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MONIKA LATOS-MIŁKOWSKA[1]

The Protection of Employers' Interests during the Coronavirus Pandemic. The Case of Poland[2]

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Abstract

The aim of this study is to offer a critical analysis and assessment of the solutions introduced to the Polish labour law in order to protect employers' interests during the coronavirus pandemic and of the economic crisis the pandemic has caused. The solutions introduced by the Polish legislator in connection with the coronavirus pandemic within the framework of the so-called Anti-Crisis Shield have been thoroughly examined. The conducted analysis, however, is part of a broader trend of research on the solutions incorporated into the labour law in force in connection with the pandemic, implemented on the basis of the legislation of particular European countries. The author proposes a thesis that the introduced solutions, assessed collectively, have fulfilled their purpose – they have made it possible for employers to survive in spite of the restrictions on the way they conduct their business and have curbed the increase in unemployment. However, the analysis of particular solutions that were applied reveals their numerous shortcomings, including those related to compliance with European law and the Polish Constitution. The results of the research are original and may be a valuable contribution to further, more in-depth scientific studies, becoming a point of reference for comparative legal research. The drawn conclusions indicate also the directions of changes occurring in regulations.

Keywords: employers' interests, protection, epidemic, coronavirus, management authority, working and pay conditions.

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MONIKA LATOS-MIŁKOWSKA[3]

Ochrona interesu pracodawcy w czasie pandemii koronawirusa. Przypadek Polski

Streszczenie

Celem niniejszego opracowania jest krytyczna analiza i próba oceny rozwiązań wprowadzonych do polskiego prawa pracy w celu ochrony interesu pracodawcy w czasie epidemii koronawirusa i wywołanego nią kryzysu ekonomicznego. Analizie poddano rozwiązania wprowadzone przez polskiego ustawodawcę w związku z epidemią koronawirusa w ramach tzw. Tarczy antykryzysowej. Ze względu na krajową specyfikę tych rozwiązań artykuł nie zawiera odwołania do uregulowań obowiązujących w innych krajach. Przeprowadzona analiza wpisuje się jednak w szerszy nurt badań nad rozwiązaniami wprowadzanymi w prawie pracy w związku z epidemią podejmowanych na gruncie ustawodawstw poszczególnych państw europejskich. Autorka prezentuje tezę, że wprowadzone rozwiązania oceniane łącznie spełniły swój cel - pozwoliły pracodawcom przetrwać pierwsze półrocze stanu epidemii i przyczyniły się do ograniczenia wzrostu bezrobocia. Analiza poszczególnych przyjętych rozwiązań ukazuje jednak ich liczne mankamenty, w tym również dotyczące zgodności z prawem europejskim i Konstytucją RP. Wyniki badań mają charakter oryginalny, mogą być przyczynkiem do dalszych, bardziej pogłębionych badań naukowych oraz stanowić punkt odniesienia dla badań o charakterze prawnoporównawczym. Przyjęte wnioski wskazują również kierunki zmiany regulacji.

Słowa kluczowe: interes pracodawcy, ochrona, epidemia, koronawirus, uprawnienia kierownicze, warunki pracy i płacy.

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Introductory remarks

The coronavirus pandemic and the economic consequences it has caused are unprecedented. For the first time ever, we are dealing with the phenomenon of a global pandemic which has undermined the foundations of market economy to such a considerable extent. The fight against it has made it necessary for the governments of individual countries to make decisions radically restricting the freedom of conducting business activity – including decisions to suspend the functioning of particular economic sectors. The imposed lockdown meant that a great many of employers had to completely abandon their operations or radically limit the scope of the activities they were involved in virtually overnight, which obviously had an impact on their ability to make any profit and on their financial situation. At the same time, limiting or even cancelling the possibilities of doing business was a threat to the labour market, heralding its collapse and therefore an increase in the rate of unemployment. This is because a natural consequence of such a situation is that employers decide to dismiss employees. A real threat of an economic crisis of an unparalleled scale prompted the governments of most countries to take far-reaching measures to save the economy.

The Polish government imposed restrictions on the functioning of many economic sectors as early as in March 2020. At the same time, there began legislative work on the so-called Anti-Crisis Shield.[4] The resulting act, passed on 31 March 2020, was subsequently amended several times. The subsequent editions of the Anti-Crisis Shield featured regulations aimed at, among others, employers affected by the coronavirus pandemic.

