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COLLECTIVE AGREEMENTS IN POLAND IN THE LIGHT OF INTERNATIONAL LABOUR STANDARDS

Abstract

The paper presents the concept of the collective agreement, trade union representativeness, and the subjective scope of collective agreements in Polish law in the light of international labour law. In the author's opinion, a better adaptation of the Polish legislation relating to agreements between the social partners on working conditions to international standards by classifying as collective agreements all agreements concluded by representative trade union organisations would remove disputes and uncertainty about their legal effects and would contribute to increasing the scope of collective bargaining. A modification of the provisions on work and pay company regulations would also serve this purpose. In addition, the author suggests changes in the provisions extending the personal scope of collective agreements to workers performing work outside the employment relationship by separating the group of solo self-employed workers belonging to the "grey area" between employees and self-employed workers and extending to them the full effects of concluding an agreement.

Słowa kluczowe: układ zbiorowy pracy, reprezentatywność związkowa w rokowaniach zbiorowych, zakres podmiotowy układu zbiorowego

Keywords: collective agreement, trade union representativeness in collective bargaining, personal scope of collective agreement

ASJC: 3308, **JEL:** K31

1. Introduction

The aim of this paper is to present the Polish regulation of the concept of collective agreement, union representativeness in collective bargaining and the personal scope of bargaining in the light of ILO (International Labour Organization) standards (sections 2–4). Section 5 contains the conclusions of the presentation.

2. Notion of collective agreement

In the light of Collective Agreements Recommendation, 1951 (No. 91), the term collective agreements means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other. The stipulations of employment contracts should not be contrary to those contained in the collective agreement. Those stipulations which are contrary to a collective agreement should be regarded as null and void and automatically replaced by its stipulations. However, the stipulations which are more favourable to the workers than collective agreement should not be regarded as contrary to it. ILO Convention No. 98 in art. 4–6 associates conclusion of collective agreements with the right to collective bargaining which according to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up[1] is a fundamental right endorsed by the members of the ILO by the very fact of their membership.

The concept and effects of concluding a collective agreement as outlined above are widely accepted as standard of international labour law. However, due to the "soft" nature of ILO Recommendation No. 91, differing regulations in national law cannot be considered contrary to the obligations of an ILO member if they do not otherwise violate the principle of freedom of collective bargaining.

A similar concept to the above-mentioned collective agreement, as a uniform legal category covering agreements on working conditions and terms, was adopted in the Act of 14 April 1937 on collective agreements (Dz.U. 1937, No. 31, item 242, as amended). However, from 1984 onwards, the legislator began to introduce other types of agreements regulating working conditions, with a narrower scope and different formal requirements. This process was finally legitimised in 1996 in the amendments to the Labour Code Act of 26 June 1974 (Dz.U. 2020, item 1320 consolidated text, as amended, hereinafter referred to as: "the Labour Code," "l.c."). As a result we now have two legally regulated types of agreements determining the terms and conditions of work: collective agreements (Polish "układ zbiorowy pracy," hereinafter referred to as: "agreement") and other collective accords (Polish "porozumienie" hereinafter referred to as: "accord") based on the statutory law. The latter differ from collective agreements under the Labour Code in that they can only be concluded at the company level and relate to specific situations defined by law, such as with the restructuring or crisis of an enterprise, making working hours more flexible, introducing tele-work, countering the COVID-19 pandemic, etc. In the absence of trade union representation, they may be concluded by non-union employee representatives. The *ratio legis* of their separation is to make it easier for the bargaining parties to normalize working conditions in situations where the conclusion of

[1] Adopted by the International Labour Conference at its eighty-sixth session, Geneva, 18 June 1998 (annex revised 15 June 2010), www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (access: 20 April 2020).

a collective agreement would be difficult or impossible due to its greater formalization or the lack of a union organization. Unlike agreements, accords are not subject to registration and examination for legality and certain other rules linked to their functioning, termination and application. For these reasons, the number of such arrangements far exceeds the number of company collective agreements concluded.[2]

As a matter of fact, the two types of arrangements mentioned have the same legal character. The Labour Code has shaped the effects of their conclusion in a manner consistent with ILO Recommendation No. 91 and recognised their provisions regulating working conditions as provisions of labour law. Hence, notwithstanding their different names, they are collective agreements in the international legal sense.

