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WORK CERTIFICATE AFTER THE AMENDMENT OF 16 MAY 2019 TO THE LABOUR CODE AND THE CODE OF CIVIL PROCEDURE

Abstract

The amendment to the Labour Code and the Code of Civil Procedure of 16 May 2019 clarifies the provisions governing the issuance of work certificates. It establishes new obligations for the employer and entitlements for the former employee. It strengthens the protection of his vital interests of a personal and social nature. It eliminates legal gaps previously existing in the system of Polish labour law. It significantly extends access to court proceedings in the event of failure to issue a work certificate.

Słowa kluczowe: świadectwo pracy, sąd pracy, zawartość świadectwa pracy

Keywords: work certificate, labour court, contents of a work certificate

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In the system of Polish labour law, a work certificate [*świadectwo pracy*] is a basic document issued by an employer in connection with the termination of an employment relationship (Kosut 2001, p. 21ff). *De lege lata* it is unacceptable to issue the work certificate before the end of employment. The certificate fulfils two essential functions: protective and organisational. As far as the former is concerned, it consists in protection of employee's interests after the end of employment, in particular so that he does not lose his entitlements related to seniority of employment with the successive employer. At this point, it should be emphasised that protective mechanisms refer not only to substantive but also to procedural aspects. They will be discussed further in this study. On the other hand, as regards the organisational function, it aims to protect the interests of the new employer in connection with the employment of a former employee. This particularly applies to the elimination of evident abuse of right by a newly hired employee. Due to the fact that there occurred numerous irregularities in the practice of Polish industrial relations, first and foremost on the part of employers as regards issuance of work certificates, the Sejm of the Republic of Poland in the Act of 16 May 2019 amending the Labour Code and

some other acts (Dz.U. 2019, item 1043, hereinafter referred to as: the Act of 16 May 2019) attempted to solve some of the problems existing in practice. However, before I discuss the newly adopted regulations, I will present the general concept of work certificates in the Polish legislative system.

The starting point will be the observation that in the Polish labour law the obligation to issue a work certificate to a former employee is statutory (Wąż 2013, p. 640ff) and follows explicitly from Art. 97 § 1 of the Labour Code (Dz.U. 2018, item 917 consolidated text, as amended, hereinafter referred to as: the Labour Code, LC; Włodarczyk 2018, p. 723ff). The only exception to this rule is the situation in which the employer intends to enter into a new employment relationship with the employee within 7 days from the date of termination or expiration of the previous employment relationship. The content of the work certificate is precisely regulated in Art. 97 § 2 LC and in the provisions of the Regulation of the Minister of Family, Labour and Social Policy of 30 December 2016 on work certificates (Duraj 2016, p. 89ff). According to this act, the said document should contain the following information:

- the parties to the employment relationship, including, in particular the name and address of the employer and employee data,
- the exact date of issuance of the work certificate,
- the periods of employment in which the employee provided work for the employer,
- working time of the employee during the term of his employment,
- the type of work or positions held or functions performed,
- the procedure and legal basis for termination or expiration of an employment relationship, and in the event of termination of the employment contract by notice, indication which party gave the notice of termination,
- the annual leave to which the employee was entitled in a calendar year during which the employment relationship has ended,
- paternity leave, parental leave, childcare leave, additional leave and unpaid leave taken by the employee,
- the period for which the employee is entitled to compensation under Art. 36^1 LC,
- the period of active military service or its alternative forms,
- the period of performance of work in specific conditions or in specific character,
- non-contributory periods during the term of the employment to which the work certificate relates, taken into account while establishing pension rights,
- seizure on wages/salaries by enforcement authorities (such as court enforcement officer).

The above is not a *numerus clausus* list. Upon employee's request, a work certificate may also include information on the amount and elements of the remuneration as well as professional qualifications (e.g., completed schools, studies and professional courses). The employer is not obliged to mention the awards and distinctions received by the employee if they were not directly related to employment in a given workplace.

