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Some Aspects of Labour Law's Protective Function at the Time of COVID-19

Niektóre aspekty ochronnej funkcji prawa pracy w dobie COVID-19

ABSTRACT

The COVID-19 epidemic has had a substantial impact on Polish legislation since the beginning of 2020. The economic slowdown and the consequent fall in the state budget revenue are among the anticipated effects of the epidemic. As a result, provisions introducing *lex specialis* to the Labour Code and certain employment regulations specifying dissolution of employment relationships in some public administration organisations became part of the COVID-19 Act. The new legal construct comes down to extensive facilitation in the process of redundancies for employers dismissing their employees. The protective function of labour law provisions insofar as it upholds duration of the employment relationship is consequently restricted. Provisions of the COVID-19 Act in this respect are unacceptable. Each regulation should arise from objectively identified needs to legally govern social relationships and should not inflate laws or undermine citizens' trust in legislation. The postulate of this legal direction of determining social relationships is particularly important with regard to relationships of employment, in particular, those founded on appointment in public administration. The possibility of identical treatment of employees hired on various legal grounds merely appears to conform with the constitutional protection of equality in law. Without detriment to employers' right to determine employment levels, the new regulations in connection with the COVID-19 epidemic seem unnecessary, since their objectives can be attained by application of normal remedies provided for by labour law.

Keywords: COVID-19; protective function of labour law; dissolution of employment relationships; appointment; public administration

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INTRODUCTION

Labour law specialists generally accept the view of the labour law's protective function.[1] The traditional labour law doctrine assumes the function comes down to allowing a range of privileges to the employee as the economically and socially weaker party to a relationship of employment.[2] Formally, the protective function of labour law consists in the impossibility of ignoring law to the employee's detriment and is associated with the principle of employee privilege,[3] derived from Article 18 §§ 1 and 2 of the Labour Code.[4] In light of this principle, labour law can be said to lay down a minimum level of employee rights and maximum level of employee duties, since provisions of employment contracts or equivalent acts less beneficial to employees than provided for by labour law are invalid and *ex lege* substituted with appropriate provisions of labour law.

The material aspect of the labour law's protective function is in turn related to contents of large numbers of labour law norms, in particular, those intended to protect life and health, dignity and privacy of employees.[5] Regulation of termination of employment relationship by an employer, especially where a contract of employment for an indefinite term is terminated,[6] is commonly seen as a major aspect of the labour law's protective function. Labour law regulations in this respect, in particular, provisions of the Labour Code, institute a certain standard in protection of employment duration.

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[1] It should be noted, however, A. Sobczyk, without denying the labour law protects employee interests in a number of ways, is critical about the analytical and cognitive values of its protective function. He believes employee protection is not a result of the employee's subordinate or weaker negotiating position as part of employment. He says the bulk of protective regulations are universal and stem from protection of human (and occasionally civic) rights, with work serving only as the context for such protection. See A. Sobczyk, [in:] *Prawo pracy świetle Konstytucji RP*, vol. 1: *Teoria publicznego prywatnego indywidualnego prawa pracy*, Warszawa 2013, pp. 15–26. Moreover, A. Sobczyk goes on to question the use of the term "labour protection", especially for teaching purposes, since there are a range of its diverse interpretations. See idem, *Wątpliwości co do użyteczności stosowania pojęcia „ochrona pracy*", [in:] *Prawo ochrony pracy – współczesność i perspektywy rozwoju*, eds. T. Wyka, M.A. Mielczarek, Warszawa 2017, p. 59; idem, *Różnicowanie praw (ochrony) zatrudnionych – wybrane kryteria i ich ocena*, [in:] *Funkcja ochronna prawa pracy a wyzwania współczesności*, ed. M. Bosek, Warszawa 2014, p. 1.

[2] T. Liszcz, *Prawo pracy*, Warszawa 2019, p. 31.

[3] L. Florek, Ł. Pisarczyk, *Prawo pracy*, Warszawa 2019, s. 9.

[4] Act of 26 June 1976 – Labour Code (consolidated text Journal of Laws 2019, item 1040 as amended).

[5] *Ibidem*.