Distinguishing two categories of collective agreements in Polish law and calling one of them an agreement and the other an accord is misleading. This is due to the projecting the Polish statutory meaning of the term "collective agreement" onto its counterpart in international law (Hajn 2021, pp. 66–67). However, it may be to some extent justified by specific objectives of the legislator and Polish law is not alone in this respect.[3] Nevertheless, some consequences of the differentiation raise doubts. In particular, in the event of a transfer of an undertaking to another employer, the transferee is obliged to continue to apply the agreement to the transferred workers for one year but is not obliged to continue to apply the accords. In addition, the provisions concerning agreements apply *mutatis mutandis* to workers other than employees, whereas the provisions governing the accords do not apply appropriately to them, due to the belief that since they are not collective agreements, they are not covered by international or EU law relating to such agreements. Another manifestation of the non-application of international standards to accords is the way in which their conclusion is regulated by non-union employee representatives. As already indicated, under international law, collective agreements may also be concluded in the absence of a union organisation by non-union worker representatives who are duly elected and authorised by workers. Polish law does not formulate any conditions specifying how the representatives should be elected and authorised. Moreover, they do not enjoy the protection to which they should be entitled under the Workers' Representatives Convention, 1971 (No. 135).

In practice, there are also arrangements specifying the content of employment relations, which are neither agreements nor accords in the above-described meaning, but which meet the conditions to be considered as collective agreements within the meaning of international law. These include, among others, wage agreements not based on the law,[4] agreements on voluntary redundancy schemes, etc. This group also includes the so-called social packages, i.e. accords between the union representation and the investor taking over the ownership of the enterprise, concerning working conditions after the investor takes control of the enterprise.

[2] Several thousand agreements alone have been concluded regulating wages and working hours in connection with the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, and some other acts (Dz.U. 2021, item 2095 consolidated text, as amended) (Leśniak 2020).

[3] A distinction similar to the Polish one occurs, e.g. in French law (Pisarczyk 2022, p. 174).

[4] E.g. the wage agreement in the Polish Mining Group of 22 February 2022 (Błoński 2022).

The legal nature of these accords and the legal effects of their conclusion are very controversial under Polish law.

A special type of autonomous sources of labour law in Poland is workplace regulations, including the most important work regulations and pay regulations. The regulations are unilateral acts of the employer, obligatory for employers employing at least fifty employees. However, in unionised workplaces, the employer must agree these regulations with the union(s). Consent is then a condition for their effectiveness. The pay regulations determine the conditions of remuneration and other benefits, and the work regulations determine the organisation and order of the work process and the related rights and obligations of the parties to the employment relationship, including working time. These regulations may therefore determine the most important conditions of work, replacing the collective agreement in this respect. In practice, this is often the case, even though the Labour Code clearly prefers the regulation of working conditions in collective agreements, recognising the pay regulations as a subsidiary and temporary instrument. This is because it is an easier alternative for the employer and unions. Most often, wages are regulated in the collective agreement, if it is concluded at all, while the working time is regulated in the work regulations. It is also reported that the number of collective agreements is decreasing and there is a constant tendency for them to be replaced by pay regulations (Pisarczyk, Rumian, Wieczorek 2021, pp. 6–10; Sprawozdanie Głównego Inspektora Pracy 2015, p. 28).[5] In this context, it has been correctly pointed out that this practice reduces the collective protection of workers (Florek 2015, pp. 21–22). In the light of the foregoing, the question arises as to whether regulations agreed with union can be regarded as collective agreements within the meaning of international law. Without going into details, it can be said that they do not (for more on the different views on the nature of agreed regulations see Pisarczyk 2022, pp. 259–260). They are specific, negotiated acts of the employer. They are the result of negotiations, but they are not the result of collective bargaining in the international legal sense. This is among other things because if they are not agreed upon within the time limit set in accordance with the law, the right to determine them passes to the employer (save for the exception under Art. 77^2 § 3 l.c.). This excludes them from being considered to be based on the principle of freedom of collective bargaining.

