

# Restatement of Labour Law in Europe

Volume I

The Concept of Employee

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## *The Concept of ‘Employee’: The Position in Poland*

LESZEK MITRUS

### I. THE CONTRACT OF EMPLOYMENT AND THE EMPLOYMENT RELATIONSHIP

#### A. The Contract of Employment: Basic Definition, Formal Requirements and the Effects of Invalidity of the Contract

**U**NDER POLISH LAW, the definition of an employment relationship, as well as the content and form of an employment contract, are subject to statutory law. Article 22 § 1 of the Polish Labour Code of 26 June 1974 (hereinafter LC)<sup>1</sup> stipulates:

By establishing an employment relationship, an employee undertakes to carry out specific work for the benefit and under the guidance of an employer, and an employer undertakes to employ an employee in return for remuneration.

In addition, Article 2 LC stipulates that an employee (*pracownik*) is a person who is employed on the basis of an appointment, an election, a nomination or a cooperative employment contract. Thus, an employment relationship can be established on the basis of an employment contract and other above-mentioned acts. The concept of an ‘employment relationship’ (*stosunek pracy*) is broader than the concept of ‘employment contract’ (*umowa o pracę*).<sup>2</sup> However, it is commonly accepted that Article 22 § 1 LC

<sup>1</sup> Compiled text: Journal of Laws 2016, item 1666 with further amendments. For the English text, see *The Labour Code. Kodeks pracy. Bilingual Edition*, translation by A Jamroży, 2nd edn (Warsaw, CH Beck, 2014) 2 f. The Labour Code took effect on 1 January 1975 and has been subject to over 100 amendments. For changes concerning regulations on the employment contract in Poland, see E Kovacs, N Lyutov and L Mitrus, ‘Labor Law in Transition: From a Centrally Planned to Free Market Economy in Central and Eastern Europe’ in MW Finkin and G Mundlak (eds), *Comparative Labor Law* (Cheltenham, Edward Elgar, 2015) 415 f.

<sup>2</sup> See below, section I.B.

does not entail an exhaustive definition. Further elements of the employment relationship have been elaborated by judicial decisions and legal literature.<sup>3</sup> The notion of employment contract is subject to a comprehensive set of judicial decisions. For example, the Supreme Court ruled that the constitutive features of an employment contract are: voluntary character, personal work performance on a continuous basis, subordination and work performance for the benefit of the employer who carries the risk related to employment as well as to remuneration.<sup>4</sup>

An employee performs work under subordination, ie, an employee is obliged to follow instructions on his or her work performance. This factor is of major importance for determining the existence of an employment contract.<sup>5</sup> Although not expressly mentioned in the LC, it is commonly accepted that an employee is obliged to perform his or her duties in person. It is therefore impossible to introduce a clause allowing substitution under an employment contract.<sup>6</sup> An employment contract thus covers a ‘personalised’ relationship. An employment contract is a payable contract, ie, an employee always performs his or her duties in return for remuneration. Work is performed with a long-term perspective on a continuous basis, that is, an employment contract usually does not refer to a one-time activity.<sup>7</sup> An employment contract implies a contract of due diligence, ie, an employee undertakes to perform his or her duties conscientiously and carefully, but is not responsible for the final result. An employment contract implies a mutuality of obligations. However, the parties’ obligations are not always equivalent, eg, an employer is always responsible for safety at work; even where an employee does not properly carry out his or her duties, the employer may also be obliged to pay remuneration for a period of justified absence from work.<sup>8</sup>

The major feature of an employment contract is the risk that lies on the employer’s side. In other words, any negative consequences that may arise from the employment contract constitute a risk on the part of the employer.

<sup>3</sup> See, eg, B Wagner, ‘Stosunek pracy i jego treść’ in M Matey-Tyrowicz and T Zieliński (eds), *Prawo pracy RP w obliczu przemian* (Warsaw, CH Beck, 2006) 145 f; P Prusinowski, *Umowne podstawy zatrudnienia* (Warsaw, Wolters Kluwer, 2012) 45 f; Z Hajn, in Z Hajn and L Mitrus, *Labour Law in Poland* (Alphen aan den Rijn, Wolters Kluwer, 2016) 79 f.

<sup>4</sup> Judgment of 23 October 2006, I PK 110/06.

<sup>5</sup> See section IV.A below.

<sup>6</sup> Judgment of 28 October 1998, I PKN 416/98, OSNP 1999, No 24, item 775. Moreover, an employment contract automatically expires upon the death of the employee (Art 63<sup>1</sup> para 1 LC).

<sup>7</sup> Judgment of 14 December 1999, I PKN 451/99, OSNP 2001, No 10, item 337.

<sup>8</sup> In the recent literature, it has been submitted that within the framework of unreciprocated duties, employers must carry out social tasks arising out of public law. See A Sobczyk, *Prawo pracy w świetle Konstytucji RP. Tom I. Teoria publicznego i prywatnego prawa pracy* (Warsaw, CH Beck, 2013) 135 f.

