interests related to the performance of work that can be represented and defended by a trade union. There is also no entity that can verify this. Neither the hiring entity with which the trade union is formed nor the court at the registration stage of the trade union have such opportunities. However, there is no doubt that right of coalition, and thus the status of trade union activist, can only be exercised by those persons who work for profit outside the employment relationship, who have an employment entity for which they provide certain services and for whom their rights and interests can be collectively represented. As regards the self-employed, they generally have professional, economic and social interests relating to the services provided in the course of their economic activity, which must be protected in groups with the active support of trade unions. Trade union membership has the opportunity to improve their legal situation by introducing minimum protection measures which they do not enjoy by law alone. However, if the consolidation of the self-employed were merely to protect the economic, tax, or copyright interests of the sole traders associated there, this is not the basis for the exercise of the coalition right and thus for being a trade union activist (see, more broadly, Duraj 2020, 67 and the following).

3. RIGHT TO EQUAL TREATMENT IN THE EXERCISE OF A TRADE UNION FUNCTION

The first right guaranteed by the legislature to self-employed persons exercising the function of trade union activists is the right to equal treatment. In accordance with Article 3(1) of the Trade Union Act, any unequal treatment of the self-employed persons for their participation in union activities resulting

in particular in the refusal to establish or terminate a legal relationship, the unfavourable formation of remuneration for gainful employment or other conditions of employment, being overlooked for a promotion, being refused other benefits relating to gainful employment, as well as being overlooked for any professional development training, shall be prohibited, unless the hiring entity proves that it was guided by objective reasons. The above list of the different behaviours which may be characteristic for unequal treatment in employment due to the performance of the trade union functions is not complete and serves only as an example. Moreover, following the example of the mechanism used in the employment relationship (Article 18(3) of the KP), the legislature interferes with the content of civil law contracts by providing for additional protection against discrimination. The provisions of the contracts under which self-employed persons carry out work infringing the principle of equal treatment in employment for their participation in union activities and exercising of a trade union function are invalid. Instead of such provisions, the relevant legal provisions governing the legal relationship between those persons and the employer shall apply and, in the absence of such provisions, they shall be replaced by appropriate non-discriminatory provisions (Article 3(4) of the Trade Union Act).

In addition, in order to strengthen the protection of self-employed trade union activists, the legislature, in respect of claims for breach of the prohibition on unequal treatment in employment on account of the exercise of their trade union functions, requires that the provisions of Article 18^{3d} and Article 18^{3e} of the KP on workers be applied accordingly. This means that the self-employed in such a situation will be entitled to compensation of not less than the minimum wage. Since self-employment is most often based on a service contracts and contracts to perform a specified task, which are characterised by a variable and irregular amount of remuneration, it must be assumed that this is the minimum amount of remuneration guaranteed in the full-time employment (similarly Grzebyk, Pisarczyk 2019, 87–88). Furthermore, the exercise by a self-employed trade union activist of the rights enjoyed for breach of the principle of equal treatment in employment cannot be the basis for his unfavourable treatment and must not have any negative consequences for him, in particular, it cannot give rise to a reason justifying the termination of his civil law contract. Persons who have provided assistance to the self-employed in any form of redress are also protected in the same way. It is to be welcomed that the legislature, in cases concerning infringement of the prohibition of unequal treatment in employment on account of the exercise of a trade union function, *expressis verbis* requires that the provisions of the Law of 17 November 1964 – Code of Civil Procedure (Journal of Acts of 2020, item 1575 as amended – hereinafter KPC) on proceedings in matters of labour law apply accordingly. Since the court with jurisdiction to hear these cases is the labour court, this will undoubtedly facilitate the redress procedure for the self-employed person, all the more so because, as in the case

of employees, the burden of proof is being shifted onto the hiring entity. A self-employed trade union activist merely has to establish before the court the fact of unequal treatment in employment because of the exercise of his trade union function, and then the hiring entity will have to demonstrate that, by differentiating the situation of the employees, he was guided by the objective reasons.

In my view granting self-employed trade union activists the right to equal treatment in employment and to protect them in this respect is a good move. The mere fact of performing a trade union function and representing the rights and interests of workers, in view of the high risk of conflict with the hiring entity, justifies protection against discrimination, irrespective of the type of legal relationship between the activist and that body. This is fully in line with international standards, which are included in ILO Convention No 135. Under Article 1 of that act, all employees' representatives in an enterprise (including trade union activists) should enjoy effective protection against any acts of harm (and therefore also those of a discriminatory nature) taken on the basis of their trade union membership or participation in trade union activities.

4. RIGHT TO PAID TIME OFF FROM WORK

Granting self-employed persons the opportunity to act in trade union structures means in consequence that they are entitled – as in the case of guarantees given to regular employees – to paid time off from work, both on an ad hoc basis (for the purpose of carrying out current activities resulting from their trade union function) and permanently. This applies to activities in all trade union organisations – on a sectoral and cross-sectoral level.

As regards ad hoc leaves, in accordance with Article 25(6) of the Trade Union Act, the self-employed person is entitled to take the time off from work necessary to carry out an ad hoc activity resulting from his trade union function outside the establishment if that activity cannot be carried out during his non-working time. That person shall retain the right to remuneration, unless otherwise specified in the special provisions.[7] The right to such remuneration will therefore depend on the specificities of the legal relationship. If the basis for self-employment is a civil law contract for the provision of services, where the remuneration depends on the number of hours worked, then the payment for the time taken off from work by the self-employed trade union activist will be payable at the rate specified in the contract. If the person's remuneration is specified in the civil law contract on a flat-rate basis or depends on the results of the work (e.g. the contract for the specified

[7] The same applies to the right to ad hoc paid leaves which the legislature guarantees to those persons if they have the status of members of the management board of a trade union organisation (Article 31(4) of the Trade Union Act).

task), then there will be no separate remuneration for the time taken off for the performance of the ad hoc activity. In order to protect the interests of the hiring entity, the legislature pointed out that the contract concluded between that entity and the self-employed, which sets a time limit for the performance of the specified task (e.g. completion of specified task), is not extended by the time taken off from work to perform some ad hoc activity. In addition, the collective agreement may set limits for the time necessary to carry out an ad hoc activity resulting from the trade union function of persons engaged in gainful employment. The very idea of guaranteeing self-employed workers the right to time off from work for the performance of an ad hoc activity resulting from the performance of a trade union function deserves approval. *Prima facie*, it seems that the legislature has taken into account the specificities of non-employee employment relations here. In my opinion, however, this entitlement goes too far, interfering very significantly with civil contract freedom. Firstly, there is the problem of an acceptable limit on such time off, which has been highly controversial for years in terms of the inconvenience caused to the hiring entity (see Kulig 2015, 9 and the following). I believe that limiting the possibility of setting this limit only to contractual provisions (in Poland the number of collective agreements concluded is rather minor) is insufficient and that the legislature should allow it to be proposed at the level of ordinary agreements concluded between the hiring entity and the trade union party. Secondly, I have doubts as to the right to remuneration for the time taken off from work. Although a derogation from the principle of reciprocity of obligations is permissible on the basis of an employment relationship, which is a manifestation of the protective function of labour law (protection of the weaker party to the employment relationship), the transfer of that mechanism to civil-law relationships, which are not inherently permanent, raises legitimate doubts. In my view, the time off from work necessary for the performance of ad hoc activities resulting from the trade union function in respect of self-employed activists should, in principle, be free of charge and only exceptionally be allowed to be paid, but only for those self-employed persons who are economically dependent on the contracting entity.[8]

On the other hand, covering the self-employed trade union activists with the right to permanent paid time off from work (so-called trade union posts) should not be assessed positively. In accordance with Article 31 of the Trade Union Act, the right to be exempted from the obligation to work for a term of office on the management board of a trade union organisation is also vested in persons other than employees who perform the gainful employment (including

[8] These are self-employed persons whose income is wholly or predominantly derived from the hiring entity where the trade union organisation operates. On the other hand, the draft of 2018 of the Polish Individual Labour Code provided for an hourly criterion of the economic dependence of self-employed persons (provision of services to one entity on average of at least 21 hours per week, for a period of at least 182 days).

self-employed) designated by that organisation. During the period of such time off, a self-employed trade union activist shall be entitled to the rights or benefits of a person engaged in gainful employment, as well as the right to remuneration or cash benefit, provided that the management of the trade union organisation so requests. Charging employers with the costs related to the provision of rights to trade union activists and the remuneration for longer periods of non-service (creation of artificial trade union posts), when those activists do not provide work but focus solely on the performance of trade union functions, has long raised doubts with regard to employees acting in the structures of a trade union. It is difficult to consider such a solution justified in view of the market economy and equality of the social partners. It is all the more inappropriate in relation to self-employed trade union activists who are linked to the employing entity with a trade union organization, under a civil law contract that does not guarantee such durability and stabilization of employment conditions as the employment relationship, which usually results in the absence of a strong legal relationship with the workplace (it is clearly visible, for example, in relation to the contract for a specified task). However, if we were to grant self-employed trade union activists the right to permanent paid leave from work for the duration of their term of office on the board of a trade union organisation, it would certainly only be those who provide services to the entity in which such an organisation operates, under conditions of economic dependence. Unfortunately the Polish legislature does not observe such a criterion at all when introducing the right to permanent paid leaves for non-employees.

5. THE RIGHT TO PROTECTION OF THE DURABILITY OF THE EMPLOYMENT RELATIONSHIP

The consequence of extending the coalition right to non-employees and enabling self-employed persons to be active in union structures is guaranteeing them the right to increased protection of the durability of civil law contracts constituting the basis of their bond with the entity in which the trade union organization operates. In this respect, the Polish legislature wanted to comply with international standards, under which trade union activists, as representatives of employees in a company, should enjoy effective protection against any acts harmful taken by the hiring entity, including dismissal. Pursuant to Art. 32 of the trade union act, the employing entity may not terminate or dissolve the legal relationship without the consent of the management board of the company trade union organization, cannot terminate or dissolve the legal relationship with the self-employed person who is a member of the trade union organisation concerned, authorised to represent this organization in front of the employer, and may not unilaterally change the working conditions or remuneration to the detriment of

that person, except in the event of bankruptcy or liquidation of the employer, and also if this is permitted by separate provisions. This protection is granted for a period specified by a resolution of the management board, and after its expiry – additionally for a period corresponding to half of that period, but not longer than one year after its expiry. A similar right is granted by the legislature to a self-employed person who chooses a trade union function outside the company trade union organization, if he or she benefits from the exemption from the obligation to perform work in the hiring entity. This protection is granted for the period of this exemption and for one year after this period.

What is new is the definition of statutory deadlines (14 or 7 working days) within which a trade union may take a position on whether to agree (or refuse) to terminate a legal relationship with a self-employed trade unionist or unilaterally change its content. The ineffective expiry of those time-limits is tantamount to the consent of the management board of the company trade union organization. That regulation therefore introduces a legal fiction which applies to all trade union activists, regardless of the basis of employment. This is a very important solution that significantly reduces the uncertainty as to the protection of the employment stability of people holding union functions, including the self-employed (see more in Baran 2018b, 23 and the following). As regards non-employees, the existing rules for determining the number of protected trade unionists referring to the parity and progressive method and making this number dependent on the representativeness of the trade union organisation have been maintained (see more in Dral 2018, 254 and the following Cf. also Latos-Miłkowska 2017, 19 and the following).[9]

It can be seen, therefore, that the Polish legislator decided to transfer the employee structure of the special protection of the durability of the employment relationship of union activists to non-employee employment relationships, including self-employed persons operating in the structures of trade unions, both at the workplace and outside the company. This is the first legal regulation (not counting homeworkers) that interferes so much with the principle of freedom of contract applicable under civil law (Art. 353^1 of the Civil Code). There are at least a few arguments against the far-reaching privileges of self-employed trade union activists. Firstly, the legislature extends to those persons the employee rights which for years have aroused justified controversy in the doctrine of the labour law as excessively protecting trade unionists employed on the basis of an employment relationship, exceeding the standards resulting from international regulations (see

[9] Maintaining the progressive method, while expanding the subjective scope of the right of coalition, may in the future lead to an increase in the number of protected trade union activists (as the number of trade union organizations is increasing by members performing paid work on a basis other than an employment relationship). As a consequence, this will place greater burdens on the hiring entity, which may have an impact on the negative perception of trade unions already regarded unfavourably by entrepreneurs in Poland.

more broadly Kurzynoga 2020, 178 and the following). While it is true that Art. 6 of Recommendation No. 143 of the ILO indicates the need to obtain the consent of the relevant entity to dismiss a trade union activist, but this is to be the consent of an independent entity, and not, as is the case in Polish collective law, a decision of the management board of a trade union. Moreover, the protection of trade union activists in our country is not limited only to cases related to the performance of trade union functions, and the management board of a trade union organization may refuse to consent to a unilateral change or termination of the employment relationship in any case, even if the activist grossly violates his basic obligations resulting from his employment relationship, having no connection with trade union activity (this is often the case in real life, e.g. drinking alcohol in the workplace). In such a situation, the hiring entity may claim its rights only in court by using the construction of an abuse of rights which is used by the trade union activist in a manner contrary to the socio-economic purpose or principles of social coexistence (Article 8 of the Labour Code).[10] Secondly, the application to self-employed trade union activists of the mechanism of obtaining the consent of the trade union management board to terminate a civil law contract does not take into account at all the specificities of the functioning of self-employed persons, who most often do not have such a strong legal bond with the hiring entity as employees. This is too far-reaching interference in the rights and obligations of parties to contracts governed by dispositive standards of the Civil Code. In my opinion, the Polish legislator cannot restrict the employing entity's right to terminate a civil law contract with a self-employed trade union activist in the event of a gross violation of its provisions not related to his function in trade union structures. This is completely contrary to the nature of civil law contracts. This is too far-reaching interference in the rights and obligations of parties to contracts governed by dispositive standards of the Civil Code. In my opinion, the Polish legislator cannot restrict the employing entity's right to terminate a civil law contract with a self-employed trade union activist in the event of a gross violation of its provisions not related to his function in trade union structures. This is completely contrary to the nature of civil law contracts. A sufficient mechanism for the protection of such a trade union activist, taking full account of the specific characteristics of self-employment, would be to guarantee him high compensation in the event of termination of his civil law contract in connection with his duties in the structures of a trade union. Thirdly, even if the Polish legislator decided to introduce a requirement for the consent of the management board of a trade union organization to terminate a civil law contract with a self-employed trade union activist, this mechanism should not apply to all trade unionists – non-employees, but only to those who are economically dependent on the hiring entity.

