PROBLEMS OF THE IMPLEMENTATION OF EU LABOUR LAW IN POLAND

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Before the accession to the European Union (May 2004) Poland implemented all directives of labour law. The paper presents problems and difficulties of the implementation and application of EU labour law in Poland. It concerns, in particular the equal treatment of employees, employment for a specified period, temporary employment, transfers of undertakings, businesses or parts of undertakings or businesses, mass redundancy (group layoffs), informing and consulting employees and partially working time with special regard to doctor's situation. The highlighted problems are connected with different provisions and institutions of Polish labour law based on a national legal tradition. Some problems of implementation have been the consequence of still different economic situation as compared with old European countries. They have been also resulted from different industrial relations in Poland, especially the lack of collective bargaining on the above-undertaking level. Some problems have been related to other Polish international obligations, especially ratified International Labour Organization conventions. Some troubles have caused the way of translating and implementing the EU labour law directives in Poland.

Keywords*: European Union, labour law, equal treatment of employees, mass redundancy.*

Equal treatment

The European law proclaims equality between men and women as a "task" and an "aim" of the Community and impose a positive obligation to promote it in all its activities. In the EU Law equal treatment were regulated by many directives. The principle of equal treatment for men and women was introduced by Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes and also by Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex1. They were replaced by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)2**.** The prohibition of the discrimination from other reasons governs Council Directive 2000/43/EC of 29 June 2000

1 Council Directive 75/117/EEC - Official Journal L 45, 19.2.1975, p. 19, Council Directive 76/207/EEC - Official Journal L 39, 14.2.1976, p. 40, Council Directive 86/378/EEC - Official Journal L 225, 12.8.1986, p. 40, Council Directive 97/80/EC - Official Journal L 14, 20.1.1998, p. 6.

2 Official Journal L 204, 26/07/2006 P. 0023 – 0036.

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin3 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation 4

All these provisions have been implemented by the Labour Code5. The Code provides for the equal treatment of employees, which means they may not be discriminated against with respect to employment terms and working hours, on the grounds specified in Arts. 11^3 and 18^{3a}: gender, age, disability, race, religion, nationality, views (in particular political or religious), trade union membership, ethnic background, denomination and sexual orientation. Employees should be treated equally with respect to the initiation and termination of the employment relationship, employment terms, promotion opportunities and access to training. This applies to both direct and indirect discrimination. The latter involves discrimination based on seemingly neutral criteria or on actions resulting in a deterioration of the employment conditions for a group of employees characterized by any of the aforementioned traits (Art. 18^{3a} § 4). Discrimination may also include harassment and sexual harassment (Arts. 18^{3a} § 5 and 6). Harassment is defined as conduct that is aimed at or results in the violation of the dignity, humiliation or degradation of an employee. If this kind of wrongful conduct is of a sexual nature or relates to an employee's gender, it is considered sexual harassment.

Discrimination may consist in wrongful conduct on the part of the employer (or a person acting on its behalf) or in inciting another person to engage in such a conduct (Art. 18^{3a} § 5). In particular, it may involve a refusal to employ a person on the grounds specified above, unless such a refusal is justified by the nature of the work applied for, its conditions or employment requirements connected with the position (Art. 18^{3b} § 2 point 1).

Above all, employees are entitled to equal remuneration for the same job or a job of the same value (Art. 18^{3c}). In this respect the notion of remuneration includes all of its components, irrespective of their name or nature, as well as any other work-related benefits. Jobs of the same value are jobs that require similar professional qualifications and comparable responsibility and effort.

A violation of the right to equal treatment gives rise to compensation in a value not smaller than the minimum monthly remuneration (Arts. 18^{3c} and 18^{3d} para. 1). If the employee avails himself of the rights mentioned above, such action may not be a reason for the termination of employment (Art. 18^{3e}).

Implementation of directives took place by extended provisions of the Labour Code. General Polish provisions of the Constitution and the Labour Code gave in a large extent similar protection against discrimination as EU law. In the view of the Commission, the full implementation of the directive requires the repetition of its expressions in the domestic law. As a result, the part devoted to the principle of equal treatment is more extended than other principles of labour law. It creates a false impression that equal treatment is more important than working time, remuneration or especially protection of life and health of employees.