The purpose of this text is to provide a comprehensive analysis of the measures incorporated in the Anti-Crisis Shield in order to protect the interests of employers, i.e. the solutions related to the situation of employment of employees. The starting point will be an attempt to establish the rationale guiding the legislator when introducing these solutions. Then, the analysis will focus on the instruments used by the legislator to provide the protection of employers' interests – and on the

[4] Act of 2 March 2020 on special solutions related to preventing, counteracting, and combating covid-19, other infectious diseases, and crisis situations arising therefrom (Journal of Laws of 2020, item 374, as amended), hereinafter also referred to as the Anti-Crisis Shield.

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subject of protection. Finally, an attempt to evaluate the effects of these regulations will be made.

The *ratio legis* of the introduced regulations

The presentation and assessment of regulations aimed at protecting the interests of employers in connection with the coronavirus pandemic and its consequences should be made from the point of view of the goals that the legislator wanted to achieve by introducing them. Therefore, first of all, an attempt should be made to identify them.

One of the objectives of the regulations in question was certainly to enable employers to quickly adapt the organizational conditions of work to new circumstances. An expression of this intention was, for example, the permission to unilaterally switch to remote work, which helped some employers maintain the continuity of their operations.

The legislator's clear goal was also to improve the financial condition of employers, which was manifested in particular in the transfer of public funds allocated to co-financing employees' salaries, statutory reduction of certain work-related benefits, or the possibility of suspending the provision of social benefits financed by the employer.

Last but not least, the legislator's goal was to save jobs.[5] The improvement of the situation of employers – especially of their financial condition – was to limit the trend of layoffs and convince employers to maintain the current levels of employment, even beyond the real need. The normative expression of this involved connecting some protective measures – e.g. subsidizing employees' salaries – with the ban on terminating employment contracts.

It can therefore be concluded that the legislator gives employers instruments enabling them to operate as usual at least partially (to the extent possible) in new external conditions and takes measures to improve the financial condition of employers in order to enable them to survive the pandemic and then return to normal functioning and to save the existing jobs.

[5] As Z. Hajn points out, "Protection of jobs can also be viewed broadly, as an entirety of legal solutions reducing the number of dismissals on a social scale", Z. Hajn, *Ochrona miejsc pracy z interes pracodawców*, [in:] L. Florek (ed.), *Prawo pracy a bezrobocie*, Warszawa 2003, p. 26.

Measures to protect the interests of employers under the Anti-Crisis Shield

In order to provide protection to employers in the era of the coronavirus pandemic, the legislator has employed a wide range of legal measures, among which the following can be distinguished:

- increasing the scope of the management authority of employers,
- introduction of extraordinary methods of changing the content and provisions of employment contracts,
- statutory reduction of certain benefits resulting from employment relationship,
- providing direct financial support from public funds in relation to the protection of jobs,
- enabling the suspension of the employer's obligation to provide social benefits.

A synthetic description of the implemented solutions is provided below.

Increasing the scope of the management authority of employers

Management authority, in the broadest sense, is understood as the possibility for an employer to unilaterally shape the content of the employment relationship. As H. Lewandowski points out, management authority includes "everything that serves to make use of the workforce which the employee offers to the workplace under the contract and the applicable regulations."[6] This essentially means that in an employment relationship, the employer has a certain range of powers and rights by means of which they can shape the nature of this employment relationship through official orders. The scope of the employer's management authority results from the provisions of the labour law in force and of the content of a given employment contract.[7]

The scope of an employer's executive authority is of crucial importance from the point of view of the protection of the employer's interests in the sphere of functioning of the employment relationship. It can be said that the wider the scope of executive authority in a particular employment relationship, the better the

6 H. Lewandowski, *Uprawnienia kierownicze w umownym stosunku pracy*, Warszawa 1977, p. 26.

7 M. Latos-Miłkowska, *Ochrona interesu pracodawcy*, Warszawa 2013, pp. 81–83.

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employer's interest is secured.[8] The legislator often uses this measure in the provisions of the Anti-Crisis Shield – there is a noticeable increase in the employer's range of authority in the scope of the privilege to unilaterally shape the content and nature of the employment relationship.