[6] T. Liszcz, *Prawo…*, p. 32. On the other hand, A. Dral (*Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*, Warszawa 2009, p. 20) treats duration of employment relationship as axiomatic and inextricably linked to the protective function of labour law.

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It is rightly observed by specialists the protective nature of labour law, which lies at the root of its emergence and development, should not be simplified and regarded solely from the viewpoint of employees' interests.[7] The state and employers are equally concerned about correct protection of employees' rights and interests. Effective work management and attainment of economic and social objectives are only possible on condition of a harmonious regulation of employees' and employers' interests and goals of the state's social policies.[8] It is undoubtedly in this context that the public authorities' obligation should be seen to conduct policies with a view to full and productive employment by means of unemployment countering programmes including organisation and support of professional counselling and training as well as public and emergency works[9] under Article 65 para. 5 of the Constitution of the Republic of Poland.[10]

Adequate protection of employees' rights and interests and employers' interests is of particular importance in the free market economy. The latter passes economic cycles that force entrepreneurs (employers) to adjust, often very rapidly, employment levels to demand for voluntarily subordinated labour. In the circumstances, "ordinary" labour law regulations that bind employees and employers in times

[7] Z. Salwa, *Nowy ład pracy w Polsce a ochronna funkcja prawa pracy*, [in:] *Nowy ład pracy w Polsce i w Europie*, ed. M. Matey, Warszawa 1997, p. 51. See also L. Florek, *Interes pracodawcy w prawie pracy*, „Państwo i Prawo" 2012, no. 5, pp. 18–30; M. Latos-Miłkowska, *Ochrona interesu pracodawcy*, Warszawa 2013.

[8] Z. Salwa, *op. cit.*, pp. 51–52. The extremely interesting discussion of employment flexibility, defined as numerical flexibility, in M. Skąpski's monograph entitled *Ochronna funkcja prawa pracy w gospodarce rynkowej* (Warszawa 2006, p. 295 ff.). should be mentioned in this connection. The author concludes the mechanism of legal protection of employment duration poses no problem to the Polish economy (*ibidem*, p. 343).

[9] The Constitutional Tribunal in its judgement of 13 March 2000 (K 1/99, OTK 2000, no. 2, item 59) found Article 65 para. 5 of the Constitution of the Republic of Poland a programming regulation that indicates the principal guidelines for public authorities. In spite of this, the Tribunal stated programming norms contain a minimum of civic rights as an equivalent to minimum obligations of the public government. As a consequence, the programming norm derived from Article 65 para. 5 of the Constitution of the Republic of Poland lays the foundations for obligations of public authorities. Accepting the view expressed in specialist literature, the Tribunal pointed out Article 65 para. 5 of the Constitution, where the writer expressly defined: 1) objective (full productivity of employment); 2) addressee (public authorities); 3) conduct decreed to attain the objective (unemployment countering programmes including organisation and support of professional counselling and training as well as public and emergency works). It should be accepted, therefore, Article 65 para. 5 of the Constitution of the Republic of Poland can serve as the model for constitutional control. As in J. Oniszczuk, *Źródła prawa pracy*, [in:] *Zarys systemu prawa pracy*, vol. 1: *Część ogólna prawa pracy*, ed. K.W. Baran, Warszawa 2010, p. 318. Otherwise A. Sobczyk, K. Kulig, *Komentarz do art. 65*, [in:] *Konstytucja RP*, vol. 1: *Komentarz. Art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 1478.

[10] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483 as amended). English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.01.2021].

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free from economic upheavals prove inadequate to dynamic macro-economic processes detrimental to employees. It can be noted, though, objective needs to deviate from the standard protection guaranteed by labour law may even arise at times of economic growth, in the so-called employee's job market. This can be caused by individual decisions of entrepreneurs who, striving for profits or cutting their costs, implement new technologies or methods of operation (automation, robotisation, e-commerce) that require less employment.