3. Representativeness in collective bargaining

In principle, Polish law does not make the right of a union organisation to conclude an agreement or an accord conditional on its representativeness. It is sufficient if the organisation has at least ten employees. Such an organisation can conclude an agreement or an accord on its own if there are no other organisations in the bargaining unit. The concept of representativeness only arises when the workers are represented by more than one organisation. In such a situation, the representative organisation may conclude the agreement or accord itself. Such a provision is

[5] Subsequent reports lack analysis on collective agreements registered by labour inspectors. More on this topic Hajn 2019, pp. 55 ff.

the result of limiting the representativeness in collective bargaining to the selection function, consisting in designating the organisation entitled to conclude an agreement in the situation when several organisations apply for this right and are not able to agree on joint action. This means, as indicated, that it is not necessary to have representativeness when the bargaining unit is represented by a single organisation.

The described regulation differs from the standpoint of international law expressed in ILO Recommendation No. 91, according to which a union organisation should be representative even if it is the only organisation for a bargaining unit.[6] The absence of this requirement objectively violates the right of representative trade union organisations to bargain, as well as the right of workers to be represented by an organisation capable of expressing their interests. The fact that an organisation is representative is also important for its independence, considered to be a necessary feature of a union as a bargaining party (ILO 2006, § 967). Only an organisation which has the support of a given group of workers and expresses their real aspirations can act independently. Consequently, it must be claimed that the State should not recognise agreements concluded by non-representative union organisations as collective agreements.

4. The personal scope of collective bargaining

From the point of view of the personal scope of collective bargaining, two issues in the Polish law seem to be the most essential. The first is their scope in the public service. The second is the extension of bargaining to workers who are not in an employment relationship.

The first one has already been discussed in detail in the legal writing (e.g. Góral 2010, pp. 143–145). For that reason, I shall limit myself to recalling that the greatest objections are raised by the exclusion of the civil service corps from the scope of negotiations, and the fact that union participation is limited to consultations.

The second issue relates to the extension, as from 1 January 2019, of the scope of the right of association and certain other collective rights to a wide range of workers, including self-employed persons (the Act of 5 July 2018 amending the Act on trade unions and some other acts, Dz.U. 2018, item 1601). Thanks to this, Poland has largely fulfilled its obligations under, *inter alia*, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Baran 2018, pp. 2–4). At the same time, the amendment extended the personal scope of collective agreements to workers previously not covered by the right of association (Grzebyk, Pisarczyk 2019, pp. 93–94). The new regulation undoubtedly aims to implement the obligation under ILO standards to ensure the right to collective bargaining for all workers, with possible restrictions for the armed forces and the police and modalities in relation to public services. ILO documents emphasize that the term "workers" in Conventions Nos. 87, 98 and 154 have the same meaning and scope, and that the right of association and collective bargaining are inseparable and mutually reinforcing (Report of the Committee

[6] In this connection, it is said that the union should have a certain degree of representativeness (Gernigon, Odero, Guido 2002, p. 32).

of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) 2011, p. 124; Servais 2017, p. 215). However, with all sympathy for the ideas underlying the ILO position one must ask whether the recognition of such a broad scope of the right to collective bargaining has not been taken too hasty without first putting in place the legal instruments necessary for its implementation and whether it is not to a significant extent an expression of wishful thinking. Indeed, it should be noted that, in practice, the exercise of collective rights by non-employee workers, including the self-employed, is difficult both because they are dispersed and because their work is often seasonal, casual and unstable. The focus of international and national legislation on the protection of the collective rights of employees (wage workers) is also a significant obstacle (Servais 2017, p. 215). Difficulties also arise in identifying the other party to the bargaining, which often cannot be the entity considered to be the employer in the employment relationship. There should therefore be no doubt that the emergence of an effective model for the collective protection of workers working outside the employment relationship requires measures that take into account their specific situation. This particularly concerns finding a way to resolve the conflict between the right to collective bargaining of self-employed workers and competition law.[7] Indeed, they are both workers and entrepreneurs. This also raises the question of whether the extension of the right to bargain in the sense established in the ILO standards, is at all feasible and necessary, especially since, according to the Committee on Freedom of Association, the right to organise also applies to self-employed workers who are not subordinated or dependent on another person (ILO 2018, pp. 70–71). The above uncertainties are to some extent confirmed by the few ILO standards which recognise that the typical forms of association and determination of working conditions are not fully adequate for self-employed workers. For example the Rural Workers' Organisations Convention, 1975 (No. 141) clearly indicates that it applies to all types of their organisations, including organisations not restricted to but representative of them. It also recommended that collective bargaining could, where appropriate, be replaced by more adequate instruments for the protection of the self-employed.[8] The above-mentioned amendment to the Act of 23 May 1991 on trade unions (Dz.U. 2019, item 263 consolidated text) adopted a simplified solution, according to which the provisions of Chapter XI of the Labour Code governing collective bargaining and collective agreements apply *mutatis mutandis* to other than employees workers entitled to join trade unions. However, Art. 9 § 1 and 2 and Art. 18 § 1 and 2 l.c. defining the effects of collective agreements in accordance with ILO Recommendation No. 91 do not apply to them.[9] The main weakness of the amendment is