The most essential expression of an increased scope of management authority of employers is the possibility to introduce the so-called remote work model by the employer's order.[9] According to Art. 3 of the Anti-Crisis Shield, in order to counteract COVID-19 employers may require their employees to perform their duties specified in the employment contract outside the standard place of their performance (remote work) for a specified period of time during the period of an epidemic threat or epidemic state announced due to COVID-19 – and for 3 months after the cancellation of such an announcement. The adoption of this solution is understandable during the coronavirus pandemic – the closing or a significant limitation of the functioning of some workplaces combined with the necessity to prevent the spread of the pandemic and the simultaneous need to sustain the economy required a tool which would enable employers – taking into account the above considerations – to maintain the functioning of the workplace whilst ensuring the safety of life and health of their employees.[10] Remote work is a tool that lets employers – at least in relation to some types of activity – achieve this goal. Therefore, the introduction of such a tool should be considered as justified and adequate to the circumstances. At the same time, it is important to notice that this is a very significant change in relation to the regulations concerning the only form of remote work regulated so far in the labour law – telework. The legislator consistently required an explicit consent of both parties to introduce telework – it could be introduced when concluding an employment contract, or – during the employment relationship – by means of an amendment to the contract. In order to guarantee full voluntary telework, the legislator even excluded the possibility of introducing it using the usual method of changing the content of the employment contract, i.e. a notice of change. The literature on the subject also points to the fact that the very change of the place of work (which is the essence of remote work) has always required an amending agreement or a notice of change of the terms of work and remuneration.[11]

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8 Ibidem, p. 81.

9 L. Mitrus, *Praca zdalna de lege lata i de lege ferenda – zmiana miejsca wykonywania pracy czy nowa koncepcja stosunku pracy? Część 1*, PIZS 2020, 10, p. 5.

10 For more informations see: M. Gładoch, *Praca zdalna w Polsce*, Warszawa 2020, p. 16; see also: L. Mitrus, op. cit., p. 4.

11 Compare: M. Rycak, *Prawa i obowiązki stron stosunku pracy w czasie pandemii COVID-19*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2020, 27, p. 307.

Therefore, the broad and – initially – almost unconditional adoption of official instructions to work remotely was a complete opposite of the previous legislative practice.[12] It was not until one of the subsequent editions of the Anti-Crisis Shield that the legislator introduced quite generally formulated grounds for ordering remote work.[13] When accepting the generally adopted solution, one should pay attention to certain risks that quickly occurred in practice, especially those regarding the transfer of costs of organizing remote workstations and equipping remote employees with the necessary tools. The issue of reimbursements of expenses incurred by employees on account of using their own equipment when working remotely had become a serious problem, which the legislator completely ignored in the regulation.

The scope of employers' management authority has also increased in the area of granting overdue holiday leaves. According to Art. 15gc of the Anti-Crisis Shield, during the period of epidemic threat or epidemic state announced due to COVID-19, an employer may require their employee to use up the leave which was not used by the employee in previous calendar years – in the amount of up to 30 days, and the employee is obliged to use such a leave. Of course, there arises a question of whether the compulsory leave granted to an employee at the time when the possibility to take advantage of effective rest is highly limited due to epidemiological restrictions is not an excessive restriction of the employee's right to rest and leisure. It seems that the answer to such a question should be negative. The employer's entitlement applies only to overdue leave, i.e. the leave for previous years. The way of using the leave for the current year was not modified in any way, so the employee's annual leave remained in the existing amount. Moreover, this provision essentially sanctioned an already existing practice which had developed earlier on the basis of the existing body of juridical decisions of the Supreme Court.[14] Therefore, it can be concluded that the adopted solution was balanced – on the one hand, it was appropriate for the existing situation and protected employers, and, on the other hand, it did not excessively curb the rights of employees.

Employers also gained new – unprecedented – ways to shape employees' right to daily and weekly rest. According to Art. 15zf section 1 item 1, an employer experiencing a decrease in economic turnover as a result of COVID-19 and who is not in arrears in paying tax liabilities and social security contributions may limit

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12 About the remote work order in a wider sense – cf. M. Gładoch, op. cit., p. 23.

13 The Act of 19 June 2020 on subsidies to interest rates on bank loans granted to entrepreneurs affected by the consequences of COVID-19 and on the simplified procedure for the approval of arrangement in connection with the occurrence COVID-19, Journal of Laws No. 2020, item 1086.

