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Model of collective labour agreements in the Polish legal system

Model układów zbiorowych pracy w systemie prawa polskiego

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Summary The amendment of 5 July 2018 to the Act on Trade Unions provides in article 21(3) a statutory basis for the conclusion by the social partners of "non-employee" collective agreements. This eliminated a significant gap in the system of collective labour legislation. As from 1 January 2019 it will be possible to conclude collective agreements that are only for persons in gainful employment other than employees. Until now, they could have been beneficiaries of a collective agreement, provided that the personal scope of such agreement covered also non-employees. Thus the Constitutional freedom to bargain collectively and to conclude collective agreements has been fully implemented in the system of labour law. Article 59(2) of the Constitution of the Republic of Poland does not limit, in the personal sphere, the beneficiaries of collective agreements. In model terms, according to the personal criterion, *de lege lata* the Polish labour law provides three possible categories of collective agreements: employee collective agreements (Article 239 of the Polish Labour Code), non-employee collective agreements (Article 21(3) of the Act on Trade Unions), heterogeneous (hybrid) collective agreements.

Keywords: employee collective agreements, non-employee collective agreements, heterogeneous (hybrid) collective agreements.

Streszczenie Nowelizacja z 5 lipca 2018 r. ustawy o związkach zawodowych w art. 21 ust. 3 stworzyła podstawę ustawową dla zawierania przez partnerów społecznych „pozapracowniczych" („niepracowniczych") układów zbiorowych pracy. Tym samym została wyeliminowana istotna luka w systemie ustawodawstwa zbiorowego. W ujęciu modelowym w systemie polskiego prawa pracy *de lege lata* możliwe jest zawieranie trzech podstawowych kategorii układów zbiorowych pracy: pracowniczych (art. 239 k.p.), pozapracowniczych („niepracowniczych", art. 21 ust. 3 ustawy o związkach zawodowych), heterogenicznych (hybrydowych).

Słowa kluczowe: pracownicze układy zbiorowe pracy, niepracownicze układy zbiorowe pracy, hetorogeniczne układy zbiorowe pracy.

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The last category raises certain doubts. The problem requiring analysis is whether a collective agreement can be concluded for both employees and other persons engaged in gainful employment on a legal basis other than a labour law employment relationship. Even if, *de lege lata*, the statutory provisions do not explicitly provide such a formula, I think that based on *in dubio pro libertate* argument, in connection with the directive laid down in Article 59(2) of the Constitution of the Republic of Poland, it is legitimate to argue that the conclusion of such a heterogeneous (hybrid) collective agreement is acceptable.

To start the deliberations on the collective agreement model in the system of Polish employment law, worth noting is Article 21(3) of the Act on Trade Unions introduced by the amendment of 5 July 2018. This provision thus creates a statutory basis for "non-employee" collective agreements, the beneficiaries which are persons who perform paid work on a basis other than a labour law employment relationship, if they do not employ other people for this type of work, regardless of the basis of employment, and they have such rights that can be represented and defended by a trade union. Such interpretation refers to the provisions of Article 1^1(1) of the Act on Trade Unions and has its justification in *a cohaerentia* and *a completudine* argumentation (Baran, 2018a, pp. 3–4).

In practice, this means that "non-employee" collective agreements can be concluded for a broad range of employed people. By this I mean in particular persons who perform work under civil-law contracts (such as service contracts or self-employed). In this context,

a question arises whether the "non-employee" collective agreement may apply to persons referred to in Article 2(4[1]) and (5) of the Act on Trade Unions. The textual interpretation and *a contrario* argument seem to speak in favour of a negative answer. On the other hand, Article 59(2) of the Constitution of the Republic of Poland speaks for an approving answer, based on *in dubio pro libertate* argumentation. For my part, I am in favour of the latter option, with the reservation that *de lege lata* it is not permitted to conclude collective agreements exclusively for persons specified in Article 2(4[1]) and (5) of the Act on Trade Unions.

Another problem that will appear in the context of Article 21(3) of the Act on Trade Unions is the issue of the admissibility of concluding "non-employee" collective agreements for officers employed under administrative law framework, as defined in Article 2(6) of the commented Act (e.g. police officers, officers of Prison Service, Border Guard). The starting point for further deliberations will be that the trade union rights of the categories of officers indicated explicitly in this provision are governed *mutatis mutandis* by the provisions of the Act on Trade Unions, taking into account the limitations resulting from separate laws governing employment of specific categories of public sector employees (*pragmatyki*). Due to the fact that they do not regulate the collective agreement issues, it seems reasonable to argue — in accordance with the classic formula *quod lege non prohibitium, licitum est* — that conclusion of a collective agreement for officers of services indicated explicitly in Article 2(6) of the Act on Trade Unions is permissible. This interpretation is justified also by Article 59(2) of the Constitution of the Republic of Poland, which does not establish any personal restrictions in this regard. This interpretation meets the bargaining practice in uniformed services, where the social partners more and more often conclude "other" collective arrangements that set out the standards of service performed by officers, including those regarding remuneration.