In this context, we can distinguish between a 'technical risk', ie, an employer is obliged to pay remuneration for periods in which no work was performed due to technical reasons, for example, as a result of work stoppage. The employer assumes a 'personal risk', ie, the employer is responsible for the employee's actions. For example, where an employee causes damage to a third party while performing his or her duties, only the employer is obliged to compensate the damage. Under an 'economic risk', in turn, even in the case of economic difficulties or losses, an employer is obliged to pay employee remuneration and other work-related benefits. Finally, 'social risk' implies that an employer is obliged to provide remuneration even where an employee does not perform work, eg, in case of sickness or absence from work due to the employee's personal situation.<sup>9</sup>

Article 29 § 1 LC specifies the content of an employment contract. An employment contract should specify the parties to the contract, the type of contract and the date of its conclusion, as well as the conditions of work and remuneration. The contract should, in particular, specify the type of work, the place of its performance, the remuneration corresponding to the given type of work and its components, the duration of working time and the date of commencement of work. In addition, the parties are free to determine other elements of the contract that they regard as substantial, such as additional employee benefits, additional annual leave or competition clauses. In principle, the parties are free to determine the type of employment contract, ie, a contract for probation, a contract for a fixed-term or an open-ended contract.

Labour law provides irreducible minimum employee rights. The provisions of the employment contract and other instruments on the basis of which an employment relationship is established cannot be less favourable to the employee than the provisions of labour law.<sup>10</sup> The provisions of employment contracts and other acts mentioned above which are less favourable to the employee than the provisions stipulated in labour law shall be null and void; instead, the appropriate provisions of labour law shall apply.<sup>11</sup> Thus, parties to an employment contract can improve the employee's situation by extending his or her rights. At the same time, it is inadmissible to reduce the level of employee rights. Where the parties introduce contractual stipulations that are less favourable than the provisions of labour law, the invalidity of these specific stipulations only will be implied rather than the entire contract.<sup>12</sup> In addition, an employment contract cannot violate the principle

<sup>9</sup> See also Ł. Pisarczyk, *Ryzyko pracodawcy* (Warsaw, Wolters Kluwer Business, 2008) 27 f.

<sup>10</sup> LC, art 18, para 1.

<sup>11</sup> *ibid*, art 18, para 2.

<sup>12</sup> L. Mitrus, 'The Relationship between Statutory Law, Collective Agreement and Employment Contract: The Case of Poland' in György Kiss (ed), *Recent Developments in Labour Law* (Budapest, Akadémiai Kiadó, 2013) 63 f.

of equal treatment. Provisions of employment contracts and other acts on the basis of which an employment relationship is established and which violate the principle of equal treatment in employment are null and void. The relevant provisions of labour law shall apply instead. When there are no such provisions, the relevant provisions of a non-discriminatory character shall apply instead.<sup>13</sup>

Each employment contract shall be made in writing.<sup>14</sup> If the contract is not concluded in writing, then the employer is obliged to provide the employee with a written statement of the stipulations of the contract, as well as its type and conditions. However, an oral employment contract remains valid—eg, an employee can claim remuneration for work performed. At the same time, an employer or anyone acting in his or her name, who does not confirm the employment contract concluded in writing with the employee, is liable to a fine.<sup>15</sup> Thus, an oral contract of employment remains in force, but the lack of a written form constitutes an offence against the employee's rights and is subject to penal sanctions.

The LC does not cover all issues related to an employment contract. The provisions of the Civil Code apply to an employment relationship in cases not regulated by the provisions of labour law, provided that they do not contravene the principles of labour law.<sup>16</sup> The LC regulates the means to conclude an employment contract. Recourse should be taken to the Civil Code. An employment contract can be concluded by accepting an offer (which is the most common case), through negotiation or *per facta concludentia*. The latter option refers to the parties' conduct indicating the will to conclude an employment contract, eg, continuing to work after the probation period has ended or to take up work in a particular post.<sup>17</sup>

Under Polish labour law, an employment contract is not automatically void. There is no concept of 'rescission' of an employment contract. In certain cases, an employment contract can be terminated by an employer, with or without notice, depending upon the situation. For example, where a contract violates statutory provisions (eg, if a contract was concluded

<sup>13</sup> LC, art 18, para 3. See also Z Góral, 'Zasada uprzywilejowania pracownika' in KW Baran (ed), *Zarys systemu prawa pracy. Tom I. Część ogólna prawa pracy* (Warsaw, Wolters Kluwer, 2010) 663 f.

<sup>14</sup> LC, art 29, para 2.

<sup>15</sup> *ibid*, art 281, point 2.

<sup>16</sup> *ibid*, art 300. The LC contains Chapter IIa (arts 10–18<sup>3a</sup>) 'Basic principles of labour law', which refers, inter alia, to the right to work, respect for the employee's personal rights, a ban on discrimination, the right to fair remuneration, the right to rest, and the employer's duty to ensure healthy and safe working conditions. In addition, principles have been elaborated in doctrine and the case law, eg, protection against dismissal or limited financial liability of employees. See also Z Góral, *O kodeksowym katalogu zasad indywidualnego prawa pracy*, (Warsaw, Wolters Kluwer, 2011) 64 f.