[10] While Article 8 of the Labour Code will apply to trade union activists employed on the basis of an employment relationship, Article 5 of the Civil Code applies to self-employed trade unionists.

On the other hand, the limited scope of claims which a self-employed trade union activist may assert from the hiring entity in the event of termination of a civil law contract without the prior consent of the management board of the trade union organisation must be assessed positively. Here, the legislature did not decide on the right of workers to restitution of the employment relationship (this is the effect of the court's recognition of the claim for reinstatement). This would not only be contrary to the nature of civil law contracts, but also, in the conditions of a market economy, it would have a rather façade character (Baran 2018a, 9). Pursuant to Article 32 (1^3) of the Trade Union Act, in the event of a breach of the protection of trade union activists, a self-employed person is entitled, irrespective of the amount of damage suffered, to compensation in the amount equal to the 6-month remuneration to which that person was entitled in the last period of employment, and if the remuneration of that person is not paid monthly – in the amount equal to 6 times the average monthly salary in the national economy in the previous year.[11] When determining the amount of this compensation, the average monthly remuneration for the period of 6 months preceding the date of termination, dissolution or unilateral change of the legal relationship is taken into account, and if the self-employed person has been working for a period shorter than 6 months – the average monthly remuneration for the entire period. Thus, the compensation for the self-employed trade union activist has not only a compensatory nature, but is also a kind of repression against an entity that has violated the protection of the durability of the employment of trade union activists. Its amount is minimal and may in a specific case exceed the amount of damage suffered by the dismissed trade union activist (Baran 2018b, 25). The legislature has therefore taken into account, unlike in the regulations analysed so far, the specificities of self-employment provided in the context of a sole proprietorship, which deserves approval. In addition, a self-employed trade union activist may claim, under the general rules of civil law, compensation or redress exceeding the amount of the damages. It seems that in this case both the tort and contractual liability regime is at stake (Grzebyk, Pisarczyk 2019, 92).

Termination by the hiring entity a civil law contract with a self-employed trade union activist or unilaterally changing its provisions in violation of Article 32 of the Trade Union Act does not make the legal act of this entity absolutely invalid. By adopting the mechanism known under the employment relationship, the legislator recognizes the effectiveness of this activity. In such a case, however, this activity is defective, and the self-employed person may apply to the court for the payment of compensation in the amount equal to the 6-month remuneration. A significant drawback of the analyzed regulation is the lack of a provision

[11] This is the minimum amount of compensation guaranteed by the legislature, which may be increased by means of a collective agreement or other agreement concluded between the hiring entity and the trade unions.

which, in that regard, would *expressis verbis* give self-employed workers acting as trade union activists the right to assert such claim in proceedings before a labour court. This would guarantee them – as in the case of employees – the possibility of enjoying a privileged position in labour law proceedings and faster and more effective enforcement of claims. *De lege lata*, it is impossible to agree with the position sometimes presented in the doctrine of labour law (Baran 2018b, 26; Kurzynoga 2020, 182) that we are dealing here with the cognition of labour courts, and these cases are matters from other legal relations, to which, under separate provisions, the provisions of the labour law should be applied (Article 476 § 1 point 2 of the Code of Civil Procedure). It is true that labour courts are the best prepared substantively to resolve trade union cases, however, a literal interpretation of the trade union act excludes their jurisdiction in this area, making them competent to consider claims under Article 32 civil courts (similarly Grzebyk, Pisarczyk 2019, 92). If the legislator wanted to provide for the cognition of labour courts in these matters, it would directly regulate this issue, as it will do with the claims of self-employed trade union activists for violation of the prohibition of unequal treatment in employment due to the performance of a trade union function. Pursuant to Article 3 sec. 3 of the Trade Union Act, the provisions of the Civil Procedure Code on proceedings in matters relating to labour law shall apply accordingly to proceedings in discriminatory cases against persons who perform paid work other than employees. The competent court to hear these cases is the competent labour court. A similar regulation should be included in Article 32 of the Trade Union Act.

6. CONCLUSIONS

It should be assessed positively that the Polish legislator, by extending the right of coalition to self-employed persons who perform gainful employment as sole traders, at the same time granted them certain rights and privileges in the field of their activity in trade union structures. The Trade Union Act extended protection to self-employed union activists, which until 2019 was granted exclusively to employees. Pursuant to the amendment of July 5, 2018, these persons were granted – based on international standards – the right to non-discrimination on the basis of performing a trade union function, the right to paid leaves from work, both permanent and temporary, for the purpose of performing current activities resulting from the performed trade union function, as well as protection of the durability of civil law contracts constituting the legal basis for the services provided.

An analysis of the Polish trade union law leads to the conclusion that the scope of privileges granted to self-employed trade unionists practically does not differ much from the privileges granted to trade union activists having the

employee status. Such a method of regulation should be clearly considered defective. The legislator does not sufficiently notice the separateness resulting from civil law contracts, which constitute the basis for the performance of work by the self-employed. In my opinion, the scope of rights guaranteed *de lege lata* to self-employed trade union activists constitutes an excessive and unjustified interference with the fundamental principle of freedom of contract on the basis of civil law employment relations. This regulation does not take into account the specificity of self-employed persons, who most often do not have such strong legal relationship with the hiring entity as employees. While the far-reaching protection of self-employed trade unions in terms of equal treatment due to the performance of trade union functions (here differences would be difficult to accept) should be fully supported, the right to paid leaves from work (permanent and temporary) and the absolute requirement for the consent of the trade union management board to terminate the civil law contract are completely unconvincing. These are mechanisms that overburden the entities where the trade unions are formed. They generate additional unjustified costs and make it difficult to operate in a market economy.

The disadvantage of the regulation analyzed is also that Polish collective labour law does not in any way differentiate the scope of the rights and privileges guaranteed to self-employed trade unionists, ensuring the same level of protection for all. In that area, it appears that the legislature *de lege ferenda* should differentiate the scope of that protection by referring to the criterion of economic dependence on the hiring entity for which the services are provided. This means that the widest range of powers and privileges (closest to that of employees) should apply to those self-employed trade union activists whose income is wholly or predominantly derived from the hiring entity where the trade union organisation operates. Such a criterion for the application of powers (including of a collective nature) to the self-employed is found in the legislation of certain European countries. For example, the Spanish legislature, in a special law on the status of self-employed persons, took the view that the economically dependent self-employed worker is a self-employed person who earns at least 75% of his income from one contractor (Article 11 of the law of 11 July 2007 concerning the status of independent work Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, BOE núm. 166, de 12/07/2007). A similar situation can be observed in German law, where the above mentioned income threshold is 50% (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 of 29 April 2010, SOC/344- CESE 639/2010, 7–8). The Italian legislature, on the other hand, does not use the income threshold when it comes to demonstrating economic dependence, but rather the so-called 'criterion of permanent cooperation'. On the other hand, the draft of the Polish Labour Code of 2008 defined economic dependence as a situation in which a person providing services on the basis of a contract other than an employment

contract performs in person for one hiring entity work of a continuous or recurring nature for the remuneration exceeding half of the minimum wage, and as work for the hiring entity, from whom the employed person receives a greater proportion of the salary if it exceeds half of the minimum wage (Article 462). On the other hand, the 2018 draft of the Individual Labour Code provided for the hourly criterion of economic dependence of self-employed persons (Article 177 § 1 of this draft). Since in the literature on the subject the criterion of economic dependence is sometimes questioned as being difficult to verify and establish in practice, differentiating the scope of rights of self-employed trade union activists, one can also refer to the objective criterion of working for a period of at least 6 months for the entity covered by the operation of a given trade union organization.

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THE LEGAL NATURE OF REMUNERATION FOR PERIODS OF RELEASE FROM THE OBLIGATION TO PERFORM WORK FOR TRADE UNION ACTIVISTS

Abstract. In this article the Author analizes the issue of legal character of trade union activists released from work, covered by employers. The Author underlines the latest extension of subjective rights in this matter by Polish legislator to other than an employee persons who perform gainful work. In her opinion the remuneration for work, paid by employers at abovementioned basis may be qualified as work-related benefits of a social (even public) nature. In her opinion the current regulations in this matter are questionable in the light of the principle of the independence of trade unions and the principle of proportionality.

Keywords: trade union activist, remuneration, employer, gainful work, proportionality.

CHARAKTER PRAWNY WYNAGRODZEŃ ZA OKRESY ZWOLNIEŃ OD PRACY DZIAŁACZY ZWIĄZKOWYCH

Streszczenie. W ramach artykułu Autorka analizuje kwestię charakteru prawnego wynagrodzeń dla działaczy związkowych zwolnionych z obowiązku świadczenia pracy, których koszty pokrywane są przez pracodawców. Autorka zwraca uwagę na ostatnie rozszerzenie przez polskiego ustawodawcę uprawnień podmiotowych w tym zakresie także na inne niż pracownicy osoby wykonujące pracę zarobkową. Jej zdaniem wypłacane przez pracodawców wynagrodzenia z tych tytułów można kwalifikować jako świadczenia związane z pracą o charakterze społecznym (a nawet publicznym). Aktualne rozwiązania w tym zakresie pozostają zdaniem Autorki wątpliwe w kontekście zasady niezależności związków zawodowych oraz zasady proporcjonalności.

Słowa kluczowe: działacz związkowy, wynagrodzenie, pracodawca, praca zarobkowa, proporcjonalność.

1. GENERAL REMARKS

One of the instruments aimed at facilitating trade union activity[1] is the obligation imposed by the legislator on employers to cover the costs of the remuneration of trade union activists for periods of release from the obligation to perform work for the

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[1] Cfr. Article 2 of the Convention no. 135 of the International Labour Organisation concerning protection and facilities to be afforded to workers' representatives in their undertaking of 23 June

purposes of the performance of the office held in the trade union. The Act on Trade Unions of 23 May 1991 (Journal of Laws of 2019, item 263; hereinafter "ATU") provides for two kinds of paid release from the obligation to perform work with respect to the performance of the office held in the trade union while retaining the right to remuneration. The two kinds are: release from work for the time necessary to carry out *ad hoc* activity resulting from his or her office held in the trade union (Article 25 sections 5–6 and Article 31 sections 3–4 ATU)[2] and release from work for the time necessary to perform a full time office held in the trade union for members of the trade union management board (Article 31 sections 1–2 ATU).[3] Since the amendment to the ATU of 5 July 2018 (the Act on the amendment of the Act on Trade Unions and some other acts of 5 July 2018, Journal of Laws of 2018, item 1608) the right to paid release on this basis has been granted not only to employees but also to other persons who perform gainful work. The costs on this account are also borne by employers, whose definition as a subject was changed on this occasion.[4]

In this context, it is interesting to consider the legal nature of the remuneration paid by employers in the case of such release. Namely, is this really remuneration for work *sensu stricto* which should on principle be characterised by payment, gainfulness, mutuality and a certain degree of equivalence (cfr. for example Wagner 1996, 1–2, 10)? Or perhaps, in fact, the employers bear the costs of benefits of public/social character i.e. work-related benefits other than remuneration for work *sensu stricto* (cfr. the title of Division III of the Labour Code; cfr. Mędrala 2020, 116–119, 139–144, 477–478). From this perspective one may pose further questions concerning the regularity of a construction currently adopted by the legislator concerning the sources of financing for the release under discussion in the context of, on the one hand, the principle of trade union independence (Article 1 section 2 ATU) and, on the other hand, from the perspective of the principles of proportionality and subsidiarity.[5] I subject these questions to analysis in this article. In the text I use the classical method of synthesis and analysis.