14 Cf.: ruling of the Supreme Court of January 24, 2006, I PK 124/05, LEX nr 176539.

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the uninterrupted rest referred to in Art. 132 § 1 of the Labour Code, up to not less than 8 hours, and an uninterrupted weekly rest referred to in Art. 133 § 1 of this Act to not less than 32 hours, including at least 8 hours of daily rest. This is another entitlement that significantly increases the scope of employers' management authority, aimed at facilitating the organization of the work process in conditions of an epidemic, especially due to illness and quarantine or high rate of absenteeism among employees. Nevertheless, it should be noted that this right is somewhat unconditional. Apart from a drop in the turnover level, there are no other conditions required to reduce the length of the period of an employee's rest. According to Art. 132 and 133 of the Labour Code, derogations from the principle of 11-hour daily rest and 35-hour weekly rest are strictly limited. Art. 15zf gives employers a virtually unlimited possibility to considerably shorten an employee's rest period without the need to indicate any objective reasons for such a measure. This is a very significant limitation of the rights of employees, especially considering that the right to rest and leisure is a value provided for in the Polish Constitution, also recognized as an employee's personal right.[15] A question may also be raised regarding the compliance of the adopted solution with Directive 2003/88 on certain aspects of the organization of working time,[16] which obliges Member States to guarantee employees the right to 11 hours of rest per day and 35 hours of rest per week. The first impression is that the solution adopted in Art. 15zg of the Anti-Crisis Shield is not consistent with the solutions allowed by the Directive.[17] Under the directive, it would be permissible to shorten the rest periods by means of an agreement with a representative body of employees'.[18]

Facilitating making changes to working and remuneration conditions

A characteristic element of the so-called Anti-Crisis Shield is the legislator's common approval of measures aimed at enabling employers to uniformly worsen the working and remuneration conditions of employees by collective means. An expression of this is the extensive use of institutions of collective agreements, the

15 See: ruling of the District Court in Łódź of 29 January 2020, VIII Pa 127/19.

16 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time OJ L 299, 18.11.2003, pp. 9–19.

17 K. Stefański, [in:] K.W. Baran (ed.), *Tarcza Antykryzysowa 1.0–3.0. Szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych. Komentarz*, Warszawa 2020, p. 235.

18 Ibidem.

so-called crisis agreements, the aim of which is to enable employers to quickly adjust the original working and salary conditions to the dynamically changing external conditions. The essence of crisis agreements is the ability of social partners to directly influence the content of individual employment relationships in order to worsen the working and remuneration conditions, justified by the difficult situation of the employing entity.[19] These agreements have a direct impact on the content of employment relationships with no need for any change notices or amending agreements to become effective.

The conclusion of a collective agreement on temporary layoff or reduction of the working time referred to in Art. 15g section 11 of the Anti-Crisis Shield was a precondition for entrepreneurs or other entities listed in Art. 15g section 1 to receive a Guaranteed Employee Benefits Fund (FGŚP) subsidy to the remuneration paid to employees. The possibility of concluding an agreement on reducing the working time or a temporary layoff is also provided for in Art. 15gb of the Anti-Crisis Shield (to which the provisions of Art. 15g paragraphs 11–15 apply accordingly). The Anti-Crisis Shield also provides for a possibility of concluding collective agreements introducing an equivalent working time system (Art. 15zf section 1 item 2) and enables social partners to conclude an agreement on the application of less favourable employment conditions than those resulting from employment contracts concluded with employees (Art. 15zf section 1 item 3). This led to a widespread practice of concluding such agreements, in particular those mentioned in Art. 15g section 11 et seq. The conclusion of these agreements was a condition to receive subsidies to employee remuneration.

The aforementioned agreements lead to an unfavourable change to the content of employment contracts, made by the will of the social partners concluding a given agreement – regardless of the will (and sometimes even without the knowledge) of the employee concerned.[20] Therefore, it is an instrument which to a large extent interferes with the principle of priority of more favourable individual contractual arrangements concerning working and remuneration conditions and – hence – an essential breach of *the pacta sunt servanda* principle and the constitutional principle of labour protection.[21] For the above reasons, it raises numerous controversies – also of constitutional nature.

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19 Ł. Pisarczyk, *Porozumienia kryzysowe jako instrument dostosowania przedmiotu świadczenia stron stosunku pracy do zmieniających się okoliczności*, [in:] L. Florek (ed.), *Indywidualne a zbiorowe prawo pracy*, Warszawa 2007, pp. 123–124.

20 M. Gersdorf, *Próba umiejscowienia nowych porozumień o zawieszeniu umów o pracę w polskim porządku prawnym*, PIZS 2003, 1.

