Relationship between statutory law, collective agreement and employment contract:
case of Poland

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Abstract:

The present elaboration is dedicated to the analysis of relationship between different sources of labour law and employment contract. Author introduces the general outline of the Polish labour law. He enhances the predominant role of the Labour Code and other statutes. The he analyses the status of social partners and possibilities to conclude collective labour agreements as well as other collective arrangements. The role of an employment contract is also taken into account. Author is of the opinion that individual employee is not strong enough to protect his legitimate interests. The combined action of the legislator and social partners seems to be the best option to determine employment conditions. In countries with rigid statutory regulations it would be desirable to strengthen the status of social partners and give them broader margin of discretion with regard to collective bargaining.

1. Introductory

It goes without saying that work carried out within the framework of an employment relationship constitutes the basic source of income for majority of population. Yet, is not just about wages. It has been rightly pointed out: "beyond determining the material standard of living, work also provides people with a principal source of meaning in their lives. A job usually occupies a large proportion of the day. Through their work people seek personal fulfillment, and through participation in workplace they obtain entry into a social community. Work can be exhausting, boring, and dangerous, but without it many people become socially excluded and lose any sense of personal worth"[1]. Thus, the importance of an employment relationship cannot be underestimated.

The aim of social policy in general and labour law in particular is to achieve fair and just working conditions for employees[2]. In principle, labour law should protect employee, who is a weaker party to an employment relationship. In Poland this rule has been introduced by art. 18 of the Labour Code (hereinafter: LC)[3]. Article 18 § 1 LC provides that the provisions of employment contracts and other

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[1] Hugh Collins, *Employment law*, Oxford University Press, Second Edition, 2010, p. 4.

[2] Thomas Blanke, *Fair and just working conditions (Article 31)*, (in:) B. Bercusson (Ed.) *European Labour Law and the EU Charter of Fundamental Rights*, Nomos Verlag 2006, p. 359.

[3] Law of 26th June 1974 Labour Code, consolidated text Journal of Laws of 1998, No. 21, item 94 with further amendments. For English version see: *"The Labour Code. Kodeks pracy. Bilingual edition",* translation by Agnieszka Jamroży, C.H. Beck, Warszawa 2010.

acts on basis of which an employment relationship is established[4] may not disadvantage an employee more than provisions of labour law. According to § 2 LC any provisions of the contracts and acts defined in § 1 are invalid; the appropriate provisions of labour law will apply instead. Therefore, provisions of employment contracts may not be less favourable to employee than provisions of Labour Code, other statutes and subordinate legislation. The same principle applies to relationship between various sources of labour law[5]. In other words, labour law provides the minimum standard of employee protection. Social partners or parties to an employment relationship are free to improve employee situation.

However, when we talk about relationship between statutory law, collective agreement and employment contract, it is not just about hierarchy of labour law provisions or competence to improve employee situation. In my opinion the very the basic question arises: who should have the last word on determining work and employment conditions? Should it be the legislator, social partners or maybe parties to an employment relationship? The present elaboration is dedicated to analysis of the abovementioned problem against the background of Polish labour law. Firstly, the general characteristic of national labour law will be outlined. Secondly, the relations between particular sources will be analyzed. Thirdly, an attempt will be made to draw some general conclusions, taking into account both wording of labour law provisions and their application in practice.

2. General background.

The leading act of Polish labour law is the Labour Code (laid down on June the 26th, 1974, took effect on January the 1st, 1975). This legal instrument came into being during the socialist period, i.e. in different social, economic and political circumstances. Originally, the Code was designed to regulate employment relations in large state – owned enterprises. Since that time the abovementioned statute was substantially amended. There were more than 100 amendments, introduced mainly after breakthrough in 1989. Unfortunately, the new Labour Code has not been enacted yet.

The Labour Code enumerates sources of labour law. According to art. 9 § 1 LC for the purposes of the Labour Code, labour law includes the provisions of the Labour Code and the provisions of other statutes and subordinate legislation setting out the rights and duties of employees and employers, as well as provisions of collective labour agreements and of other collective agreements based on statute and internal regulations determining the rights and duties of the parties to an employment relationship. According to art. 9 § 2 and § 3 LC the provisions of collective labour agreements and of other collective agreements may not disadvantage employees more than provisions of the Labour Code and other statutes as well as subordinate legislation.