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3 Official Journal L 180, 19/07/2000 p. 0022 - 0026

4 Official Journal L 303 , 02/12/2000 p. 0016

5: *Polish Labour Code*,C.H. Beck, Warsaw 2003, K. Michalowska (transl The Labor Code of 26 June 1974, J.L. 21/1998 Item 94, with subsequent amendments. An English version of the Cod).

Art. 18^{3a} of Labour Code mentions not only the criteria of discrimination covered by EU directives, but also resulting from the international law, in particular Convention No. 111. It also uses a phrase "in particular". As a result, often raises an allegation of discrimination by differentiation of the employees from any reason. Therefore, it is assumed that the protection against discrimination deriving from directives concerns only the situations mentioned herein.

A large number of allegations of discrimination concerns remuneration. In this way some employees try to get an increase of remuneration. It is not appropriate since remuneration can be differentiated. Pursuant to the Art. 78 § 1 of the Labour Code remuneration for work is calculated in such a way that it corresponds in particular to the type of the work performed and the qualifications required to perform it, as well as reflecting the amount and the quality of the work performed.

Employment for a specified period

Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the Union of Industrial and the Employer's Confederations of Europe (UNICE), the European Centre for Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC)6 has been implemented by Labour Code provisions.

Employment contracts may be concluded for a specified, unspecified or a period necessary to perform a particular task. The difference between a contract for a specified period and a contract for performing a particular task hinges on the way in which the period of operation of the contract (the calendar date versus the accomplished task) is fixed. The parties have complete freedom to select any type of contract they wish. However, the contract for a specified period may be concluded only twice. The third consecutive contract of this type shall be transformed by operation of law into a contract for an unspecified period with all legal effects attached to such contracts, unless the time gap between two successive contracts for a specified period exceeds one month. If an employee needs to be substituted with a temporary replacement, the employer may employ another person for that purpose.

In the private sector the prevalent form of employment is an
employment contract for a fixed period of time. This new trend is one the most distinctive features of the new employment relations. The increasing importance of this type of employment contract is due to the fact, that it automatically terminates when the period on which it is based expires without discharge money and also justuication of the contract resiliation.

Often it is difficult to separate situation in which an employer in fact needs an employee for a definite period of time from the situation when he concludes such an agreement in order to avoid the protection, to which is entitled an employee employed for an indefinite period of time. Therefore, the provision of art. 25^{1} § 3 allows situations in which it is possible to conclude contract for a definite period of time without limitations. In particular, the limititation does not apply to employment contracts for a definite period of time concluded: 1) for the purpose of substituting an employee during a justified absence from work, 2) for the purpose of completing occasional or seasonal work, or tasks performed periodically. Here a question arises whether it does not violate the directive.

6 Official Journal L 175,10.7.1999

In recent years, there is a practice of long-term contracts for a definite period of time, for instance for 5 – 10 years. Upon the conclusion of an employment contract for a definite period of time of more than 6 months, the parties may provide for the early termination of an employment contract with a two-week period of notice (Art. 33)
The employer can terminate this contract in any time, what gives him similar profits as the conclusion of the next contract for a definite period of time. In certain circumstances the Supreme Court recognises it as the abuse of law.

Temporary Employment

Temporary work is arranged through agencies, which employ temporary workers and subsequently outsources them to an end-employer who is in need of workers of a particular kind. The agency pays employees their remuneration, charging a fee for its services. The temporary employee does not enter into an employment relationship with the end-employer. The agency employs temporary employees based on an employment agreement or a civil law contract agreement (when the conditions of performing the job are not typical of the employment relationship).

The 2003 Law on Temporary Employment7 governs temporary employment, which may be seasonal, periodic, supplementary or substitutional.6 Jobs may not be unduly hazardous and may not be used as replacements for employees on strike. An employee who has an employment relationship with an employer may not be temporarily employed on the above-described basis. This also applies to employers which resorted to group layoffs within the previous six months or which laid off an employee from a given position for reasons not attributable to employers within the previous three months.

