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The legal status of trade unions that associate workers employed under civil law contracts and trade union officials in Poland

Status prawny związków zawodowych zrzeszających osoby zatrudnione na umowach cywilnoprawnych i ich działaczy w Polsce

Abstract
The article is devoted to the issue of the coalition in trade unions of persons employed on civil law basis. The notion of civil law employment may be understood in different ways. In the narrow interpretation (sensu stricto) it refers only to individuals who perform work under civil law agreements, such as a contract of mandate or an agreement on the provision of services. In the wider sense (*sensu largo*), one might also add performing work by self-employed persons (b2b). Moreover, the article discusses some aspects of the status of trade union officials performing work on a civil law basis

Keywords
collective labour law, trade unions, civil law contracts, trade union officials

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Streszczenie
Artykuł poświęcony jest problematyce zrzeszania się w związkach zawodowych osób zatrudnionych na podstawach cywilnoprawnych. W szerokim zakresie tego rodzaju uprawnienia wprowadziła nowelizacja z 5 lipca 2018 r. do ustawy o związkach zawodowych. Odnosi się ona zarówno do zatrudnionych na podstawie umów z kodeksu cywilnego, jak i samozatrudnionych. Ponadto w artykule omówiono niektóre aspekty statusu działaczy związkowych świadczących pracę na podstawach cywilnoprawnych.

Słowa kluczowe
zbiorowe prawo pracy, związki zawodowe, umowy cywilnoprawne, działacze związków zawodowych

Introductory remarks

The amendment to the Trade Unions Act (Journal of Laws of 1977, item 263) of July 5 2018 was a certain *aggiornamento* of the collective labour law to contemporary industrial relationships. In this matter, we are dealing with a non-comprehensive reconstruction of this part of labour law. It changes, to a certain extent, the model of functioning of trade unions in the Polish legal system. What I mean here, first of all, is the extension of the scope of the subjective collective employment law to cover persons employed based on civil law contracts (cf. Żołyński, 2019a). The notion of civil law employment may be understood in different ways. In the narrow interpretation (*sensu stricto*) it refers only to individuals who perform work pursuant to civil law agreements, such as a contract of mandate or an agreement on the provision of services. In the wider sense (*sensu largo*), one might also add performing work by self-employed persons (b2b). For the purposes of this study, the second interpretation convention will be used.

The right to coalition of individuals employed based on civil law contracts

The starting point for further discussion will be the claim that the amendment of July 5 2018 to the Trade Unions Act granted the individuals who perform work based on civil law contracts *sensu largo* a full right to coalition (more on the right to coalition: Grygiel-Kaleta, 2015, passim). This applies to individuals employed both pursuant to named and unnamed civil law contracts. The argument *lege non distinquente* leads to the conclusion that the right to coalition does not distinguish between agreements based on due diligence (e.g. contract of mandate) and on the results (e.g. a contract to perform

a specific work). In the second case, this type of obligatory status may generate serious problems in the practical functioning of collective labour relationships. The right to coalition is also granted to persons who perform work based on agency agreements, provided that they do not employ another person at the same time. Members of agricultural cooperatives also have the right to associate by forming trade unions. However, this does not apply to their household and family members.

In the light of the regulations included in the amended Article 2, item 1 of the Trade Unions Act, the problem of persons employed based on managerial contracts arises. These contracts are usually civil law agreements. This means that such individuals have the full right to coalition, provided that they do not employ other persons. This type of mechanism raises certain doubts, because in practice it may lead to the emergence of small, but influential associations of managers, which might, as a consequence, introduce some dysfunctions to the employment relationships.

De lege lata, the right to form trade unions and to associate has been granted to self-employed individuals. In practice, this means that sole proprietors who do not employ other people to perform this type of work and have the rights and interests that may be represented by trade unions, have the full right to coalition. This right introduces a completely new quality to Polish collective labour relationships.

Among persons who are employed based on civil law contracts, only those whose rights and freedoms may be defended collectively may associate in trade unions (Grzebyk & Pisarczyk, 2019, p. 85 ff.). In practice, the rights and interests in question concern, mainly, the conditions of work (e.g. organisational or technical), the remuneration conditions (e.g. the principles of redistribution of financial means), and social conditions (e.g. spending the funds from the company social benefits fund). However, this list is of a merely exemplary nature. It refers, *ab examplo*, to the regulations of Article 1 of the Act on resolving collective disputes. This provision outlines the most important planes of collective interests in labour relationships. The proposed interpretation option has its roots in the *a cohaerentia* argumentation.