The COVID-19 epidemic[11] has determined actions of the Polish legislators since February 2020. The so-called anti-crisis shields, or laws intended to counteract and fight adverse effects of the COVID-19 epidemic in various areas of social and economic life, are the results of these actions. These include in particular: the Act of 2 March 2020 on the special solutions in connection with prevention, counteracting, and fighting COVID-19, other infectious diseases, and the resultant crisis situations,[12] the Act of 16 April 2020 on the special support instruments in connection with spread of SARS-CoV-2 virus (the so-called shield 2.0),[13] the Act of 14 May 2020 on amending certain acts concerning protective actions in connection with spread of SARS-CoV-2 virus (the so-called shield 3.0),[14] and Act of 19 June 2020 on the subsidies to interest on bank credits to entrepreneurs affected by COVID-19 and the simplified procedures of agreement approval in connection with COVID-19 (the so-called shield 4.0).[15] Counteracting adverse impacts of the epidemic in the job market, understood as higher unemployment in effect of terminating relationships of employment with employees, is a key goal of the crisis legislation. Provisions of these laws, on the other hand, stipulate deviations from the labour law that are beneficial to employers in specifying rules and procedures of terminating relationships of employment and restrain realisation of the labour law's protective function with reference to employees.

The specific nature of the anti-crisis laws needs to be mentioned before proceeding to discuss the way they fulfil the protective function. They are unique in the unprecedented broad scope of their objective regulation caused by the variety of challenges posed by the epidemic to executive and legislative authorities. As far as the vertical division of law is concerned, provisions of the anti-crisis laws govern matters in the sphere of both private and public laws, while considerations of more precise classification place them in such branches of law as administrative,

[11] The term "COVID-19 epidemic" is used in this text, normatively defined as the state of epidemic risk in connection with SARS-CoV-2 virus infections under the Regulation of the Health Minister's of 13 March 2020 on announcement of the epidemic risk in the Republic of Poland (Journal of Laws 2020, item 4233).

[12] Journal of Laws 2020, item 374, hereinafter: the COVID-19 Act.

[13] Journal of Laws 2020, item 695.

[14] Journal of Laws 2020, item 875.

[15] Journal of Laws 2020, item 1086.

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labour, national insurance, commercial, etc. This "multisectorality" of the anti-crisis laws is not in itself a criticism of such a legal regulation. When passing them, the legislature addressed the directive expressed in § 3 para. 2 of the Regulation of the Prime Minister of 20 June 2002 on "Principles of Legislative Technique",[16] according to which an act of parliament shall not include provisions to regulate matters beyond its objective (the relationships it governs) and subjective (the group of subjects it applies to) scopes. The objective scope of an act should be determined by its title, as § 18 para. 1 of the Principles states. Titles of the anti-crisis shields allow the legislators for a comprehensive regulation of social relationships that would normally be found in a variety of laws.[17]

Regulations in the anti-crisis laws are analysed in the article to determine if and to what extent the labour law regulations contained in the anti-crisis laws contribute to realisation of the labour law's protective function. Due to the space constraints of this paper, the complexity of the issue of the labour law's protective function, and the scale of the legislators' interference with areas relating to that function, the emphasis was placed on the way duration of the employment relationship, in particular, employment relationships of civil servants, are treated by the legislators. Such a perspective implies the need to address not only labour legislation but also relevant constitutional regulations, as well as specialist literature and judicial decisions. In connection with this objective, the formal-dogmatic method of law examination was applied.

TERMINATION OF EMPLOYMENT CONTRACTS IN THE LIGHT OF THE COVID-19 ACT PROVISIONS

Shield 1.0 includes a single provision, Article 3, which belongs to labour law. By its force, the legislators have introduced to the Polish labour law the concept of teleworking, that is, work an employee performs as ordered by an employer out

[16] Consolidated text Journal of Laws 2016, item 283 as amended. It can be noted by the way questions of following this principles can be posed in relation to some of the provisions.

[17] There is an obvious paradox here. The anti-crisis laws would not have appeared in the Polish legal system had it not been for the COVID-19 epidemic. It should be noted by the way the Polish Senate pointed out in its resolution of 18 June 2020 concerning the act on subsidies to interest on bank crediting given to assure financial liquidity of entrepreneurs affected by COVID-19 and its amendments no. 28, 49, 50, 62 and 119 the act should not contain provisions whose scope of regulation is not normatively connected to the subject matter of the Act of Parliament and whose adoption gives rise to essential doubts as to their compliance with Article 118 para. 1 and Article 119 para. 1 and 2 of the Constitution of the Republic of Poland. See Ustawa o dopłatach do oprocentowania kredytów bankowych udzielanych na zapewnienie płynności finansowej przedsiębiorcom dotkniętym skutkami COVID-19, www.senat.gov.pl/prace/senat/proces-legislacyjny-w-senacie/ustawy-uchwalone-przez-sejm/ustawy-uchwalone-przez-sejm/ustawa,990.html [access: 10.01.2021].