1971, ratified and binding in Poland from the 9th of June 1978 (Journal of Laws of 1977, no. 39, item 178); http://www.mop.pl/doc/html/konwencje/k135.html [Accessed: 1 August 2020].

[2] Which is granted to each employee who holds any office in the trade union (cfr. Góral 2012, 470).

[3] Under Article 34 section 1 these provisions are also applicable to an inter-establishment trade union organisation whose activity covers the employer.

[4] Under Article 1^2 point 2 ATU the employer needs to be understood as the employer defined under Article 3 of the Act of 26 June 1974 – the Labour Code (Journal of Laws of 2020, item 1320 as amended) and an organizational unit, even without legal personality, as well as a natural person, if they employ a person other than an employee who performs gainful work, irrespective of the employment basis.

[5] More on these principles in the context of labour law: Mędrala 2020, 321–338.

2. THE COSTS OF REMUNERATION FOR TRADE UNION ACTIVISTS FINANCED BY EMPLOYERS

Under Article 25 section 5 ATU, an employee has the right to be released from work while retaining the right to remuneration for the time required to carry out *ad hoc* activity resulting from his or her office held in the trade union outside the work establishment, if this activity cannot be performed during his or her free time. Under the newly added provisions of sections 6–7 Article 25 ATU, this right is also granted to "a person other than an employee who performs gainful work". Such a person, like an employee, "retains" the right to remuneration in such a situation. Exceptions are the situations provided for under special provisions, grounded in the special character of a given contract, dependent on the effects of work, for example a contract for specific work.[6]

Furthermore, the legislator determined that a contract entered into between an employer and a person other than an employee who performs gainful work in which a time limit for the performance of the work was determined is not extended by the time of the release from work (Article 25 section 7 ATU). Moreover, the provisions of a collective labour agreement may determine the limits of the time of release from work for the time necessary to carry out *ad hoc* activity resulting from his or her office held in the trade union for the persons who perform gainful work (Article 25 section 8 ATU), which – considering the many doubts in this area which exist in practice – (cfr. for example Żołyński 2013, 516–519; Piątkowski 2012, 474–510; Grzebyk 2019a, commentary to Article 25 ATU, thesis 4; the judgement of the Supreme Court of 6 June 2001, I PKN 460/00; *Prokuratura i Prawo* 12 (2002): 48, LEX no. 52259; Książek 2019, commentary to Article 25 ATU, thesis 3; Żołyński 2019, 48–52) may be a very useful solution.

In similar conditions under Article 31 sections 3–4 ATU, both an employee and a person other than an employee who performs gainful work have the right to be released from work for the time required to perform a casual activity resulting from the office held in the trade union if such an activity cannot be performed during free time.

In each of the cases specified above, the employer is obliged for the period of release to pay, instead of the regular remuneration for work, a benefit which is its equivalent, even though the employee or different person performing gainful work does not perform the contracted work.

Apart from the costs of the release for the purpose of *ad hoc* activities resulting from the office held in the trade union, employers also cover the costs of the remuneration of so called full time trade union activists (more in: Rączka 2013,

[6] View the grounds for the draft act (filed by the Prime Minister on 12 October 2017) on the amendment to the Act on Trade Unions and some other acts, RM -10–117–17, 25; https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1933 [Accessed: 26 December 2020].

19–24). Under Article 31 section 1 ATU, depending on the number of members of an establishment's trade union organisation employed by the determined employer, the right to be released from the obligation to perform work for the term of office on the management board of an establishment's trade union organisation is granted. A similar right under the amendment referred to is granted to a person who performs gainful work during the period of release from work and who holds the right to remuneration or a financial benefit, if the board of the establishment's trade union organisation so requested (Article 31 section 2 point 2 ATU).[7]

Undoubtedly, the institutions under discussion seek to guarantee to a person who performs gainful work a source of maintenance at the same level as if he or she were working normally, even though he or she does not perform work due to the performance of social functions or partly public functions. On the other hand, benefits (remuneration) for the periods of performance of tasks by social labour inspectors are typically of a social nature.[8]

An essential novelty of the binding regulations is that the right to the benefits under discussion granted instead of remuneration for work is extended to each person who performs gainful work and who is a trade union activist. The provisions of the ATU introduce the notion of "a person who performs gainful work" as not only an employee within the meaning of the Labour Code but also a person who performs gainful work under a basis other than the employment relationship; if he or she does not employ other persons for this kind of work, irrespective of the employment basis and he or she holds the rights and interests connected with the performance of work which may be represented and protected by a trade union (Article 1^1 point 1 ATU). In the literature it is pointed out that the extension of the scope of the subjective right to unite may contribute to increasing the level of employed persons; to reinforce the autonomy of trade unions which may independently decide (as they have a broader choice) on the circle of the

[7] Detailed principles are provided for in the Regulation of the Council of Ministers of 27 November 2018 on the regime by which the release from the obligation to perform work is granted and enjoyed for the term of office held in the management board of the establishment's trade union organisation to which a person who performs gainful work is entitled; in which the amount of remuneration or a financial benefit granted to a person for the period of release from work is determined; and the respective rights and benefits are upheld (Journal of Laws of 2018, item 2323), hereinafter "Regulation". Under § 5 of the Regulation the employee's remuneration for the period of release from work is determined under the principles applicable when calculating a financial equivalent for an annual leave which has not been used by the employee. Under § 6 of the Regulation, however, for a person other than an employee who performs gainful work for the period of release from work a monthly financial benefit is determined based on the amount of the average remuneration granted to such person for the period of 6 months previous to the period of release and if such person performs work for a period shorter than six months – based on the amount of the average remuneration granted to such person for all this period.

[8] The above was subject to my considerations in: Mędrala 2020, 479. Cfr. more on the institution of the social labour inspection, including the remuneration of social labour inspectors: Liszcz 2019, 2–11.

represented and protected persons (Grzebyk, Pisarczyk 2019, 82). This means a gradual expansion of the working law in its broader meaning (which provides for working relationships based not only on the employment contract but also other bases) on the labour law in its narrower meaning. In any case, within the doctrine, the term of "collective working law" is already being used (Baran 2018, 4; Baran 2019b; Baran 2019a, 591 and the following). In this context I do not evaluate the legitimacy of the direction of changes because, as I have already stated elsewhere, a different (maybe a better) way would be to introduce instruments targeted at preventing the avoidance of employment under the employment contract.[9] At the same time, the above means the extension of the rights within the scope of the benefits under discussion, typical for the labour law, onto a group of non-employees pointed out in the statute.

3. ARGUMENTS FOR TREATING REMUNERATION FOR RELEASE AS REMUNERATION FOR WORK

While analysing the legal nature of the release of a trade union activist for the term of office held in the establishment's trade union organisation, the Supreme Court points out that

> the right to be released from the obligation to perform work is an employee's (trade union activist's) subjective right – which is granted to him or her by will of the legislator, if the conditions referred to in Article 31 section 1 ATU are met, involving the modification of the content of the employment relationship (Article 22 § 1 of the Labour Code) in such a way that – while still being in this relationship – an employee does not perform its basic element i.e. he or she does not perform work for the benefit of the employer and the employer is still obliged to pay the remuneration to the employee (the judgement issued by the Supreme Court on 19 June 2012, II PK 270/11, Legalis no. 537275 and the documents referred to in its grounds: the resolution of the Supreme Court in the panel of 7 judges of 20 January 1999, III ZP 25/98, OSNAPiUS 1999 no. 17, item 541; the judgements of the Supreme Court: of 5 June 1996, I PRN 37/96, OSNAPiUS 1997, no. 3, item 36 and of 4 April 2002, I PKN 233/01, OSNP 2004, no. 6, item 96).

On the other hand, in the context of the legal nature of the remuneration for full time trade union activists, it is interesting to consider the justification of the resolution of the Supreme Court of 13 December 2005, II PZP 9/05 (OSNP 2006, no. 7–8, item 109), in which the Supreme Court stated that an employee released from the obligation to perform work as a member of the management board of the establishment's trade union organisation performs at the given employer's location

[9] More in: Mędrala 2020, 69–77. In the context of the right to unite for the self-employed a particularly careful attitude is suggested, as a certain interference with market conditions is pointed out – cfr. Grzebyk, Pisarczyk 2019, 86; a similarly critical view in the context of the right to associate of persons employed under contracts for running an undertaking, management or similar contracts – Baran 2019a, 597.

"the duties within the scope of the protection of widely understood employees' rights and interests, their representation in disputes with the employer, the observance of labour law provisions and other duties entrusted to this organisation under the provisions of the Act on Trade Unions". *Ipso facto* the Supreme Court treats the remuneration paid by the employer to employees on this account as remuneration for work (although it is a kind of work which is different from the one specified in the contract), clearly still recognising in it elements of equivalence and mutuality (cfr. Mędrala 2020, 477–478).

J. Żołyński points out that during the period of release from the obligation to perform work, the employee's employment relationship is temporarily modified but is not interrupted. The difference involves the lack of the employee's obligation to be ready to perform work. But it is still an employment relationship of a mutual nature, although there is no traditional equivalence of benefits (Żołyński 2014, commentary to Article 31 ATU, thesis 4). An employee is still present at work. He or she is still obliged to perform his or her duties within the framework of Occupational Health and Safety, to register his or her working time, etc. He or she also holds the right to annual leave (cfr. Żołyński, commentary to Article 31 ATU, thesis 5–8). This is also confirmed by § 3 of the executive regulation of 27 November 2018, under which a person who performs gainful work and who benefits from the release from the obligation to perform work and is present in the workplace observes the determined organisation and order in the process of work, as well as the provisions on occupational health and safety and fire regulations.

An additional argument for treating this type of remuneration as remuneration for work is also the fact that the employer may include the costs borne on this account among the revenue earning costs which in fact means that if the release is granted a higher level of remuneration than is provided for in the statutory provisions, it will not be included among such costs (cfr. Żołyński 2014, commentary to Article 31 ATU, thesis 10 and the letter of the Fiscal Administration Chamber in Katowice of 28 June 2010, IBPBI/2/423–507/10/MO, https://sip-1lex-1pl-1ym3yi9cc13ca.han.uek.krakow.pl/#/guideline/184590926?cm=DOCUMENT [Accessed: 9 April 2021]).

Its remunerational nature is also supported by the provision of section 2 § 5 of the Regulation under which the remuneration is determined again, if the principles of remuneration of all employees or an occupational group are modified and the employee would be subject to this modification if he or she were not enjoying the release. It means, therefore, that the legislator does not create a specific trade union post, rather an employee/a non-employee continues to perform work for which he or she was employed under the contract. His or her situation in the light of the principle of equal treatment for the purposes of remuneration should be compared to employees employed in posts analogous to his/her post indicated in the stipulated employment contract.

Remuneration for trade union activists in the situations under discussion is subject to taxation and social security contributions like regular remuneration. Therefore, from a normative point of view, we may still consider it as remuneration for work.

Similar arguments may be presented in the case of release from work for the time necessary to carry out *ad hoc* activities resulting from the office held in the trade union.

4. ARGUMENTS FOR TREATING REMUNERATION FOR RELEASE AS A WORK-RELATED BENEFIT OF PUBLIC/SOCIAL NATURE

In the judgement of the Supreme Court of 19 June 2012, II PK 270/11, Legalis no. 537275, it was, among other things, pointed out that "the performance of an activity for the benefit of an entity other than the employer is not the performance of work for the benefit of the employer and consequently it is not the performance of occupational duties resulting from the employment relationship". Considering the lack of the features of mutuality and equivalence which are typical for remuneration for work, in my view there are some arguments to support the thesis that the benefits paid to employees on this account are of a public nature (including above all – its social aspect) whose cost is covered by employers (Mędrala 2020, 477–478). It is one of the examples where the public/social burden is imposed by the state on employers' property. In the literature concerning social politics, public, social and welfare issues (from the broadest to the narrowest definition) are distinguished (Szarfenberg 2018, 36). The payment of remuneration on the basis under discussion fulfils typically public purposes; mainly social purposes which are a subgroup of widely understood public purposes. It is impossible to find therein any direct equivalence and mutuality from an economic point of view.