Both the employee (the performer of the work) and the employer enter into a contract with the temporary work agency that specifies the terms that govern the work to be performed. The contract protects the rights of the temporary employee, and, to a certain extent, the employer. The employer and the agency must agree on the type of work and the basic terms of employment (e.g., the required qualifications, working hours and the place of employment). The employee enters into a contract similar to a typical employment contract with the agency for a specific time or for the performance of specific work. The end-employer has certain obligations towards the temporary employee, which primarily include the observance of safety and health regulations, work time-keeping and, in the case of employment for over six months, vacation leave of two days per month. A temporary employee may not be treated less favorably with regard to working conditions than permanent employees. If this rule is violated, the employee is entitled to seek compensation from the employer of not less than the minimum monthly remuneration required by law.

In temporary employment agencies dominate the employment on the basis of civil law agreements. In the period of 36 subsequent months the total period of temporary work for one employer can not exceed 12 months and by the replacement of the absent employee – 36 months. In such situations the re-employment is possible after 3 years. These restrictions are often not respected, in many cases with the consent of employees, who are afraid of lack of work.
Employer's obligation to inform employees

Transfers of undertakings, businesses or parts of undertakings or businesses

7 Journal of Laws No. 166/2003 Item 1608

An undertaking or its part can be transferred to the new employer (change of the employer). Under article 23^1 of the Labour Code, when part of the employing establishment is transferred to another employer, the latter becomes, by operation of law, the party to the existing labour relationships. This corresponds to Article 3 of the Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses8.

The transfer of the undertaking, shall not in itself constitute grounds for dismissal of the employee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce. Within two months of the above notification, each employee may terminate his/her labour relationship without notice, seven days in advance.9

In such a situation trade unions can negotiate the Social Pact. Frequently negotiations of this Pact delay the process of privatisation. Sometimes trade unions take even strike against a change of employer, what goes beyond their right to strike.

Mass redundancy (Group Layoffs).

Mass redundancy is regulated by the 2003 Law on the Special Rules on Terminating Employment Relationships for Employer Related Reasons which replaced the 1989 Law.5 This corresponds to the Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses10. The law provides for special terms for lay-offs for reasons not attributable to the employee11. This type of lay-off is regulated by the 2003 Law on the Special Rules on Terminating Employment Relationships for Reasons not Attributable to the Employee12. The law addresses both group lay-offs and individual redundancies. Its provisions are designed to help adjust employment to the employer's needs and capacity which sometimes involves restricting the scope of protection against employment termination. Furthermore, the regulations provide for an information and consultation procedure with respect to group lay-offs and also grant certain rights to the individuals being laid off, including the right to a severance payment and, in the case of group lay-offs, the opportunity to return to work.

The law applies to establishments employing at least 20 employees. Smaller employers are exempt and may lay off employees on general principles. The law applies when the lay-offs are "not attributable to employees", which usually implies reasons attributable to the employer. Special reasons necessitating lay-offs include the liquidation or bankruptcy of the employer, which, as a rule, involves laying off the entire workforce, unless some part or the entire establishment is taken over by another entity. Mass lay-offs are defined as the termination of employment agreements within 30 days of at least 10 employees out of a total under 100 employees, 10 per cent of employees out of a total of between 100 and 300 employees, and 30 employees out of a total of at least 300

8 Official Journal L 082 , 22/03/2001 P. 0016 - 0020

9 Polish Labour Law Blog, Polish Labour Law for the UK and US readers, Transfer of undertakings: the concept of transfer.

10 Official Journal L 082 , 22/03/2001 P. 0016 - 0020

11 B. Raczkowski, Poland (in:) Collective Redundancies Guide, Ius Laboris, 2009, p.163

12 Journal of Laws 2003 No. 90, Item 844 with subsequent amendments

employees. The aforementioned rules also apply to terminations by the parties' mutual consent if at least five employees are involved. In the case of group lay-offs, the employer is obliged to inform the trade unions functioning in the establishment of the reasons for the lay-offs, the number and profile of the employees to be laid off, the lay-off period, the criteria for selecting the employees to be laid off, the order in which the lay-offs will be implemented and of any additional employee rights connected with the lay-off (i.e., the right to retrain in another profession or receive compensation). The same information has to be furnished to the local labour bureau. Trade unions may submit proposals on the avoidance of the contemplated lay-offs or reduction in their scope (e.g., by a temporary voluntary reduction in remuneration).