21 B. Cudowski, *Zbiorowe zawieszenie treści umownych stosunków pracy*, [in:] L. Florek (ed.), *Prawo pracy a bezrobocie*, Warszawa 2007, p. 111.

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Crisis agreements are concluded between the employer and the employees' representatives. In principle, it is to guarantee that the introduction of these unfavourable solutions for employees will take place under the control of the social partner, which will prevent excessive depletion of employee rights. Primarily, a trade union representation was authorized to conclude an agreement, which seems to guarantee a reliable course of collective bargaining.

In non-unionized workplaces, the party to the collective agreements regulated by the Anti-Crisis Shield are employee representatives selected according to the manner adopted by a given employer. However, this is a very weak form of employee representation. The main drawback here is the lack of at least minimum standards that should be followed in the procedure of selecting employees' representatives. This creates room for manipulation and gives rise to the risk of employers' desires to influence the election of representatives. An important aspect to raise here is the lack of increased protection of the durability of the established employment relationship, which greatly weakens the negotiating power of such representatives, and the lack of the right to information, which makes it difficult to verify the employer's current economic situation.[22] All these observations remain fully relevant also in relation to the analysed regulation.

In practice, it should not come as a surprise that the majority of the aforementioned agreements concluded within the framework of the Anti-Crisis Shield are those concluded with employees' representatives appointed in line with the manner adopted by a given employer. To a large extent, this is certainly a result of the low level of unionization of employees in Polish companies. However, it can be assumed to some degree that this is also a result of the unions' refusal to enter into agreements unfavourable for employees.[23] However, this raises real concerns that in many cases the conclusion of the agreement might not have resulted from negotiations between two equal entities, but took place in conditions of domination (or even dictatorship) of the employer. This significantly undermines the protective quality of the adopted formula of the agreement.

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22 Ł. Pisarczyk, op. cit., p. 128, M. Latos-Miłkowska, *Przedstawiciele pracowników wyłaniani w trybie przyjętym u danego pracodawcy*, PIZS 2010, 10; A. Sobczyk, *Przedstawicielstwa pozazwiązkowe w systemie zbiorowej reprezentacji pracowników. Stan obecny i kierunki zmian*, [in:] A. Wypych-Żywicka, M. Tomaszewska, J. Stelina (eds.), *Zbiorowe prawo pracy w XXI wieku*, Gdańsk 2010, p. 225.

23 This is addressed by M. Latos-Miłkowska, *Porozumienia zbiorowe w tarczy antykryzysowej*, PIZS 2020, 10, p. 32.

Statutory reduction of benefits related to termination of employment

Another solution related to the protection of employers' interests during the crisis caused by the COVID-19 pandemic is a significant reduction of the amount of benefits paid to employees due to the termination of employment. According to Art. 15gd of the Anti-Crisis Shield, during the period of an epidemic threat or epidemic state announced in the light of the spread of COVID-19, in the case of employers experiencing a decrease in the level of turnover or a significant increase in the burden of the remuneration fund, the amount of severance pay, compensation, or other cash benefits paid by this employer to employees in relation to the termination of their employment contracts may not exceed ten times the minimum remuneration for work. The *ratio legis* of the analysed provision seems clear – to reduce the costs of terminating an employment contract, and thus make it easier for employers to make redundancies. However, attention should be paid to the broad material scope of the provision – it covers, in principle, all benefits related to the termination of employment – retirement and disability severance pay, severance pay referred to in Art. 8 of the Act on extraordinary rules for terminating employment relationships for reasons not related to employees, compensation for unilateral shortening of the notice period, compensation for termination of an employment contract without notice by an employee based on Art. 55 § 1^1 of the Labour Code. There are some doubts regarding compensation paid in relation to faulty notice of termination of an employment contract or termination of an employment contract without notice. In this case, it is necessary to defend the argument that the above circumstances are not covered by Art. 15gd because the reason for their occurrence is the violation of law by the employer, and not the termination of an employment contract. Moreover, the categorical formulation of the provision suggests an interpretation that this applies not only to benefits resulting from generally applicable provisions (which the legislator may change), but also benefits related to the termination of employment, resulting from autonomous sources of labour law. However, such a conclusion should be rejected as contrary to the principles of the hierarchy of sources of labour law under Art. 9 § 2 of the Labour Code. These provisions show clearly that the autonomous sources of labour law may contain solutions more favourable to employees than the generally applicable provisions. Article 15gd should therefore only apply to severance pay, compensation, and other benefits related to the termination of employment under generally applicable provisions. Taking into account the said *ratio legis* of the provision, it should be also stressed that the legislator did not link its application to the termination of employment relationships for reasons not related to employees. The

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reduction in the amount of benefits will therefore apply in principle to all cases of termination of employment, regardless of the procedure applied and on which party initiated the termination of the employment contract.

