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Right to Work for People with Disabilities

Keywords: disabled person, disability, right to work, human rights, labor market

Słowa kluczowe: osoba niepełnosprawna, niepełnosprawność, prawo do pracy, prawa człowieka, rynek pracy

Abstract

The article refers to the right to work of people with disabilities. The author explains the meaning of the terms “disabled person”, “disability” in the context of international regulations and national legislation. He also points to the foundations of the right to work in the context of the Constitution of the Republic of Poland, as well as the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities. The author draws attention to international regulations of the UN and ILO in this field. The article outlines the realization of this right in the context of employment of people with disabilities in protected labor market entities and on the so-called open labor market.

Streszczenie

Prawo do pracy osób z niepełnosprawnością

Artykuł odnosi się do prawa do pracy osób z niepełnosprawnością. Autor wyjaśnia znaczenie pojęć „osoba niepełnosprawna”, „niepełnosprawność” na tle regulacji międzynarodowych oraz ustawodawstwa krajowego. Wskazuje również na podstawy prawa do pracy w kontekście Konstytucji RP, a także ustawy o rehabil-

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itacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych. Autor zwraca uwagę na regulacje międzynarodowe ONZ i MOP w tym zakresie. Artykuł nakreśla realizację tego prawa w kontekście zatrudnienia osób z niepełnosprawnością w podmiotach chronionego rynku pracy oraz na tzw. otwartym rynku pracy.

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I. Introduction

The right to work is one of the fundamental human rights. It has been qualified to the second generation of rights, i.e. economic and social rights. People with disabilities are a group particularly vulnerable to difficulties in taking up employment. The article addresses the issue of the right to employment of disabled people under national and international law.

II. Definition of the Terms “Disabled Person”, “Disability”

It should be noted that the Constitution does not provide a definition of terms “disability” and “person with disabilities”. Constitutional Court in its judgment of July 7, 2015 pointed out that “these are ambiguous terms, referring to the various functional limitations that appear in every human population in the world. The constitutional concepts, and therefore the concept of “persons with disabilities”, are in principle treated as autonomous. In the search for their understanding, however, one cannot completely dissociate oneself from the meaning of these concepts developed in case law, ordinary legislation or the regulations of EU and international law...”².

The legal act defining the notion of a “disabled person” is the Charter of Rights of Persons with Disabilities³ adopted by the Sejm on August 1, 1997. It assumes that persons with disabilities are those

² Judgment of Constitutional Tribunal of 7 July 2015, sign. K. 47/12, Dz.U. 2015 item 996.

³ Resolution of Polish Sejm of 1 August 1997, M.P. 1997 No. 50 item 475.

whose physical, mental, or psychological fitness permanently or periodically hinders, restricts, or prevents them from living, studying, working, and fulfilling social roles. The definition of a disabled person was further specified in the Act on Vocational Rehabilitation of 27 August 1997, and social and employment of disabled people⁴. The legislator, in Article 1, has defined the subjective scope of the Act, which concerns persons whose disability has been confirmed by one of the rulings indicated in the provision:

1. on qualification by the adjudicating bodies to one of three degrees of disability (mild, moderate, or significant),
2. with total or partial inability to work,
3. about a disability, issued before the age of 16.

The latest definition in the Polish legal system is contained in the Electoral Code⁵. The term “disabled” is considered: a “voter with limited physical, mental, psychological or sensory abilities which make it difficult for him/her to participate in elections”. It should be emphasized that this notion raises numerous doubts because it has not been unified with the already binding legal definitions in Polish law⁶.

The clarification of the definition of “disabled person” should also be sought in supranational acts. The Convention on the Rights of Persons with Disabilities⁷ is a legal act that comprehensively regulates the rights of persons with disabilities. According to the Convention, the term “persons with disabilities” should be understood: “persons with long-term physical, mental, intellectual or sensory impairments which may, in interaction with various barriers, impede their full and effective participation in society, on an equal basis with others”.

The Convention No. 159 of the International Labor Organization⁸ concerning Vocational Rehabilitation and Employment of Persons with Disabil-

⁴ Dz.U. 1997 No. 123 item 776.

⁵ Act of 5 January 2011 – Electoral Code Dz.U. 2011 No. 21 item 112.

⁶ M. Florczak-Wątor, *Status prawny wyborcy niepełnosprawnego*, “Przegląd Prawa Konstytucyjnego” 2011, No. 3, pp. 111–112.

⁷ Adopted in New York by the UN General Assembly on 13 December 2006 and ratified by the President of the Republic of Poland on 6 September 2012, Dz.U. of 2012 item 1169.

⁸ Dz.U. of 2005 No. 43 item 412.

ities defines the term “person with disabilities”. According to the first article of that act, the term “person with a disability” in question means a “person whose opportunities for obtaining and maintaining adequate employment and for professional advancement are significantly reduced as a result of a loss of physical or mental capacity, duly established”.