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of a permanent work location. Assuming the labour law provisions help to fulfil a certain function, this provision must be seen to realise an organisational rather than the protective function. An order issued by its force produces a temporary yet major modification to contents of the employment relationship, namely, location where employment duties are carried out.[18]

Employment issues made a far more extensive appearance in shield 2.0, whose provisions have persuaded me to write this text. By virtue of shield 2.0, the legislators added Articles 15zzzzzzo–15zzzzzzx to the COVID-19 Act. A mechanism has been established whereby employees can be dismissed in ways that were not provided for in the preceding labour law regulations.[19] The subjective scope of these regulations was initially limited to employees of the Prime Minister's Chancellery, ministers' back offices, back offices of regional state administration, as well as organisations reporting to and supervised by the Prime Minister, a minister responsible for a section of the state administration, or a region administrator. By passing the anti-crisis law 4.0, the legislators decided to extend the subjective scope of Articles 15zzzzzo–15zzzzzx of the COVID-19 Act from the organisations[20] designated in the original Article 12zzzzzp para. 1 to public finance organisations under Article 9 points 5–9 the Act of 27 August 2009 on the Public Finances. It should be remembered implementation of the mechanism governed by Articles 15zzzzzzo–15zzzzzzx of the Act of 2 March is conditional upon the Council of Ministers' ruling contemplated in Article 15zzzzzo para. 1. A state of risk to public finances, in particular, the state budget deficit or the state public debt rising higher than anticipated in the budget law are pre-requisite to issue of such an executive act.

Prior to a more detailed analysis of the regulations in question, their remarkable similarity to the solutions provided for in the Act of 16 December 2010 on rationalisation of employment in state budget organisations and certain other organisations of the public finances sector should be noted.[21] It can be said with a bit of simplification the act's goal was to reduce employment with state organisations while enhancing effectiveness of their operations in order to cut costs of the public administration (Article 1 para. 2 of the Rationalisation Act). The act was a kind of "catchall" to carry out redundancies in the public administration on special terms other than stipulated by the labour law. Mass lay-offs of public administra-

[18] Workplace is treated as *naturalia negotii* in the employment contract. Cf. T. Liszcz, *Umowa o pracę*, [in:] *System Prawa Pracy*, t. 2: *Indywidualne prawo pracy. Część ogólna*, ed. K.W. Baran, Warszawa 2017, pp. 247, 262–269.

[19] In parallel, the legislators have instituted a special mechanism of introducing terms and conditions of employment less beneficial to employees than those at the source of a relationship of employment.

[20] These organisations are treated as employers under Article 3 of the Labour Code.

[21] Trybunał Konstytucyjny orzekł przed podpisaniem ustawy przez Prezydenta jej niezgodność z Konstytucją, http://orka.sejm.gov.pl/proc6.nsf/ustawy/3579_u.htm [access: 10.11.2020].

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tion employees,[22] intended to cut costs of public administration, were primarily justified with an apparent need for cost-cutting in connection with the difficult position of public finances and the socio-economic situation at the time. The legislators assumed the act's objectives could not be achieved by means of ordinary procedures of day-to-day staffing policies. In its judgement of 14 June 2011,[23] the Constitutional Tribunal found Article 2 in conjunction with Article 7 point 1 of the Rationalisation Act, insofar as they apply to civil servants, in contravention of Article 2 and Article 153 para. 1 of the Constitution of the Republic of Poland. Since those provisions were inextricably linked with the entire law, the act never became effective. It should be stressed in this connection Article 15zzzzzo ff. of the COVID-19 Act replicates some solutions of the Rationalisation Act, though some objections expressed in the Tribunal judgement of 14 June 2011 have been taken into consideration.

