| Chapter 7 |

Poland: Employment Relationship from the Perspective of Individual, Collective Labor Law and EU Law

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ABSTRACT

In Poland, labor law is now an independent branch of law (within a uniform legal system). The employment relationship is a central concept in Polish labor law. This relationship has a specific legal character, which distinguishes it, e.g., from civil law, administrative law, and criminal law relationships. In the Polish legal order, employment does not must have an employee character (within the employment relationship). This chapter is devoted to Polish national regulations concerning employment contracts and collective labor agreements, with particular emphasis on their power to shape legal relationships. The content of the chapter shows the relationship between the individual and collective labor law. An analysis has been made of the compliance of Polish regulations on employment relationships with EU law. It also presents selected current regulatory issues of Polish labor law through the prism of issues concerning the formative power of an employment contract and a collective agreement (in terms of the impact of COVID-19 and automation on employment relationship regulations).

KEYWORDS

employment contracts, collective agreements, Poland, labor law, EU law, COVID-19, automation

1. Place of Labor Law in the Polish Legal System

In the current Constitution of the Republic of Poland, the notion of work has been included in various contexts and meanings, with the notion generally being broader than 'work' as understood in the Polish Labor Code.[1] According to art. 24 of the Constitution, work (of any kind) is under the protection of the Republic of Poland and the State exercises supervision over the conditions of work.

1 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, no. 78, item 483 as amended; Act of 26 June 1974—Labor Code, consolidated text, Journal of Laws of 2020, item 1320, as amended, hereinafter referred to as KP (translation of Labor Code: Jamroży, 2019, with the exception of the translation of art. 22 §11 KP—own translation). See also Sobczyk, 2013, pp. 65–67.

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In Poland, labor law is currently an independent branch of law (within a uniform legal system), separate inter alia from civil law and administrative law. The subject of labor law does not include social insurance, although there are close relationships between labor law and social insurance law. At the same time, it should be stressed that labor law has quite strong relationships with civil law, from which it is partly derived. In accordance with art. 300 KP 'in cases not regulated by the provisions of labor law, the provisions of the Civil Code apply accordingly to an employment relationship, provided they are not contrary to the principles of labor law.'

The Labor Code contains a legal definition of labor law itself, formulated, however, only for the purpose of this normative act. Labor law includes the provisions of the Labor Code and the provisions of others laws and subordinate legislation setting out the rights and duties of employees and employers, as well as provisions of collective labor agreements and other collective agreements, regulations, and statutes based on the law and determining the rights and duties of the parties to an employment relationship (art. 9 §1 KP). If an employment relationship concerning a specified category of employees is regulated by special provisions, the provisions of the Labor Code apply to the extent not regulated by those provisions (art. 5 KP). Many acts separately define employees' status (the so-called employee pragmatics). These regulations govern the employment relationships of such categories of employees as seafarers, teachers, academic teachers, local government employees, court and prosecutor's office employees, foreign service employees and state office employees.

According to art. 22 §1 KP, 'By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration.' It is accepted in the literature that labor law is a set of legal norms governing subordinate employment relationships and other legal relationships inherent in them.[2] This specific obligatory relationship, which is the employment relationship, is a central concept in labor law. It is precisely the criterion of the subject of regulation that makes it possible to distinguish labor law as a separate branch of law. It is common in both jurisprudence and literature to contrast employment relationships with other workers' work.[3] The employment relationship, as a legal relationship governed by labor law, has a specific legal character that distinguishes it, for example, from civil law relationships,[4] administrative law relationships (work relationships in which officers of militarized formations remain in connection with the performance

2 Wyka, 2017, p. 171. See also Szubert, 1980, pp. 7–9.

3 More on this subject Musiała, 2011; Gersdorf, 2013; Baran, 2015a.

4 This division is, for example, clearly visible in the regulations on the employment of temporary employees. A temporary work agency hires temporary employees based on an employment contract for a definite period. However, the agency may also, based on a civil law contract, direct persons who are not employees of such agency to perform temporary work (art. 7 of Act of 9 July 2003 on the employment of temporary workers, consolidated text, Journal of Laws of 2019, item 1563, as amended).

of a specific service), and criminal law relationships (work under conditions of compulsion). In the Supreme Court's view, the work does not have to be of an employee nature.[5] According to K.W. Baran, 'Non-employment work includes all non-incidental provision of work except for classically conceived employment of a legal employee nature.'[6]

The structural features of an employment relationship are voluntary commitment, the need to perform work personally, the aforementioned employee subordination,[7] the employer's risk,[8] the remuneration of work and continuity of work.[9]

Labor law has two primary functions characteristic of this branch of law: a protective function and an organizational function.[10] The protective function of labor law stems from the need to establish, at the level of universally binding legislation, specific guarantees and benefits for employees, since the employee, as the weaker party in the employment relationship, cannot safeguard his professional and social interests on his own.[11] The protective function manifests itself primarily in the principle of preference for the employee (described later in this chapter), as well as the general and specific protection of the permanence of the employment relationship, wage guarantees and compulsory annual leave (labor law defines a minimum of rights and a maximum of obligations for the employee). The organizational function of labor law, on the other hand, is

> to ensure the efficient organization of teamwork processes by defining the powers of management and the duties of employees, the legal measures to counteract their violation, as well as the role of the representative bodies of the workforce and the forms of their interaction with the management of workplaces.[12]

5 Judgment of the Supreme Court of 7 October 2004, II PK 29/04, LEX no. 145435. See also judgment of the Supreme Court of 9 December 1999, I PKN 432/99, LEX no. 39601.