It goes without saying that system of labour law sources is complex and complicated. Several factors influence national labour law systems. Let us mention historical background and legal tradition, autonomy and bargaining

[4] According to art. 2 LC an *employee* is a person employed under employment contract, appointment, election, nomination or under a co-operative employment contract. Thus, under Polish law the notion "employment relationship" is broader than "employment contract".

[5] See below point 3.

power of social partners, legislative framework allowing for lesser or bigger margin of flexibility, or the role of state institutions acting as actor of industrial relations. In several countries, for example in Scandinavia, collective agreements are of primary importance[6]. Polish labour law is a mainly statutory law and collective labour agreements play secondary role. In other words, the collective bargaining is of secondary importance for determining employee situation. The current situation is to a large extent the outcome of historical development. Under socialist period the state institutions and state – owned – enterprises were main employers. Statutory regulations were very rigid. There were no independent trade unions[7] and autonomous employers organizations. Since the radical change of political and economical system in 1989 Poland has been introducing the new pattern of industrial relations. The development of collective labour law has not been a spontaneous process. Several statutes enacted in the beginning of the 90s shaped the position of trade unions and employers organizations, collective disputes settlement and collective labour agreements. Thus, the Polish system of collective labour relations is to greater extent more political subject than a legal one.

After 1989, Polish labour law has been subject to various amendments. The needs of free market economy and necessity to introduce requirements of the European Union had to be taken into account[8]. With regard to industrial relations it needs to be enhanced that trade unions remain to be the strongest representation of employees[9]. For example, only trade union can be a party to a collective labour agreement or can organize a legal strike. Trade unions are very strong in large establishments, usually being former state - owned enterprises. Usually several trade union organizations exist in such undertakings. Quite often they rather compete than cooperate. On the other hand, there are very few trade unions in small and medium enterprises. In fact, many employees do not enjoy trade union protection at all.

3. Sources of labour law.

3.1. The Labour Code and other statutes.

The Labour Code constitutes the primary source of individual labour law. The Code regulates rights and duties of employees and employers. This legal acts introduces the basic principles of labour law, ban on discrimination in employment, types of employment contracts and protection against dismissal, protection against abuse of fixed – term employment included, rights of employee

[6] Reinhard Fahlbeck, *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, (in:) Peter Wahlgren (Ed.) *Stability and Change in Nordic Labour Law*, Stockholm 2002, p. 87 – 132.

[7] Although independent and self – governing trade union "Solidarity" should be mentioned. This organisation was established in 1980 in the period of heavy economic crisis and social tensions. In fact, "Solidarity" turned into a massive social movement, which influenced the history of Poland and other socialist countries.

[8] See Leszek Mitrus, *The Influence of Community regulations on Polish labour law*, „Archivum Iuridicum Cracoviense", Vol. XLI, 2008, p. 107 – 125.

[9] The Law of 7th April 2006 on informing and consulting employees (Journal of Laws 2006, No. 79, item 550 with further amendments) introduced employee councils which enjoy participation rights.

in the case of an unjustified or unlawful termination of the employment contract by the employer, telework, remuneration for work, prohibition on competition, employee's liability, working time, paid holiday, the rights of employee in relation to parenthood, situation of young workers, health and safety provisions, collective labour agreements, limitation of claims. The Labour Code is very detailed and has a significant meaning for day-to-day practice. The Code was subject to continuous change over the last two decades. In general, there was a strong tendency towards flexibilization.

At the same time, many issues are regulated by separate statutes. Let us indicate some examples. With regard to collective labour law, three statutes were laid down on 23rd May 1991: law on trade unions[10], law on employers organisations[11] and law on collective disputes settlement[12]. Law of 13th March 2003 on specific terms and conditions for terminating employment relationships with employees for reasons not related to the employees regulates collective redundancies[13], and Law of 13th July 2006 on protection of employee claims in the event of an insolvency of an employer[14] regulates outstanding employee claims in case of a liquidation of an undertaking. Poland has been affected by recent economic crisis to a smaller extent than other Member States of the European Union. However, the Polish legislator laid down special Law of 1st July 2009 on the relief of the effects of the economic crisis for entrepreneurs and workers (so – called "anti – crisis law")[15]. This legal act became effective on 22nd August 2009 and remained in force till 31st December 2011. The basic aim of the Law was to help employers overcome the effects of the economic crisis and to preserve jobs.