When analyzing the definitions of disability in the context of EU legislation, it should be noted that the European Union has not adopted a uniform definition of this concept that would be valid in all Member States, with the result that there is no uniform system of jurisprudence⁹. This concept has been developed in the case-law of the Court of Justice of the European Union. In the *Chacon Navas*¹⁰ judgment, the Court pointed out that disability “must be understood as a limitation resulting specifically from an impairment of physical, mental or psychological functions which constitutes an obstacle for the person concerned in participating in professional life”. The EU Court has extended this concept to include elements contained in the definition of the UN Convention on the Rights of Persons with Disabilities, which has been ratified by the European Union after this judgment¹¹. Subsequent decisions of the CJEU clarified these concepts in the context of the definition in the mentioned Convention on the Rights of Persons with Disabilities¹².

⁹ A. Dral, *Ochrona pracowników niepełnosprawnych*, [in:] *System Prawa Pracy*, TOM X *Międzynarodowe Publiczne Prawo Pracy Standardy Europejskie*, ed. K.W. Baran, Warszawa 2019, p. 775.

¹⁰ Judgment of 11.07.2006 in the case C-13/05 *Sonia Chacon Navas v. Eures Colectividades SA*, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30db17c69033594643eba395cbdf9bc206c6.e34KaxiLc3qMb40Rch0SaxuLa310?text=&docid=63729&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=18800> (20.11.2020).

¹¹ Council decision No. 2010/48/WE of 26 November 2009 on the European Community’s Convention of United Nations on the rights of disabled persons (Dz. Urz. UE L 23 of 27.01.2010).

¹² Judgment of 11.04.2013 in joined cases C-335/11 and C-337/11, HK Danmark acting on behalf of *Jette Ring v. Dansk almennyttigt Boligselskab* and HK Danmark, acting on behalf of *Lone Skouboe Werge v. Dansk Arbejdgiverforening*, acting on behalf of Pro Display A/Sin bankruptcy, Judgment of 01.01.2016 in the case C-395/15 *Mohamed Daoudi v. Bootes Plus SL*, Fondo de Garantia Salarial, Misterio Fiscal, and Judgment of 22.05.2014, in the case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*.

III. Legal Basis for the Right to Work of Disabled People

The legislature does not explicitly refer to the concept of the “right to work” in the constitution. This does not mean, however, that the Article 65 Section 1 of the Basic Law only guarantees the freedom to work for all people. Although the Article 65 of the Constitution does not contain a reference, the right to work is included in the paragraph 5 of this provision. Namely, paragraph 5 of Article 65 provides guarantees for the right to work in the form of policies implemented by public authorities. Its main objective is to strive for productive and full employment. A similar situation is found in the Article 10 of the Labor Code, which includes this type of policy among the basic principles of labor law¹³.

The right to work is included in the ILO and UN regulations. In Convention No. 159, the ILO obliged the Member States to conduct policies in the field of rehabilitation of disabled persons aimed at professional activation in the open labor market. Recommendation 168¹⁴ indicates that employment should be in line with the individual’s own choice of the disabled person, as well as taking into account her abilities and allowing for professional advancement. In turn, the UN Convention in Article 27 recognizes the right of persons with disabilities to work on an equal basis with others. The implementation of this right will be protected by the States Parties and will require that they take appropriate steps, including legislative ones. In particular, they will include prohibiting discrimination based on disability, promoting employment opportunities for people with disabilities in the labor market, and introducing reasonable accommodation in the workplace¹⁵.

IV. Realizing the Right to Employ People with Disabilities

People with disabilities have been recognized by the Polish legislator as a special category of people on the labor market. The state, by implementing the

¹³ T. Zieliński, *Prawo do pracy – problem konstytucyjny*, “Państwo i Prawo” 2003, No. 1, p. 7.

¹⁴ Recommendation 168 of the International Labour Organisation concerning vocational rehabilitation and employment of disabled people adopted on 20 June 1983.

¹⁵ K. Roszewska, *Prawo do zatrudnienia osób z niepełnosprawnościami według regulacji MOP i ONZ*, “Praca i Zabezpieczenie Społeczne” 2018, No. 5, pp. 17–18.

obligations arising from the Constitution of the Republic of Poland and the regulations of international law and the European Union, supports the employment of people with disabilities.

One of the forms of support for the professional activation of disabled people is employment on the protected labor market, which is intended exclusively for this category of people. Protected employment consists of sheltered workshops, professional activity workshops, and social cooperatives of the disabled. The legislator has made it possible to create and run entities of the protected labor market by the sector of private entrepreneurs. In the case of professional activity companies, however, the law also gives such a possibility to local government units. Obtaining the status of a protected labor market entity and detailed obligations and entitlements is specified in the Act on professional and social rehabilitation and employment of disabled persons.