There is a fundamental doubt regarding section 2 of the analysed provision, according to which the provision of section 1 shall apply accordingly in the case of a notice or termination of a contract of mandate, another contract for the provision of services to which the provisions of the Act of April 23, 1964 – the Civil Code regarding mandate contracts apply, a specific task contract, or in connection with the termination of the holding of a paid position, excluding an agency contract. First of all, there arises a question of what benefits related to the termination of a contract of mandate or a specific task contract, or in connection with the termination of the holding of a paid position are considered here. The provisions of the Civil Code and of the Code of Commercial Companies do not provide for such benefits. It would seem reasonable to conclude that Art. 15gd section 2 or Anti-Crisis Shield is pointless. However, this would be a conclusion hard to accept from the point of view of the rational legislator principle. Perhaps the legislator meant benefits related to the termination of a contract of mandate or a specific task contract resulting from a collective labour agreement.[24] It seems, however, that also this conclusion may give grounds to far-reaching doubts. An interpretation according to which section 2 concerns individual arrangements made by the parties to an agreement mentioned in this provision may not be accepted either. There are no grounds for such a far-reaching intervention of the legislator in the freedom of arrangements made by parties in civil-law contracts. In addition, the provisions of the Civil Code provide for an institution that allows for the modification of the service provided by one party of the contract in the event of an extraordinary change of conditions – which is *the rebus sic stantibus clause.*

Financial support from public funds

One of the most obvious manifestations of protection of employers' interests within the framework of the Anti-Crisis Shield is the support granted from public funds. This article will first of all analyse all forms of financial support related to the employment of employees. One of such forms is the subsidy to employees' salaries provided for in Art. 15g, 15gg, 15gga, and 15zzb of the Anti-Crisis Shield.

[24] At present, there is no doubt that in the light of Art. 21 section 3 of the Act on Trade Unions, collective labour agreements may also regulate the conditions of work performed by persons employed on a basis other than employment relationships.

Initially, only entrepreneurs within the meaning of Art. 4 sec. 1 of the Entrepreneurs Law Act,[25] suffering from the negative financial effects of the pandemic and who have concluded collective agreements on temporary layoffs or reduced working hours could apply for the financial support under the terms specified in Art. 15g section 1. The aid provided for in Art. 15zzb was also aimed at entrepreneurs. In the subsequent editions of the Anti-Crisis Shield, the legislator expanded the list of entities entitled to obtain the funding referred to in Art. 15g section 1 and (to a lesser extent) Art. 15zzg, including non-governmental organizations, church legal entities and its organizational units as well as cultural institutions. When introducing Art 15gg to the Anti-Crisis Shield, the legislator made it possible to obtain co-financing to entities indicated in Art. 15g section 1 regardless of whether they have concluded a collective agreement to reduce the working time or impose temporary layoffs.

The latest aid instrument is Art. 15gga, which provides for the payment of an allowance to the salaries of employees (in a flat-rate amount of PLN 2,000 per month) employed by employers operating in industries particularly affected by restrictions in conducting business. The list of these sectors has been drawn up using the Polish Classification of Activity (PKD) codes in Art. 15gga.

In all cases, the grant is limited to three months and aims to save jobs. During the grant period, the employer must not terminate a given employee's employment contract for reasons not related to the employee.

The right to suspend the employer's obligation to provide social benefits

The special rights provided for in the Anti-Crisis Shield enabled employers affected by negative economic consequences of the pandemic to unilaterally suspend the social benefits they provided to their employees. Thus, the legislator created a possibility for employers to be temporarily exempt from incurring the costs of fulfilment of this obligation, with the aim to improve their financial situation. As a formality, it should be stressed that this is a measure other than expanding employers' management authority referred to in item a. Employers' management authority concerns employment relationship. Meanwhile, the obligation to provide social benefits is not an element of an employment relationship (apart from a possible claim for a holiday allowance). The right to use the forms of social benefits provided

[25] Consolidated text in the Journal of Laws of the Republic of Poland of 2021, item 162.