To sum up the discussion so far, I should state that among individuals who perform work based on civil law agreements, only those who do not employ other people in their businesses may associate in trade unions. Thus, if they employ eve one person, they lose their right to trade union coalition (cf. Baran, 2019a, p. 85 ff).

The status of a trade union member is acquired voluntarily. No individual who performs work based on a civil law agreement can be forced to participate in trade union structures. In the Polish legal system, the principle of negative freedom of coalition applies also to this category of the employed. In practice, the important issue is whether the statute of a trade union may limit the statutory subjective scope of freedom of association. Personally, I represent the belief that introducing limitations in the statute seems acceptable, provided that they are not introduced with the aim to discriminate, in particular based on gender (cf. Wandzel, 2003, passim), age, race, and religious beliefs or political views. This position seems to be supported by the provisions of Article 3 of Convention No. 87. In practice, this means that limitations of a professional, sector-related or territorial nature are permitted, as well as the basis for employment.

Trade unions that associate individuals employed pursuant to civil law contracts

A trade union may be established by 10 (ten) people who are employed based on civil law contracts. Adopting the resolution on establishing a trade union should precede the resolutions adopting its statute and appointing the founding committee. The Committee should file a motion for the registration of the trade union to the district court within thirty days (cf. e.g. Tomaszewska, 2014, p. 269 ff.). The motion should be filed on an official template form defined in the Ordinance of the Minister of Justice. During the proceedings, the court analyses the submitted documents, to verify, in particular, whether they are compliant with the provisions of the Trade Unions Act. If they are compliant with the law, then the trade union is entered in the National Court Register. The trade union acquires legal personality on the date of registration. This means in practice that it may participate in legal transactions in industrial relationships.

The trade union has the rights of the workplace trade union organisation or an inter-workplace trade union organisation if it associates at least 10 members who are employed based on civil law contracts *sensu largo*. The quantitative verification of members is performed on the general conditions specified in Article 251 of the Trade Unions Act (cf. Baran, 2019b, pp. 8–11; Żołyński, 2019b, pp. 12–15). Here, it is worth noting that a person employed pursuant to a civil law contract who belongs to several trade union organisations may be considered as a member of only one organisation selected by them. This may take any form, even conclusive. In a situation when a "multi trade union member" who performs work under a civil law contract does not select any organisation, they cannot be considered as a member of any such trade union organisation.

A trade union organisation that associates persons employed based on civil law contracts *sensu largo* may also represent employees in industrial relationships. This interpretation is supported by the provisions of Article 7, item 1 of the Trade Unions Act. Thus, in the collective aspect, such organisation may represent the rights and interests of all categories of employees (cf. Baran, 2019a, pp. 56–57). An opposite legal mechanism functions in individual cases, where only members of the given trade union organisation are protected. In special cases, the

trade union organisation may also represent the employed who are not its members, if they filed the relevant motion. It is worth noting here that the trade union organisation is by no means obliged to accept such motion. According to the principle of independence, the legislator leaves the decision to be made at the discretion of the organisation.

Trade union organisations that associate individuals employed pursuant to civil law contracts have *de lege lata* an equal status as organisations that associate employees. *Natura rerum*, the scope of their competences is, however, slightly different from that of trade unions that associate employees. Let me present the basic scope of competences of these organisations here:

- the right to collective bargaining (e.g. over collective labour arrangements, or other collective agreements) (cf. e.g. Sanetra, 1998, p. 3 ff.),
- taking positions towards the employer or associations of employers in cases concerning the collective rights and interests of persons employed pursuant to civil law contracts,
- exercising control over the compliance with occupational health and safety regulations of persons who are employed pursuant to civil law contracts *sensu largo*, (cf. Baran, 2019a, p. 1650),
- taking positions towards the employer in individual cases of trade union members,
- consulting internal regulations (e.g. by-laws or statutes),
- v the right to information necessary to conduct trade union activities and related to the employer's statute (e.g. in human resources policy or remuneration principles) (cf. Baran, 2019a, p. 176 ff.),
- the right to initiate and conduct collective disputes, including the right to strike and protest, (cf. e.g. Hajn, 2013, p. 182 ff.),
- the right to obtain premises necessary to conduct trade union activities from the employer (cf. e.g. Baran, 2019a, pp. 233–234),
- participation in court proceedings of trade union members,
- the right to conduct business activity cf. e.g. Latos-Miłkowska, 2020, p. 6 ff.).