The Labour Code and other statutes introduce relatively high level of employee protection, at least in theory. Therefore, employers or their organizations are not keen on concluding new collective labour agreements and granting additional rights to the staff.

3.2. Collective labour agreements.

According to article 59 of the Constitution of the Republic of Poland[16] the freedom of association in trade unions and employers' organisations shall be secured. Trade unions and employers and their organisations shall have the right to bargain, particularly for the purposes of resolving collective labour disputes and to conclude collective labour agreements and other arrangements. Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields. The scope of freedom of association in trade unions and in employers' organizations may only be subject to such statutory limitations which

[10] Unified text: Journal of Laws 2001, No 79, item 79 with further amendments.
[11] Jornal of Laws 1991, No. 55, item 235 with further amendments.
[12] Jornal of Laws 1991, No. 55, item 236 with further amendments.
[13] Journal of Laws 2003, No. 90, item. 844 with further amendments.
[14] Journal of Laws 2006, No. 158, item 1121 with further amendments.
[15] Journal of Laws of 2009, No. 125, item 1035; amendment: Journal of Laws of 2010, No. 219, item 1445.
[16] The Constitution of the Republic of Poland of 2nd April 1997, Journal of Laws 1997, No. 78, item 483 with further amendments. Various linguistic versions of the Polish Constitution are available at: http://sejm.gov.pl/Sejm7.nsf/page/akty_prawne Last visited: 30th November 2012.

are permissible in accordance with international agreements to which Poland is a party.

Thus, there is strong constitutional basis for freedom of association and collective bargaining, as well as concluding collective agreements. Under art. 9 § 1 LC the very important distinction needs to be made in this respect. There are two categories of sources of this king. Firstly, "collective labour agreements" (Ger. *Tarifvarträge*) Thus, on the one hand we have "typical collective agreement" which cover broad spectrum of issues. They can be concluded by trade union(s) only. Secondly, there are "other collective agreements based on statute" (Ger. *andere auf ein Gesetz gestützte Gruppenvereinbarungen*). These arrangements can be made for specific issues, when such a possibility is provided by statute. Such agreements can be concluded by trade unions. If there is no trade union at the establishment, special employee *ad hoc* representation be created.

Collective labour agreements are regulated by Section Eleven of the Labour Code (art. 238 – 241^{30}). During socialist period there was no room for free and effective collective bargaining[17]. Amendments to the Labour Code of 1994[18] introduced legal framework for free collective bargaining with a very broad scope of application. However, collective agreements did not become the primary source of employee protection.

In principle, collective labour agreements shall be made for all employees employed by employers bound by its provisions, regardless of their trade union affiliation (art. 239 LC)[19] The substantive scope of the agreement can be extensive (art. 240). Such an agreement should set out the terms of employment relationship and mutual obligations of the parties to a collective labour agreement (i.e employers and trade unions who signed an agreement). The only restrictions are that agreement may not regulate those matters which are regulated by mandatory rules and shall not infringe the rights of third parties. It is allowed to conclude agreements on the level of particular establishment, as well as branch of industry, region or the entire country. There are no restrictions for autonomy of social partners in this respect. In Poland agreements for sectors of industry or group of employers are not common. Instead, there are more collective labour agreements concluded for a particular establishment.

The procedure to negotiate and conclude collective labour agreements is very detailed (art. 241^2 – art. 241^6 LC). It is justified by the fact that before 1989 there was no comprehensive legal framework for collective labour agreements. Therefore it was necessary to regulate this matter in order to introduce bargaining process. Both employer and trade union are entitled to initiate negotiations process. Another party may not refuse the request by the other party to enter into bargaining. Each of the parties shall negotiate in a good faith and respect the legitimate interests of the other party. A collective agreement shall be made in writing for an unfixed or a fixed term. An agreement shall enter into force on the date specified therein, not earlier, however, than on the date on which is it registered. A register is kept by the Minister for labour (for collective agreements made for several work establishments) or a regional labour inspector (for collective agreements made for a single work establishment). Should the terms of

[17] Although to a limited extent it was possible to conclude collective labour agreements for certain branches, e.g. mining or steel industry.