The view that the remuneration of an employee or a different person who performs gainful work is a work-related benefit is in a certain way supported by the way in which the remuneration for such periods is calculated, i.e. the right to additional remuneration for work in conditions that are: harmful to health, particularly strenuous, strenuous or dangerous is granted only if, for the period of release from work, the employee's previous exposure to such conditions does not stop; on the condition that it is indicated that such conditions continue or would continue to affect him or her while performing the activities resulting from his or her office held in the management board of the establishment's trade union organisation.[10]

[10] § 5 of the Regulation of the Council of Ministers of 27 November 2018 on the regime in which the release from the obligation to perform work is granted and enjoyed for the term of office held in the management board of the establishment's trade union organisation to which a person who performs gainful work is entitled; in which the amount of remuneration or financial benefit

In my view, when releasing from work (granting a paid leave, an *ad hoc* release) an employee or a different person who performs gainful work, the employer releases the employee from work under payment for the purposes of performance of activities of a social or even public nature. And of such nature are activities performed by trade union activists when released from work. The tasks which are performed by trade unions are oriented towards public interests, including primarily social interests. The public activity of trade unions includes activity within the Social Dialogue Council, i.e. expressing opinions on draft acts of law (Article 19 sections 1–3 ATU). Also, trade unions have the right to publicly express their opinions on the assumptions or draft acts of law in the mass media, including radio and television (Article 19 section 4 ATU); the right to express opinions on consultative documents of the European Union (Article 19^1 ATU); the right to submit motions to pass or amend a law (Article 20 ATU). Trade unions monitor compliance with labour law (Article 23 ATU); they have the right to conduct collective negotiations and conclude collective bargaining agreements, as well as other agreements stipulated by the labour law provisions (Article 21 ATU); or they contribute to widely understood protection of work under Article 24 of the Constitution of the Republic of Poland. Among a series of tasks performed by trade unions as the subject of social policy there are: the representation and defence of working people's rights, as well as their occupational and social interests – Article 1 section 1 ATU (participation in labour market policy); the supervision of occupational health and safety (participation in pro-health policy); the maintenance of social peace within social dialogue; participation in human resources management (cfr. Piątkowski 2014, 109–111). The activity of trade union organisations is aimed at ensuring the constitutional protection of freedom of association in trade unions (Article 59 of the Constitution of the Republic of Poland), at exercising the social rights of working people to unite. This is also confirmed by the fact that a request for the paid release from work of a trade union activist must be filed with the employer by the management board of the establishment's trade union organisation (as a kind of social, and partially public body) and not the employee on his/her own (cfr. Żołyński 2011, 96). In the doctrine, one may even find a view that trade unions, through their imperative powers within the freedom of labour (e.g. they may approve the revoking of special protection before the termination of the employment relationship), exercise – to a certain degree – public power (Sobczyk 2014, 2–11).

Thus, I think that in this case we are dealing with a work-related benefits that are different from remuneration for work (in its exact meaning). They are non-reciprocal, not equivalent, aimed at achieving public goals (including especially social goals), obligatory, based on statutory provisions (cfr. Mędrala 2020, 112). It

granted to a person for the period of release from work is determined along with the respective rights and benefits, Journal of Laws of 2018, item 2323; Baran 2020, commentary to § 5 of the Regulation, thesis 3.

may be stated that the state imposes on the employers the burden of public/social benefits connected with the performance of some public/social roles.

Both an employee as well as a person who performs gainful work under a different basis perform in this time tasks of a public nature (mainly of a social nature) as part of the constitutional protection of work and which at the same time are included in the activity of trade unions which under the statutory definition is characterised by independence from the employer (cfr. Article 1 section 2 ATU). Therefore, in my opinion, there are arguments to support the view that the employers *de facto* cover the costs of public/social benefits of an individual nature.

5. THE COSTS OF REMUNERATION FOR TRADE UNION ACTIVISTS VERSUS THE PRINCIPLE OF TRADE UNION INDEPENDENCE AND PROPORTIONALITY

Taking the above into account, I support the view that in this context the fact that the employers cover the costs on this account is questionable in the light of the principle of the independence of trade unions (Article 1 section 2 ATU) and that it is a disproportionate burden on employers in the current market situation.

Z. Góral emphasises a broad subjective range of *ad hoc* releases which apply irrespective of the number of trade union members employed in the establishment (Góral 2012, 470) which is highly questionable in the context of the principle of proportionality. K.W. Baran, on the other hand, suggests the introduction of a maximum limit to the number of activists who enjoy such releases under Article 31 section 1 ATU (Baran 2013, 569). In this context it also needs to be pointed out that the number of terms of office of full time trade union activists is currently not limited in any way, which means that the employer might be obliged in some cases to pay to such persons the benefits which are an equivalent of their remuneration for over ten years or even for decades.[11]

In the literature it is also pointed out that the financial support granted to trade unions i.e. the coverage by the employer of the costs of full time trade union activists is rooted in the 1990s (Grzebyk, Pisarczyk 2019, 91). At that time it was justified by the difficult situation of trade unions and the interim character of this solution was emphasised (Grzebyk, Pisarczyk 2019, 91). According to the representatives of the doctrine, in the current conditions of the market economy and parity of social partners this solution remains questionable (Grzebyk, Pisarczyk 2019, 86).

P. Grzebyk is right to indicate the controversies connected with the costs of so called full time trade union activists. The Author in particular refers to the solutions provided for in Article 2 section 1 of Convention no. 98[12] which states

[11] K.W. Baran opts for the limitation of such rights to two terms of office (Baran 2014, 935).

[12] The Convention no. 98 of the International Labor Organization concerning the application of the principles of the right to organize and collective bargaining, adopted at Geneva on 1 July 1949 (Journal of Laws of 1958, no. 29, item 126).

that workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration (section 1). In my opinion the Author is right to question the fact that the employers bear the main costs on this account, even if it is recognised that trade unions care about the public interest (e.g. fair redistribution, the observance of the labour law provisions) and perform public tasks within the realm of the protection of work. Such doubts are, according to the Author, even more understandable in the light of the fact that trade unions hold not only conciliatory powers which may deepen a social dialogue but also confrontational powers, e.g. via strikes. The Author claims that remuneration for the performance of trade union activity should be in the first place paid by the trade union and not by the employer.[13] Also, the Author's further considerations should be deemed as fair, i.e. that the release from the obligation to perform work under Article 31 sections 1–2 ATU fulfils a public interest rather than an employer's private interest (Grzebyk 2019b, commentary to Article 31 ATU, thesis 4). The views referred to hereinabove of the quoted Author are also arguments to support the thesis that when covering the costs of the release from work of full time trade union activists the employing entities in fact do not pay them remuneration for work rather a work-related benefit of a public/social nature.

Moreover, even if we accept the view that trade unions hold private status,[14] financing of private entities' activity which acts contrary to their interests is even more questionable in the light of trade union independence. It also needs to be indicated that there is quite a low level of unionisation.[15] In many establishments employees are represented by works councils or representatives elected under special provisions for determined purposes to represent employees' rights and interests. Employers are obliged, however, to finance such benefits only in the case of trade unions.

In this context I consider it to be a fairer solution where an employee is released from the obligation to perform work without the right to remuneration or only to partial remuneration. The costs of remuneration on this account could be *de lege ferenda* covered – at least partially – by funds from the national budget, local

[13] Grzebyk 2019b, commentary to Article 31 ATU, thesis 2. Whereas K.W. Baran opts for the limitation of trade union leaves to the establishment's level (Baran 2013, 569).

[14] Such view in e.g. Z. Hajn (2013, 58–59).

[15] In 2013 K.W. Baran indicated the number of 15% (Baran 2013, 568); similarly in 2014 – J. Żołyński. The Author indicated 15%, including 5–10% of so called "yellow trade unions" (Żołyński 2014, 83). This number is, however, gradually decreasing. According to the report issued by CBOS – a statement from the research no. 87/2017 – *Działalność związków zawodowych w Polsce* [The activity of trade unions in Poland], Warsaw, July 2017, 1 and the following – a membership in a trade union is declared by 5% of citizens. Whereas according to the latest report issued by CBOS – a statement from the research no. 138/2019 – *Działalność związków zawodowych w Polsce* [The activity of trade unions in Poland], Warsaw, November 2019, 1 and the following – a membership in a trade union is declared by 6% of citizens.

authorities or trade union funds. The current solution, as it excessively burdens employers, also generates doubts in the context of the principles of proportionality and subsidiarity.[16] This problem is also noticed by practicians who opt for an increase in the minimum number sufficient to create so called full time trade union posts, which compared to other European countries, is quite rare in Poland.[17]

6. CONCLUSIONS

The conducted analysis leads to a few conclusions.

It is a justified thesis that the benefits paid to employees and persons employed under a different basis in place of the remuneration for work, when such a person is released for the time necessary to perform *ad hoc* activities resulting from the office held in the trade union as well as the remuneration for so called full time trade union activists are in fact work-related benefits of a social (even public) nature. In the context of the title of Division III of the Labour Code they need to be classified as "other work-related benefits". They are benefits of a public/social nature because the tasks performed by trade union activists released from work for such purposes as well as the activity itself carried out by an establishment's trade union organisations are of a public/social nature.

In principle, it needs to be evaluated favourably that the benefits under discussion are extended to the persons who work under a basis other than an employment relationship. In this area, the situation of the persons for whom the

[16] Cfr. my conclusions with this respect in the context of the remuneration of full time trade union activists (Mędrala 2020, 478).

[17] In this place I refer to my discussions with lawyers-practitioners concerning collective labour law, including with Janusz Żołyński, Hab. PhD. Cfr. also the data from the European Trade Union Institute: in the Czech Republic the paid release from work is granted on a part-time basis, if the trade union unites 400–600 members, one full time post is granted in the case of 600 members, two full time posts, if the trade union unites up to 1500 members; http://www.worker-participation.eu/National-Industrial-Relations/Countries/Czech-Republic/Workplace-Representation [Accessed: 8 August 2020]; in Austria: one paid full time post, if 150–700 trade union members are employed. If 701–3000 members are employed – two full time posts are granted, if more than 3000 – three full time posts; an additional full time post for all 3000 members; http://www.worker-participation.eu/National-Industrial-Relations/Countries/Austria/Workplace-Representation [Accessed: 8 August 2020]. In France the trade union delegates are granted 12 hours of paid release monthly, if 50–150 employees are employed; 18 hours of paid release monthly, if 151–499 employees are employed; 24 hours monthly, if more than 500 employees are employed; http://www.worker-participation.eu/www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/France/Workplace-Representation [Accessed: 8 August 2020]. In Italy one paid hour annually is granted for each employee, if less than 200 employees are united; eight hours monthly for all 300 employees, if less than 3.000 employees are united; eight hours monthly for all 500 employees, if more than 3.000 employees are united; http://www.worker-participation.eu/www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Italy/Workplace-Representation [Accessed: 8 August 2020].

work from a determined source is a permanent source of income should not differ. However, some detailed issues such as e.g. trade union rights for the self-employed need to be subject to separate analysis.

On the other hand, it should be evaluated negatively that the legislator continues to maintain the status quo concerning the sources of financing of such costs. I think that the current model of employment relationships, or in fact working relationships in their more extensive meaning, needs to be modified in this respect. What still needs to be considered *de lege ferenda* is the limitation of the entire financing of so called full time trade union activists from the employers' means to their previous extent or their limitation via an increase in quantity limits for the right to paid release on this account. This is supported by the low level of unionization, the lack of similar guarantees for other non-trade union employees' representations, the abuse of full time trade union posts in practice, excessive privileges granted to Polish trade union activists and the excessive burden imposed on employers in this respect compared to other countries. The above also remains questionable in the context of the principle of trade union independence as well as the principles of subsidiarity and proportionality.

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WHISTLEBLOWER RIGHTS AND PROTECTION IN THE WORKPLACE: THE ROLE OF TRADE UNIONS IN POLAND SELECTED ISSUES

Abstract. The article discusses selected problems related to trade unions' functions and their future role in the protection of whistleblowers. The author analyzes the current provisions of the Act on Trade Unions concerning the functioning of trade unions in protecting whistleblowers in the workplace, reporting irregularities (illegal, unethical or otherwise inappropriate activities) and the use of collective bargaining power of trade unions. Workers' representatives have an express right to assist whistleblowers as defined by national law. The author states that the functions of trade unions under trade union law in Poland in reporting irregularities are often perceived as signaling and, consequently, limited.

Keywords: whistleblower, trade unions, employers, employees, employed, protection of whistleblowers.

UPRAWNIENIA I OCHRONA SYGNALISTÓW W MIEJSCU PRACY: ROLA ZWIĄZKÓW ZAWODOWYCH W POLSCE WYBRANE ZAGADNIENIA

Streszczenie. W artykule omówiono wybrane problemy związane z funkcjami związków zawodowych i ich przyszłą rolą w ochronie sygnalistów. Autorka analizuje aktualne przepisy ustawy o związkach zawodowych dotyczące funkcjonowania związków zawodowych w aspekcie ochrony sygnalistów w miejscu pracy, zgłaszania nieprawidłowości (działań niezgodnych z prawem, nieetycznych lub w inny sposób niewłaściwych) oraz korzystania z sił rokowań zbiorowych związków zawodowych. Przedstawiciele pracowników mają wyraźne prawo do wspierania sygnalistów w sposób określony przez prawo krajowe. Autorka stwierdza, że funkcje związków zawodowych na gruncie prawa związkowego w Polsce w zakresie zgłaszania nieprawidłowości są często odbierane jako sygnalizacyjne a w konsekwencji są ograniczone.