The substantial dimension of the regulations introduced by force of shield 2.0 and amended by the two successive anti-crisis laws[24] consists in instituting special – different than under labour legislation – models of terminating the relationship of employment by the employer and modifications to terms and conditions of employment.[25] The legal import of these models arises from the fact labour law, by restricting employers' liberty when terminating relationships of employment that are subject to the so-called universal and special protection against termination, stabilises employment, thereby realising the state's obligations under Article 24 of the Constitution of the Republic of Poland.[26]

The labour law doctrine and jurisprudence agree on distinguishing between the universal protection of the employment relationship duration, which comprises relationships of employment based on employment contracts for indefinite terms,

[22] The act provided for dismissals of a minimum of 10% employees by employers it would apply to (Article 6 para. 1).

[23] Judgement of the Constitutional Tribunal of 14 June 2011, Kp 1/11, OTK-A 2011, no. 5, item 41.

[24] Minor changes to these COVID-19 Act regulations are introduced by Article 46 point 34 letters a–b of shield 3.0.

[25] I understand the model of terminating the relationship of employment first of all as rules of terminating contractual relationships of employment under regulations of the Labour Code. In turn, contents of a contractual relationship of employment are modified by way of the amending termination contemplated by Article 42 of the Labour Code subject to appropriate provisions on termination of the employment contract. Contents of a work relationship can also be amended by way of an amending agreement.

[26] Cf. W. Sanetra, *Ustrojowe uwarunkowania ochrony trwałości stosunku pracy*, [in:] *Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej*, ed. G. Goździewicz, Warszawa 2010, p. 56 ff.; judgement of the Constitutional Tribunal of 18 October 2005, SK 48/03, OTK ZU 2005, no. 9A, item 101; judgement of the Constitutional Tribunal of 24 October 2006, SK 41/05; judgement of the Constitutional Tribunal of 12 July 2010, P 4/10; judgement of the Constitutional Tribunal of 22 May 2013, P 46/11, OTK-A 2013, no. 4, item 42.

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and special protection. The universal protection of employment relationships against termination is assumed to encompass: the duty to consult the intention to terminate a contract with a company trades union organisation representing the employee under Article 38 of the Labour Code, the duty to provide reasons for contract termination, and the employee's right to claim the termination is ineffective and, at the end of the term of notice, to demand restoration to work.[27]

The so-called special protection against termination is extended to relationships of employment of some employee categories due to their family situations (their biological role), particular merits and services to society, and their representative functions. This denotes a set of legal remedies and guarantees in the form of prohibitions against or special restrictions on termination, dissolution of or modifications to a relationship of employment by an employer.[28]

De lege lata the model of employment contract termination at the employer's notice provided for by the Labour Code does not apply to the so-called collective redundancies by force of the Act of 13 March 2003 on the special principles of terminating relationships of employment for reasons unrelated to employees.[29] This law needs to be discussed at some length for at least two reasons. First, Article 5 para. 1 stipulates that Articles 38 and 41 of the Labour Code as well as separate regulations on the special protection of employees against termination or dissolution of their employment relationship shall not apply to terminations as part of collective redundancies. It can be said, therefore, provisions of this law constitute *lex specialis* relative to some Labour Code regulations that govern dissolution of employment contracts by employers and are thus similar to the normalisations under Article 15zzzzzo ff. of the COVID-19 Act. Another reason for offering some comments on the Collective Redundancies Act is the similarity of its regulations and normalisations arising from the provisions specifying methods of reducing costs of employment.

Fulfilment of quantitative, temporal, and objective conditions set out in the Collective Redundancies Act is pre-requisite to collective redundancies. The thresholds laid down in Article 1 para. 1 of the Collective Redundancies Act vary around 10% of dismissable employees. The temporal condition of collective redundancies means they must be carried out during a maximum of 30 days, while the objective condition means "causes unrelated to employees". It is assumed in judicial practice the causes unrelated to employees are all and any circumstances which are not connected to employees' mental and physical characteristics and the way they discharge their duties,[30]

[27] T. Liszcz, *Prawo…*, p. 190 ff.

[28] Cf. A. Dral, *Szczególna ochrona umownego stosunku pracy*, [in:] *System Prawa Pracy…*, pp. 703–707.

[29] Consolidated text Journal of Laws 2018, item 1969 as amended.