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by the employer is a collective right of employees,[26] whose nature is, in principle, not that of a claim. Hence, it is justified to analyse this measure of protecting employers' interests separately.

According to Art. 15ge of the Anti-Crisis Shield, in the period of an epidemic threat or epidemic state announced due to COVID-19, in the event an employer within the meaning of Art. 3 the Labour Code suffers a decrease in the economic turnover level referred to in Art. 15g section 9, or a significant increase in the burden of the remuneration fund referred to in Art. 15gb section 2, the employer may suspend their fulfilment of the following obligations:

1) establishing or maintaining an employee benefit fund,
2) making contributions to company employee benefit funds (deductions from pay),
3) paying of vacation benefits,
   – referred to in the Act of March 4, 1994 on the Employee Benefit Fund (Journal of Laws of 2020, item 1070).

In the case of an employer with no representative company trade unions within the meaning of Art. 15g section 11 item 1 or 2, the suspension of the provision of social benefits is made by means of a unilateral decision of the employer. In the case of an employer with representative company trade unions referred to in Art. 15g section 11 item 1 or 2, the suspension is made in agreement with these organizations. In this case, the legislator refers to the union representation formed for the purpose of concluding an agreement on reducing the working time or imposition of temporary layoffs. It is therefore all representative company trade unions acting jointly within the meaning of Art. 25^3 section 1 or 2 of the Act on Trade Unions, each of which associates at least 5% of employees employed by an employer, and in the absence thereof – all representative company trade unions within the meaning of Art. 25^3 section 1 or 2 of the Act on Trade Unions, who do not meet the additional condition of association of at least 5% of employees working for a given employer. In the absence of a reference in Art. 15ge section 2 of the Anti-Crisis Shield to Art. 15g section 11 item 3 thereof, it should be assumed that the employer will be able to suspend the provision of social benefits on their own not only in a situation where no trade union organization functions in their structure at all, but also in a situation where only one company trade union organization functions there.[27] The above conclusions, although supported by the normative content of the provision, are quite difficult to accept, especially in view of the very large scope of rights that

[26] Cf. J. Skoczyński, *Komentarz do ustawy o zakładowym funduszu świadczeń socjalnych*, Warszawa 1999, p. 14.

[27] M. Latos-Miłkowska, *Działalność socjalna pracodawcy w czasie epidemii koronawirusa*, PIZS 2021, 1, p. 8.

trade unions have in the domain of the provision of social benefits in the light of Art. 27 of the Act on Trade Unions.

It is easy to see the very wide subjective scope of the allowed suspension. Based on Art. 15ge section 1, an employer may suspend their obligation to make contributions to their company employee benefit fund and (in the case of employers who are obliged to do so) the provision of vacation benefits referred to in Art. 3 section 3 of the Act on the Employee Benefit Fund, which seems justified in the context of the regulation's purpose. However, an employer may also suspend the entire functioning of the company's employee benefit fund, and therefore the payment of social benefits to employees from the resources already accumulated in this fund. In this case, one may wonder if this solution is not going too far. The resources accumulated on the account of a company employee benefit fund have a special purpose and may not be used for purposes other than those indicated in the regulations of the company employee benefit fund. In particular, an employer may not dispose of them at their own discretion.[28] Therefore, the suspension of a company's employee benefit fund combined with the use of funds already accumulated on it in no way improves the financial situation of the employer, but also significantly worsens the situation of employees, who often need social aid during the pandemic and to deal with the resulting economic crisis.[29]

In addition to the above, in Art. 15ge section 3, the legislator *ex lege* suspended the application of the provisions of collective labour agreements or remuneration regulations introduced pursuant to Art. 4 of the Act of March 4, 1994 on the Employee Benefit Fund, setting a higher amount of the contribution to employee benefit funds and other welfare benefits than those specified in this act. It is difficult to understand the motivation behind the solution applied by the legislator. First, the suspension is applied by operation of law, without the involvement of the parties to collective labour agreements, and without the involvement of employers themselves. One may even wonder whether such an interference on the legislator's part does not violate the constitutional right to engage in collective bargaining, as expressed in Art. 59 section 2 of the Polish Constitution.[30] This type of arbitrariness is difficult to explain, it seems that it was more appropriate to leave this decision to the parties to collective labour agreements or – in the case of regulations – employers acting in agreement with their company trade union organizations. During the period of this suspension, the contributions made to a company employee

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28 A. Musiała, *Komentarz do ustawy o zakładowym funduszu świadczeń socjalnych*, [in:] K.W. Baran (ed.), *Zbiorowe prawo zatrudnienia*, Warszawa 2016.