To sum up, in personal terms of the model of heterogeneous (hybrid) collective labour agreements in the system of Polish employment law, it is possible to distinguish the agreements concluded for:

- employees and persons gainfully employed on a basis other than a labour law employment relationship, as well as pensioners,
- persons gainfully employed on a basis other than a labour law employment relationship, persons providing work without remuneration (Article 2(41) of the Act on Trade Unions) and persons directed to alternative service (Article 2(5) of the Act on Trade Unions),
- officers of the militarized services authorised to associate in trade unions and persons in gainful employment (Article 2(6) in connection with Article 2(1) of the Act on Trade Unions).

The above list is purely illustrative. It is possible to further multiply the personal scopes of collective agreements. In order to maintain the transparency of arguments at the model level, I will not introduce additional subjective categories. This does not mean in practice that such collective agreements are not normatively possible.

Due to the fact that the "employee" collective agreements have already been discussed in detail in legal writings (Włodarczyk, 2017, p. 843 and the literature referenced there), I will focus my attention on "non-employee" collective agreements. The starting point will be the conclusion that such collective agreement is in principle concluded for people who provide work on a basis different than a labour law employment relationship. In particular, it is unacceptable to include in it a differentiation clause according to which the provisions of the non-employee collective agreement would apply only to members of a trade union which is a party to the agreement and only they would be its beneficiaries. Such an interpretation has its justification in the amended version of Article 3 of the Act on Trade Unions, which explicitly prohibits unequal treatment of persons in employment depending on their membership or non-membership in a trade union. It does not, however, mean an absolute prohibition to restrict the personal scope of the provisions of a collective agreement. It is because there are no normative obstacles to exclusion, in whole or in part, of provisions of the collective agreement based on a type of work provided by persons employed on a basis other than a labour law employment relationship (for example due to the specifics of self-employment).

A party to a collective agreement concluded for people who provide paid work on a basis other than a labour law employment relationship may be trade union organisations associating only non-employees, but also those associating both employees and non-employees. In the case of representative multi-establishment trade union organisations, they should have the characteristics set out in Article 25[2] of the Act on Trade Unions, and in the case of company-level organisations, the characteristics set out in Article 25[3] of the same Act.

The other party to a multi-establishment agreement concluded on the basis of Article 21(3) of the Act on Trade Unions in accordance with the textual wording of Article 241[14] § 1(2) of the Labour Code, should be a competent statutory body of employers' organisation. In the case of a company-level agreement, the party is the employer. On the basis of *a cohaerentia* and *a completudine* argumentation, it should be assumed that this is an employer in a broad sense within the meaning of Article 1[1](2) of the Act on Trade Unions (Baran, 2018, p. 7 ff.). In practice, this means that a party to such an agreement may be not only an employee employer, but also a heterogeneous employer employing both employees and persons gainfully employed on a different contractual basis.

Article 21(3) of the Act on Trade Unions, with regard to "non-employee" collective agreements, explicitly sets up a *mutatis mutandis* clause. According to the textual wording of this norm, the provisions of Section XI of the Labour Code should be applied *mutatis mutandis*. This

a *fortiori (a maiori ad minus)* means that the Labour Code regulations should be applied taking into account the differences, both subjective and objective. It involves primarily an extensive interpretation, in particular at the objective and functional level. It is also permissible to apply directly the provisions of the Labour Code, without any modifications. This is supported by a *fortiori* (*a maiori ad minus*) argumentation.

In practice, the provisions governing the following matters may be applied in this respect:

- the material (objective) scope of collective agreements (e.g. Article 240, 241^1 of the Labour Code),
- negotiation and registration procedure (e.g. Article 241^2, 241^3, 241^4 of the Labour Code),
- conclusion of a collective agreement (e.g. Article 241^5 241^{14}, 241^{23} of the Labour Code),
- entry of the collective agreement into force (e.g. Article 241^{12} of the Labour Code),
- transformation of a collective agreement (e.g. Article 241^9, 241^{13} of the Labour Code),
- suspension of the collective agreement (e.g. Article 241^{27} of the Labour Code),
- termination of a collective agreement (e.g. Article 241^7 of the Labour Code),

The above list is purely illustrative. Ultimately, the social partners and law enforcement bodies applying the law decide whether to apply the provisions of Section XI of the Labour Code directly or *mutatis mutandis*. This mechanism creates a necessary element of flexibility in collective labour relations, which should be noted with approval.

The "non-employee" collective agreement is not considered a source of labour law within the meaning of Article 9 § 1 of the Labour Code. On the other hand, the heterogeneous (hybrid) agreement is a source of labour law in relation to employees and is not a source of labour law in relation to persons in gainful employment.

To sum up the above, I conclude that the amendment of 5 July 2018 to the Act on Trade Unions extended, at the normative level, in the personal scope, the model of collective agreement law. This regulation should be welcomed. However, this does not prejudge to what extent the legal mechanisms will be applied by the social partners. Much will depend on the level of unionisation among persons gainfully employed on a basis other than a labour law employment relationship. This applies in particular to those employed on the basis of service contracts and self-employed. Whether the introduced collective agreement instruments will be applied or not, will depend on their activity.

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