[30] Judgement of the Supreme Court of 10 October 2019, I PK 196/18, LEX no. 2773243. Cf. A. Tomanek, *Uwagi o zasadności wypowiedzenia umowy o pracę z przyczyn dotyczących pracodaw-*

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thus, any causes in the employer's responsibility and other objective causes which are not in the responsibility of the employer or the employee, which are nonetheless sole reasons for dissolving the relationship of employment.[31]

It cannot be ruled out that, in the current legal order, the obligations arising from the regulation under Article 15zzzzzo para. 2 of the COVID-19 Act will result in employment reductions in circumstances identical with the conditions for application of the Collective Redundancies Act regulations. This does not mean, however, provisions of the Act will apply as part of the procedure implied by the said regulation. According to Article 15zzzzzzq para. 2 of the COVID-19 Act, regulations of the Collective Redundancies Act shall not apply to employment under the Act. This provides grounds for questioning reasons for introducing an extremely vague, inconsistent and constitutionally dubious regulation where instruments are available under the legal system which allow employers, including those contemplated by Article 15zzzzzzp para. 1 of the COVID-19 Act, to reduce employment and introduce terms and conditions less beneficial to employees. The latter include provisions of labour law, in particular, of the Labour Code and the Collective Redundancies Act, that permit short-term dismissal of employees and amendments to contents of an employment relationship while repealing the universal and special protection of the employment relationship against dissolution by termination.

Dissolving a relationship of employment is a form of fulfilling the obligation to cut costs of payroll and thus a way of achieving the *ratio legis* of the COVID-19 Act regulations under discussion. Absence of any statutory criteria that would qualify employees for redundancies is the gravest shortcoming of the 2010 Employment Reduction Act, raised by the Constitutional Tribunal in its judgement of 14 June 2014. The legislator has provided the Act with a sample catalogue of these criteria, describing them as basic (Article 15zzzzzr para. 3 point 1) and auxiliary (Article 15zzzzzr para. 3 point 1). The COVID-19 Act does stipulate the duty of supplying the trades unions active in a company[32] with information about the criteria adopted, forms of employment reduction, and numbers of employees, yet any opinions of a trades union are not necessarily taken into consideration by a person charged with activities intended to cut costs of payroll.

Article 15zzzzzs para. 1 of the COVID-19 Act states extension of employment reductions to employees, including civil servants and civil service employees, constitutes the sole ground for dissolving their relationships of employment by termination.

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cy, [in:] *Prawo pracy między gospodarką a ochroną pracy. Księga jubileuszowa Profesora Ludwika Florka*, eds. M. Latos-Miałkowska, Ł. Pisarczyk,Warszawa 2016, pp. 558–574.

[31] Judgement of the Administrative Court in Gdańsk of 21 December 2016, III Au/12/9316, LEX 2191588.

[32] Where a trades union is absent from a company, a minimum of two employee representatives must be selected by means prevailing with a given employer, who shall have the rights of a company trades union organisation set out in Article 15zzzzzs para. 6.