Słowa kluczowe: sygnalista, związki zawodowe, pracodawcy, pracownicy, zatrudnieni, ochrona sygnalistów.

In both the public and private sectors, illegal, unethical, or otherwise improper activities are often difficult to detect. Employees are a key element in disclosing serious irregularities, especially when they know about corrupt behavior or other anomalies and voluntarily provide this information to employers or other

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authorized persons. However, employees who disclose "inside" information are exposed to possible retaliation not only by the employer, but also by their colleagues. Without protection against retaliation, many would-be whistleblowers will decide not to reveal irregularities in their workplace. Therefore, legal protection for whistleblowers must be part of a long-term protection plan (Kobroń 2013, 296; Kobroń 2015, 81–92; Kobroń-Gąsiorowska 2018, 129–142). However, creating provisions of protection is a challenge for every country, because effective whistleblower protection requires a well-synchronized legal framework on criminal, labor, administrative and procedural law. There is no doubt that there will be trade unions that the Polish legislator must take into account. Unfortunately, the lack of proper legislative preparation, i.e. implementation and changes in regulations, may lead to chaos.

On January 1, 2019, the long-awaited amendment to the Trade Union Act – the 1991 Act, was entered into force. One of the main goals of this amendment was to include, among other classes of employees, based on civil law contracts, self-employed individuals, and the possibility of association in trade unions. To this end, the definition of employee was expanded, but the functions of trade unions no longer associated with this definition came in the role of protecting persons reporting irregularities in the workplace. This article will indicate selected problems of redefining the functions of trade unions in their role they may play after the implementation of the provisions in Polish legislation of the Directive of the European Parliament and of the Council on the protection of persons reporting violations of Union law (EU Directive 2019/1937 OF the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. In short called the whistleblower directive, which is available at https://eur-lex.europa.eu/eli/dir/2019/1937/oj).

1. WHISTLEBLOWER IS MAINLY EMPLOYED

I purposely use the word "employed" to show that whistleblowers can provide paid work not only under a traditional employment contract, but under other statuses too. A whistleblower can be an employee, a trainee, an apprentice, a former employee, and also a person in any other traditional employment relationship (Kobroń 2013). Most often, the employed are the most reliable source of information on improper activities in the workplace. By disclosing them, they run the risk, such as dismissal and harassment from the employer as well as harassment and snubbing by their colleagues. Due to historical events, the act of whistleblowing in Poland is marked by very negative connotations. Also, in Polish legal culture, the issue of whistleblowing is still very controversial and criticized for the lack of adequate legal safeguards for the whistleblower. Reporting irregularities is a key mechanism in the fight for integrity and public

interest (Kobroń-Gąsiorowska 2019a, 75–87; Kobroń-Gąsiorowska 2019b, 333–343). Its role as a mechanism for reporting misconduct, fraud and other forms of illegal or unethical behavior allows the public to be aware of infringements, some of which might otherwise never be revealed. This applies especially to democratic countries, in which responsibility and transparency, strengthened by reporting irregularities, are basic values supporting the functioning of the state. Therefore, protecting the whistleblower against retaliation, disproportionate penalties, unfair treatment or mobbing is necessary because it enables the employeed to use the appropriate channels in the fight against inappropriate actions and behavior.

2. TRADE UNIONS – CHANGE OF ROLE AND MEANING

Generally, the role of trade unions is seen as whistle in Polish labor law (Kobroń-Gąsiorowska 2019c, 188). With regard to reporting on irregularities, this role has not yet been polemical, which I consider to be a serious oversight. In this perspective, the role of trade unions can now be seen as defensive. Trade unions have limited resources and believe that their primary function with regard to whistleblowing is to advise potential informers and to represent both those who believe that they have been harmed because of reporting concerns, and employed informers who are therefore subjected to mobbing. The first doubt that arises here is whether trade unions perform these tasks well and whether they are effective. A more proactive and collective role of trade unions would be to negotiate policies and procedures for reporting irregularities in the workplace. Research conducted in Poland has consistently shown that informants usually report their doubts first internally (Kobroń 2013). Sometimes, however, reporting an irregularity to a supervisor may be considered as an ordinary, groundless denunciation. I am not saying that this must become the rule, although this problem should not be avoided. However, another question arises as to whether the trade unions may become an alternative reporting point.[1] I am aware that the existing situation and status of trade unions regarding their functioning in connection with the process of bring attention to irregularities is not very stable and not specified by the trade union act. The following legal acts pave the way for comprehensive EU legislation in the field of whistleblower protection:

– Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse [available at https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A32014R0596];

– Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the

[1] See: https://www.pwc.pl/pl/media/2020/2020–03–05-badanie-przestepczosci-gospodarczej-2020.html.

Council with regard to reporting actual or potential infringements of this regulation to competent authorities [available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2392];

– The European Parliament resolution of 24 October 2017 on reasonable measures to protect whistleblowers acting in the public interest when disclosing confidential information held by companies and public authorities (2016/2224 (INI)) [available at https://op.europa.eu/pl/publication-detail/-/publication/5c4565d3-c1ea-11e8–8bb4–01aa75ed71a1].

The above only naturally encourages trade unions to actively cooperate in the protection of whistleblowers. This leaves the regulation of the role of trade unions in this regard to the Member States. The transition period for the whistleblower directive begins for good. Starting from December 17, 2019, Member States have two years to implement regulations in national legal orders providing, inter alia, new whistleblower protection institutions. The Directive now offers a reversal of the burden of proof, a wide and open scope of protection not only for employees but also for volunteers, trainees, etc. Although internal reporting is encouraged, reports without direct reporting will also be protected. It is also worth noting that the text clearly emphasizes the role of public authorities, trade unions and civil society organizations in supporting whistleblowers and raising awareness about the existing legal framework. In particular, the European Parliament underlines the "role played by public authorities, trade unions and civil society organizations in supporting whistleblowers in their organization activities" and "underlines the importance of raising employees' awareness of the existing legal framework for information in cooperation with trade union organizations" [available at https://www.europarl.europa.eu/doceo/document/A-8–2017–0295_EN.html]. Trade unions should become even more important entities in the protection of the employed reporting irregularities. However, such a role of increased union activity may not be easy to accept, especially for businesses.

From the point of view of the above Directives and positions of the European Parliament, trade unions in the role of protecting whistleblowers is to be significant. Changes in national regulations will affect trade union rights. From the point of view of the above remarks, the following problems should be considered: The legislator should consider the possibility of ensuring the right to representation and consultation with trade unions as regards the implementation of internal procedures for reporting irregularities by the employed. Employees as well as other persons providing work in the workplace using internal reporting to the supervisor must be provided with real protection, and not only using a dedicated internal reporting channel. This is not clear enough in the Directive. The use of documents in the workplace for reporting must be secure, without any risk of criminal liability. Directive neither nor even the 2018 Commission Communication on Strengthening Whistleblower Protection at EU Level also indicates potential

problems at the employer-trade union level and, more specifically, the role of trade unions in protecting an employed informant [available at: see Communication from the Commission to the European Parliament the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level, available at https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/WhistleCommunication.pdf].

3. TRADE UNION "NEW FUNCTIONS" AND WHISTLEBLOWER PROTECTION

The amendment to the Act on Trade Unions, which went into force on January 1, 2019, was a long-awaited amendment. It was supposed to introduce huge changes in the act, because it expanded the scope of the act to include the possibility of association in trade unions also by persons working under civil law contracts, the self-employed and trainees (the "employed"). The possibility of including these persons meant that they could apply to the trade union to represent their interests in the event of a conflict with the employer. According to art. 1 of the Act on trade unions, a trade union is established to represent and defend the interests of working people. This provision undoubtedly defines the main function of trade union activities, i.e. representing the rights of working people of their professional and social interests.

My short remark will relate to art. 4, introducing a very broad understanding of the functions of trade unions, which also applies to dignity, rights and material and moral interests, both collective and individual. According to the provisions of the analyzed provision, the main function of a trade union is to defend the rights and interests of working people. The term "moral rights and interests" is vague and the purpose mentioned in art. 4 may also relate to moral collective interests, which in this aspect has lost its significance in its previous burden, but is now gaining by expanding the concepts of law and interests, currently affecting a wide group of working people. I believe that such a broad definition of the role of trade unions in the Act on trade unions will be a huge challenge for trade unions in pursuing the protection of the employed informant who will have to go beyond the provisions set out in the Labor Code.

Another function of trade unions I distinguished is representing the interests of the employed, included in art. 7 of the Act on Trade Unions. My doubts are raised by the regulation of point 2 of this article, which contains the principle of representation in individual cases by trade unions of persons engaged in gainful employment only at its request. It should be noted that there is some inaccuracy in the article 7 under consideration, as it introduces the optional possibility for a trade union to take action at the request of a non-affiliated person, a worker not affiliated with a trade union. The second sentence (point 3) of Art. 7 of the discussed Act sets out the principle of negative trade union freedom, which means

that, in individual cases, a trade union may represent an unaffiliated person only at its request (Florek 2000, 306; Rączka 1996, 30; Skoczyński 1993; Stalina 1994, 59). It is not my intention to deny one of the aspects of the right to freedom of association, but I would like to emphasize that my doubts are raised by the fact that the trade union is not obliged to respond positively to this conclusion, which in my opinion is a solution that undermines the basic function of trade unions, i.e. protection of the interests (as indicated by statute) of all persons employed or paid. The trade union is under no obligation to justify its decisions (Florek 2000, 306; Rączka 1996, 30; Skoczyński 1993; Stalina 1994, 59), which in principle is to be arbitrary and not subject to any control. The individual dimension of the representation of the rights and interests of persons performing work who decide to inform their supervisor or employer about the irregularities found is in my opinion the most important area that requires the active role of the trade union, in the event that such a person turns to the union for help. Depriving such protection of a person who expresses his will to represent his interests by a trade union is an indirect violation of the nature of the trade union's activity, and thus the right to freedom of association of an individual working person.

In my opinion, it is also worth analyzing art. 8 of the Act on trade unions, which is an important component of the basic function of a trade union, which is the protection of the interests of working people. Art. 8 lists the control function of trade unions with provisions regarding employees within the meaning of the Labor Code, namely regular employees, persons performing work on the basis of a civil law contract, the self-employed, and persons working without remuneration. The controlling function of trade unions is manifested in supervising not only the activities of employers, but also public administration bodies (Kobroń-Gąsiorowska 2019c, 188). On the basis of the amended act, a new type of trade union control appears, referring strictly to persons who are not employed within the meaning of the Labor Code and those performing unpaid work. The current control function of trade unions is only whistling, because, in my opinion, they cannot be called even interventionist. If the trade union states that the conduct of the employer, a state administration body, or a local government is unlawful, i.e. it violates the legitimate interests of the employed, it may request the appropriate unit to remove the detected irregularities or even consider the possibility of initiating a collective dispute (Wratny 1994, 29; Bednarski, Wratny 2000, 56; Kałuziński 1984, 128; Salwa 1998, 17; Goździewicz, Myszka, Piątkowski 2005, 247; Sowiński 1990, 23). The new trade union control function will be the same except that it will also cover people who do not work under a contract of employment.

The last problem is more complex because it concerns actual cooperation between trade unions and employers. The first thought that comes to mind after analyzing the above provision, i.e. art. 8 of the Act on trade unions, is that under the existing provisions, the control function of trade unions is not only limited to signaling irregularities prevailing at a given employer, but

it is necessary to consider what degree of unionization is being dealt with. It should be remembered that in addition to implementing the provisions of the Directive, the Polish legislator must consider and take appropriate legislative measures in determining the position and role of trade unions, which will soon face the challenge of helping an the employed informer and the relationship with the employer. Secondly, on the basis of the current wording of the provisions of the Act on trade unions I do not see the possibility of real cooperation of the trade union with the employer in the field of signaling perceived violations. Regarding ongoing research into reporting irregularities, trade unions have been neglected as organizations that could not only become key elements in informant protection, but also in taking action to stop violations before they occur. In terms of information, it cannot be ruled out that it may be safer for people reporting irregularities to report them to the trade union than to others in authority. This will most likely be the subject of polemics in the literature.

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STAFF REPRESENTATION RIGHTS RELATED TO THE CREATION OF EMPLOYEE CAPITAL PLANS (PPK)

Abstract. The article presents the role of the staff representation under the Act of 4 October 2018 on Employee Capital Plans. Employee Capital Plans (PPK) are the part of third pillar of polish pension system. By creating the PPK, the legislature placed the staff representation and the employer under an obligation to co-decide on the form of the created capital plan. The method of identifying the staff representation, as defined in the Act on Employee Capital Plans, is modelled on the regulation contained in the Act on Occupational Pension Schemes. The Act on Employee Capital Plans states, that an occupational trade union organisation operating within the premises of the company excludes the competence of representation of employees. The legitimacy of the primacy of the trade union over the non-union representation of the staff stems, first of all, from the possibility of guaranteeing the employees' effective participation in the selection of the financial institution.