<sup>17</sup> Judgment of the Supreme Court of 31 August 1977, I PRN 112/77, Lex No 14418.

with a minor below the legal working age or a contract with a female to carry out work she is prohibited from performing), it is not automatically invalid.<sup>18</sup> Instead, it must first be terminated with notice. The employer is obliged to pay remuneration for the notice period and can be subject to a fine for breaching employee rights. Where a contract was concluded on false pretences (eg, a candidate submitted false documents relating to his or her qualifications), it can be terminated by the employer with immediate effect.<sup>19</sup>

## **B. Employment Relationship: Basic Definition**

Apart from an employment contract (see the previous section), several non-contractual grounds for establishing an employment relationship exist. Article 2 LC provides that an employee is a person who is employed on the basis of an employment contract (*umowa o pracę*), an appointment (*powołanie*), a nomination (*mianowanie*), an election (*wybór*) or a cooperative employment contract (*spółdzielcza umowa o pracę*). Two major categories can be differentiated: an employment contract and sources other than employment contracts that may constitute an employment relationship. Employment relationships in the public sector are usually based on an appointment, a nomination or an election. It should be emphasised that employment relationships concluded on a legal basis other than an employment contract are only permissible in cases specified in labour law.

An employment relationship can be established on the basis of an appointment in the cases specified in separate provisions.<sup>20</sup> Such situations refer, for example, to executive managers of state-owned enterprises and his or her deputy. Certain posts in local government offices can be contracted by appointment, eg, deputies of mayors. Appointed employees can be recalled from their post at any time, with immediate effect or as of a certain date by the body that appointed them. An employment relationship can be established on the basis of an election if the duty to perform work as an employee results from such an election,<sup>21</sup> eg, mayors of cities. The internal regulations of social or political organisations can request an election to take place for the establishment of an employment relationship. An employment relationship based on an election terminates upon the expiry of the term in office.<sup>22</sup>

<sup>18</sup> Judgment of the Supreme Court of 26 January 1982, V PZP 8/81, OSNCP 1982, No 7, item 94.

<sup>19</sup> A Sobczyk, *Rozwiązanie umowy o pracę bez wypowiedzenia* (Gdańsk, ODDK, 2010) 15 f.

<sup>20</sup> LC, arts 68–72.

<sup>21</sup> *ibid*, arts 73–75.

<sup>22</sup> See also A Giedrewicz-Niewińska, *Wybór jako podstawa nawiązania stosunku pracy w samorządzie terytorialnym* (Warsaw, Wolters Kluwer, 2008) 56 f.

Under Article 76 LC, an employment relationship is established on the basis of a nomination in the cases specified in separate provisions. Nominations are regulated by specific statutes on employment in the public sector. The provisions of the LC apply to the extent that certain labour law-related areas are not regulated by those specific provisions.<sup>23</sup> Nominations constitute a legal basis for the establishment of employment relationships in public administrations, the educational system, high schools and the judiciary. Public entities can act as employers vis-a-vis the nominated employees, eg, civil servants, judges, public prosecutors and teachers. Statutory provisions introduce different regulations with regard to specific categories of nominated employees. However, some common features emerge. To be employed on the basis of nomination, certain recruitment criteria may apply (eg, Polish nationality, ethical behaviour and minimum age). As a general rule, nominated employees are subordinated to their superiors to a larger extent in comparison to employees who have concluded an employment contract. Moreover, special duties may be imposed on them (eg, a statutory ban on conducting an additional activity). Employees employed on the basis of nomination are subject to disciplinary liability. Protection against dismissal is stronger than in the case of an employment contract. A nominated employee can only be dismissed in cases expressly provided in the relevant statute.<sup>24</sup> Nomination is also used in law enforcement agencies, eg, the police, the Internal Security Agency and the Central Anti-Corruption Office. Persons who serve in such institutions are not employees, but rather ‘functionaries’, as their level of subordination is much higher. Their employment relationship is governed by administrative law.<sup>25</sup>

Article 77 LC provides that an employment relationship shall be considered as having been established between a labour cooperative and a member on the basis of a cooperative employment contract. Such an employment relationship is governed by the Law of 16 September 1982 on Co-operatives.<sup>26</sup> Labour cooperative membership is a prerequisite for signing a cooperative employment contract. This type of contract is rarely used in practice.

Establishing an employment relationship as well as determining the conditions of work and remuneration regardless of the legal basis of the employment relationship requires a unanimous statement of intent by both the

<sup>23</sup> LC, art 5.

<sup>24</sup> J Stelina, *Charakter prawny stosunku pracy z mianowania* (Gdańsk, Fundacja Rozwoju UG, 2005) 17 f.

<sup>25</sup> T Kuczyński, E Mazurczak-Jasińska and J Stelina, ‘Tom 11. Stosunek służbowy’ in R Hauser, Z Niewiadomski and A Wróbel (eds), *System prawa administracyjnego* (Warsaw, CH Beck, 2011) 3 f.

<sup>26</sup> Compiled text: Journal of Laws 2016, item 21, with further amendments.

employer and the employee.<sup>27</sup> In other words, a consensus of both parties is required to create such types of employment relationships. With regard to appointment and nomination, which are in fact unilateral administrative decisions, an employee can express his or her intention by accepting the decision and taking up the duties at the given post. There are few exceptions to the above-mentioned Article 11 LC.