6 Baran, 2015b, p. 22.

7 It is expressed primarily in the ability to give work instructions to an employee.

8 The employer bears the negative consequences of the employee's improper work performance. Moreover, in situations specified in the labor law, the employer is obliged to tolerate the employee's absence from work and release the employee from the obligation to provide work (often with retention of the right to remuneration). The employer has specific obligations under the Act of 4 March 1994 on the company social benefits fund (consolidated text, Journal of Laws of 2021, item 746, as amended). As a rule, the employer is also obliged to pay remuneration in cases of disruptions in the functioning of the workplace (situations of over- or under-employment, as well as the inability of employees to provide work). The negative consequences of economic events cannot in principle be shifted to the employee.

9 Work within the framework of an employment relationship involves the performance of specific activities at repeated intervals during a permanent bond between the employee and the employer. The employee is also obliged to act diligently throughout the work process.

10 Ćwiertniak and Salwa, 2017, p. 476.

11 See also judgment of the Constitutional Court of 18 October 2005, SK 48/03, OTK z 2005 r., no. 9/A, item 101; judgment of the Constitutional Court of 24 October 2006, SK 41/05, OTK z 2006 r., no. 9/A, item 126.

12 Szubert, 1971, p. 567.

Thanks to this function, employers can maximize the effects of the work of subordinate employees without the risk of infringing the interests of these employees (e.g., through detailed regulation of working time systems). The indicated functions of labor law, although they perform different tasks, their directions of action are not opposed to each other.[13]

2. The Employment Contract as the Basis for the Employment Relationship

According to art. 2 KP, 'An employee is a person employed based on an employment contract, an appointment, an election, a nomination or a co-operative employment contract.' This list is enumerative (it is not possible to employ the employee on any other basis). Therefore, as it has been stressed earlier, among others, persons employed under civil law contracts (e.g., under a contract of mandate) do not acquire the status of an employee, as they are employed under the so-called non-employment of the civil law type subject to the regime of civil law. Moreover, work under the conditions specified in art. 22 §1 KP is considered work based on an employment relationship, regardless of the name of the contract concluded between the parties (art. 22 §11 KP). Employment contracts cannot be replaced with a civil law contract where the conditions of the performance of work specified in §1 remain intact (art. 22 §1[2] KP). In its judgment of 7 June 2017, the Supreme Court emphasized that by the parties' will, the basis of work cannot be changed when the employee performs the activities specified in the contract falls within the regime of art. 22 §1 KP.[14]

The employment contract is the most common basis for the employment relationship.[15] It is a bilateral legal action, consensual (it comes into effect through the mere making of consensual declarations of intent), bilaterally binding, and pecuniary.[16] An employment relationship is established on the date specified in the employment contract as the date of commencing work, and if this date is not specified—on the date of the conclusion of the employment contract (art. 26 KP). The form and contents of the employment contract are, in turn, defined in art. 29 KP.

According to art. 25 §1 KP an employment contract is concluded for a trial period, for an indefinite period or for a definite period. The employment contract for a trial period not exceeding 3 months is concluded to check the qualifications of the employee and the possibility of his employment for the purpose of performing a specified type

13 Ćwiertniak and Salwa, 2017, p. 476.

14 Judgment of the Supreme Court of 7 June 2017, I PK 176/16, LEX no. 2300072. See also judgment of the Supreme Court of 14 September 1998, I PKN 334/98, LEX no. 37685. It should be noted here that the National Labor Inspectorate (the body established in Poland to supervise and control the observance of labor law) has the right to bring actions, and with the consent of the person concerned—to participate in proceedings before an labor court, in cases for determining the existence of an employment relationship (art. 10(1) point 11 of Act of 13 April 2007 on National Labor Inspectorate, consolidated text, Journal of Laws of 2019, item 1251, as amended).

15 Głowacki, 2018, p. 4.

16 Zieliński, 1986, p. 3.

of work (art. 25 §2 KP).[17] In turn, under art. 251 §1 KP the employment period based on an employment contract for a definite period time, as well as the total employment period based on employment contracts for a definite period concluded between the same parties to the employment relationship, may not exceed 33 months, and the total number of these contracts may not exceed three (however, the legislature provides for several exceptions in this respect). However, it is the employment contract for an indefinite period that fulfills the already mentioned protective function of labor law. This is because this contract realizes the rights and obligations of employees and employers in the most accurate way and is characterized by the strongest bond between the parties to the employment relationship.[18] This means that 'an employment contract for a definite period time should be an exception to the principle of employment of indefinite duration, to be used when objective circumstances are justifying the temporary employment.'[19]

3. The Collective Labor Agreement as an Autonomous Source of Labor Law

In the earlier fragments of this study, it has already been indicated that the Polish legislature includes within the conceptual scope of labor law, among others, collective labor agreements (art. 9 §1 KP). Autonomous (specific, peculiar) sources of labor law do not come from any state authority—they are created by social partners (collective labor agreements, other collective agreements) or by the employer itself (regulations, statutes). Each autonomous source of labor law has its statutory basis and determines the rights and obligations of the parties to the employment relationship.