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Certain interpretative issues with this provision have twin sources. The terminological inconsistency between Article 15zzzzzs para. 1 of the COVID-19 Act and provisions of the Labour Code setting out the employer's duties in connection with termination of an employment contract for an indefinite term, which evidently provide the normative context to Article 15zzzzzs para. 1 of the COVID-19 Act, is one source. Thus, in compliance with Article 30 § 4 of the Labour Code, the employer's statement of termination of an employment contract for an indefinite term should indicate a reason for the termination. In the light of Article 45 § 1 of the Labour Code, termination of an employment contract should be reasonable. The question arises whether "the sole ground for dissolving the relationship of employment" as phrased by Article 15zzzzzs para. 1 of the COVID-19 Act is equivalent to the "reason for termination" and "reasonable termination" of the employment contract, if it should be also (or exclusively) construed as additional to the conditions defined by regulations concerning dissolution of a relationship of employment by appointment. In spite of these terminological divergences between provisions of the COVID-19 Act and the Labour Code, "the sole ground for dissolving the relationship of employment" cannot be interpreted other than in the context of the Labour Code regulations contemplating the "reason for termination" and "reasonable termination" of an employment contract for an indefinite term. It is reasonable to ask whether someone reducing employment, whether by force of definitive or amending termination, will fulfil the duty of providing reasons for the termination by making a relevant statement an employee is subject to the employment reduction as part of the obligation under Article 15zzzzzo para. 2 point 1 of the COVID-19 Act. This is important insofar as a defective (amending) termination could provide grounds for a labour court to admit the employee's suit. The employer is in breach of Article 30 § 4 of the Labour Code by failing to provide reasons for termination, supplying untrue reasons or designating reasons in such an unspecific way that they are incomprehensible to the employee, and therefore unverifiable. A single sufficiently important cause or several less essential causes that summarily substantiate a termination are sufficient for treating a termination as reasonable. The term "unreasonable termination" in Article 45 § 1 of the Labour Code is not sufficiently specific and a case-by-case evaluation of reasons for termination as dependent on all relevant circumstances is necessary. The employer should therefore be assumed to satisfy the duty of stating reasons for termination as defined by and arising from Article 30 § 4 of the Labour Code by indicating the termination is connected to the employer's regulatory obligation of reducing employment. However, reasons for termination as contemplated by Article 45 § 1 of the Labour Code can only be identified with reference to the employer's duty of informing employees of the criteria whereby such employees are eligible for termination of their employment relationship arising from Article 15zzzzzr para. 4 of the COVID-19 Act. It should be pointed out the employer will be bound to provide the employees with updated information if opinions of a trades union or staff representatives (as provided for by

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Article 15zzzzzs para. 6 or 7, respectively) are accepted and thus modify any of the criteria deciding dismissal of an employee or a sequence of such criteria. Absence of such information would prevent the employees from determining whether the employer and the criteria they ultimately apply to affect termination of employment relationships are objective, which could lead to finding such termination unreasonable.

Cancellation of the special protection of the relationship of employment duration (subject to Article 15zzzzzr para. 9 and 13) and partly of the universal protection (under Article 15zzzzzr para. 8) results in exclusion from among the employees subject to redundancies in connection with the regulation by virtue of Article 15zzzzzo para. 2 of the COVID-19 Act and the employees holding positions contemplated by Article 15zzzzzp para. 6 of the COVID-19 Act. Definitive or amending terminations, the latter reducing working time and, proportionally, the wages, cannot apply to such individuals. Reasons for establishing the relationships of employment with holders of these positions will be of no import.

CIVIL SERVANTS AND DISMISSALS BY FORCE OF THE COVID-19 ACT

Abandonment of the principle of protection of the relationship of employment is one of the similarities between the mechanism of redundancies by force of Article 15zzzzzzo ff. of the COVID-19 Act and the collective redundancies act regulations mentioned above. Pursuant to Article 15zzzzzr para. 12 of the COVID-19 Act, when relationships of employment are terminated as part of realising the obligation of employment reduction, the separate regulations concerning the special protection of employees from termination or dissolution of the employment relationship and instituting special pre-requisites or conditions of contracting or terminating the relationship of employment shall not apply. This provision is equivalent to Article 5 para. 1 of the Collective Redundancies Act, though its normative contents are even richer. It is also functionally related to Article 15zzzzzs para. 1 of the COVID-19 Act, which regards extension of the employment reduction to a civil servant as the sole grounds for termination. It not only expands limits of the employer's freedom with dismissing employees covered with the special protection against termination but also permits dissolution of employment relationships with employees hired on the basis of other than contractual relationships of employment, in particular, appointment. The exclusion of regulations setting out special conditions for dissolving relationships of employment ought to be interpreted in this manner. For instance, the Civil Service Act[33], applicable to employees with some organisations subject to the duty of employment reduction, lists a close-ended catalogue of occurrences

[33] Act of 21 November 2008 on the Civil Service (consolidated text Journal of Laws 2017, item 1889 as amended).

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that lead to obligatory (Article 71 para. 1) or facultative (Article 71 para. 2) termination of a relationship of employment by appointment. In the light of Article 15zzzzzs para. 1 of the COVID-19 Act, it will be legal to dismiss an appointed civil servant as provided for by the special purpose law. Thus, qualification of a civil servant for dismissal under the duty of employment eduction stipulated by Article 15zzzzzo para. 2 point 1 of the COVID-19 Act has become a pre-requisite for the obligatory termination of a civil servant's relationship of employment additional to the conditions designated in Article 71 of the Civil Service Act.