The laws do not specify in what form the employee should submit a request for including in the work certificate the information on the amount and components of remuneration and qualifications obtained. This means that any form, including oral, is allowed. However, teleological reasons (*verba volant, scripta manent*) speak for the written, or at least e-mail form.

As far as the content of the work certificate is concerned, it should be emphasised that it can contain only information that follows from the applicable legal provisions or demanded by the employee. Entering into this document other information may be considered violation of personal rights or interests of an employee. By this I mean in particular the information on penalties imposed on him during employment or on the factual circumstances of termination of employment (e.g. without notice due to the fault of the employee).

The employer is *de lege lata* obliged to issue a work certificate directly to an employee or a person authorised by the latter (e.g. a representative). It can, for example, be submitted personally in the place of previous employment. For evidentiary purposes, the employer should ensure that the former employee confirms in writing the receipt of the certificate and date of such receipt. According to the new wording of Art. 97 § 1 LC, second sentence, if for objective reasons (e.g. illness or departure) the issuance of a work certificate to the employee is impossible within 7 days from the date of termination or expiration of employment, the employer must send a certificate to the employee or an authorised person within 7 days from the date of termination or expiration of the employment through a postal operator within the meaning of the Act of 23 November 2012 – Postal Law (Dz.U. 2018, item 2188 consolidated text, as amended), or to deliver it in a different way. Such delivery is possible, for example, via a specialised courier company. The certificate should be sent to the address indicated by the former employee. In a situation where the address is outdated, the employer is not obliged to determine the new place of residence of the former employee. The employer should then put the certificate in the employee's personal files.

In accordance with the wording of Art. 97 § 2^1 LC adopted in the Act of 16 May 2019, within 14 days from receipt of the work certificate an employee may request rectification of that certificate by the employer. The employer should respond to it. If the request is not granted, the employee may, within 14 days of the notification of refusal to rectify the work certificate, file a motion to a labour court. If the employer fails to notify about the refusal to rectify the work certificate, the demand for rectification should be lodged with the labour court. It is worth emphasising that the "in-house" procedure for rectification of a work certificate is obligatory for the former employee. He cannot apply to the labour court directly. The new wording of Art. 97 § 2^1 LC, in particular the phrase "if the motion is not granted" clearly supports an interpretation according to which a relevant motion to the employer is a condition *sine qua non* to effectively initiate court proceedings. In this context, a problem arises whether this kind of regulation does not violate Art. 45 (1) of the Constitution of the Republic of Poland (Dz.U. 1997, No. 78, item 483 as amended, hereinafter referred to as: the Constitution) which

explicitly provides for the right to a fair trial. In the case concerned we are dealing with a mechanism of conditional jurisdiction, the essence of which consists in the fact that the initiation of the pre-litigation procedure is the premise for opening the court proceedings. A question arises whether it is possible to approve such a normative mechanism in labour law matters. I am representing an unorthodox view that such a procedural mechanism can be accepted from the axiological point of view, provided that the labour court, if a motion is referred to it to rectify the work certificate, is able to examine the whole disputable matter without any limitations. It should also be emphasised that Art. 77 (2) of the Constitution only sets up the directive according to which the right of access to court cannot be limited and it does not explicitly determine the in-house procedures, such as the procedure for rectification of work certificate. Such standpoint is the result of a compromise between the principle of judicial administration of justice and the principle of procedural economy.

Introduction in the new Art. 97 § 2^1 LC of the 14-day period for submission to the employer of the request to rectify the work certificate deserves approval. The previously applicable 7-day deadline was too short, because inaccuracies in the work certificate revealed one week after receipt of the document by the employee precluded the possibility of taking a legal action, which violated the principles of procedural justice. The regulation introduced by the Act of 16 May 2019 secures much better the interests of the former employee in the temporal sphere.