[7] According to the Court of Justice of the EU (CJEU), only the "false self-employed" may have the right to bargain (judgment of the CJEU of 4 December 2014, C-413/13, FNV KunstenInformatieen Media v. Staat der Nederlanden, ECLI:EU:C:2014:2411).

[8] Rural Workers' Organisations Recommendation, 1975 (No. 149) does not refer to collective bargaining but to representing, furthering and defending the interests of rural workers by undertaking negotiations and consultations at all levels on behalf of such workers collectively.

[9] Accordingly, the basis for the binding force of collective agreements insofar as they apply to this group of workers is sought in civil law (Raczkowski 2018, pp. 2 ff) or in the Civil Code and provisions of the Labour Code other than those mentioned (e.g. Grzebyk, Pisarczyk 2019, pp. 93–94).

that it covers the entire group of workers who are entitled to associate. At the same time, the legislator offered them uncertainty resulting from the clause of appropriate application and ambiguities concerning the mechanism of agreement binding. It would be more justified to refer to already existing patterns, consisting in extending the effects of collective agreements envisaged in ILO Recommendation No. 91 to dependent solo self-employed workers belonging to the "grey area" between employees and independent self-employed workers, while specifying the criteria for distinguishing this group. Such regulation has been adopted in some national legislations (see, e.g., ILO 2016, pp. 37–39).[10] Also worthy of special mention is the draft for a Communication from the Commission—Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons of 9 December 2021.[11] It is to be added that the existence of this category of workers has unfortunately not been acknowledged in ILO instruments, despite lengthy debates, as clearly expressed in the Employment Relationship Recommendation, 2006 (No. 198).

Conclusions

In Poland, negotiations between the social partners lead to the setting of working conditions in three types of agreements: collective agreements within the meaning of the Labour Code, collective accords based on the law and other arrangements on working conditions that are not so based. All these arrangements are collective agreements within the meaning of ILO Recommendation No. 91 if they are concluded by representative trade union organisations. Therefore, it seems appropriate to postulate the recognition by the law that any agreement regulating the rights and obligations of workers and concluded by a representative union organisation is a collective agreement (Hajn 2021, pp. 66–70; Pisarczyk 2022, pp. 261–264). This would remove the state, contradictory to the freedom of collective bargaining, in which the status of collective bargaining is granted only to agreements based on the statute, and therefore authorized by the state.[12] Besides, such a regulation would put an end to the uncertainty as to the nature and legal effects of accords not based on law. The resignation of the obligation to register collective agreements and its replacement by a mandatory notification of all arrangements between the social partners shaping working conditions would also serve to facilitate and expand the practice of collective bargaining.

Increasing the scope of collective bargaining in the international legal sense would also serve by setting out the principle that the employer may unilaterally determine the remuneration

[10] In Poland, the extension of the right to bargain to this group of workers was proposed in the draft Collective Labour Code of 2007 (*Kodeks pracy. Zbiorowy kodeks pracy. Projekty*, Katowice 2010, p. 133).

[11] Communication from the Commission. Approval of the content of a draft for a Communication from the Commission—Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, OJ C 123, 18 March 2022.

[12] Similarly, on the basis of Art. 59 (2) and 81 of the Constitution of the Republic of Poland of 2 April 1997, Dz.U. 1997, No. 78, item 483 as amended (Jaśkowski 2007, pp. 80–83 and literature cited therein).

for work and working time in workplace regulations only if collective bargaining aimed at regulating these matters in a collective agreement has not led to its conclusion.

It seems necessary to change the current unclear regulation of the application of collective agreements to self-employed workers. This purpose could be served by singling out the category of workers in the "grey area" and including them in the personal scope of collective agreements, extending to this group the effects of concluding an agreement under Art. 9 and 18 l.c.

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