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MODELS OF CASCADE APPLICATION OF STATUTORY NORMS IN POLISH INDIVIDUAL LABOUR LAW

MODELE KASKADOWEGO STOSOWANIA NORM W POLSKIM INDYWIDUALNYM PRAWIE PRACY

Summary: The cascade application of statutory regulations in individual labour law consists in the subsidiary application of increasingly general statutory norms in order to define the legal status of the subjects of the individual employment relationship. In practice, in its widest understanding, it is applicable in official labour law. In the general employment relationship this mechanism consists in the subsidiary application of the Civil Code to the individual employment relationship.

Keywords: cascade application of acts, Polish individual labour law, official pragmatics

Streszczenie: Kaskadowe stosowanie przepisów ustawowych w indywidualnym prawie pracy polega na subsydiarnym stosowaniu coraz to ogólniejszych norm ustawowych w celu określenia statusu prawnego podmiotów indywidualnego stosunku pracy. W praktyce w najszerszym wymiarze ma ono zastosowanie w urzędniczym prawie pracy. W powszechnym stosunku pracy mechanizm ten polega na subsydiarnym stosowaniu kodeksu cywilnego w indywidualnym stosunku pracy.

Słowa kluczowe: kaskadowe stosowanie prawa, indywidualne prawo pracy

The general hierarchy of the sources of labour law in the Polish legal system is defined in Art. 9 of the Labour Code[1]. The top of this hierarchy[2] are statutory acts,

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1 Cf. K.W. Baran, *Z problematyki źródeł prawa pracy*, „Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2010 [*On the Problems of Labour Law Sources. Studies in Labour Law and Social Policy*], pp. 12-13.

2 Cf. K.W. Baran, D. Książek, [in:] *System prawa pracy. Część ogólna* [*The Labour Law System. General Part*], K.W. Baran (ed.), Warszawa 2017, Vol. 1, pp. 646 ff.

including the Constitution of the Republic of Poland[3]. Apart from it, there are also numerous ordinary acts[4]. They usually regulate a specific subjective and objective aspect of the labour relationships. The binding regulations do not directly specify a sequence of the application of standards with respect to specific acts. This study analyses the issues of the sequence of their application in terms of individual labour law, which is particularly important in the employment regulated by civil service laws. This area is governed by legislation acts issued for self-government employees, employees of public authorities, members of the civil service, judicial employees, as well as teachers and academic teachers. One the one hand, these pragmatics are an instrument of subjective differentiation of employment relationships, as they adapt the statutory regulations to the specificity of work in a certain sector or profession, but on the other hand they generate serious problems concerning the sequence of application of statutory norms.

Presenting the characteristic of acts as the sources of labour law in individual employment relationship, it is worth pointing to the mechanism of cascade application. Its essence lies in the subsidiary application of increasingly general statutory regulations in order to determine the legal status of the subjects of individual employment relationships, specifically the employee and the employer. This is done based on reference norms of the first or second degree. The first variant of the cascade occurs when a specific pragmatics refers to another pragmatics of a statutory rank. An example illustrating this situation is the Act of the 18 December 1998 on employees of the judicial system and prosecution[5], which, in Art. 18 refers to the Act on employees of public offices in cases not regulated by its provisions[6]. The latter Act has the status of a base pragmatics in the Polish civil service law system. If the regulations of the referenced Act are still not specific enough, the provisions of the Labour Code should be applied, pursuant to Art. 5 of the Labour Code. We are dealing with the second variant of the cascade, when the provisions of the pragmatics (Art. 43 item 1 of the Act on self-government employees[7] or Art. 9 item 1 of the Act on civil service[8]) refer directly to the Labour Code and other provisions of labour law. However, if the pragmatics does not provide any references, then the provisions of Art. 5 of the Labour Code are applied *explicite*. This provision states that if the employment relationship of a specific category of employees is governed by special regulations, the Labour Code shall apply to the extent not provided for in those special regulations If the employment relationship of a specific category of

[3] Cf. more J. Oniszczuk, [in:] *System prawa pracy. Część ogólna* [*The Labour Law System. General Part*], K.W. Baran (ed.), Warszawa 2017, Vol. 1, p. 667 ff.
[4] Cf. K.W. Baran, [in:] *System prawa pracy*…, pp. 811 ff.
[5] Journal of Laws 2018.577.
[6] Journal of Laws 2022.2290.
[7] Journal of Laws 2022.530.
[8] Journal of Laws 2022.1691.

employees is governed by special regulations, the Labour Code shall apply to the extent not provided for in those special regulations

De lege lata, here we are dealing with a subsidiary mechanism of application of the norms of the Labour Code to regulate the status of employees and employers whose employment relationship is governed by professional pragmatics, not only those that apply to civil servants. The provisions of Art. 5 of the Labour Code are applicable to a limited extent, only to the norms of the Labour Code [9]. Thus, it cannot be applied to other standards that regulate the status of employees and employers in the non-code dimensions. In the analysis of the provisions of this regulation, it is worth defining the meaning of the notion of special regulations. It refers both to norms of a statutory rank and executive standards, provided that they regulate the employment relationship of a specific category of employees.