Keywords: employee capital plans, occupational pension schemes, staff representation, trade union.

UPRAWNIENIA REPREZENTACJI ZAŁOGI ZWIĄZANE Z TWORZENIEM PRACOWNICZYCH PLANÓW KAPITAŁOWYCH (PPK)

Streszczenie. W artykule przedstawiono rolę reprezentacji pracowniczej w świetle ustawy z dnia 4 października 2018 r. o PPK. Pracownicze Plany Kapitałowe (PPK) są częścią trzeciego filaru polskiego systemu emerytalnego. Tworząc PPK, ustawodawca nałożył na reprezentację pracowników i pracodawcę obowiązek współdecydowania o formie tworzonego planu kapitałowego. Sposób wyłaniania reprezentacji załogi, określony w ustawie o pracowniczych planach kapitałowych, wzorowany jest na regulacji zawartej w ustawie o pracowniczych programach emerytalnych. Ustawa o PPK stanowi, że zakładowa organizacja związkowa działająca w podmiocie zatrudniającym wyłącza kompetencje pozazwiązkowej reprezentacji osób zatrudnionych. Zasadność prymatu związku zawodowego nad pozazwiązkową reprezentacją załogi, wynika przede wszystkim z możliwości zagwarantowania stronie zakładowej rzeczywistego udziału w wyborze instytucji finansowej.

Słowa kluczowe: pracownicze plany kapitałowe, pracownicze programy emerytalne, reprezentacja załogi, związek zawodowy.

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1. PRELIMINARY REMARKS

In Western countries, staff representation plays an important role in the process of creating occupational pension plans. The cooperation of the staff and its hiring entity is the result of a nearly two-hundred-year tradition of creating company forms of old age security (Żukowski 1997, 12). In Poland, the participation of the staff in the creation of the company forms of saving for old age is a relatively new phenomenon, related to the reform of the pension system. By creating the third pillar of that system, the legislature placed the staff representation and the employer under an obligation to co-decide on the company and inter-company occupational pension scheme (PPE). When designing the employee capital plans (PPK), another company form of III pillar saving, the legislator granted the representation of the staff[1] the power to choose the form of saving and the financial institution that will manage the funds of the PPK contributors.

The objective of the foregoing publication is to indicate the rights of the company trade union organisation and the representation of the company's employees under the Act of 4 October 2018 on Employee Capital Plans (consolidated text Journal of Laws of 2020 item 1342 as amended) and comparing them with the staff rights set out in the Act on Occupational Pension Schemes (consolidated text Journal of Laws of 2020 item 686 as amended).

2. THE IMPORTANCE OF STAFF REPRESENTATION IN PILLAR III OF THE PENSION SCHEME

Under the basic pillars, first pillar of the Social Insurance Fund – FUS, the FUS sub-account and the Open Pension Fund – OFE (Jędrasik-Jankowska 2001, 21), the legislator did not provide the opportunity for the hiring entity and the person employed to co-decide on the shape of their retirement pension insurance. The lack of participation of both entities is the result of the public and regulatory nature of the pension contribution (Wantoch-Rekowski 2015, 36) which is the main source of funding for both the FUS and the OFE, as well as the adopted formula for financing the pension – i.e. the financing of pensioners' benefits from contributions from the economically active people of working age (*pay-as-you-go* method). Benefits from both pillars are covered by a guarantee of payment by the State budget. The public and regulatory nature of the contribution and the formula for financing the pension marginalize the position of the premium payer, limiting it to the role of the one who calculates the amount of the premium and sends it

[1] By this concept, I understand the company staff organization, as well as representation of the employees referred to in art. 7 sec. 3 and sec. 4 of PrPlKaU.

to the Social Insurance Fund (FUS). Therefore, neither the insured nor the payer decides on the form of saving for old age, how the premium is multiplied or how the benefit is paid (Krajewski 2014, 220). The exception in this respect relates only to the decision of the insured person to save or not to save in the OFE and, consequently, the decision on the choice made by the insured person regarding an open-end pension fund.

The third pillar of the pension system is distinguished by the voluntary nature of the participation in the pension scheme or the capital plan. The funds collected in the PPE and PPK are provided collectively by the hiring entity and the persons employed. There is no guarantee that the State budget will allow for the future benefits to be paid. The role of the State has been limited to defining the rules for the management of the funds, supervision of the whole system, including in particular financial institutions managing payments to the employee capital plans (PPK), as well as protection of the interest of the participant in the capital plan. Article 51 of PrPlKaU provides that the employee capital plans supervision shall be exercised in the legality and interest of the participants in the capital plan.

The provisions of the Act on Employee Capital Plans and the Act on Occupational Pension Schemes introduce a strictly stipulated register of entities offering these forms of saving for old age. By identifying the list of entities authorised to manage funds in the PPE and the PPK, and by supervising them, the State makes trade union organisation or non-trade union staff representation focus primarily on the criterion of the effectiveness of the various entities offering savings in pillar III (understood as the rate of return of the investment in relation to the costs to be borne by the participants). This is supported by the fact that the legislature, by calculating in Article 7(3) of the PrPlKaU the criteria to be followed when selecting the managing authority for funds in PPK, indicates that it is carried out in particular on the basis of an assessment of the conditions proposed by financial institutions for the management of funds collected in PPK, their effectiveness in the management of those assets and their experience in the management of investment funds or pension funds.

3. THE CHARACTER OF THE STAFF REPRESENTATION

When designing the employee capital plans, the legislator had, among other things, to determine the character and the method of selecting the representation of the staff. There were two approaches taken into consideration. First, that the representation established by the group of the employed persons shall be formed outside the trade union organisation, and the second that the operation of the trade union organisation in the company excludes the competence of the non-union representation of the staff – representation of employed persons (Krajewski 2013, 520). The first approach could be supported by the fact that the capital plan should

be the decision of all potential participants, whether they are members of a trade union or not. The employer, when selecting the representation of the persons employed e.g. convening the staff meeting, is obliged to indicate the suggested financial institution and the conditions for the conduct of the capital plan. After having become acquainted with the suggested conditions, the persons employed may agree, by voting, to enter into an agreement with the hiring entity or may refuse to enter into such an agreement.

A special situation may occur when the representation of the persons employed will consist of one employee or a contractor. It is worth noting that, in accordance with Article 7(1) of PrPlKaU, the obligation to set up a PPK applies also to an entity which employs only one person on behalf of whom it is required to conclude a contract for the operation of the PPK. There are no derogations in this respect. As a result, the hiring entity will agree on the selection of the financial institution with the employed person who shall be entitled to represent the persons employed. In case when the trade union is entitled to enter into the employee capital plan agreement (PPK) or the occupational pension scheme contract (PPE), non-members are deprived of the real possibility of co-deciding on the shape of this form of protection of old age risks. On the other hand, in the case of an employer employing several hundred or more employees, or where part of the crew carries out tasks outside the company's premises, the selection of the representation of the persons employed requires certain logistical procedures slowing down the procedure for concluding the agreement, which may, as a result, significantly impede the selection of the staff representation and the conclusion of an agreement on the selection of the financial institution within the time laid down by law. In such case, negotiations and the conclusion of an agreement with the trade union organisation constitute an essential convenience for the hiring entity.

The Act on Employee Capital Plans states, as is the case under the Occupational Pension Schemes Act, that an occupational trade union organisation operating within the premises of the company excludes the competence of representation of employees. The trade union has a stronger position in negotiations with the employer, which can affect the choice of the financial institution in line with the expectations of the staff, and thus a higher level of participation in the capital plan. It is also important not to underestimate the fact that a trade union organisation can operate in a number of entities and provide an important source of information for the hiring entity at the selection stage of the financial institution or during the negotiation of financial conditions (for example management fees). It is worth noting, however, that in the case of PPK, the conditions for running the capital plan are similar. The maximum level of fees to be paid by PPK participants has been set at a relatively low level and, moreover, the investment of so-called target-date funds averages the investment risk borne by the persons participating in the capital plan (the level of investment risk is reduced in proportion to the age of the PPK participant). The situation of the PPE participant is different, as the

employer and the financial institution can shape the conditions for running the programme as flexibly as possible, including the level of investment risk.

The method of identifying the staff representation, as defined in the Act on Employee Capital Plans, is modelled on the regulation contained in the Act on Occupational Pension Schemes. It can be argued that it has evolved from employee representation. Article 2(9) of the 1997 PrPrEmU indicated that the employees were represented by the trade union organisation and that, if there was no trade union organisation in the company, the representation of the staff was determined in the manner set out in Article 15(4) of the 1997 PrPrEmU. Pursuant to the aforementioned provision, the non-union representation of the employees was chosen from the staff members during the staff meeting, on the basis and in accordance with the procedure laid down by it (Kopeć, Wojewódka 2005, 77). The main objective of the employee representation was, first of all, to accept or reject an offer to conclude a workforce agreement, that is to say, to agree to create an occupational pension scheme with the employer. If consent was given to the conclusion of the workforce agreement, the staff was represented on behalf of appropriately authorized representatives of the trade union or persons selected by the employer's staff and empowered to conclude an occupational pension scheme on its behalf. The Occupational Pension Schemes Act of 1997 did not specify who, among the persons employed by the employer, was entitled to express the approval or disapproval of creating the PPE. By way of interpretation, that catalogue could be determined on the basis of the concept of worker contained in Article 2(1) of the 1997 PrPrEmU. By means of interpretation, such rights could be determined on the basis of the concept of employee contained in Article 2(1) of the 1997 PrPrEmU. According to the aforementioned provision, an employee was a person employed under an employment contract, contract of appointment, selection or nomination agreement; employed under a cooperative employment contract, an agency contract or a contract of mandate, if covered by social security; employed under a contract concluded as a result of an appointment or election to a body representing a legal person, including a managerial contract.

If there was a trade union organisation operating in the company, it was they who agreed or did not agree to the creation of the PPK. As a result, the decision to create the PPK was taken by persons who were members of the trade union organisation concerned. The right to join trade unions, pursuant to Article 2 of the ZwZawU, was held by employees, regardless of the basis of their employment relationship, members of agricultural production cooperatives and persons working under an agency contract, if they were not employers. In addition, persons engaged in outwork had the right to join trade unions operating within the premises of the hiring entity with which they had established an outwork employment contract. This continued until the amendment to the Trade Union Act, which entered into force on 1 January 2019, (however since June 2015 outworkers have been deprived of their the right to join a trade union). By amending the

Trade Union Act, the number of persons entitled to join a trade union has been stretched out, and, at present, covers an employee or a person providing paid work on a basis other than an employment relationship if they do not employ other persons for that type of work, irrespective of the basis of employment, having such rights and interests in the performance of work which may be represented and defended by the trade union. According to Article 25^1 of ZwZawU, the rights of a trade union organisation shall be vested in an organisation of at least 10 members who are employees of an employer covered by that organisation or other persons performing gainful employment who have been working for at least 6 months for the employer covered by that organisation.

In 2018, with the introduction of the Act on Employee Capital Programs, the concept of an 'employed person' was introduced. It is correlated, but not the identical, with the concept of employee as defined in the Act on Occupational Pension Schemes. In accordance with Article 2(1)(18) of the PrPlKaU, the term 'employed person' means:

a) the employees referred to in Article 2 of the Act of 26 June 1974; – Labour Code (Journal of Laws of 2020, item 1320 as amended), with the exception of workers on mining leaves and leave for employees of the mechanical coal processing plant referred to in Article 11b of the Act of 7 September 2007 on the operation of coal mining (Journal of Laws of 2019, item 1821), and juvenile workers within the meaning of Article 190(1) of the Labour Code,

b) natural persons engaged in outwork who have completed 18 years of age referred to in the executive regulations to Article 303 § 1 of the Labour Code,

c) members of agricultural production cooperatives or agricultural cooperatives associations referred to in Article 138 and Article 180 of the Act of 16 September 1982 – Cooperative Law (Journal of Laws of 2020, item 275, as amended,

d) individuals who have completed 18 years of age, performing work on the basis of an agency contract or a mandate contract or other service contract, to which, in accordance with Article 750 of the Act of 23 April 1964 – Civil Code (Journal of Laws of 2019, item 1145, as amended) the rules on the mandate shall apply,

e) members of board of directors remunerated for the performance of those functions,

f) persons referred to in point a-d on parental leave or receiving maternity or equivalent paternity benefits – subject to compulsory retirement and disability insurance under these titles in the Republic of Poland, within the meaning of the Act of 13 October 1998 on the social security system (Journal of Laws of 2020, item 266, as amended).