The list is not of an enumerative nature. It is only an example of the basic rights of trade union organisations that associate persons employed pursuant to civil law contracts. A detailed description of these rights would exceed the scope of this study.

Trade union officials

To continue our discussion on the status of trade unions that associate persons employed pursuant to civil law contracts, one should also present the status of trade union officials. Let us start with the statement that their rights are similar to those of employees (cf. Baran, 2019a, p. 216 ff). This refers, on the one hand, to the right to "union leave", and on the other, to the protection of the durability of employment. I will start the analysis with the leave. Pursuant to art. 31, item 1 of the Trade Unions Act, the right to be released from the duty to perform work is granted for the term in the governing body of the workplace trade union organisation. This means that it lasts only as long as the mandate. Thus, if the term of members of the board is shortened pursuant to a resolution adopted by its members or if the mandate expires due to other reasons, the official cannot use the release from the duty to perform work any longer. However, if the term has been prolonged, even contrary to the provisions of the trade union statute, the right to be released from work still applies. The re-election to the governing bodies for another term also entitles the employee to be released from the duty to perform work.

If the employer refuses to grant such leave, the person who performs work pursuant to a civil law contract *sensu largo* may demand such leave in court. However, they must not abstain from performing work, because such unauthorised omission might expose them to legal sanctions foreseen in the Civil Code.

Pursuant to Article 31, item 1 of the Trade Unions Act, the factor that determines the number of persons entitled to be released from the duty to perform work, as members of the governing body, is the total number of members of the workplace trade union organisation. The more members it has, the more members of the management board are entitled to "union leave". The legislator used the principle of progressiveness, with the delimitation criteria at the levels of 150, 500, or 1000 members. Thus, Polish legislation respects the directive of adequacy adopted in Article 2, item 2 of Convention on the protection of workers' representatives in enterprises and granting them certain facilitations (Journal of Laws No. 39/of 1977, item 178) which stipulates that when granting the rights to workers' representatives, one should take into consideration the size and possibilities of the employing entity.

The release from performing work for members of the management of the workplace trade union organisation may also be divided pursuant to Article 31, item 1(6) of the Trade Unions Act and allocated to various officials of the trade union. The trade union organisation is the only entity competent to make this decision, and the employer cannot challenge its legitimacy.

Pursuant to Article 31, item 2 of the Trade Unions Act, a person who performs paid work pursuant to a civil law contract *sensu largo* shall be entitled ex lege to all rights and benefits during the period of release from work. This view is justified by the *lege non distinquente* argument. The only exception is the right to remuneration or financial consideration, which is granted in request of the trade union organisation.

Pursuant to Article 31, item 4 of the Trade Unions Act, a trade union official who is employed pursuant to a civil law contract *sensu largo* also has the right to be released from work for the time necessary to perform emergency actions. However, this provision does not foresee a precise time of leave for the purposes of performing emergency actions. Thus, it should be

proportional to the duration of such actions, assuming that the action is performed in a normal way, with use of ordinary means (e.g. travel by public transport). The duration of emergency actions usually should not exceed one working day. They may last longer only in extraordinary situations that are justified by objective circumstances. After the emergency action has been performed, the official should return to the workplace immediately, i.e. as soon as it is possible in the normal way and with use of normally used means of transport, if it results from their normal daily work time schedule. At the same time, the period remaining to the end of work on the given days is irrelevant. Article 31, item 4 *in fine* of the Trade Unions Act foresees that the official is entitled to remuneration for the time of performing emergency actions, unless specific regulations state otherwise. It is undisputable that such regulations may be of the statutory or enforcement nature (e.g. an ordinance). However, this issue raises the question whether this type of limitations related to remuneration may be imposed by arrangement standards, such as collective arrangements or other collective agreements, or by-laws. The answer to this question has to be negative, as Article 9 para. 1 of the Labour Code, whose systemic interpretation is applicable here, provides a clear distinction between regulations and decisions. The presented interpretation option is also strongly rooted in the *a cohaerentia* and *a completudine* argumentation.

Article 31, item 5 of the Trade Unions Act stipulates that the agreement concluded between the employer and a person other than the employee who performs paid work with a defined period of performing work shall not be prolonged by the time of release from work in order to perform emergency actions. This provision is applicable *explite* to all temporal civil law contracts, both those based on efficient work and on the results. In particular the latter will require the person other than an employee, who performs paid work, to plan their professional activity in detail.