In the Polish legal system there are numerous normative regulations of the statutory rank, which define the status of employees in the widely understood public sphere separately, based on official pragmatics (e.g. those for members of the civil service or self-government employees). However, they should be distinguished from service pragmatics, which define the employment status of persons who perform work pursuant to administrative law relations[10] (e.g. policepersons, other members of the uniformed services, or professional soldiers). The provisions of Art. 5 of the Labour Code are not applicable to them, as their work is not performed under an employment relationship, but pursuant to employment under administrative law. W here, one should agree with the view of the Supreme Court expressed in the Resolution of the 18.03.2008, II PZP 3/08, stating that pursuant to Art. 5 of the Labour Code, the provisions of the Labour Code on remuneration for working overtime do not apply to an officer of the State Fire Brigades who performed overtime service.

In the light of the provisions of Art. 5 of the Labour Code, the question arises whether this provision should be applied if a standard of professional pragmatics (e.g. Art. 147, item 2 of the Act on Higher Education and Science[11]) introduces a clause on the adequacy of the application of the Labour Code[12]. In my opinion, in such situation, priority should be given to the regulation of the professional pragmatics, according to the collision directive *lex specialis.* This means that, in such case, it is acceptable in practice to apply the norms of the Labour Code based on the clause of adequacy, which means that Art. 5 of the Labour Code is not applicable.

Analysing Art. 5 of the Labour Code, we encounter the problem whether the pro-

[9] Cf. K.W. Baran, [in:] *Kodeks pracy. Komentarz* [*The Labour Code. Commentary*], Vol. 1, K.W. Baran (ed.), Warszawa 2022, pp. 72 ff.

[10] Cf. more *System prawa pracy. Zatrudnienie administracyjnoprawne* [*The Labour Law System. Administrative Law Employment*], K.W. Baran, M. Szustakiewicz, E. Ura (ed.), Vol. 12, Warszawa 2023, passim.

[11] Journal of Laws 2022.574.

[12] Cf. K.W. Baran, [in:] *Akademickie prawo zatrudnienia. Komentarz* [*Academic Employment Law. Commentary*], K.W. Baran (ed.), Warszawa 2020, pp. 264.

visions of the code are applied to special regulations directly or adequately. Due to the fact that the provision in question does not establish the clause of adequacy, one should assume that the regulations of the labour code should be applied directly, without any changes, provided that the special regulation does not establish an adequacy clause.

Another level of the statutory cascade is the application of the provisions of the Civil Code in individual labour relationships. The normative expression of the connections between labour law and civil law is provided, first of all, in Art. 300 of the Labour Code.[13] Its scope is general, as it is applicable to all categories of employees, which results from the *lege non distinguente* argument.

Thus, characterising the Civil Code as a statutory source in the cascade regulation of the employment relationship, the specific prerequisites for its application should be presented. The first of them is the fact that the "matters" are not provided for in the labour law[14]. In the light of the literal interpretation, this means that the application of the provisions of the Civil Code cannot be applied in situations when the labour law provides regulations that are sufficiently detailed in the given objective or temporal aspect.

In order to apply the provisions of the Civil Code, an actual legal gap must exist. It emerges, when the rules that construe the specific conventional significance of the performance of certain acts are not sufficiently detailed[15]. However, the lack of a desirable regulation, i.e. an axiological gap cannot be considered. Thus, it is inacceptable to derogate the provisions of labour law by the norms of the Civil Code if the regulations in the labour law system are sufficiently precise.

The second statutory prerequisite for the application of the standards for the Civil Code in labour relationship is the fact that they must not be contrary to the provisions of labour law. They may be understood in a directive or extra-directive (descriptive) way. In the context of this distinction, the acceptability of application of descriptive principles within the limitations provided in Art. 300 of the Labour Code raises certain doubts. In this matter, there is an important discrepancy of views in the doctrine. According to the first point of view, this type of rules provides interpretational directives that allow to fill the structural gaps.

According to a different approach[16] formulated in literature on labour law, an actual legal gap cannot be removed by referring to an extra-directive principle, as the specific institution cannot be described in detail, precisely because of the existence of the gap. Without underestimating the reservations provided in this view, based on the *lege non distinguente* argument, I am of the opinion that the norms of the

[13] Cf. J. Jaskulska, *Stosowanie przepisów kodeksu cywilnego na podstawie art. 300 kodeksu pracy* [*The Application of the Provisions of the Civil Code pursuant to Art. 300 of the Labour Code*], Toruń 2021, passim.