Where an undertaking or part thereof is transferred to another employer, that new employer becomes *ex lege* a party to an existing employment contract. With regard to appointments, an election, nomination or cooperative employment contract, the new employer should at least propose new employment conditions.<sup>28</sup> There are also exceptional situations where a particular person enjoys an enforceable claim to be employed. An employer may terminate an employment contract without notice in the event of a long period of incapacity for work due to illness through no fault of the employee (in principle, 182 days). However, an employer is obliged—to the extent possible—to re-employ an employee who reports to work immediately after the reasons for his or her incapacity ceases to exist within six months of the termination of his or her employment contract.<sup>29</sup> A contract of employment expires after an employee is absent from work due to temporary detention (ie, awaiting trial), unless an employer terminated the contract previously without notice through the employee's fault. An employer is obliged to re-employ the employee if the criminal proceedings are discontinued or when the employee has been acquitted, provided that the employee reports his or her return to work within seven days from the date when the court's decision becomes valid. This rule does not apply if the criminal proceeding is barred by limitation or discontinued due to an amnesty, or in the case of conditional discontinuation.<sup>30</sup> Moreover, where an employee has been dismissed within the framework of a collective dismissal and if employees are being hired in the same occupational category, an employer should employ an employee who applies to re-establish the employment contract within a year of the date of the termination of the employment relationship. An employer is obliged to re-employ such an employee within 15 months from the date of terminating the previous employment relationship.<sup>31</sup>

<sup>27</sup> LC, art 11.

<sup>28</sup> *ibid*, art 23, para 1 See also judgment of the Supreme Court, 1 February 2001, I PKN 508/99, OSNP 2001, No 12, item 412.

<sup>29</sup> LC, art 53. See also judgment of 10 September 1976, I PZP 48/76, OSNP 1977, No 4, item 65.

<sup>30</sup> *ibid*, art 66.

<sup>31</sup> Article 9 of the Law of 13 March 2003 on Specific Rules on Terminating an Employment Relationship due to Reasons Not Related to the Employee. Compiled text: Journal of Laws 2016, item 1474 (so-called 'Law on collective dismissals').

## II. EMPLOYEE AND EMPLOYER

### A. Employee: Basic Definition

In Polish, there is no linguistic distinction comparable to the English differentiation between ‘employee’ and ‘worker’. Both notions, which are used in instruments of international or European law, are translated into Polish as ‘pracownik’. The scope of this expression in such international or European legal acts should be determined in each individual situation, depending upon the context. However, there is no doubt that the notion ‘pracownik’, as used in the LC and other statutory labour law provisions, reflects the meaning of the term ‘employee’.<sup>32</sup>

Article 2 LC introduces the legal definition of ‘employee’, namely a person who is employed on the basis of an employment contract, an appointment, a nomination, an election or a cooperative employment contract (see the previous section). In other words, an employee is a person who is party to an employment relationship within the meaning of Article 22 § 1 LC. This notion has universal scope, since it applies both to employment law and collective labour law. The LC expressly introduces two prerequisites for being deemed an employee. The first is the minimum statutory age—according to Article 22 § 2 LC, anyone who is over 18 years of age may be an employee.<sup>33</sup> Under the provision of section 9 LC (ie, Articles 190–206), a person under the age of 18 years can be hired as an employee.<sup>34</sup> The second is that limited legal capacity is required.<sup>35</sup> According to Article 22 § 3 LC, a person with a limited legal capacity may establish an employment relationship and perform activities under the law relating to this relationship without consent of his or her statutory representative. However, if an employment relationship is contrary to the interests of that person, a legal representative may terminate the employment relationship with prior judicial permission.

The Law of 13 October 1998 on the social security system<sup>36</sup> introduces an independent definition of ‘employee’. An employee is a person who is party to an employment relationship.<sup>37</sup> In addition, a person who concluded a separate civil law contract with his or her employer is considered an

<sup>32</sup> There might be a discrepancy between the Constitution and the LC on defining the personal scope of protection related to work.

<sup>33</sup> Judgment of the Supreme Court of 22 November 1979, III PZ 7/79, OSN 1980, No 4, item 83.

<sup>34</sup> These regulations refer to the employment of minors. See section III.A below.

<sup>35</sup> Article 11 of the Civil Code provides that the full capacity for legal acts is acquired at the time that individuals become adults. In addition, under art 15 of the Civil Code, minors who have attained 13 years of age and persons who are partially legally incapacitated have limited capacity for legal acts.

<sup>36</sup> Compiled text: Journal of Laws 2016, item 163 with further amendments.

<sup>37</sup> Article 8, point 1.

employee,<sup>38</sup> eg, as regards the duty to pay contributions. In addition, the Social Security Institution is entitled to examine the nature of the relationship. If a bogus contract was concluded (eg, no work was actually performed), the existence of the employment contract will be questioned and any social benefits connected to employee status may be denied.<sup>39</sup> The Law of 26 July 1991 on income tax of natural persons<sup>40</sup> introduces another definition for employee. An employee is a person who is party to a public service relationship (which covers nominated employees and functionaries) or an employment relationship, or is a home worker.<sup>41</sup> Therefore, the definitions of 'employee' under social security law and taxation law are broader in comparison to that under labour law.

## **B. Employer: Basic Definition**

Article 3 LC defines an 'employer' as an organisational unit, even if it has no legal personality, or any natural person, provided that it employs employees. Thus, under Polish law, the basic prerequisite for being defined an employer is to 'employ employees'. In a broader sense, this requirement relates to the competence to take action with reference to the employment relationship, eg, to hire a candidate, to promote an employee to a higher post or to terminate an employment contract. Any natural person, institution, entity, organisation etc can become an employer if it employs employees under its own name and capacity.<sup>42</sup> This principle fully applies to groups consisting of a parent company and its subsidiaries. Such a group cannot be a priori considered an employer. In order to establish whether the parent company or a subsidiary is the employer in a given case, it is necessary to determine which entity is entitled to act in the field of labour law (eg, to conclude an employment contract).