According to the hierarchy of autonomous sources of labor law established in the Labor Code, the provisions of regulations and statutes may not disadvantage employees more than the provisions of collective labor agreements and collective agreements (art. 9 §2 KP). The provisions of regulations and statutes may not disadvantage employees more than the provisions of collective labor agreements and collective agreements (art. 9 §3 KP).

A collective labor agreement is a normative agreement (an agreement that is a source of norms).[20] In literature, it is emphasized that defining a collective labor agreement as a normative agreement means that within this category, two aspects may be distinguished—normative and contractual. Normativity is expressed: in the

17 According to art. 25 §3 KP it is possible to re-sign an employment contract for a trial period with the same employee: 1) if the employee is to be employed for the purpose of performing another type of work; 2) after a lapse of at least three years from the date of termination or expiry of the previous employment contract if the employee is to be employed for the purpose of performing the same type of work; in this case it is permissible to re-assign an employment contract for a trial period.

18 Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX no. 2549369.

19 Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX no. 2549369.

20 Dörre-Kolasa et al., 2017, pp. 856–857.

statutory empowerment of this act indicated in art. 9 KP, in the way its provisions function,[21] in the subjective scope of its impact (it is not limited only to the parties to the agreement, but also includes employees regardless of their trade union affiliation) and in the subjective scope (every collective labor agreement defines rights and obligations of the parties to the employment relationship).[22] The contractual aspect of the collective labor agreement, on the other hand, is mainly expressed in the procedure of creating this act (autonomous negotiations of the social partners), the provisions contained in its content defining the mutual obligations of the parties to the collective agreement, as well as the procedure of amending and terminating the collective labor agreement.[23]

The Labor Code distinguishes two types of collective agreement: single employer collective labor agreements (*zakładowy układ zbiorowy pracy*), to be concluded by employers and representative trade unions,[24] and multi-employer collective labor agreements (*ponadzakładowy układ zbiorowy pracy*), to be concluded by the appropriate statutory body of a multi-enterprise trade union, acting for the employees, and the appropriate statutory body of an employers' association, acting for the employers, on behalf of the employers united in the association.[25] The provisions of an enterprise agreement may not be less advantageous to employees than the provisions of the multi-enterprise agreement that covers them (art. 241^{26} §1 KP). Collective labor agreements must be concluded in writing, for an indefinite or a definite period (art. 241^{5} §1 KP). According to art. 241^{5} §3 KP prior to the expiry of the period of an agreement concluded for a definite period, the parties may extend its validity for a definite period, or recognize the agreements as concluded for an indefinite period.[26]

Through the registration obligation, the number of collective labor agreements can be determined. By the end of 2015, 8,032 single-employer collective labor agreements had been registered, covering nearly 1.8 million workers, of whom slightly above 1 million were employed in the public sector, and nearly 800,000 in the private sector.[27] At the same time, there were 86 multi-employer collective labor agreements covering 390,000 employees.[28] Currently, only 61 multi-employer collective labor agreements remain in the ministerial register.[29] Only a minority of employees in

21 See further sections of the chapter on art. 18 KP and art. 2411^{3} KP.
22 Dörre-Kolasa et al., 2017, p. 856 and the literature referred to therein.
23 Ibid.
24 According to art. 238 §1 point 2 KP 'For the purposes of the provisions of this Section [Section Eleven. Collective Labor Agreements—M.B.] a trade union representing employees includes a trade union of employees for whom an agreement will be concluded. This also applies to federations of trade unions comprising such trade unions, as well as national confederations of trade unions uniting trade unions or federations of trade unions'.
25 Czarzasty, 2019, p. 469.
26 Amendments to an agreement are introduced by way of additional reports. Provisions applicable to the agreement apply accordingly to the additional reports.
27 Czarzasty, 2019, p. 474
28 Ibid.
29 Ministerstwo Rozwoju, Pracy i Technologii, 2021.

Poland are covered by collective bargaining, which takes place largely at company or workplace level. As of 2018 collective bargaining in Poland can only be described as 'being in its death throes: it plays a marginal role, both in terms of the volume of collective agreements and the number of employees covered.'[30] A report by the European Trade Union Institute (ETUI) shows that the number of employees covered by collective labor agreements in Poland is among the lowest in the European Union. In 2018, only 18% of employees were covered by collective labor agreements.[31]

	2015	At present
Single-employer collective labor agreements	8,032	Data not available
Multi-employer collective labor agreements	86	61

4. The Relationship between Individual and Collective Labor Law

Systematizing the Polish labor law, one should distinguish the general part of labor law, which consists primarily of the issues of norms, sources, and labor law principles. Only then it is justified to distinguish particular sections of labor law: individual labor law, procedural labor law, and collective labor law. Individual labor law contains legal norms regulating the relationships between the employer and a particular employee. Closely related to this branch of labor law is procedural labor law, which regulates legal protection proceedings in labor relationships (individual labor dispute law). Collective labor law, in turn, contains the legal norms regulating the relationships between employers and entities representing the collective interests of employers and entities representing the collective interests of employees and between these entities and public authorities.[32]

Individual and collective labor law are not entirely separable. L. Florek notes that 'the legal regulation of individual employment relationships is not based only on statutory provisions, but also on autonomous sources of law created by the parties to collective employment relationships.'[33] It is an essential instrument of trade union influence on the content of individual employment relationships. As L. Florek adds, 'This applies especially to collective labor agreements, which are an institution of both individual and collective labor law'[34].