[18] Journal of Laws 1994, No. 113, item 547.

[19] Under art. 7 of the Law on trade unions, with regard to collective rights and interests trade unions represent all employees, regardless of their membership.

collective labour agreement be better than those of individual employment contract (e.g. raise of the salary), they *ex lege* replace provisions of individual contract. However, when collective labour agreement introduces less favourable conditions of employment, the individual termination of existing terms of employment contract is required (art. 241^{13} LC).

As already stated, trade union constitutes the only employee representation competent to conclude a collective labour agreement. There is no possibility to make such an agreement by another employee representation, e.g. employee council or *ad hoc* committee. When several trade unions operate at the establishment, they may establish a joint representation. Unfortunately, lack of cooperation and mistrust between trade unions is in Poland quite common situation. The Labour Code precisely defines which criteria are to be fulfilled by trade unions to be representative and be entitled to conclude an agreement. In short, number of members is decisive, and the largest organization may be declared a representative enterprise trade union (art. 241^{25a} LC). In practice small trade unions can be left outside bargaining process while negotiating a collective agreement. It is useful when there are several trade unions active in an establishment and are not able to reach consensus against themselves.

A collective labour agreement shall be terminated by the mutual consent of the parties. It can also expire at the end of the term for which it has been made, or at the end of the period of notice given by one of the parties. Such declaration shall be made in writing, the period of notice shall be three calendar months unless the parties provide otherwise in the agreement (art. 241^{7} LC).

The level of employee protection as provided by LC and other statutes is quite high (at least in theory). Therefore employers are not willing to undertake additional obligations towards the employees. Collective labour agreements did not become the primary sources of Polish labour law. As a matter of fact, they have supplementary role in comparison with the statutory law. Quite often provisions of such an agreement reproduce provisions of the Labour Code. Certainly, the specific situation of a particular establishment can be taken into account, for example with regard to remuneration and other benefits for work (e.g. various bonuses, benefits in kind, etc.), organization of working time or paid holidays[20].

3.3. Other collective agreements based on statutes.

Under art. 9 § 1 LC, "collective agreements based on statute" constitute the second category of autonomous sources of labour law. Trade unions do not have monopoly to enter into such arrangements. In principle, if there is no trade union at the establishment, other employee representation than a trade union can be established in order to settle a particular issue[21]. The law provides various situations when such arrangements can be made. Let us indicate some examples.

[20] For further analysis see e.g. Grzegorz Gozdziewicz, *Das Modell der Tarifverträge in Polen*, (in:) Grzegorz Gozdziewicz (Wissenchaftliche Redaktion), *Aktuelle Probleme des Kollektivarbeitsrechts in Polen und in Deutchland*, Torun 2012, p. 41 - 56.

[21] J. Stelina, *Aussergewerkschaftliche kollektive Arbeitnehmervertretung in Polen*, (in:) Grzegorz Gozdziewicz (Wissenchaftliche Redaktion), *Aktuelle Probleme des Kollektivarbeitsrechts in Polen und in Deutchland*, Torun 2012, p. 95 - 108.

According to art. 9^1 LC if it is justified by the financial situation of an employer, agreements can be concluded suspending the application of all or part of the provisions of labour law determining the rights and duties of the parties to an employment relationship; this does not apply to the provisions of the LC, other statutes and subordinate regulation. Such an agreement can be concluded between an employer and trade union representing employees. If no such organisation operates at the undertaking, it is the employer and representatives of the employees chosen in the standard manner adopted at the undertaking that conclude the agreement. The suspension of the application if the provisions of labour law may last no longer than three years. The employer should notify the agreement to the relevant district labour law inspector. In practice, such an agreement to suspend the application of workplace provisions of labour law can e.g. diminish remuneration for predetermined period of time in order to avoid collective dismissals.

According to art. 67^6 LC the conditions of applying telework must be defined in an agreement between the employer and enterprise trade union(s)[22]. If such an agreement has not been reached within 30 days of the employer presenting the draft agreement, then the employer must define the conditions of telework in the workplace regulations, taking into account the settlements made with the trade union during the negotiations. If there is no enterprise trade union acting at the undertaking, the conditions of applying telework must be set out by the employer in the workplace regulations, after prior consultation with the representatives of employees chosen in the standard method adopted at given employer. Therefore, telework must be voluntary. The agreement with employee representation and a subsequent consent of a particular employee is always required.