Article 24 of the Constitution of the Republic of Poland of 2 April 1997<sup>43</sup> expressly provides that work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work. Moreover, several constitutional provisions relate to social rights, ie, the freedom of association in trade unions and employers' organisations (Article 59 item 1),

<sup>38</sup> Article 8, point 2a of the Law. See also I Jędrasik-Jankowska, *Konstrukcje prawne ubezpieczenia społecznego*, 5th edn (Warsaw, Wolters Kluwer, 2013) 57 f.

<sup>39</sup> See, eg, judgment of the Supreme Court of 21 November 2011, II UK 69/11; judgment of the Supreme Court of 12 July 2012, II UK 14/12; judgment of the Supreme Court of 22 June 2015, I UK 367/14, Lex No 1771586.

<sup>40</sup> Compiled text: Journal of Laws 2016, item 2032 with further amendments.

<sup>41</sup> Article 12, point 4 of the Law. See also section XI.A below.

<sup>42</sup> Judgment of the Supreme Court of 13 March 2012, II PK 170/11, Lex No 1211150.

<sup>43</sup> Journal of Laws 1997, No 78, item 483 with further amendments. See The Constitution of the Republic of Poland (Warsaw, Sejm Publishing Office, 1997). English translation of the Constitution is also available at [www.sejm.gov.pl/prawo/konst/angielski/kon1.htm](http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm).

the freedom to choose and pursue an occupation and to choose the place of work (Article 65 item 1), the right to safe and hygienic conditions at work (Article 66 point 1) and the right to statutorily specified days of leave and annual paid holidays, as well as the maximum permissible hours of work (Article 66 point 2). In the legal literature, it has been rightly submitted that the constitutional protection of work cannot be limited to the employment relationship only.<sup>44</sup> Thus, not only employees within the meaning of the Labour Code should enjoy statutory protection, though the extent of rights of employees and other categories of persons who perform work may differ.<sup>45</sup>

In a recent ruling, the Constitutional Tribunal<sup>46</sup> declared the provisions of the Law of 23 May 1991 on trade unions<sup>47</sup> that confine the right to unionise to employees within the meaning of Article 2 LC (with some minor exceptions). The Tribunal ruled on the incompatibility of the above Law with the Constitution of Poland and ILO Convention No 87 on Freedom to Association and Protection of the Right to Organize. The Tribunal emphasised that the notion ‘*pracownik*’ (see point 2.1 above) has an independent and autonomous constitutional scope. The Constitution protects persons who carry out paid work, remain in a legal relationship with a subject who is a beneficiary of work, and have common interests that can be collectively defended. The legal form of the performance of work should not determine the personal scope of the right to establish trade unions. Thus, it seems that constitutional protection refers to ‘workers’, ie all categories of persons who carry out paid work. As a consequence of the ruling, civil law contractors and self-employed persons shall enjoy the right to set up trade unions alongside employees.<sup>48</sup>

### III. SUB-TYPES OF EMPLOYEES AND WORKERS

#### A. The Establishment of Sub-types of Employees

Polish law introduces a universal definition of ‘employee’ with the same meaning in all parts of its labour law (see above, section II.A). No general distinction is made between blue-collar and white-collar employees.

<sup>44</sup> See, eg A Sobczyk, *Prawo pracy w świetle Konstytucji RP. Tom I. Teoria publicznego i prywatnego prawa pracy* (Warsaw, CH Beck, 2013) p 46 f.

<sup>45</sup> See also s 11.1 below.

<sup>46</sup> Judgment of 2nd June 2015, K 1/13, 80/6/A/2015. See also Z Hajn, ‘The Right of Association in Trade Unions – the Right of Employees, or the Right of Working People?’ in J Stelina, Ł Pisarczyk (eds) *Studia Iuridica vol 60 Collective Labour Law* (Warszawa 2015) p 107 f.

<sup>47</sup> Compiled text, *Journal of Laws* 2015, item 1881.

<sup>48</sup> The Law on Trade Unions should be amended, although the extent of modification is not yet clear.

At the same time, a differentiation is made regarding the status of various categories of employees employed on the basis of agreements other than employment contracts (see above, section I.B). There is no special category of family employees. There are no special labour law provisions for athletes or artists. They can carry out work on the basis of an employment contract or a civil law contract. Moreover, it must be emphasised that in relation to health and safety at work, an employer is responsible not only towards employees, but also towards persons who perform work on a basis of an agreement other than an employment relationship, as well as those who conduct business activities on their own account, in a work establishment or other place designated by the employer.<sup>49</sup>

Minors constitute a particular category of employees. According to the LC, a minor (*pracownik młodociany*) is a person who has reached the age of 16, but is not yet 18 years old. It is prohibited to employ a person who has not yet reached the age of 16.<sup>50</sup> A minor can only be employed for the purpose of vocational training or to perform light work.<sup>51</sup> Minors are required to supplement any work they perform with schooling until they reach the age of 18. They enjoy special rights with regard to health and safety protection. Teleworkers<sup>52</sup> and temporary agency workers<sup>53</sup> constitute separate categories of employees with specific rights and duties connected to the method of work performance. Their legal status is based on the Framework Agreement on Telework<sup>54</sup> and Directive 2008/104 of 19 November 2008 on Temporary Agency Work,<sup>55</sup> respectively. In addition, seafarers also constitute a separate category. They are covered by the Law of 5 August 2015 on Work at Sea.<sup>56</sup>

Managerial employees do not constitute a separate legal group with a comprehensive set of rights, but several LC provisions have been expressly

<sup>49</sup> LC, art 304.