30 Czarzasty, 2019, p. 466.
31 Czarzasty, 2019, p. 478. Poland is the largest of the new EU Member States with a population of approximately 38 million.
32 More on this topic Florek, 2007a. An example of such a regulation is Act of 23 May 1991 on the resolution of collective disputes, consolidated text, Journal of Laws of 2020, item 123, as amended.
33 Florek, 2007b, p. 18.
34 Ibid.

Unlike individual labor law, collective labor law is characterized by a balance of the parties to collective employment relationships. Trade unions have been established to counterbalance the weaker position of employees against employers.[35] In this context, W. Sanetra emphasizes that the functional dependence of collective labor law on individual labor law speaks against its autonomization and shaping it as a separate branch of law.[36] In the thematic scope of the relationship between the individual and collective labor law, however, it is impossible to overlook the fact that essentially the entire Act of 5 July 2018 amending the Act on trade unions and certain other acts,[37] which is the implementation of the Constitutional Court's judgment of 2 June 2015, entered into force on 1 January 2019.[38] The amendment mentioned above brought about a significant (even fundamental) change in right of association in trade unions. At present, according to art. 2(1) of the Act of 23 May 1991 on trade unions the right to create and join trade unions is granted to persons performing paid work.[39] By a person performing paid work legislature means an employee or a person performing paid work on a basis other than employment relationship, if he does not hire other persons for such work, regardless of the basis of work, and has such rights and interests related to the performance of work that may be represented and defended by a trade union (art. 11 point 1 UZZ). Thus, in principle, also persons working under civil law contracts and the self-employed gained the full right of association. In the judgement mentioned above, the Constitutional Tribunal stated that the obligation on the legislature to implement the freedom of association in trade unions must consist of granting the possibility to establish unions and join them to all persons who, on constitutional grounds, may be classified as workers (in the broad sense). At the stage of public consultations of the draft of the amendments mentioned above, it was emphasized that granting the status of a trade union to an organization that does not associate any employee does not consider the specific nature of labor law.[40] However, it should be stressed that the attribute of a trade union organization, although related to the scope of individual labor law, does not prejudge the exclusivity of the tasks carried out by trade unions under labor law.[41] At the same time, it is rightly argued in the literature that although the expansion of the right of coalition on the grounds

35 Florek, 2007b, p. 17.

36 Sanetra, 2007, p. 42.

37 Act of 5 July 2018 amending the Act on trade unions and certain other acts, Journal of Laws of 2018, item 1608.

38 Judgment of the Constitutional Court of 2 June 2015, K 1/13, Journal of Laws of 2015 r., item 791.

39 Act of 23 May 1991 on trade unions, consolidated text, Journal of Laws of 2019, item 263, as amended, hereinafter referred to as UZZ.

40 Opinia w sprawie projektu ustawy o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw z dnia 2 sierpnia 2016 r. Available at: http://legislacja.rcl.gov.pl/docs//2/12283551/12343252/ 12343255/dokument254231.pdf (Accessed: 13 June 2021).

41 Zestawienie uwag do projektu ustawy o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw zgłoszonych przez reprezentatywne organizacje pracodawców w trybie art. 16 ustawy o organizacjach pracodawców. Available at: http://legislacja.rcl.gov.pl/docs//2/12283551/12343252/ 12343255/dokument255874.pdf (Accessed: 13 June 2021).

of collective labor law was necessary, the specific regulatory solutions raise a lot of interpretative doubts. B. Mądrzycki rightly notes that the main problem is that 'the legislature still does not take any real steps to organize the forms of employment.'[42]

It should also be stressed that because of the amendment as mentioned above, according to art. 21(3) UZZ the provisions of section eleven of the Act of 26 June 1974—the Labor Code (entitled 'Collective Labor Agreements') shall apply accordingly to persons other than employees who perform paid work and their employers, as well as to organizations uniting these entities. At present, therefore, 'non-employee' collective labor agreements can be concluded for a vast range of persons in paid work outside the employment relationship.