It is worth noting that, until the amendment to the Trade Union Act 2019, the personal scope of the concept of an employed person, as used in the Act on Employee Capital Plans, differed significantly from the subjective scope of the

concept of a person entitled to join a trade union under the Trade Union Act. After the amendment of the Trade Union Act and the granting of the right to join trade unions to persons who provide paid work on a basis other than an employment relationship, the subjective scope of the two terms is similar. It is therefore legitimate to take the view that, in the current legal situation, the choice of a financial institution by both the trade union organisation and the representation of the persons employed gives the warranty of sufficiently extensive consultation with the staff and thus safeguards the interests of future participants in PPK. At the same time, for organisational and logistical reasons, as mentioned above, the primacy of the trade union over the non-union representation of the staff as regards the creation of employee capital plans, should be assessed positively.

4. RIGHTS OF STAFF REPRESENTATION AT THE STAGE OF THE CREATION OF THE EMPLOYEE CAPITAL PLAN

The employer has been entrusted with an essential role in the process of creating and operating company forms of old-age security. The scope of its rights depends on the form of the pension plan (scheme) it intends to create. In the case of an occupational pension scheme, the legislator equated the position of the hiring entity and the employee representation. The correspondingly strong position of employee representation is expressed in Article 11 of the PrPrEmU, according to which the workforce agreement is concluded by the employer and the representation of employees. The rejection of an offer by an employee to enter into such agreement means that no occupational pension scheme will be created for the employer concerned. In addition, the legislature decided that the representation of employees would be created by all the trade union organisations operating with the employer concerned. The rejection of an offer to conclude a workforce agreement contract by at least one of the trade union organisations, in principle, makes it impossible to create an occupational pension scheme. However, in order to limit the possibility for an unrepresentative trade union organisation to block the creation of a scheme, provision has been made for the possibility for the hiring entity to repeat an offer of concluding an occupational pension contract and to refer it only to representative trade union organisations within the meaning of the Trade Union Act (Sierocka, 2010, 126). Pursuant to Article 11(8) of PrPrEmU, if, within a period of 2 months from the date on which the employer submits an offer to set up the programme, there is no conclusion of a workforce agreement because the parties cannot agree on its content, the employer may conclude a workforce agreement with representative trade union organisations within the meaning of Article 25^3 (1) or (2) of the ZwZawU, each of which brings together at least 5% of the employees employed in the company. As a result, any representative trade union organisation can effectively block the creation of an occupational pension scheme.

The Act on Employee Capital Plans introduces an obligation to conclude a contract for the management of PPK and thus an obligation for the establishment of PPK by the employing entity. In the event of non-compliance with this obligation, the Polish Development Fund shall invite the hiring entity in writing to conclude, within 30 days of receipt of the request, a contract for the management of PPK with a defined benefit pension fund managed by a designated financial institution, or to provide the PFR with information on the conclusion of a contract for the management of PPK with another financial institution.

By calling for the creation of a PPK and identifying the specific financial institution with which the hiring entity is to conclude a contract for the management of PPK, the legislator has created a regulation that effectively prevents the hiring entity in agreement with the staff representation from effectively blocking or delaying the creation of a capital plan. It should be noted that the creation of PPK entails a significant increase in the cost of employment for the hiring entity. Therefore, the trade union could, in agreement with the employer, deliberately block the creation of a capital plan by negotiating other benefits in return, e.g. pay rise for the staff. It is worth pointing out that, in accordance with Article 106 of the PrPlKaU, if the hiring entity or the person required to act on behalf of the hiring entity does not comply with the obligation to conclude a contract for the management of PPK within the prescribed period, it is liable to a fine of up to 1.5% of the remuneration fund of the relevant entity in the financial year preceding the commission of the offence.

The staff representation rights defined under the Employee Capital Plans Act are determined by the obligation to create a capital plan by the hiring entity. In view of the voluntary creation of the PPE (e.g. Bagiński 2000, 9), the legislator strengthened the position of the hiring entity and weakened the powers of staff representation. In accordance with Article 7(3) and (4) of the PrPlKaU, the hiring entity shall, in agreement with the staff representation, select a financial institution. The one who initiates the selection of the manager of funds in PPK, i.e. the entity that indicates the financial institution can be both the hiring entity and the representation of the staff. Importantly, in taking a position on the selection of the managing authority for contributions to PPK, the representation of the staff does not by law become a party to the PPK management contract. The parties to this agreement, in accordance with Article 7(2) of the PrPlKaU, shall be the hiring entity and the financial institution authorised to manage the PPK. As a result, the staff representation cannot effectively block the creation of PPK. This is supported by the wording of Article 7(5) of the PrPlKaU. Pursuant to the aforementioned provision, if, one month before the expiry of the period within which the hiring entity is required to conclude a contract for the management of PPK, no agreement has been reached, the hiring entity shall choose the financial institution itself. The entitlement of the hiring entity is defined in the literature as an independent decision-making right (Wojewódka 2020, 49).

The Employee Capital Programs Act does not contain specific rules for consulting the staff representation. Article 7(5) of the PrPlKaU merely specifies that, one month before the expiry of the deadline for concluding the PPK management contract, the hiring entity may conclude a contract for the management of the PPK with the financial institution of its choice, unless an agreement with the crew representation has been already reached. In practice, the period within which the hiring entity carries out consultations should be so defined that the trade union can consult the staff and, once completed, assess the merits of selecting a financial institution from among the designated institution(s) authorised to manage the PPK. On the other hand, where the management entity does not have a trade union organisation and it is necessary to select the representation of the persons employed in the manner adopted in the company, e.g. convening a staff meeting, that period must take account of the need to notify the persons employed, to carry out the necessary consultations and to select the persons empowered to conclude an agreement on the selection of a financial institution. If the crew representation does not take a position, the hiring entity makes the decision to select a financial institution on its own.

A particular case involves a situation where there is more than one trade union organisation operating within the premises of the hiring company. In accordance with Article 7(3) of the PrPlKaU, the hiring entity selects a financial institution in agreement with the trade union organisation operating in that hiring entity. That provision must be interpreted in such a way that the hiring entity concludes an agreement with each trade union organisation operating in the hiring entity concerned. Where an agreement is concluded with certain trade union organisations, Article 7(5) of the PrPlKaU shall apply, which provides that, in the absence of an agreement with a trade union organisation, the hiring entity shall itself select the financial institution and then conclude a contract with it for the management of the PPK.

After the conclusion of the agreement, the hiring entity is obliged to conclude a management contract with the institution designated in agreement with the trade union organisation or the representation of the employees. This is supported by the wording of Article 7(5) of the PrPlKaU, according to which the hiring entity concludes a contract for the management of PPK without the position of crew representation only if it does not reach an agreement with it and at the same time is obliged to conclude a contract for the management of PPK within a period of less than one month.

It is worth noting here that the hiring entity can terminate the PPK management contract on its own and, as a result, lead to a change of financial institution. The PrPlKaU does not, as a general rule, provide for the possibility for the employer to wind up the capital plan and completely abandon this form of saving. In accordance with Article 12(1) of the PrPlKaU, the hiring entity may terminate the PPK management contract if it has concluded a contract for the

management of PPK with another financial institution run by another investment fund company, Polish Economic Society (PTE), employee pension fund or insurance company. This means, as a consequence, a change in the management of the funds in the PPK. It is worth noting that the legislator introduced a requirement for the cooperation between the employer and employee representation both at the stage of the creation of the capital plan and in the event of a change of the PPK managing authority (Jakubowski, Prusik 2019). Although the law indicates that it is the employer who takes certain actions related to the change of manager and is therefore the one who initiates the change, it is also true that when the financial result achieved by the management entity is unsatisfactory, the trade union organisation may file a non-binding application with the employer asking for a change of the managing institution. Cooperation in this regard is important as it directly affects the number of savers in the amount of future PPK payout.

5. CONCLUSIONS

The participation of the staff in the creation of the company's form of old age security is a relatively young phenomenon in Poland. With the implementation of the three-pillar concept of the system, voluntary occupational pension plans were introduced by Western countries. The different philosophy of their functioning, that is to say, the company's nature, the flexibility of the rules for saving for old age, co-financing of the contributions or payments to the scheme, meant that the legislature granted the employee representation the competence to co-decide on the choice of financial institution. It is worth stressing that the involvement of the staff during the programme development phase should mean primarily a high level of participation in the programme.

The legitimacy of the primacy of the trade union over the non-union representation of the staff stems, first of all, from the possibility of guaranteeing the employees' effective participation in the selection of the financial institution. Due to the rights of trade union representatives, the trade union organisation has a greater opportunity to negotiate conditions in line with the crew's expectations. However, it should be made clear that in the case of PPK, there is no classic protection of the interests of the staff known from labour law. The rules for joining the program are regulated in detail by law and secured by sanctions. PPK management agreements and joining the PPK are among the agreements specifically defined by law.

When comparing the rights of staff representation in the Act on Employee Capital Plans and in the Act on Occupational Pension Schemes, it is worth pointing out that PPE is a typical voluntary form of saving for old age. In the case of PPK, there is an obligation to create a capital plan. Considering PPK as a basic form of saving for old age, it is essential that the shape of the structure adopted by the

employer is approved of by the staff, so that they have an incentive to join the programme.

By creating a regulation requiring the creation of a PPK or enabling of the creation of PPE, the legislature does not correlate it with the regulations governing organisation and joining a trade union.

Under the Occupational Pensions Scheme Act, it was often the trade unions that blocked the creation of the scheme in order to achieve an short-term win in the form of pay rise, rather than a long-term benefit from the PPE. It is also due to the aforementioned reason that the legislature prevented the trade union organisation from blocking the creation of the scheme.

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COLLECTIVE LABOUR RIGHTS OF SELF-EMPLOYED PERSONS ON THE EXAMPLE OF SPAIN: IS THERE ANY LESSON FOR POLAND?[1]

Abstract. This paper aims to analyse collective labour rights of both "classic" self-employed persons and economically dependent self-employed workers under the Spanish Statute of Self-Employed Workers (*Ley 20/2007 del Estatuto del Trabajo Autónomo*). The author applies comparative analysis and critical reasoning with a view to answering the questions: is the scope of protection wide enough, and can Poland draw a lesson from it? The paper presents evidence that demonstrates that among all self-employed workers, only economically dependent self-employed workers are granted the right to bargain collectively. However, findings suggest that in practice, collective bargaining is stymied mainly because it takes place only at the enterprise level, and because the number of economically dependent self-employed workers is minimal. The paper concludes that collective labour rights under the Statute of Self-Employed Workers could be better protected (especially as regards "classic" self-employed persons). On the other hand, however, in Poland, the lack of any criteria that would enable a diversification of the scope of collective rights granted to self-employed persons is subject to criticism. It appears that in some areas the legislator should differentiate the scope of protection. The criterion of economic dependence, which exists in Spanish law, could be successfully used for this purpose.

Keywords: self-employment, collective labour rights, Spanish law, "classic" self-employed persons, economically dependent self-employed workers.

ZBIOROWE PRAWA PRACOWNICZE OSÓB SAMOZATRUDNIONYCH NA PRZYKŁADZIE HISZPANII: LEKCJA DLA POLSKI?

Streszczenie. Celem artykułu jest analiza zbiorowych praw pracowniczych zarówno „klasycznych" samozatrudnionych, jak i samozatrudnionych ekonomicznie zależnych w świetle hiszpańskiej ustawy Prawo samozatrudnionych (Ley 20/2007 del Estatuto del Trabajo Autónomo). Autorka posługuje się metodą porównawczą i wykorzystuje krytyczne rozumowanie, aby odpowiedzieć na pytania: czy zakres ochrony jest dostatecznie szeroki i czy Polska może wyciągnąć wnioski z uregulowań hiszpańskich. W artykule wskazano, że spośród wszystkich samozatrudnionych tylko osoby samozatrudnione ekonomicznie zależne mają prawo do rokowań zbiorowych. Wyniki

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sugerują jednak, że w praktyce negocjacje zbiorowe są trudne, głównie dlatego, że odbywają się one wyłącznie na poziomie przedsiębiorstwa oraz ponieważ liczba pracowników samozatrudnionych ekonomicznie zależnych jest znikoma. W artykule podniesiono, że zbiorowe prawa pracownicze wynikające z Prawa samozatrudnionych mogłyby być lepiej chronione (zwłaszcza w odniesieniu do „klasycznych" samozatrudnionych). Z drugiej strony w Polsce krytykuje się brak jakichkolwiek kryteriów, które pozwalałyby na zróżnicowanie zakresu praw zbiorowych przysługujących osobom prowadzącym działalność na własny rachunek. Wydaje się, że w niektórych obszarach ustawodawca powinien zróżnicować zakres ochrony. W tym celu z powodzeniem można zastosować kryterium zależności ekonomicznej, które istnieje w prawie hiszpańskim.

Słowa kluczowe: samozatrudnienie, zbiorowe prawa pracownicze, prawo hiszpańskie, osoby „klasyczne" samozatrudnione, samozatrudnieni ekonomicznie zależni.