<sup>50</sup> *ibid*, art 190. Please note that according to the Law of 19 March 2009 on the amendment of the Law on Education System and several other statutes (Journal of Laws 2009, No 56, item 458), from 1 September 2018 the minimum age for legal employment will be 15 years. This change is connected to a comprehensive reform of the primary education system.

<sup>51</sup> Light work may not endanger the life, health or psychological development of minors, and may not impede their school duties. A list of light work duties should be set out by the employer with prior permission from an occupational doctor. This list must be confirmed by the labour inspector (art 200, paras 2 and 3 LC).

<sup>52</sup> LC, art 67<sup>5</sup>–67<sup>17</sup>. See also A Sobczyk, *Telepraca w prawie polskim* (Warsaw, Wolters Kluwer, 2009) 24 ff.

<sup>53</sup> The Law of 9 July 2003 on the employment of temporary agency workers, Journal of Laws 2016, No 360, item 1608 with further amendments. For the English text, see *A Collection of Labour Law Acts and Ordinances. Prawo pracy—zbiór ustaw i rozporządzeń*, translated by N Faulkner, B Glogier-Osińska and J Sikora (Warsaw, CH Beck, 2013) 87 ff.

<sup>54</sup> Available at [www.etuc.org](http://www.etuc.org).

<sup>55</sup> Directive (EC) 2008/104 of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work [2008] OJ L 327/9.

<sup>56</sup> Journal of Laws 2015, item 1569.

modified in respect to them. For the purposes of working time, Article 128 § 2 point 2 LC introduces the notion of an ‘employee managing the establishment on behalf of the employer’.

This provision applies to employees who manage the establishment, deputy managers, employees who are members of a collective body and manage the establishment, as well as chief accountants. In principle, they are obliged to perform overtime work when necessary, without the right to additional compensation.<sup>57</sup> Moreover, a plant collective agreement cannot determine the remuneration of such persons.<sup>58</sup> They cannot be members of a conciliation commission at the undertaking.<sup>59</sup>

## **B. The Establishment of a Specific Category of ‘Workers’**

There is no general category of ‘workers’.

### IV. SUBORDINATION: CRITERIA AND INDICATORS/ ECONOMIC DEPENDENCE

#### **A. Criteria: Work Instructions, Work Control and Integration**

Employee subordination is an essential factor of an employment relationship. Article 22 § 1 LC expressly provides that an employee performs work of a specified type:

[F]or the benefit of an employer and under his supervision, in a place and time specified by the employer.

As emphasised above,<sup>60</sup> an employee is obliged to carry out work in person. The provision of work instructions by the employer constitutes a major element defining an employment relationship. Thus, an employee is obliged to follow the employer’s work instructions. He or she is not free to decide on the mode of work performance. This feature is a structural characteristic of an employment relationship.<sup>61</sup> Employment is often described as ‘organisational subordination’, since employees are integrated into the structure of an establishment and are obliged to carry out work within the organisational framework of an undertaking, its hierarchy etc. However, the scope of subordination within the framework of an employment

<sup>57</sup> LC, art 151.

<sup>58</sup> *ibid*, art 241, para 2.

<sup>59</sup> *ibid*, art 246.

<sup>60</sup> See section I.A above.

<sup>61</sup> Judgment of the Supreme Court, 25 November 2005, I UK 68/05; judgment of the Supreme Court of 22 April 2015, II PK 153/14, Lex No 1712814.

contract can vary, depending upon the type of work. For example, employee subordination is relatively weak in the case of telework, where activities are performed outside the employer's premises. Moreover, employees who occupy managerial posts can be expected to take the initiative with regard to work performance. This situation is not affected by the existence of an employment relationship, since such employees are bound by the rules on the organisation and functioning of the undertaking.<sup>62</sup>

Based on the case law of the Supreme Court, the concept of 'autonomous subordination' has been introduced.<sup>63</sup> This refers to situations in which an employer determines the duration of working time and the tasks to be completed, but does not directly interfere in the employees' mode of work performance. In other words, the employee is required to achieve the results requested by the employer, but has a relatively broad scope of discretion with regard to the method of performing the work. In practice, this concept relates to employees with high skills or autonomy.

## **B. Indicators**

In practice, not all criteria (see section I.A above) must be met in order to classify an employment relationship as a valid one. In the view of the Supreme Court, the legal nature of a contract cannot be determined on the basis of a single factor, but on a comprehensive assessment of the factual situation.<sup>64</sup> Where the features of an employment relationship do not prevail, the description of the contract and the mode of work performance are decisive.<sup>65</sup> On the other hand, when the features that are characteristic of an employment relationship in accordance with Article 22 § 1 LC prevail, it will be deemed that an employment relationship has been established, regardless of the description of the contract by the parties and their initial will.<sup>66</sup> Should the features of an employment contract and civil law contract be equal, then the will of the parties prevails.<sup>67</sup> As a general rule, a lack of duty to perform the work in person is an indicator that the agreement is not an employment contract.<sup>68</sup> In practice, the mode of work performance is of major importance, regardless of the label of the contract. Another major

<sup>62</sup> Judgment of the Supreme Court of 11 October 2007, III UK 70/07.