5. Current Regulatory Issues of Polish Labor Law Through the Prism of Issues Concerning the Shaping Power of the Employment Contract and the Collective Labor Agreement

5.1. Introductory Remarks

The most important consequence of qualifying a collective labor agreement as a provision of labor law is applying to the provisions of such an agreement, defining the rights and obligations of the parties to the employment relationship, of the special mechanism resulting from art. 18 KP. The Polish Labor Code establishes in this provision the principle of privilege of the employee, according to which the provisions of employment contracts and other acts based on which an employment relationship is established may not disadvantage an employee more than the provisions of labor law (art. 18 §1 KP). Any provisions of these contracts and acts defined that are less favorable to an employee than the provisions of labor law are invalid; the appropriate provisions of labor law will apply instead (art. 18 §2 KP). The principle of privilege of the employee sets limits on the parties' freedom to the employment relationship to shape their mutual rights and obligations. In its judgment of 5 October 2016, the Supreme Court indicated that the essence of the regulation of art. 18 §1 and 2 KP is to ensure that the employment contract does not violate the standards arising from the provisions of the labor law, while at the same time the parties are free to shape the terms and conditions of employment in the contract in a manner more favorable to the employee. These more favorable contractual provisions 'may introduce into the employment relationship employee rights to an extent greater than that provided for by the labor law, but they may also establish a right to benefits not provided for by those provisions.'[43] On the other hand, the principle of privilege of the employee

42 Mądrzycki, 2021, p. 37. See also Duraj, 2020, pp. 67–77; Barański and Gredka-Ligarska, 2018, pp. 24–39.

43 Judgment of the Supreme Court of 5 October 2016, II PK 205/15, LEX no. 2165563.

cannot be reduced to a simple relation to resolving doubts in favor of the employee because a principle of this content cannot be derived from labor law provisions.[44]

Through the prism of the issues concerning the formative power of the employment contract and the collective agreement, mention should also be made of art. 2411[3] §1 KP, according to which upon the collective labor agreement entering into force, more advantageous provisions of an agreement will, by operation of law, replace the conditions of an employment contract or of other forms of employment that results from existing provisions of labor law. According to art. 2411[3] §2 KP the provisions of an agreement that are less advantageous to employees will be introduced by notice of termination of the current conditions of an employment contract or of other forms of employment. Notice of termination of the current conditions of an employment contract or of other forms of employment is not subject to provisions limiting the possibility of notice of termination of the current conditions of an employment contract or of other forms of employment.

5.1.1. COVID-19 and Its Influence on the Employment Relationship

In the current legal state in Poland, there are several anti-crisis regulations related to preventing, counteracting and combating COVID-19, which are often controversial in terms of changes in labor law and directly affect the situation of employees.

Pursuant to art. 15g(11) of the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them,[45] it is possible to conclude an collective agreement specifying the conditions and procedure for performing work during the period of economic work stoppage or reduced working hours. It refers to the status of employees, but its personal scope may also include persons working outside an employment relationship, for example, under civil law contracts and the self-employed[46].

The employer concludes the aforementioned collective agreement with a representative trade union organization or with employee representatives (if there is no trade union at the workplace).[47] The agreement shall specify at least: 1) the occupational groups covered by the economic standstill or reduced working hours; 2) the reduced working hours applicable to employees; 3) the period for which the solutions concerning the economic standstill or reduced working hours apply (art.

44 Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX no. 2549369.

45 Act of 2 March 2020 on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases and crisis situations caused by them, consolidated text, Journal of Laws of 2021, item 2095, as amended, hereinafter referred to as the Anti-Crisis Act.

46 Baran, 2020, p. 194.

47 The employer shall forward a copy of the collective agreement to the competent district labor inspector within five working days from the date of the conclusion of the agreement. Suppose a multi-employer collective labor agreement covered the employees employed by the employer. In that case, the district labor inspector should transmit information on the agreement on determining the conditions and procedure for performing work during the period of economic stoppage or reduced working hours to the register of multi-employer collective labor agreements (art. 15g[12] of the Anti-Crisis Act).

15g[14]) of the Anti-Crisis Act). From the perspective of the subject of the present study, the most relevant is the fact that, under art. 15g(13) of the Anti-Crisis Act, to the extent and for the period specified in the collective agreement as mentioned above, the terms and conditions of employment contracts and other forms of employment resulting from the multi-employer collective labor agreement and the single-employer collective labor agreement shall not apply. Therefore, the agreement under consideration is a unique mechanism for suspending the provisions of a collective labor agreement[48]. Moreover, under art. 15g(15) of the Anti-Crisis Act, art. 42 §1–3 KP also does not apply when determining the conditions and procedure of performing work in the period of economic stoppage or reduced working hours (this provision regulates the notice of termination of the existing work or remuneration conditions). On the other hand, the legislature did not exclude in this case the application of art. 42 §4 KP, according to which no notice of termination of the existing work or remuneration condition is required if the employee is assigned, where justified by the needs of the employer, to work other than that specified in the employment contract, for a period of up to 3 months in a calendar year, provided that it does not result in the reduction in the remuneration of the employee and corresponds to the employee's qualification.

It is argued in the literature that art. 15g(14) of the Anti-Crisis Act sets out only the minimum requirements of an anti-pandemic agreement. This means that

> Within the framework of freedom of agreement, the social partners may define all other conditions of importance for them, both those of an individual nature, concerning the rights and obligations between the parties to the employment relationship and those of an obligation nature, referring to the relationship between the social partners.[49]

It is possible, for example, to suspend the payment of bonuses or other remuneration components (e.g., seniority bonuses), but it is not permissible to reduce the benefits of those employed below the legal minimum (minimum wage).[50] This remark should also be applied to other labor standards of statutory rank (the suspension of the implementation of the collective labor agreement cannot limit the protection stemming from provisions of statutory rank).