The law on collective dismissals provides another example[23]. An employer planning to carry out collective dismissals must inform trade union(s) about it, he also is obliged to enter into consultations with any enterprise trade union acting at the establishment. According to art. 3 of the statute, within a period not longer than 20 days from the date of the abovementioned notification, an employer and trade union should conclude an agreement. Such an agreement should stipulate the principles of action in matters concerning employees covered by proposed collective redundancy, as well as obligations of an employer necessary to resolve other employee matters connected with that redundancy. If it is not possible to agree upon the content with enterprise trade union(s), the principles of action in matters concerning employees covered by planned redundancy should be set out by an employer in regulations, having considered, as far as possible, the proposals raised by an enterprise trade unions in the course of consultation. If there is no trade union at the establishment, the principles of action in matters concerning proposed redundancy should be set out in the regulations issued by an employer, after consultation with the employee representation appointed in the manner adopted at given employer.

[22] Under art. 67^5 § 1 LC work may be performed awal from the premises of an employer, on a regular basis, by means of information and communications technologies in the meaning of the provisions on rendering services by electronic work (telework).

[23] Law of 13th March 2003 on specific terms and conditions for terminating employment relationships with employees for reasons not related to the employees, Journal of Laws 2003, No. 90, pos. 844 with further amendments.

Another example can be found by the abovementioned (see point. 3.1) anti – crisis law, which remained in force in years 2009 - 2011. The statute (art. 9 – 12) allowed modifications of the Labour Code solutions on working time. These regulations enabled the introduction of more flexible solutions relating to the organization of working time. To achieve this, it was necessary to include appropriate solutions in the collective labour agreement or to conclude a separate agreement between the employer and the trade unions. If there is was no trade union, the agreement could have been concluded with the employees' representation established *ad hoc* in accordance with the procedure applicable at the given employer. The employer, however, cannot introduce anti-crisis solutions pertaining to working time unilaterally, for instance by issuing workplace regulations.

According to the anti – crisis law, if it was justified by objective or technological reasons or reasons related to the organization of work, the calculation period may be extended to not longer, however, than 12 months[24]. Nevertheless, the general principles of employee safety and health as well as the employees' right to rest period per day and week must have been maintained. The conditions for applying the calculation period were therefore very general and basically any entrepreneur can meet them. During the extended calculation period the individual working time schedule of an employee could have envisaged that the number of working hours in particular months was different. The periods of longer work were offset against the periods of shorter work or periods when work is not performed. In each month the worker should received at least the minimum wage[25].

So-called "social pacts" constitute another kind of collective agreements. Such arrangements can by concluded during the privatization of state-owned enterprises or other kind of transformation of an establishment. Usually they introduce ban on dismissal for certain period of time and the right to financial compensation in case of terminating an employment contract. There is no clear statutory basis to make such an agreement. However, according to well-established case law of the Supreme Court they constitute a source of labor law and may be a ground for an enforceable claim[26].

3.4. Workplace regulations.

According to art. 104 – 104^3 LC workplace regulations (Ger. *Arbeitsordnung*) set out the organisation and order in the work process, along with the related rights and duties of an employer and employees. Workplace regulations are not introduced if the provisions of collective labour agreements apply or when an employer employs less than 20 employees. Workplace regulations determining the right and duties of an employer and employees related to order at the undertaking set out in particular: work organization, systems and schedule of working time, night – time hours, date, place, time and frequency of payment of remuneration,

[24] Working time issues are the subject of section six of the Labour Code (art. 128 – 151^{12}). According to art. 129 of the Labour code the basic calculation period is 4 months, with a possibility of exceptions in situations envisaged in the Code.

[25] See Leszek Mitrus, *Anti – Crisis Regulations of Polish Labour Law*, „European Labour Law Journal", Vol. 1., No 2, 2010, p. 269 – 275.