<sup>63</sup> Judgment of the Supreme Court 17 September 1999, case I PKN 277/99; judgment of the Supreme Court of 11 October 2007, case UK 70/07.

<sup>64</sup> Judgment of the Supreme Court of 7 October 2009, case III PK 38/09.

<sup>65</sup> Judgment of the Supreme Court of 2 September 1998, I PKN 293/98.

<sup>66</sup> Judgment of the Supreme Court of 18 January 2012, case II PK 239/11.

<sup>67</sup> Judgment of the Supreme Court of 18 June 1998, case I PKN 191/98.

<sup>68</sup> Judgment of the Supreme Court of 28 October 1998, case I PKN 642/98.

factor is for the work to be carried out on a continuous basis (civil law contracts often cover one-time or short-term activities).<sup>69</sup>

### C. The Relevance of ‘Economic Dependence’

There is no particular category of economically dependent workers. Economic dependence cannot be the sole criterion to determine whether an employment relationship exists.

## V. THE PRINCIPLE OF PRIMACY OF FACTS

Article 22 § 1 LC provides that an employment relationship based on the terms specified in this provision<sup>70</sup> shall be considered a valid employment relationship, regardless of the label of the contract concluded by the parties. According to Article 22 § 1 LC, it is not permissible to replace an employment contract with a civil law contract where the terms upon which the work to be provided are based on the provisions specified in § 1. Thus, the ‘primacy of facts’ principle is expressly recognised in the LC. Where a legal relationship has the features of an employment contract, the description of the contract by the parties is irrelevant.<sup>71</sup> The content of the contract and the mode of work performance are decisive for establishing the legal nature of the contract.<sup>72</sup> However, Article 22 § 1 LC does not establish the presumption that an employment contract has been concluded.<sup>73</sup> It is up to the court to determine whether an employment contract has been entered into, even where the parties, in good faith, concluded a civil law contract, but the content of the contract and the mode of its performance are characteristic of an employment contract.<sup>74</sup>

## VI. QUALIFICATION IN FULL

Under Polish law, there are no mixed contracts, ie, contracts with features combining an employment contract and a civil law contract. The contract must belong to a specific category with all the consequences that arise

<sup>69</sup> Judgment of the Supreme Court of 14 December 1999, I PKN 451/99, OSNP 2001, No 10, item 337.

<sup>70</sup> See section I.A above.

<sup>71</sup> Judgment of the Supreme Court of 7 April 1999, case I PKN 642/98.

<sup>72</sup> Judgment of the Supreme Court of 24 June 2015, II PK 189/14, Lex No 1764808.

<sup>73</sup> Judgment of the Supreme Court of 29 June 2010, case I PK 44/10.

<sup>74</sup> Judgment of the Supreme Court of 3 June 2008, case I UK 282/07.

from concluding such a contract.<sup>75</sup> However, there is the possibility for the parties to an employment relationship to conclude an additional contract. For example, the parties can agree on a competition clause during the employment relationship<sup>76</sup> or following its expiry.<sup>77</sup> In addition, the parties to an employment relationship are free to conclude a civil law contract among each other. Yet, this may lead to abuse of labour law provisions, eg, with regard to overtime work. In principle, a civil law contract concluded between an employer and an employee should refer to another type of work than that covered in the existing employment contract.<sup>78</sup>

In addition, if damage is caused by the employee to a third party while performing his or her duties, the employer is obliged to compensate for the damage. An employee bears liability towards the employer for compensation connected to damage incurred by a third party.<sup>79</sup>

## VII. LIMITS TO THE FREEDOM OF CONTRACT

As already mentioned,<sup>80</sup> the existence of an employment contract must be determined on the basis of objective criteria. The concept of 'employee' is mandatory and parties to a contract cannot alter the concept through contractual stipulations. In other words, an employee's rights cannot be waived based on the will of the parties. As regards appointments, elections, nominations or cooperative employment contracts, it is worth mentioning that these can only be concluded in cases specified in the labour law provisions.<sup>81</sup>

## VIII. COLLECTIVE BARGAINING, ESTABLISHED CUSTOM AND PRACTICE

### A. Social Partners

Polish labour law consists primarily of statutory law; collective agreements play a secondary role. Only the legislator may determine or modify the criteria that designate an employee relationship and employee status. There is no room for social partners to modify the statutory notion of 'employee'.

<sup>75</sup> Judgment of the Supreme Court of 18 November 2003, I PK 580/02.

<sup>76</sup> LC, art 101.

<sup>77</sup> *ibid.*

<sup>78</sup> In such a case, a civil law contractor is considered an employee for social security purposes (see section II.A above).

<sup>79</sup> LC, art 120.

<sup>80</sup> See section V above.

<sup>81</sup> See section I.B above.

## B. Custom and Practice

Custom and practice are irrelevant in determining the existence of an employment relationship.

## IX. LEGAL PRESUMPTIONS AND THE SHIFTING OF THE BURDEN OF PROOF

The Supreme Court expressly ruled that Article 22 § 1 LC does not introduce a presumption of the existence of an employment contract.<sup>82</sup> The burden of proof lies entirely with the individual who seeks to prove the existence of an employment relationship. In practice, this applies to civil law contractors who are of the opinion that they have concluded a disguised employment contract.