The regulation mentioned above is not the only anti-crisis regulation that affects labor relationships. At this point, it is also worth noting the regulations concerning remote work. According to art. 3(1) of the Anti-Crisis Act, in the period of validity of an epidemic emergency or a state of epidemics, declared due to COVID-19, and in three months after their cancellation, to counteract COVID-19, an employer may order an employee to perform, for a specified period, work specified in the employment

48 Baran, 2020, p. 195.
49 Baran, 2020, p. 194.
50 Baran, 2020, pp. 194–195.

contract, outside the place of its regular performance (remote work).[51] It is unnecessary to enter into a separate agreement between the parties to the employment relationship regarding the temporary performance of remote work by the employee (although the parties to the employment relationship may establish this form of work provision by way of an amending agreement).[52] It should be stressed that the legislature in the aforementioned art. 3 of the Anti-Crisis Act uses such terms as 'employee,' 'employer,' 'employment contract,' which clearly indicates the limited subject scope of this provision. It covers only employment cases of an employee (within the employment relationship framework). The regulation applies only to employees employed under an employment contract (it does not apply to employees employed under appointment, election, or nomination)[53]. Legislative proceedings are currently underway in Poland to permanently introduce the concept of remote work into the Labor Code (to replace the regulation on telework).

5.1.2. Automation and Its Influence on the Employment Relationship

In Poland the discussion on work automation and the future of work focuses mainly on the number of jobs that will be lost because of automation.[54] Much less attention has been paid to the legal analysis of the risks associated with the ever-growing interaction between people and technological tools (both in the form of advanced machines and software used to manage enterprises and production processes) and its influence on the employment relationship.

K. Stefański rightly notes that a decrease in the amount of work ('technological development may result in a decrease in demand for human labor') with an increasing supply of work must mean the necessity to redistribute the good, which is work.[55] Flexible working time arrangements can be an excellent instrument here.[56] In this context, special attention should be paid to such flexible forms of work as part-time work, on-call work, or job-sharing. However, in its judgment of 19 March 2013, the Supreme Court emphasized that on-call work with fully paid waiting time does not constitute employment as defined in art. 22 §1 KP.[57]

One of many interesting examples of the impact of automation on the employment relationship is the creation of an employee work using weak artificial intelligence (AI).

51 Under art. 2(2) of the Anti-Crisis Act, whenever the Act refers to 'counteracting COVID-19,' it is understood to mean all activities related to eradicating infection and preventing the spread, prophylaxis and combating the effects of the disease. As long as the employee is not absent from work on an excused basis (e.g., due to illness), in the event of the need to take measures to counteract COVID-19, the employer should, therefore, give the employee an order to work remotely.

52 Barański, 2021, p. 274.

53 Barański, 2021, pp. 274–275.

54 Błachowicz, 2019, pp. 10–14; Rojszczak, 2019, pp. 5–13. Until recently, the term 'automation' itself was associated only with the streamlining of production processes. Today, algorithms in the form of computer programs are beginning to compete with many different employees.

55 Stefański, 2016, pp. 28–32.

56 Ibid.

57 Judgment of the Supreme Court of 19 March 2013, I PK 223/12, LEX no. 1415490.

Indeed, the personal nature of providing work within the employment relationship does not exclude the possibility of creating such work.[58] In its judgment of 9 February 2007, the Supreme Court indicated that

> In the light of art. 22 §1 KP, the employment relationship cannot be understood so that any assistance provided to the employee in the performance of his duties is contrary to it. Such a rigorous understanding of the requirement of personal performance of work would not only be unreasonable but would also result in the elimination of a great many legal relationships from the scope of influence of the labor law.[59]

The Polish literature emphasizes that today the computer has essentially merely taken over 'the previous role of a musical instrument, a paintbrush or a typewriter, leaving the essence of the creative process unchanged.'[60] Doubts of a legal nature (copyright law) arise, however, e.g., in those factual situations where an employee—user of a computer program, creating a product of an intellectual nature, uses ready-made elements developed by the programmer for the purposes of the program.[61]

6. Demonstration of Compliance of Polish Regulations on Employment Relationships with EU Law

It is assumed in the literature that Poland's membership in the European Union means that EU law does not pose a threat to Polish labor law. On the contrary, it is 'an important guarantee of its further existence and development.'[62] It is true that the implementation of EU law has resulted in a decrease in the technical and legislative quality of the Polish Labor Code (this process is complex and complicated), but at the same time, it has 'contributed to raising the level of protection of employees' interests and to raising the standards which characterize social progress.'[63]

In Poland, the Labor Code has become the main instrument for implementing EU directives.[64] At the same time, as W. Sanetra emphasizes, despite the fact that it

58 Barański and Jankowska, 2018, pp. 198–199.
59 Judgment of the Supreme Court of 9 February 2007, I UK 221/06, LEX no. 948780.
60 Jankowska, 2011, p. 336.
61 Barański and Jankowska, 2018, pp. 198–201.
62 Mitrus, 2017, p. 421.
63 Sanetra, 2015, p. 95.
64 Sanetra, 2015, p. 81. As L. Mitrus points out, EU regulations in the field of EU labor law are of little significance, because they are an instrument for harmonizing legal solutions on a European Union scale. Therefore they do not allow for flexibility in terms of their implementation. EU regulations do not consider the specifics of labor law institutions or the particular conditions existing in a particular Member State (Mitrus, 2006, p. 169).