No later than 20 days after the information referred to above has been provided, the employer and the trade unions should initiate talks in order to reach an agreement, which is to specify the procedure to be followed in the case of the lay-offs and also as the rights to be observed by the employer (e.g., the payment of higher severance pay to the employees). If no agreement has been reached, the employer announces termination rules, which should be substantially similar to the terms of the failed agreement. If there are no trade unions in a given employment establishment, the intention to conduct lay-offs and the announcement of the lay-off rules must be communicated to employee representatives selected according to a procedure applicable to a given employer. After the agreement has been reached or the lay-off rules have been announced, the employer is obliged to notify the local labour bureau. Lay-offs may follow after the lapse of 30 days from such a notification, which is designed to give the labour bureau enough time to find new jobs for the laid off employees.

The aforementioned procedure does not apply in case of individual lay-offs for reasons not attributable to the employees when the number of laid off individuals is smaller than what is defined as a group lay-off. Finally, the new law grants certain rights to the employees laid off in accordance with the procedure specified therein. First of all, this includes the right of all employees laid off individually or as a group to receive a severance payment. The severance payment is equal to one, two or three month's remuneration to employees who have worked for a given employer for up to two, between two and eight and over eight years, respectively. An employee dismissed as a result of mass lay-offs should be re-employed in the case of new employment of employees from the same professional group, if the employee informs the employer of his intention to be re-employed within a year after the termination of employment contract.

The Code provides for the equal treatment of employees, which means they may not be discriminated against with respect to the termination of the employment contract, on the grounds specified in Arts. 11^3 and 18^{3a} namely: gender, age, disability, race, religion, nationality, views (in particular political or religious), trade union membership, ethnic background, denomination and sexual orientation. Employees should be treated equally with respect to the initiation and termination of the employment relationship, employment terms, promotion opportunities and access to training. An undertaking or its part can be transferred to the new employer (change of the employer). Under article 23^1 of the Labour Code, when part of the employing establishment is transferred to another employer, the latter becomes, by operation of law, the party to the existing labour relationships. Procedure of mass redundancy contributes to the limitation of redundancies to a small extent. Frequently interests of employees and trade unions, which represent them, focus on discharge money. Trade unions and employees aim to increase discharge money.The 2003

law provides for benefits to which a dismissed employee is entitled. In particular, every employee dismissed for the above mentioned reasons has the right to discharge money (severance pay). Discharge money is calculated as vacation leave and would be paid in the following amount:

- one-month pay, if an employee's total period of employment is under 10 years,
- two-months' pay, if any employee's total period of employment is 10 or more years but less than 20,
- three-months' pay, if an employee's total period of employment is 20 or more years13.

It should be stressed that this benefit is granted to all the employees dismissed for reasons not attributable to the employee and not only those dismissed as a result of mass lay-offs.

The following slogan is popular among workers and trade unions: statutory discharge money two times or even three.

Informing and consulting employees

In other states it is often non-trade union workers' representation that is vested, at the company level, in rights similar to those granted by the Polish laws to trade unions. The phenomenon is reflected in law of the European Union whereby many powers exercised in Poland by trade unions are granted to workers' representatives. Pursuant to provisions of a number of directives, the term "workers' representatives" means workers' representatives within the meaning of the laws or practices of the Member States14. A solution like that is due to the diversity of workers' representation systems in individual countries. Hence the definition of workers' representatives must be general enough to accommodate various national systems. It is on that basis that each country may freely determine who is to be considered as workers' representatives. Therefore, the powers that serve workers' representatives are addressed to either a trade union representation or one that does not bear such a character, and the European legislation reflects legal solutions adopted in the Member States. Without the said legal solutions taken into consideration hardly would it be possible to adopt directives and other legal acts unanimously (or by a majority of votes at least). In the European Union countries there exist workers' representations of trade union nature (or lacking such a character), especially at the company level. Should any type of them be skipped in the provisions, protection of workers in a given country would be limited. For that very reason, the term must refer to both types of representation. Therefore, the powers of workers' representatives concerning, for example, the transfer of an undertaking or part thereof or collective redundancies cannot be regarded as a manifestation of trade union freedom within the meaning of international agreements and, consequently, the Constitution. That is clearly confirmed by Art. 153 Par. 5 of the Treaty on Functioning of the European Union, whereby the powers of the European Union do not include, inter alia, the right of association. Thus, the Union is not authorised to decide about the scope of trade union freedom. The election of workers' representation may be restricted under Art. 5 of