[26] See e.g. Judgement of the Supreme Court of 23th May 2006, III PZP 2/06, *Judicial Decisions of Supreme Court, Chamber for Labour, Social Security and Public Affairs, No. 3-4/2007, item 38.*

list of work prohibited to young workers and employees, obligations concerning health and safety at work and fire protection, the method of confirming the arrival and presence of employees at work, as well as the procedure for justifying an absence from work. In principle, workplace regulation should be established in an agreement with trade union. If the workplace regulations are not agreed within a period specified by the parties, or if there is no trade union at the establishment, then the workplace regulation are established unilaterally by an employer. Workplace regulation come into effect 2 weeks after they are announced. An employer must ensure that an employee is familiar with the contents of work regulations before he starts his work.

Article 77^2 LC provides that an employer with at least 20 employees are not covered by a collective labour agreement, must determine the conditions of remuneration for work in the remuneration regulations (Ger. *Entgeltordnung*). An employer may also determine other work – related benefits, along with the principles of granting them. The regulations remain in force as long as employees are covered not covered by a collective labour agreement. The remuneration regulations are determined by an employer. If there is an enterprise trade union at the undertaking, then an employee should agree the remuneration regulations with this trade union.

Unilateral regulations, should there be no collective agreement or trade unions consent, Under art. 9 § 3 LC provisions of workplace regulations may not disadvantage employees more than provisions of collective labour agreements and other collective arrangements.

4. Employment contract.

Employment contract constitutes another mode to settle employment conditions[27]. Certainly, only very few candidates are in a position to negotiate particular conditions of employment. Usually candidates accept rules stipulated in collective labour agreement as well as workplace and remuneration regulations, issued by an employer. According to art. 22 § 1 LC by establishing an employment relationship an employee undertakes to carry out a certain kind of work for the benefit and under the guidance of an employer, and an employer undertakes to employ an employee in return for remuneration. In Poland there is no concept of "arbeitnehmerähnliche Person" like in Germany. Thus, there is no intermediate category between civil law and employment contracts. In each case it is necessary to decide whether a particular contract is an employment contract or a civil law contract according to criteria listed in art. 22 § 1 LC.

According to art. 25 § 1 LC an employment contract can be concluded for an indefinite period of time, for a definite period of time, or the time to completion of a specified task. If it is necessary to substitute an employee due to his or her justified absence from work, an employer may, for this purpose, employ another employee under an employment contract for a time comprising the absence. Under § 2 each of the abovementioned employment contracts may be preceded by an employment contract for a probation period of up to 3 months.

[27] Employment contract should not be regarded a source of labour law because it does not have a general application. Instead, an employment contract constitutes a basis of an individual employment relationship.

Thus, on the one hand, there is an open - ended contract for an indefinite term. On the other hand, there are several types of fixed – term employment contracts[28].

With regard to the latter category the following types of employment contracts can be distinguished. Firstly, employment contract for definite period of time. This contract terminates at a specified date, stipulated by the parties in the contract. The contract for replacement constitutes a particular "subcategory" of a contract for a definite period. A contract for a replacement can be made when a "regular employee" is not able to carry out his/her duties, e.g. during an illness, maternity leave or unpaid leave etc. Secondly, an employment contract for a time of the execution of a specified task. Such a contract terminates at the moment when the specified task has been fulfilled. This type of contract is typical for a construction sector. Thirdly, an employment contract for a probationary period. Such a contract can be in principle concluded only once between the same parties. Its maximum duration amounts three months.

According to art. 29 LC an employment contract must specify the parties to the contract, the type of the contract, the date of its conclusion, as well as work and remuneration conditions, and in particular: the type of work, the place of carrying out work, the remuneration corresponding to the type of work, with a specification of the remuneration components, the length of working time, the date of commencing work. An employment contract is established on the date specified in the contract. If this date is not specified – on the date of the conclusion of the employment contract. An employment contract should be made in writing. If an employment contract is not made in writing, then the employer must, at latest at the day when an employee commences work, produce a written statement concerning the type of a contract and its conditions.

The Labour Code does not require to state objective reasons justifying the conclusion or renewal of a fixed – term contract. Thus, it is entirely up to the parties to choose the type of an employment contract. Needless to say, in time of high unemployment it is an employer who decides on this issue. It happens quite seldom that a person looking for a job has a bargaining power to negotiate the type of an employment contract. Polish labour law does not stipulate the maximum period of a contract for definite term. According to the Supreme Court contracts concluded for many years (*in casu* 9 years) with stipulation on admissibility of earlier termination can be regarded as an abuse of rights[29]. In practice, however, long – term employment contracts are concluded and usually they are not challenged by employees.