follows from the Treaty on the Functioning of the European Union[65] that directives may be implemented by way of the enactment of normative acts of a different nature (of a different form and legal position in the system of sources of law), and thus also by way of the conclusion of a collective labor agreement with the relevant content,[66] in Poland, for various reasons, directives are not implemented by way of collective agreements (collective labor agreements) concluded by the social partners.[67]

In the sphere of individual employment relationships, the European Union seeks to harmonize national systems. However, EU law regulates only certain aspects of employment relationships but in no way interferes with the permissibility of certain forms of employment (these matters are left to national legislatures).[68] Polish literature emphasizes that the implementation of EU directives must not lead to a lowering of the level of protection existing in Member States, which means that national solutions that are more favorable to employees remain in force.[69] In this connection, L. Mitrus points out that 'the relationship between EU labor law and Polish law is based...on the principle of the privilege of the employee' and 'this principle is the most important criterion for assessing whether Polish regulations comply with EU standards.'[70] Nevertheless, each assessment of the compatibility of Polish labor law with EU law requires an analysis of the legal nature of the given norm of EU law and the relevant regulations of national law.[71]

Regarding the correct implementation of EU regulations on employment relationships in the Polish national law, particular attention should be paid to two issues: the employer's obligation to provide employees with information on essential components of the employment contract and the legal situation of employees employed under atypical employment relationships.[72]

65 Treaty on the Functioning of the European Union of 25 March 1957, Journal of Laws of 2004 no. 90, item 864, hereinafter referred to as TFUE.

66 According to art. 288 zd. 3 TFUE a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Under art. 153 par. 2 TFUE a Member State may entrust management and labor, at their joint request, with the implementation of directives adopted pursuant to art. 153 par. 2 TFUE, or, where appropriate, with the implementation of a Council decision adopted in accordance with art. 155 TFUE. In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labor have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

67 Sanetra, 2015, pp. 81–82.

68 Mitrus, 2006, p. 206.

69 Florek, 2004, p. 31.

70 Mitrus, 2006, p. 173.

71 Mitrus, 2006, p. 176.

72 According to J. Wratny, the necessity to incorporate the EU regulations into the Polish national law created an impulse thanks to which the theory and practice began to promote atypical forms of employment as a means of combating unemployment (this phenomenon has been described as 'a more sophisticated form of influence of Community norms') (Wratny, 2005, p. 3).

The applicable art. 29 KP corresponds in principle to the content of art. 2 of the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.[73] Art. 29 §1 and 11 KP define the essential components of an employment contract.[74] An employment contract must be made in writing and if an employment contract is not made in writing then the employer must, at the latest on the date when the employee is allowed to perform work, provide the employee with a written statement that confirms arrangements regarding the parties to the contract, the type of the contract as well as its conditions (art. 29 §2 KP).[75] Moreover, the Polish Labor Code, unlike Directive 91/533, among other things, introduces an obligation inform an employee, in writing, not later than within seven days of the date of concluding the employment contract about the frequency of the remuneration payments, and, if the employer is not obliged to establish work regulations—additionally about the night-time hours, and the adopted procedure of confirming the arrival and presence of employees at work, as well as the procedure of excusing their absence from work (art. 29 §3 KP).[76] The details of the procedure for providing the indicated information are contained in art. 29 §31-33 KP.

The provisions mentioned above (art. 29 §1-4 KP) shall apply accordingly to employment relationships established on a basis other than an employment contract (art. 29 §5 KP).

Although art. 1 par. 2 of Directive 91/533 allows national authorities to exclude certain categories of employees from its scope, art. 29 of the Labor Code introduces the obligation to communicate the relevant information to all employees, without any distinction.

In breach of art. 2 par. 2e of Directive 91/533, the Polish legislature does not require the employer to inform the employee of the expected duration of the contract or employment relationship. Furthermore, in view of the case-law of the Court of Justice of the EU, the Labor Code should also provide the requirement to inform the employee of the permissible limits of overtime work and the conditions for its performance

73 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288 of 18.10.1991, pp. 32–35; hereinafter referred to as Directive 91/533.

74 An employment contract must specify the parties to the contract, the type of contract, the date of its conclusion, as well as the work and remuneration conditions, and in particular: 1) the type of work; 2) the place of performing the work; 3) the remuneration corresponding to the type of work, with a specification of the remuneration components; 4) the length of working time; and 5) the date of commencing work. Art. 29 §11 KP provides that in the event of the conclusion of an employment contract for a definite period, exceeding the time and quantity limits specified in art. 251 KP, the contract specifies this purpose or circumstances of this case by providing information about objective reasons justifying the conclusion of such a contract.

75 The Polish legislature did not use the possibility of flexible regulation of this issue, which is criticized in the literature (Mitrus, 2006, pp. 212–213).