There is no legal presumption of the existence of an employment contract in the field of social security law either.

## X. SPECIFIC PROCEDURES

In Poland, the labour courts constitute separate organisational judiciary units and are integrated into the judiciary system. The Code of Civil Procedure (hereinafter CCP)<sup>83</sup> of 17 November 1964 introduces a separate procedure for labour disputes. Therefore, the general rules for civil procedures with some modifications apply to labour disputes. Article 476 § 1 CCP covers determinations of the existence of an employment relationship. This provision covers situations in which a civil law contractor seeks to prove that his or her civil law contract is in fact a disguised employment contract. In addition, a labour inspector can evaluate whether a civil law contract has been concluded where an employment contract should have been made and, consequently, whether the employer has breached employee rights.<sup>84</sup> The Social Security Institution can also examine whether a bogus employment relationship was concluded and whether the given employee may in fact qualify for social security benefits.<sup>85</sup>

<sup>82</sup> Judgment of 29 June 2010, case I PK 44/10.

<sup>83</sup> Compiled text: Journal of Laws 2016, item 1822 with further amendments.

<sup>84</sup> LC, art 281, point 1.

<sup>85</sup> See section II.A above.

## XI. THE EXTENSION OF RIGHTS

### A. 'Employee-Like' Persons

In Poland, there is no general category of employee-like persons.

In principle, civil law contractors do not enjoy employee rights. An exception to this rule is home-based workers in the cottage industry (*praca nakładcza*). In principle, this involves simple manual work performed at home. Home-based work is performed on the basis of a civil law contract. According to Article 303 LC, the government shall regulate the scope of application of the provisions of labour law to persons engaged in home working.<sup>86</sup> Some labour law provisions apply to home workers, such as termination of the contract, remuneration for work, paid leave and responsibility for damage caused while performing work.

There is currently a debate in Poland as to whether certain employee rights should be extended to civil law contractors. *De lege lata* there is a strict distinction between an employment contract and a civil law contract for the provision of services (*umowa zlecenia*). Employees enjoy full protection under labour law and social security law. By contrast, civil law contractors (*zleceniobiorca*) are not covered by labour law at all. For example, they are not entitled to overtime remuneration, paid holiday or protection against dismissal. In addition, civil law contracts provide much more limited social security protection than employment contracts.<sup>87</sup> Thus, Poland's labour market is highly segmented. Such differentiation has attracted a lot of criticism. The draft of the new LC<sup>88</sup> explicitly provides that certain employee rights should be provided to persons who carry out work on the basis of an agreement other than an employment contract, in person, continuously, in return for remuneration that amounts to at least half of the minimum statutory wage.<sup>89</sup> Since 1 January 2017, several categories of civil law contractors enjoy the statutory minimum wage.

<sup>86</sup> Regulation of 31 December 1975, Journal of Laws 1976, No 3 item 19 with further amendments.

<sup>87</sup> I Florczak and B Muszyńska, 'Selected Differences between Civil Law and Employment Law Contracts Related to Work on the Grounds of the Polish legislation' in I Florczak and Z Góral (eds), *Developments in Labour Law from a Comparative Perspective* (Łódź, Wydawnictwo Uniwersytetu Łódzkiego, 2015) 43 f.

<sup>88</sup> *Kodeks pracy. Zbiorowy kodeks pracy. Projekty opracowane przez Komisję Kodyfikacyjną Prawa Pracy* (Katowice, Wydawnictwo Uniwersytetu Ekonomicznego w Katowicach, 2010).

<sup>89</sup> See generally AM Świątkowski, 'The Protection of Working Relationships in Poland' in F Pennings and C Bosse (eds), *The Protection of Working Relationships: A Comparative Study* (New York, Wolters Kluwer Law & Business, 2011) 115 f.

## **B. Equality and Anti-discrimination Law**

Article 11 § 2 LC provides that employees have equal rights in terms of the performance of the same duties. This principle applies in particular to the equal treatment of men and women in employment. According to Article 11 § 3 LC, any discrimination in employment, whether direct or indirect, in particular in respect of gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, creed, sexual orientation or in respect of the conditions of employment for a definite or an indefinite period or full-time or part-time work is prohibited. Further provisions are subject to Chapter IIa of the LC ('Equal treatment in employment').<sup>90</sup> The scope of anti-discrimination provisions is broad. They cover the establishment and termination of employment relationships, the conditions of employment, promotion conditions and access to training to improve professional skills and qualifications. The principle of equal treatment in Poland reaches beyond employment. The Law of 3 December 2010 on implementing provisions of the European Union on equal treatment<sup>91</sup> should be mentioned here. The Law determines the scope of application and methods of preventing violations of the principle of equal treatment based on sex, race, ethnic origin, nationality, religion, belief, disability, age or sexual orientation. It applies, inter alia, to taking up vocational training and re-training, taking up self-employment or other occupational activities, in particular within the framework of an employment contract or a civil law contract.

<sup>90</sup> Article 18<sup>3a</sup>—18<sup>3e</sup>.

<sup>91</sup> Journal of Laws 2010, No 254, item 1700. The Law implements Directives Nos 86/613, 2000/43, 2000/78, 2004/13 and 2006/54.