Taking up a job on the so-called open labor market is available to all people taking into account their professional competences and qualifications. This means that a disabled person is accepted and works under the same conditions as a fully operational person. However, the employer may use economic instruments supporting the employment of disabled people on the open labor market. The legislator has provided for the following rights: exemption from payments to the State Fund for Rehabilitation of the Disabled, reimbursement of costs of training for the disabled employee, reimbursement of costs of employment of an employee assisting the disabled employee at work, reimbursement of costs of equipping the workplace for the disabled person, reimbursement of costs of equipping the workplace for the disabled person and co-financing of salaries of the disabled¹⁶. At the same time, it is worth emphasizing that an employer, when employing a disabled employee, must consider special provisions concerning, among others, working time, vacation leaves, or other additional rights resulting from the separate status of a disabled employee. It is also important to ensure rational improvements in the workplace, which are permanent, and guarantee the principle of equal treatment of employees¹⁷.

¹⁶ M. Skóra, *Employment of people with disabilities in the open labour market in Poland. Selected Aspects*, [in:] *New form of employment. Current problems and future challenges*, eds. J. Wratny, A. Ludera-Ruszel, Wiesbaden 2020, pp. 291–294.

¹⁷ A. Bodnar, A. Śledzińska-Simon, *O potrzebie ratyfikacji Konwencji ONZ o Prawach Osób z Niepełnosprawnościami*, „Europejski Przegląd Sądowy” 2012, No. 5, p. 6.

To sum up these considerations, the realization of the right of people with disabilities to work on an equal footing with others is served by legal regulations stimulating the employment of people with disabilities in the open labor market and sheltered working conditions¹⁸.

V. Summary

The results of the Labor Force Survey indicate that in 2019 the coefficient of economic activity of disabled people of working age was at the level of 28.8%. In the last decade, we could observe a positive trend of 4.2 percentage points increase in this coefficient. The unemployment rate of people with disabilities at working age was 7.2%. In the last decade, there has been seen a decline in the unemployment rate of 5.6 percentage points, and the employment rate has also increased to 26.8%. The number of economically active people of working age was at the level of 458 000 (of which 425 000 are working people, 33 000 are unemployed). The State Fund for Rehabilitation of the Disabled registered 247 000 disabled employees in the Register of Employed Disabled Persons, for whom it subsidizes salaries. Including 100 200 people on the protected labor market and 146 800 people on the open labor market¹⁹. These data indicate greater activity of the disabled on the open labor market and a decrease in employment in sheltered workplaces and occupational activity establishments, which indicates a reversal of the previous proportions.

However, it is worth mentioning that despite a wide range of economic measures supporting employers employing people with disabilities, the level of the professional activity of this group of people is much lower than that of fully capable people. This is undoubtedly due to various factors. First of all, the research commissioned by PRFRON shows that employers consider the regulations on the employment of disabled people as unstable, inconsistent,

¹⁸ M. Szablowska-Juckiewicz, *Prawo osób niepełnosprawnych do pracy – zarys problematyki*, [in:] *Zatrudnianie osób niepełnosprawnych*, eds. A. Giedrewicz-Niewińska, M. Szablowska-Juckiewicz, Warszawa 2014, p. 75.

¹⁹ Data behind the website:

www.niepelnosprawni.gov.pl/p,80,rynek-pracy (30.11.2020).

and inadequate to the needs of employers²⁰. The second reason concerns numerous bureaucratic obligations imposed on employers in connection with hiring this group of people²¹. It is certainly a worrying phenomenon that too little attention is paid to people with disabilities in terms of their education and access to vocational training²².

To sum up, the presented considerations, raising the level of employers' knowledge of legal instruments supporting the employment of people. The situation of disabled people in the labor market will be significantly improved by stable and comprehensive legal regulations in this area. Besides, the legislator should strive to reduce the bureaucratic burden for employers wishing to employ disabled employees. It also seems necessary to make the employment relationship more flexible and to use teleworking as a form of employment for people with disabilities.

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²⁰ A. Kowalczyk, *Bezrobocie a niepełnosprawność. Rehabilitacja zawodowa jako przejaw aktywizacji zawodowej osób niepełnosprawnych – Wybrane zagadnienia*, "Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria prawnicza" 2017, No. 27, p. 57.

²¹ L. Grzonka, *Zatrudnianie osób niepełnosprawnych*, Warsaw 2010, p. 65.

²² M. Szablowska-Juckiewicz, *Aktywizacja zawodowa jako metoda przeciwdziałania wykluczeniu społecznemu osób niepełnosprawnych*, [in:] *Tendencje rozwojowe indywidualnego i zbiorowego prawa pracy. Księga Jubileuszowa Profesora Grzegorza Goździewicza*, eds. M. Szablowska-Juckiewicz, B. Rutkowska, A. Napiórkowska, Toruń 2017, p. 720.

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