The amendment also fills in the existing legal gap in the system of Polish labour law. The new Art. 97^1 § 1 LC provides that if the employer does not issue a work certificate, the employee is entitled to apply to the labour court requesting that the employer be obliged to issue the work certificate. Moreover, § 2 of the same provision states that if the employer does not exist (e.g. informally liquidated the enterprise) or for other reasons it is impossible to bring an action against it to issue a work certificate (e.g. it does not have the governing bodies required by law), the employee may apply to the labour court to establish the right to obtain the work certificate. In the previous version, the Labour Code did not provide for this type of entitlement, which, on the one hand, undermined the elementary social interests of the former employee, and on the other hand violated the constitutional right to judicial protection (Art. 77 (2) of the Constitution). Generally, the legitimate view is that the new regulations adopted in Art. 97 §§ 1 and 2 LC contribute significantly to increasing legal certainty in labour relations. In this context, it is worth emphasising that the demands mentioned earlier may be submitted at any time before the expiry of the limitation period. Such directive is explicitly set out in Art. 97^1 § 3 LC. In temporal dimension, it significantly contributes to strengthening the protection of vital interests of a former employee, strengthening the practical implementation of the protective function in the Polish system of labour law.

The amendment of 16 May 2019 to the provisions governing work certificates regulates – as I have mentioned earlier – not only the substantive but also procedural issues, what deserves approval. It introduces into the Code of Civil Procedure (Dz.U. 2018, item 1360 consolidated text, as amended, hereinafter referred to as: the Code of Civil

Procedure, CCP) a new Art. 477^{1a}, according to which the motion to obligate the employer to issue a work certificate referred to in Art. 97^{1} § 1 LC, if it turns out that the employer does not exist or for other reasons it is impossible to bring an action against it, will be heard by the labour court in non-litigious proceedings as a motion to establish the right to receive a work certificate. In this procedure, a public prosecutor may participate as a spokesman for the public interest or entity acting for the benefit of a former employee (Art. 7 CCP). A relevant motion can be filed also by a trade union representing the former employee. The motion for establishment of the entitlement to receive a work certificate in accordance with the new Art. 691^{10} § 1 CCP should indicate:

1) the period and type of work, working hours, job title and place of performance of work,

2) the procedure of termination or the circumstances of the expiry of the employment relationship, if the employee has such information, otherwise the circumstances in which he ceased to provide work,

3) an employer who was obliged to issue the work certificate and the reason why it is impossible to demand that it issues the work certificate.

This is a *numerus clausus* list. This means that such information must be included in the motion to the court. There are no legal obstacles to provide other facts and circumstances related to the provision of work.

If it is possible to bring an action against the employer to issue a work certificate, the court will hear the case in a trial (Art. 691^{10} § 2 CCP) in accordance with the general rules applicable in labour law matters (Art. 459 et seq. CCP). If the court grants the motion of establish the right to receive a work certificate, the court in its decision will determine the content of such work certificate. If it is not possible to establish all facts, the court decision (Art. 691^{10} § 3 CCP) should specify at least:

- the period and type of work performed,
- working hours,
- positions held,
- the method of termination or circumstances of expiration of the employment relationship.

The legally valid decision of the labour court establishing the entitlement to obtain a work certificate replaces *ex lege* such certificate (Art. 691^{10} § 4 CCP). We are dealing here with a declarative ruling, which can be used by the former employee as an official document not only in public institutions, but also with another employer.

The amendment of 16 May 2019 to the Labour Code provides in Art. 282 (3) of that Act for penalties in the case of failure to issue the work certificate in due time. Pursuant to the regulation adopted in this provision, a fine of PLN 1,000 to PLN 30,000 may be imposed on a person who is subject to a statutory or even contractual obligation of this type. In practice, it can be not only the employer, but also a plant manager, and even any person duly authorised by him.

In summary of the deliberations regarding the amendment to the Labour Code and the Code of Civil Procedure of 16 May 2019 regarding work certificates, I conclude that

it introduces new favourable regulations that protect the interests of a former employee. Worth noting is that they are not only substantive but also procedural and are in close mutual correlation. Thus, they reinforce the legal position of the person towards whom the employer failed to fulfil its obligations to issue, on time or as appropriate, the work certificate.

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