Article 18^{3a} § 1 LC introduces prohibition against discrimination in employment. Employees should be treated equally regardless of employment for a definite or indefinite period of time. This principle fully applies to employment conditions. However, there is a strong difference as far as protection against dismissal is concerned. Employees employed under open – ended employment contracts enjoy much stronger stability. The termination with notice must be justified (art. 30 § 4 and 45 § 1 LC), an enterprise trade union representing an

[28] See also Ł. Pisarczyk, *Fixed – term Employment Contracts in Poland – in Search of Equilibrium between Flexibility and Protection* (in:) Tomas Davulis, Daiva Petrylaite, *Labour Market of 21st Century: Looking for Flexibility and Security. The Material of the International Scientific Conference, 12-14 May 2011*, Vilnius 2011, p. 366 and following.

[29] Judgement of the Supreme Court of 7 September 2005, II PK 294/04, *Judicial Decisions of Supreme Court, Chamber for Labour, Social Security and Public Affairs, No. 13-14/2006, item 207*.

employee must be consulted (art. 38 LC), in case of an unjustified dismissal an employee may lodge a claim before a labour court and demand reinstatement or financial compensation (art. 45 LC). A contract for a definite period and a contract to complete a specified task should not in principle be prematurely terminated. Theoretically they should last until the agreed date or event. However, there is an important are exceptions to this principle.

Under art. 33 LC upon the conclusion of an employment contract for a definite period of more than 6 months, the parties may provide for the possibility of early termination of a contract with a 2 week notice period. The Supreme Court ruled that such a stipulation can be agreed by the parties not only at the moment of a conclusion of a contract but also at the later date[30]. When such a clause has been agreed by the parties, the termination with notice must not be justified. Trade unions are not involved either. Under Polish law each termination of an employment contract is effective, even when an employer violates provisions on dismissal. If the notice of termination of an employment contract for a definite period has been served in violation of the provisions on terminating such contracts, an employee is entitled to a financial compensation only (art. 50 LC). Thus, in case of termination of a contract for definite term an employee cannot claim a reinstatement.

In theory art. 33 LC should constitute an exception. In practice, however, almost all contracts for a definite period introduce the possibility of earlier termination with a two weeks' notice. It is a common practice to conclude fixed term - contracts for long periods. Since there is neither obligation to justify a dismissal nor a claim for reinstatement, an employer can at any moment easily dismiss an employee. As far as long term contracts for definite period are concerned, *de facto* there is no effective protection against dismissal[31].

Article 25^1 LC should countervail chain fixed – term contracts. According to § 1 the conclusion of a subsequent employment contract for a definite term shall have the same legal consequences as a conclusion of a contract for an indefinite period, if the parties previously concluded two employment contracts for a definite term for subsequent periods, where the lapse of time between a termination of the previous employment contract and the conclusion of a subsequent employment contract was no longer than 1 month. Under § 2 if, within the duration of an employment contract for a definite term, the parties agree upon a longer period of work performance than previously established, it shall be deemed that parties have concluded, from the date following the termination of a previous contract, a subsequent employment contract as defined in § 1. According to § 3 the provision of § 1 does not apply to employment contract for a definite term concluded: (1) for substituting an employee during a justified absence from work or (2) for the purpose of executing occasional or seasonal work or tasks performed periodically.

In Poland the number of renewals of contracts for definite term has been introduced. The Labour Code determines under what conditions employment contracts shall be regarded as "successive" and when they shall be deemed to be contracts of indefinite duration. The basic idea of the abovementioned art. 25^1 § 1 LC is that the third employment contract for a definite term shall automatically

[30] Judgement of the Supreme Court of 14 June 1994 , I PZP 26/94, *Judicial Decisions of Supreme Court, Chamber for Labour, Social Security and Public Affairs, No. 8/1994, item 126.*

[31] Premature termination of a fixed – term contract is also allowed in case of bankruptcy or liquidation of an employer as well as in case collective redundancies.

convert into a contract for an indefinite duration, provided that conditions specified in § 1 are fulfilled. This provision should be evaluated critically. The third employment contract for a definite term transforms into an employment contract for indefinite duration "where the lapse of time between a termination of the previous employment contract and the conclusion of a subsequent employment contract was no longer than 1 month". Thus, it is very easy for an employer to avoid concluding an employment contract for indefinite period. It is enough to have an interval between subsequent contracts which is longer than 1 month. In such a situation art. 25^1 § 1 LC is not applicable.