[14] Cf. judgments of the Supreme Court: of the 11.05.2011, I PK 194/10, LEX No. 852767, thesis 2; of the 20.11.2014, I PK 92/14, LEX No.1645255, thesis 1; of the 4.09.2014, I PK 23/14, GP 2014/172, p. 6.

[15] Cf. G.Bieniek, Prawo pracy a prawo cywilne *[Labour Law and the Civil Law]*, PiZS 1986 /9, p. 27.

[16] Cf. B.M. Ćwiertniak, O pozadyrektywalnych (opisowych) rozumieniach „zasad prawa" [*On extra-directive (descriptive) interpretations of the „principles of law"*], St. Praw. 1976/3, pp. 39 ff.

Civil Code, applied to the extent foreseen in Art. 300 of the Labour Code cannot be contrary neither to the directive nor the extra-directive principles of the labour law. The descriptive principles play a particularly important role in situations, when the norms of labour law do not provide explicitly formulated directive principles.

The main property of the principles of labour law under Art. 300 of the Labour Code is the function of approval, because the standards of the Civil Code may be applied only after it has been confirmed that they are compliant with the labour law. Thus, they also perform an eliminating function, meaning that in the event of any collision, the provisions of the Civil Code cannot be applied. In this situation, the gap in the labour law should be filled with the application of the principle itself[17] based on the *a simili, ab exemplo* or *a cohaerentia*, or even *a completudine* arguments.

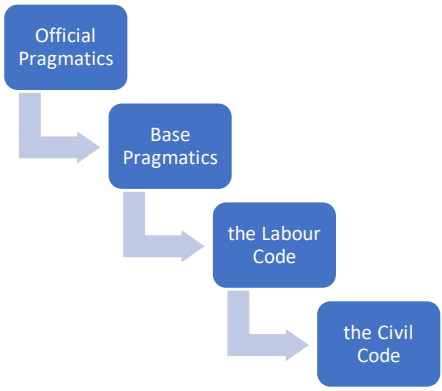
Article 300 of the Labour Code establishes a clause of adequacy, which means that the provisions of the Civil Code should be applied taking into consideration the differences that result from the nature of the civil law relationships and the employment relationship. This includes, first of all, the broadening interpretation that generally refers to the objective aspect. It is also acceptable to apply the norms of the Civil Code directly, without any modifications. This conclusion is justified by the *a fortiori* argument in the *a maiori ad minus* version.

Here, it is worth emphasising that the norms of the Civil Code do not have the status of sources of labour law *sensu stricto*, in the meaning provided in Art. 9 of the Labour Code[18] as they have not been explicitly incorporated in the labour law system. They are only a subsidiary source of regulations related to employment relationship. The formula adopted in Art. 300 of the Labour Code guarantees the necessary level of coherence of the normative regulation on the systemic level.

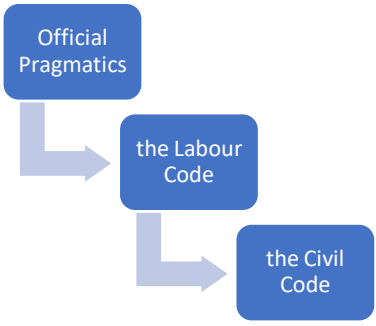
In conclusion, the reflections on the cascade application of statutory norms in Polish individual labour law based on the mechanisms of idealising theory of science, it is possible to distinguish three basic models: 1/ the four-level model, 2/ the three-level model, and 3/ the two-level model. In the schematic approach they may be presented as follows:

[17] Cf. K. Roszewska, *Skutki sprzeczności przepisów kodeksu cywilnego z zasadami prawa pracy* [*The Consequences of Contradiction of the Provisions of the Civil Code with the Principles of Labour Law*], PiZS 2005/2, p. 20 ff.

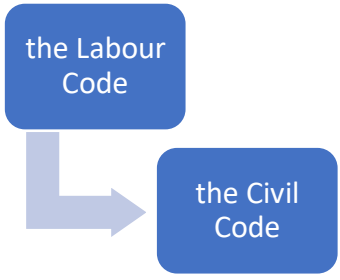
[18] Cf. K.W. Baran, [in:] *Kodeks pracy. Komentarz* [*The Labour Code. Commentary*], Vol. 1, K.W. Baran (ed.), Warszawa 2022 p. 84 ff.



The four-level model



The three-level model



The two-level model

The first two models are dominant in employment in the public sphere, in particular in civil service laws, while the third one is common for all employees and employers. The practical application of the standards of individual law is characterised by a specific diffusion, as the norms of individual legislation acts are overlapping in

the content of the employment relationship. As a result, in order to determine the status of an employee, in certain cases it is necessary to apply the norms from three or even four acts. This situation often generates serious interpretational problems and makes it difficult to clearly determine the rights and obligations of the parties to the employment relationship.

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