13 ILO's Industrial and Employment Relations Department (DIALOGUE) http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/countries/poland.htm

14 In the English text: *workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.* Also Art. 3 of ILO Convention No. 135 states that workers' representatives are persons recognized as such by national law or practice, regardless if they are representatives of trade unions or elected representatives.

Convention No. 13515 concerning protection and facilities to be afforded to workers' representatives in the undertaking. Pursuant to the provision, where there are both trade union representatives and elected representatives operating in the company, appropriate steps should be taken, if necessary, to ensure that the presence of elected representatives does not undermine the position of the trade unions concerned or their representatives. It cannot be therefore excluded that a state, which on the grounds of the EU law is free to determine which representation is vested in the powers under the law, may be restricted in the choice by the quoted provision of the Convention. For should it be assumed that the latter also falls within the scope of trade union freedom, granting of special powers by the state to a non-trade union representation may be considered a violation of the freedom.

Working time (doctors)

In Poland, the Labour Code defines working time as time during which the worker is at the disposal of the employer, either at the workplace or at another place designated for work performance. There is no express requirement that the worker is actually carrying out work, provided s/he is at the employer's disposal to do so. However, Art. 151 of the Labour Code specify that only active periods of on-call time at the workplace need to be treated as working time. Inactive periods do not need to be treated as working time; though they are not to be treated as rest periods, and must result in compensatory rest, or, if that is impossible, financial compensation. Doctors and other graduate healthcare workers in health institutions providing 24-hour care, are governed by separate health legislation. This law formerly provided at section 32 that on-call time at the workplace by these workers (whether inactive or active) was not counted as working time. A judgment of the Supreme Court in 2006 held that the concept of working time must be interpreted in accordance with the Working Time Directive16. The national authorities have amended these provisions by an Act of 27 August 2007, with effect from 1 January 2008, to provide that on-call time at the workplace is to be counted as working time. This covers both active and inactive periods of on-call time. The national authorities indicate that compliance with the Court of Justice's rulings in this sector will impose considerable challenges for funding and organisation of the health services, and have introduced an opt-out within the health sector at the same time as the amendment regarding on-call time17.

Final Remarks

Adapting Polish labor law to EU law has greatly enriched domestic regulations by incorporating many modern approaches to such issues as the equal treatment of employees, specific-term and part-time employment, temporary employment, group layoffs, working hours and holiday leaves, the protection of the employment of women and minors and the protection of employees' health (which includes limiting working hours). All in all, the adjustment process caused Polish labor law to become more flexible

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[15] Ratified by 83 states by April 2009, including Poland in 1977 (Journal of Laws No. 39, item 178) and other European Union Member States.

16 Supreme Court, I PK 265/05, judgment dated June 6th, 2005.

17 COMMISSION STAFF WORKING PAPER. Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('The Working Time Directive') Accompanying document to the REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('The Working Time Directive'), {COM(2010) 802 final}, p.51 -52.

and better adapted to market economy conditions, although in some areas only to a limited extent. Surprisingly, perhaps, the adjustment was effected by way of statutory regulation without taking advantage of the collective negotiations procedure. Furthermore, Polish legislators have not provided for a broad enough framework enabling parties to collective labor relationships to alter their labor arrangements. The fact that the adjustment was effected in several stages (e.g. involving amending existing provisions and combining the introduction of EU law with other amendments of labor law) caused the entire adjustment process to lose its transparency.