5. Assessment and conclusions.

In the field of labour law certain degree of state intervention is necessary. The state is also obliged to carry out active labour market policies[32]. At the same time, social partners should be able to influence employment issues. There are no obstacles for individual negotiations between an employer and an employee. Therefore, let us come back to the starting point of the analysis. Who should determine work and employment conditions: the legislator, social partners or parties to an employment relationship?

With regard to Poland, statutory regulations are of primary importance. This is the result of historical development. Besides, the state remains a strong actor of industrial relations. However, it seems that statutory labour law regulations are too rigid. Quite often they do not respond to needs of small and medium enterprises. Working time is a good example. Provisions on this matter definitely became more flexible in comparison with previous solutions, but it is still difficult to adjust the statutory pattern to needs of particular undertakings. In general, statutory law alone is not an appropriate tool to introduce flexicurity policy[33].

As far as social partners are concerned, they should be aware of employee needs in particular branches or undertakings much more than the legislator. Therefore they should enjoy broad autonomy and discretion to conclude collective labour agreements and to determine employment conditions. However, in Poland the protection provided by statutes is relatively high. Therefore employers not very often agree to grant additional rights. Besides, only trade unions can be a party to a collective agreements. There is no possibility to make such a contract in undertakings where employees are non unionized. It seems that Polish system of industrial relations should be reshaped in order to introduce more flexibility.

However, the application of the anti – crisis law provides an interesting example of effective social partners activities. The solutions on working time proved to be very efficient[34]. In order to apply them, it was necessary to conclude a collective arrangement between an employer and trade unions or another employee representation created ad hoc. Under anti – crisis law, 1076 agreements on modification of Labour Code solutions were concluded. Thus, the statutory 4

[32] A. Ojeda Aviles and J. Garcia Vina, *Regulation of the Labour Market* (in:) Bob Hepple and Bruno Veneziani (Eds.) *The Transformation of Labour Law in Europe. A comparative study of 15 countries 1945 – 2004*, Oxford and Portland, Oregon 2009, p. 74 – 76.

[33] Leszek Mitrus, *Flexicurity und das polnische Arbeitsrecht*, "Recht der Internationalen Wirtschaft", No. 8/2008, p. 518 – 527.

[34] At the same time, financial aid for entrepreneurs facing difficulties or training subsidies were not popular at all, since it was very difficult to meet criteria introduced by the anti – crisis law.

months calculation period was in many cases prolonged up to 12 months. Such consent between social partners allowed much more flexible functioning of an establishment, since it was possible to introduce longer periods of work when necessary and periods of shorter work when there was no need to carry out full – time work. Currently there is a heated debate whether these anti – crisis solutions should be integrated into the Labour Code and become "regular" part of the Polish labour law. In opinion of the present author such a legislative initiative should be evaluated positively.

An individual arrangement between an employer and an employee would be another option to determine employment conditions. Polish labour law shows, however, that employment contract as such does not constitute a tool of employee rights protection. Fixed – term employment is a very good example of that. As stated above (point 4), it is entirely up to the parties to choose the type of an employment contract. At the same time, the Labour Code does not guarantee the effective protection against abuses arising from the use of fixed – term employment. It is submitted that in practice Polish regulation is very close to the idea of "employment at will". It is not surprising that contracts for definite term are very popular among employers. In fact, they offer a lot of flexibility for employers and no security for employees. Poland is one of the leaders in the European Union as far as fixed – term employment is concerned: around 27 % of employees are employed under fixed – term contracts. Thus, the abovementioned example clearly shows that in principle an individual employee is not strong enough to defend effectively his rights.

To conclude: employment law issues cannot be left to market forces alone. Combined action of the legislator and social partners seems to be the most appropriate way to regulate employment conditions. Poland is a country where statutory labour law predominates. The current legal framework is definitely not flexible enough. It is desirable to strengthen the position of social partners. The broader margin of discretion would provide better possibilities to adapt employment conditions to current needs of labour market.