Trade union officials (e.g. members of the board) who are employed pursuant to civil law contracts *sensu largo* are subject to the protection of durability of legal relationship pursuant to Article 32 of the Trade Unions Act (cf. e.g. Dral, 2018, p. 243 ff). This applies both to the termination of a civil law contract upon notice and to termination without notice. The employer is always obliged to obtain the trade union's consent for terminating the civil law relationship with the protected official. The consent or refusal to grant consent for the termination, dissolution, or modification of the legal relationship of trade union officials does not require justification. However, this does not mean that it may be granted in an arbitrary way. The management of the workplace trade union organisation or another authorised entity should take into account all the circumstances of the case, also the best interest of the work establishment. In particular, it must not ignore the facts specified by the employer in the notice. A decision on this matter that omits such facts is a violation of the law that is not subject to protection. The normative instrument that is aimed at eliminating such practices is Article 5 of the Civil Code.

The ineffective expiry of the periods specified in Article 32 item 1^1 (l) and (2) of the Trade Unions Act means that, pursuant to l1 of this provision, the workplace trade union organisation has expressed its consent. In the normative sphere we are dealing with legal fiction, i.e. a norm that orders to counterfactually accept the existence of a certain legal fact (i.e. expressing consent) which, in fact, did not take place. This mechanism means uncertainty in industrial relationships, which is very important in the light of expanding the right to coalition to wide groups of non-employees. The provisions of Article 32 item l2 of the Trade Unions Act refers to the classic formula by Cicero: which became topical in the times of Justinian: *qui tacuit, cum loqui debuit et potuit, consentire videtur* (who was silent when he could and should speak, is considered to have consented).

The binding legislation regulate the claims to which trade union officials employed based on civil law contracts *sensu largo* are entitled. Pursuant to Article 32, item 1^3 of the Trade Unions Act, if the employer violates the principles of protection, the person other than an employee who performs paid work is entitled, regardless of the value of the damage suffered, to compensation equivalent to six months' remuneration that the person received in the last period of employment, and if the remuneration of this person i not paid monthly — in the amount equal to six average monthly remunerations in the national economy, as announced in the manner specified in the Act of March 4 1994 on the Company Social Benefits Fund. Additionally, the person employed pursuant a civil law contract may claim compensation or damages exceeding the amount specified above. This means that the person performing gainful work is entitled to three main claims:

- ❒ for compensation,
- ❒ for damages,
- ❒ for redress.

The nature of the compensation foreseen in Article 32 item 13 of the Trade Unions Act is not only compensatory, but also punitive, as it does not correlate directly with the damage that occurred as a result of termination, dissolution or modification of the legal relationship. As a result, the amount of compensation may exceed the value of the damage. This type of interpretation is supported *expressis verbis* in the literal wording of the Act ("regardless of the value of the suffered damage").

The provisions of Article 32 item l3 explicitly define the six months' remuneration worth of compensation. In this light, the problem of raising the compensation arises. Personally, I accept such possibility based on arrangement or obligatory regulations. However, it generally does not seem possible to lower this amount, as Article 32 item l3 uses the term "amount equal" twice.

Pursuant to Article 32 item l3 in fine of the Trade Unions Act, a person employed pursuant to a civil law

contract is entitled to claim damages or redress exceeding the amount of compensation. The damage refers to all damages resulting from the violation of the terms and conditions of termination, dissolution and unilateral change of the legal relationship by the employer. In terms of property it may, *lege non distinquente*, include both the damage suffered and the lost benefits. Although the Trade Unions Act accepts full compensation as a rule in this respect, which correlates with Article 361 § 2 of the Polish Civil Code, taken together with Article 32 item 1[3] *in fine* of the Trade Unions Act, it does not include the so-called potential damages, which are not redressed on these grounds.

Analogical mechanisms apply in cases of pursuing compensation it the protected trade union official suffered personal damages as a result of the violation of the conditions foreseen in Article 32, item 1 of the Trade Unions Act. Its functions include not only the obvious compensatory function, but also preventive and educational functions, as it should prevent the employer from violating the rights of the protected trade unionist other than an employee.

Conclusion

To summarise the deliberations on the trade union rights of persons who perform work based on civil law contracts *sensu largo* in the Polish collective labour law system, it should be concluded that, pursuant to the amendment to the Trade Unions Act of July 5 2018, these rights are now in many dimensions equal to those of employees. The legal status of trade unions that associate this category of workers does not differ significantly of the status of employee trade unions, either. As a result, this type of legal mechanism enables more effective protection of the rights and interests of persons employed pursuant to civil law contracts.

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