76 See also art. 29 §2 and §31-3[3] KP.

(however, this is currently not the case).[77] It is also stressed in the literature that the differentiation mentioned above of the information obligations of the employer, depending on whether it is obliged to establish work regulations or not, raises doubts as to the compliance of such a solution with Directive 91/533 (the Directive does not provide for such a differentiation, allowing only for the exclusion of certain categories of employees from the scope of the employer's information obligation).[78]

At this point, it should be made explicit that Directive 91/533 shall be repealed with effect from 1 August 2022. On 31 July 2019, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union entered into force.[79] According to art. 22 of Directive 2019/1152, the rights and obligations set out in this Directive shall apply to all employment relationships by 1 August 2022. Member States shall take the necessary measures to comply with this Directive by 1 August 2022. Preliminary actions are currently underway in Poland to transpose this Directive into Polish law.

As regards the legal situation of employees employed under atypical employment relationships, following W. Sanetra, it should first of all be pointed out that a separate problem of proving the compliance of Polish regulations concerning employment relationships with EU law is the issue of 'full adjustment of the already established norms of the Labor Code to the requirements resulting from the implemented directives, possibly to a more rational use—considering our realities—of the possibilities which these directives create.'[80] Until the amendments to the Labor Code, which came into force on 22 February 2016,[81] this problem concerned, for example, the regulation of art. 251 KP to the extent that this provision excluded term employment contracts other than employment contracts for a definite period[82]. According to Clause 3(1) of the Annex to Council

77 Wolfgang Lange v. Georg Schünemann GmbH, App no. C-350/99, ECR 2001/2/I-1061. See also Mitrus, 2006, pp. 209–211.

78 Mitrus, 2006, p. 211.

79 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186 of 11.07.2019, p. 105; hereinafter referred to as Directive 2019/1152. In accordance with recital 4 of the Directive 2019/1152 since the adoption of Directive 91/533, 'Labor markets have undergone far-reaching changes due to demographic developments and digitalization leading to the creation of new forms of employment, which have enhanced innovation, job creation and labor market growth. Some new forms of employment vary significantly from traditional employment relationships regarding predictability, creating uncertainty with regard to the applicable rights and the social protection of the workers concerned. In this evolving world of work, there is therefore an increased need for workers to be fully informed about their essential working conditions, which should occur in a timely manner and in written form to which workers have easy access. In order adequately to frame the development of new forms of employment, workers in the Union should also be provided with several new minimum rights aiming to promote security and predictability in employment relationships while achieving upward convergence across Member States and preserving labor market adaptability'.

80 Sanetra, 2015, pp. 90–91.

81 Act of 25 June 2015 on amending the Act—Labor Code and some other acts, Journal of Laws of 2015, item 1220.

82 Sanetra, 2015, pp. 90–91.

Directive 99/70/EC, 'fixed-term worker' means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event[83]. As has already been mentioned, the regulation of art. 251 KP now regulates the employment contract for a definite period and the multiplicity of this contracts. Thus, this regulation still focuses exclusively on the employment contract for a definite period. At the same time, however, as a result of the amendment mentioned above, in art. 25 §3 KP, the legislature specified the rules for re-conclusion of an employment contract for a trial period with the same employee.[84] Moreover, the legislature deleted one type of employment contract from the catalogue of term employment contracts: a contract concluded for the time of performance of specific work.[85]

The above interventions of the Polish legislature in the scope of types and duration of term employment contracts have not resolved all doubts of legislative nature.[86] The exclusion of certain categories of employees from the construction mentioned above provided for in art. 25 §1 KP should still be regarded as incorrect. Indeed, according to Clause 2(2) of the Annex to Council Directive 99/70/EC, subject to additional conditions, the Directive may not apply to: a) initial vocational training relationships and apprenticeship schemes; b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration, and vocational retraining program. The Polish legislature, in art. 251 §4 KP, has defined differently, and therefore incorrectly, the categories of employees deprived of protection against employer abuse.[87]

Finally, it should be noted that, according to art. 153(5) TFUE, this act does not apply to remuneration for work, the right of association, the right to strike and the right to lock-out. Therefore, the law-making activities of the European Union omit, inter alia, the collective labor agreements law.[88]

83 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, pp. 43–48.

84 It is possible: 1) if the employee is to be employed for the purpose of performing another type of work; 2) after a lapse of at least 3 years from the date of termination or expiry of the previous employment contract if the employee is to be employed for the purpose of performing the same type of work; in this case it is permissible to re-assign an employment contract for a trial period.

85 It differed from a employment contract for a definite period in that, unlike the latter, the duration was not fixed by calendar but by indicating the work on the completion of which the parties agreed to terminate the contract.

86 Currently, an amendment to the Labor Code is being drafted in Poland, which aims, inter alia, to introduce changes to ensure full compliance of the provisions on termination of fixed-term employment contracts with Directive 1999/70/EC—in connection with the European Commission's statement on unjustified unequal treatment regarding the termination of employment contracts of fixed-term employees compared to permanent employees.

87 See also Mitrus, 2006, p. 220; Walczak, 2005, p. 63; Czerniak-Swędzioł and Mądrzycki, 2018, pp. 95–109.

88 Franzen, 2012, pp. 245–246.

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