29 M. Latos-Miłkowska, *Działalność socjalna…*, p. 9.

30 Ibidem, p. 10.

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benefit fund are reduced to the amount specified in Art. 5 of the Act on the Employee Benefit Fund. It seems that it is possible that this obligation, in turn, could be suspended pursuant to Art. 15ge section 1 of the Act on preventing and combating COVID-19. Enforced by law, the provisions of collective labour agreements introducing other social and welfare benefits other than those specified in the Act on the Employee Benefit Fund were also suspended.

Final remarks

The summary of the solutions applied in connection with the coronavirus pandemic to protect the interests of employers shall be examined on several levels.

Firstly, it should be considered whether – *en bloc* – they have achieved their basic purpose intended by the legislator, i.e. if they have made it possible for employers to survive the lockdown period and mitigate the effects of the restrictions on running business operations. The prolonged period of the pandemic, of course, makes it impossible to offer final feedback – the situation may change dynamically in the near future. Nevertheless, it seems that – at least temporarily – these provisions have served their purpose. It is true that we have been operating in pandemic conditions for almost a year now, using, among others, the analysed measures. Yet, to some extent, we have managed to slow down the negative economic effects of the pandemic, to avoid a wave of bankruptcies and an avalanche increase in unemployment. Of course, the question arises as to how long this effect will last, especially since the epidemic is not over and the economy continues to function in conditions of more or less strict restrictions.

The adopted solutions can be considered significant, mostly in line with the canon of the solutions currently adopted in European countries to protect the interests of employers during the coronavirus pandemic. When introducing solutions to the anti-crisis shield to protect employers' interests, the legislator used measures that had been known to labour law before. The completely new solutions are basically only those introduced by the legislator in the scope of employers' obligation to provide social benefits to their employees.

It should be stressed, however, that the consequence of the introduced solutions aimed at protecting employers' interests is a very significant weakening of the protective function of labour law. It can be said that the legislator has transferred the costs of the pandemic and of the crisis caused thereby onto employees to a considerable degree. The lowering of the existing protection standards has not been compensated to employees in any significant way, as it is difficult to call the

short-term protection of the durability of employment relationships involving employers receiving subsidies for employee remuneration a real counterbalance to the changes made to the benefit of employers.

The particular solutions can be looked at in different ways. Some of them should be considered positive on the grounds of the specific circumstances and the purpose of the regulations introduced. The broadening of the scope of employers' management authority should be acknowledge as a positive measure. This applies in particular to the possibility of ordering remote work (although the part of the regulations concerning the grounds for this solution was introduced a bit too late) and the possibility of granting overdue vacation leave. Some doubts from the point of view of compliance with European standards are raised in relation to the possibility of shortening the daily and weekly amount of rest. The financial support provided to employers also deserves to be spoken of in positive terms. However, some solutions should be viewed in a more critical light. In the case of collective agreements referred to in Art. 15g and 15zfm a basic drawback in the absence of trade union organizations is the weakness of employees' representation acting as a party to such an agreement. There is a well-founded concern – supported also by evidence coming from an extensive analysis of the existing empirical material – that agreements concluded with employees' representatives appointed in accordance with the manner applied by a given employer are in many cases *de facto* enforced by employers. It should be noted, however, that the provisions of the Anti-Crisis Shield were prepared in crisis conditions, under great time pressure. It is therefore – to some extent – understandable that the legislator used the forms of representation already functioning in the Polish labour law in force. *De lege ferenda*, however, it is necessary to call for a critical verification of the forms of non-unionized employee representation existing in the Polish labour law. The possibility of suspending the functioning of a company's employee benefit fund in the part concerning the payment of benefits from the funds already accumulated on this fund should be considered as a rather negative way to follow – depriving employees of access to social benefits in such a difficult period is unjustified, especially since the funds accumulated on employee benefit fund accounts cannot be used for any other purpose. The excessive limitation of the role of trade unions in the decision-making process to suspend the provision of particular benefits gives also grounds to serious doubts. The interference with the scope of the freedom of bargaining which the legislator has made by virtue of the law suspending the provisions of collective labour agreements setting a higher amount of the contribution to employee benefit funds and other welfare benefits seems an exaggerated measure too.

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