1. INTRODUCTION

According to available Eurostat data, in the first quarter of 2020 the number of self-employed people in Spain amounted to 2,927.1,[2] and in light of the data for the whole 2019 that figure was 2,916.2[3] out of 20,230.78 totally employed persons.[4] The COVID-19 pandemic, which can be regarded as a black swan, has triggered a profound recession on a worldwide scale and has also influenced the situation of the self-employed in the county under analysis. Similarly to the situation caused by the global financial and economic crisis of 2008 (Ginès i Fabrellas 2020, 63, 80–81), we can expect that the coronavirus crisis may trigger further actions aiming at promoting self-employment in order to reduce the unemployment rate. This is only one of the reasons why the situation of the above-mentioned group of people should be carefully monitored. Another reason is related to fact that Spain adopted a separate statute for them, namely the Statute of Self-Employed Workers (*Ley 20/2007, de 11 julio, del Estatuto del Trabajo Autónomo*,[5] LETA).

The objective of this paper is to critically assess collective labour rights of both "classic" self-employed persons and economically dependent self-employed workers (*trabajadores autónomos económicamente dependientes*) under the Spanish Statute of Self-Employed Workers (*Ley 20/2007 del Estatuto del Trabajo Autónomo*), and to answer the question whether the Polish legislator can draw a lesson from Spanish regulations.

Before scrutinising it closer, we shall pay attention to definitions established by LETA. It indicates the way in which a self-employed person should conduct an economic or professional activity in order to be included within its scope.

[2] https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_esgais&lang=en [Last update: 11 June 2020].

[3] https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.

[4] https://ec.europa.eu/eurostat/databrowser/view/tec00112/default/table?lang=en (data based on the domestic concept).

[5] *Boletín Oficial del Estado*, 12 July 2007, no. 166.

Article 1.1 LETA sets out that LETA shall apply to natural persons who perform an economic or professional activity for profit, regularly, personally, directly, on their own account and outside the sphere of management and organisation of another person, regardless of whether they employ employees (more: Apilluelo Martín 2018, 41 *et seq.*). As signalled above, LETA has also introduced a category of the economically dependent self-employed worker, which is defined as a worker performing an economic or professional activity for profit, regularly, personally, directly, and predominantly for an individual or legal person called a client, on whom he/she depends economically, receiving from such client at least 75 per cent of total income deriving from his/her economic and professional activities (Article 11.1 LETA). It should be noted that the economically dependent self-employed workers have been offered separate privileges by the Spanish legislator, e.g. the right to collective bargaining, and separate provisions regarding, among others, the so-called professional interests agreements. In addition to these regulations, they also enjoy rights arising from the so-called "Joint regime" provided for both "classic" self-employed persons and economically dependent self-employed workers.

2. THE COLLECTIVE LABOUR RIGHTS OF SELF-EMPLOYED PERSONS: JOINT REGIME

As regards professional and collective rights of self-employed persons under the "Joint regime", Article 19 LETA concerns fundamental collective rights (*derechos colectivos básicos*) granted to self-employed persons (more: Pérez Agulla 2016, 80 *et seq.*), grouped from the perspective of individual rights (interests) – paragraph 1; and collective rights (interests) – paragraph 2. The latter group includes collective rights granted to associations of self-employed persons, e.g. establishing a federation, confederation or trade union. By contrast, to the former group the Spanish legislator has qualified:

– the right to join a selected trade union or business association under the conditions set out in the relevant provisions,

– the right to join and form – without prior authorisation – specific professional associations of self-employed persons (*asociaciones profesionales específicas de trabajadores autónomos*),

– the right to take collective action to defend their professional interests.

However, it should be noted that Article 3.1 of the Organic Law on Trade Union Freedom (*Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical*)[6] stipulates that self-employed workers who do not have workers at their service may join trade union organisations, but cannot found unions whose goal is to protect their singular interests, without prejudice to their ability to form associations under specific legislation.

[6] *Boletín Oficial del Estado,* 8 August 1985, no. 189.

According to the data presented by A. Martín-Artiles, A. Godino and O. Molina (2019, 120–121), the most representative organisations of self-employees in 2016 were the *Asociación de trabajadores autónomos* (*ATA*), the *Unión de Profesionales y Trabajadores Autónomos* (*UPTA*), the *Unión de Asociaciones de Trabajadores Autónomos y Emprendedores* (*UATAE*), and the *Confederación Intersectoral de Autónomos del Estado Español* (*CIAE*) with 58.48 per cent, 22.04 per cent, 13.41 per cent and 6.07 per cent, respectively. This data reflects a significant increase (which has taken place since the 2000s) in the number of organisations representing self-employed persons. However, as pointed out by the authors, the trade union membership rate of the self-employed was only 6.9 per cent which was below the avarage for all employed workers in the economy, i.e. 16.4 per cent in 2010, when the latest data are available.

As regards the right to take collective action to defend self-employed persons' professional interests, it has been pointed out in the literature that "this collective activity to defend their interests does not come from the fundamental right to freedom of association, but from the private or common *associationism* of Article 22 of the Spanish Constitution, which will limit the possible actions in this collective dispute" (Todolí-Signes 2019, 260).

A lack of the business counterpart made the Spanish Constitutional Court (judgement 11/1981 of 8 April) issue a ruling according to which the right to strike being recognised in Article 28.2 of the Spanish Constitution[7] is denied to self-employed workers (Moreno Vida 2017, 646). In Spain there is still no regulation in force which would extend the right to strike to "classic" self-employed persons.

3. THE COLLECTIVE LABOUR RIGHTS OF ECONOMICALLY DEPENDENT SELF-EMPLOYED WORKERS

As indicated above, LETA gives economically dependent self-employed workers the possibility of becoming members of a trade union and thus being subject to Article 28.1 of the Spanish Constitution[8] and the Organic Law on Trade Union Freedom. Under the legal basis of the scheme of Article 22 of the Spanish Constitution, which recognises the right of association, and the Organic Law

[7] According to Article 28.2 of the Spanish Constitution, "[t]he right of workers to strike in defence of their interests is recognised. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services".

[8] According to Article 28.1 of the Spanish Constitution, "[a]ll have the right to freely join a trade union. The law may restrict or except the exercise of this right in the Armed Forces or Institutes or other bodies subject to military discipline, and shall lay down the special conditions of its exercise by civil servants. Trade union freedom includes the right to set up trade unions and to join the union of one's choice, as well as the right of trade unions to form confederations and to found international trade union organizations, or to become members thereof. No one may be compelled to join a trade union".

on the Right of Association (*Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación*[9]), they are also granted the right of being members of a professional organisation. This is confirmed by the wording of Article 3.2 LETA, which – with regard to professional interests agreements (*acuerdos de interés profesional*) – states that "any clause in the individual contract of an economically dependent self-employed worker who is affiliated to a trade union or a self-employed workers association that may apply to such worker for having entered into such contract, will be null and void if it infringes the terms of the professional interest agreement entered into by such trade union or association".

The right to strike has not been excluded as regards economically dependent self-employed workers (Moreno Vida 2017, 647).[10] The right to collective bargaining has also been extended to that group (Countouris, De Stefano 2019, 27). The Spanish legislator has done so by establishing specific professional interests agreements, which have already been mentioned above.

According to Article 3.2 LETA, professional interest agreements are the source of the professional regime of economically dependent self-employed workers. They are concluded between the associations or unions that represent economically dependent self-employed workers and the companies for which they carry out their activity, and they may establish the conditions on the way, time and place of the execution of such activity, as well as other general contracting conditions (Article 13.1 LETA). The analysis should be intended to highlight problems arising from the provision in the light of which: "Professional interests agreements shall be concluded under the provisions of the Civil Code. The personal effectiveness of said agreements shall be limited to the signatory parties and, if appropriate, to those affiliated to self-employed workers associations or signatory unions that have expressly given their consent to do so" (Article 13.4 LETA). As rightly stated by J.M. Gómez Muñoz (2017, 140), we are dealing here with a hybrid negotiation procedure characterised by the convergence of labour, civil, and trade union regulations. The author has pointed out that the Spanish Civil Code does not regulate any procedure of entering into agreements, so one might deduce that professional interests agreements shall be concluded under the "clauses of formation and defects of willingness to contract", what is in "contraposition with the rules on representativeness and legitimacy to negotiate collective agreements, which partially apply to these agreements".

As regards the personal effectiveness of professional interests agreements referred to in Article 13.4 LETA, the problem seems to be even more complicated, because it turns out that in the case of certain employers only the workers who are members of the trade unions that have signed the agreement beforehand will be

[9] *Boletín Oficial del Estado,* 26 March 2002, no. 73.

[10] It should be noted, however, that a contrary view is expressed by Countouris, De Stefano (2019, 27), according to whom the right to strike is reserved only to employees in Spain.

entitled to enter into agreements. Such a consequence is described as the emergence of the constitutionally banned closed-shop clause. This means that the Spanish legislator has not paid enough attention to the *erga omnes* effectiveness of the collective agreements, even if professional interests agreements, formally speaking, are a different legal figure from them. Moreover, in the light of Article 21.1 LETA, associations registered in the National Register of Professional Associations of Self-Employed Workers (*Registro Estatal de Asociaciones Profesionales de Trabajadores Autónomos*), which demonstrate sufficient implementation at the national level (*suficiente implantación en el ámbito nacional*) shall be considered as representative professional associations of self-employed workers at the state level. The point here is quite simple. "Sufficient implementation at the national level" criterion has been created as the sole indicator of recognising the representativeness of professional associations of self-employed workers. LETA neither establishes minimum thresholds nor determines who is legitimate to enter into professional interests agreements. Thus, the negotiation of professional interests agreements turns out to be an indicator of representativeness. Besides, trade unions can enter into professional interests agreements without being obliged to demonstrate any given representativeness. In contrast, it is worth noting that "in the employee trade union sphere", only sufficiently representative trade unions can enter into agreements. Given this, J.M. Gómez Muñoz concludes that "this regulation model can generate clearly discriminatory practices among groups"[11] (Gómez Muñoz 2017, 140–141).

It should be further noted that the analysis of the extant literature reveals that in Spain, there are only 10,000 workers registered as economically dependent self-employed persons, what – as has been pointed out by A. Todolí-Signes (2019, 258) – represents less than 0.33% of all self-employed workers and less than 0.05% of the total number of workers in that country. Besides, even if economically dependent self-employed workers are granted the right to bargain collectively, collective bargaining "is extremely limited in practice" and takes place only at the company level (Countouris, De Stefano 2019, 40).

4. CONCLUSIONS FOR POLAND

The aim of this paper was to evaluate collective labour rights of both "classic" self-employed persons and economically dependent self-employed workers under Spanish LETA. Such analysis was intended to discover whether the Polish legislator would be able to draw a lesson from Spanish regulations.

[11] In Spain, professional interests agreements with effects on labour and limited effectiveness, which are binding for trade unions put self-employed workers unions in a less favourable position as regards "guaranteed rights than the rest of trade unions made up by employees" (Gómez Muñoz 2017, 140–141).

Article 19 LETA establishes professional and collective rights of self-employed persons under the "Joint regime", but what is really interesting are the main asymmetries in rights between "classic" self-employed persons and economically dependent self-employed workers. Firstly, the findings presented indicate that the right to strike has been denied to "classic" self-employed workers, however, it has not been excluded in relation to economically dependent self-employed workers. Secondly, the essay explains that among all self-employed workers, only economically dependent self-employed workers have been granted the right to bargain collectively. However – in addition to the above-mentioned problems of "effectiveness" and "representativeness" – it seems proved by the presented data that in practice, collective bargaining is limited due to the facts that it takes place only at the enterprise level, and that the number of economically dependent self-employed workers is very low.

In the light of the conclusion that collective labour rights under LETA could be better protected (especially as regards "classic" self-employed persons), it is worth trying to draw conclusions for Poland. Taking into account Spanish regulations, it is clear that the protection in question is much more modest than that which is available in our country. Since 1 January 2019, self-employed persons registered as sole traders who do not employ other people have been granted the right to coalition, which encompasses both the right to create and join trade unions and to create organisations of self-employed persons. Moreover, self-employed persons and union organisations associating them have been given the right to negotiate and conclude collective labour agreements that set certain minimum protection standards for all self-employed workers falling within their scope of application. The lack of any criteria that would enable a diversification of the scope of collective rights granted to self-employed persons is subject to criticism (Duraj 2020, 75). As rightly stated by T. Duraj, these persons, by creating a trade union or joining an already existing organisation enjoy the same privileges, regardless of whether they are permanently associated with the service provider or only occasionally render him/her services. The author postulates that in some areas the legislator shall differentiate the scope of protection, referring, for example, to the criterion of economic dependence, in the likeness of the Spanish LETA (Duraj 2020, 75). It seems that this criterion could indeed be used to differentiate the scope of protection. However, following the example of LETA, it would be necessary to eliminate the above-mentioned shortcomings resulting from this statute.

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TABLE OF CONTENTS