Subjection of employees hired by appointment to the obligation of reducing payroll costs of employment on a par with those employed according to contracts of employment is controversial not only because it constitutes a departure from the theoretical model, which assumes a special stability of employment relationships based on appointment. The appointment as envisaged by the Civil Service Act is a prestigious foundation for the relationship of employment subject to very high requirements. Seeking appointment with the civil service is not driven by financial considerations, as it does not automatically translate into higher salaries, but by the desire for stable employment. By introducing to law new occurrences that allow for dissolution of the relationship of employment by appointment, the state violates the unwritten duty of maintaining stability of such a relationship of employment. In effect, this undermines the endeavour invested in gaining appointment, levelling civil service employees who have not decided to face the challenge of a competitive procedure (or have done so and failed the requirements) with civil servants

A doubt of paramount significance arises in relation to appointed employees subject, in the light of Article 15zzzzzs para. 1 of the COVID-19 Act, to the duty of reducing personnel costs of salaries by cutting of their working time and a parallel, proportional reduction of remuneration for work. The labour legislation does not envisage part-time employment on this basis or amending termination in relation to such employees. Regulations providing for the appointment set out comprehensive provisions for modifications to terms and conditions of employment, whereby Article 42 of the Labour Code cannot be applied. The view expressed by the Supreme Court in its judgement of 19 April 2010[34], according to which transfer of an employee to another post under the State Authorities Employees Act is an independent legal construct different to regulations regarding termination of terms and conditions of work or pay in the Labour Code, appears authoritative in this respect. Meanwhile, Article 15zzzzzs para. 1 of the COVID-19 Act implies the legislator allows for reductions of working time and parallel, proportional pay cuts of civil servants. Extension of the duty of employment reductions to both relationships of employment based on appointment and pursuant to employment contracts, assuming possible employment reductions by way of amending termination that would cut working time and, in par-

[34] II PK 310/09, LEX no. 602698.

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allel and proportionally, reduce salaries, would give rise to a previously non-existent group-of part-time employees hired by force of appointment.

Provisions of the COVID-19 Act insofar as they apply to dissolution of employment relationships, reduction of working time and proportional pay cuts of civil service employees evidently undermine the employees' confidence in the state and the law it creates. They are thus contrary to the principle of legal certainty, derived from Article 2 of the Constitution of the Republic of Poland and secondary to the general principle of the rule of law, and the derivative principles – protection of justly acquired rights and interests in progress as well as assurance of legal security.[35] They also evidently violate the state's duty to protect work, declared in Article 24 of the Constitution of the Republic of Poland.

AMOUNTS OF SEVERANCE PAYS IN THE CONTEXT OF THE LABOUR LAW'S PROTECTIVE FUNCTION

Financial costs of employment reduction are undoubtedly major arguments persuading an employer to make well-considered decisions to dismiss employees. Severance packages paid to employees in connection with contract terminations for reasons related to the employer. Articles 8 and 10 of the Collective Redundancies Act are of crucial significance in this respect. It is beyond any doubt the regulatory obligation to pay severance fulfils the protective function of labour law, since it forces an employer to seriously consider steps intended to cut costs of their operation other than employment reductions. Therefore, lowering the limit of severance pay due to the employee to ten times the minimum wages determined on the basis of minimum wage regulations, introduced by force of shield 4.0 provisions to Article 15gd of the COVID-19 Act, constitutes a backward step in protection of employees' interests that adversely affects the protective function of labour law.

CONCLUSIONS

The types and scale of challenges to the state caused by the COVID-19 epidemic are unprecedented. In view of the dynamic situation, it is impossible to fully anticipate consequences of these developments to the economy and thus to public finances.

Assuming the necessity of cutting costs of public administration with regard to employee remuneration, the Polish COVID-19 Act has instituted a mode of employ-

[35] Cf. M. Zubik, *Komentarz do art. 2, pkt 15*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Warszawa 2016.

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ment reduction previously unknown to the Polish labour legislation. In my opinion, these regulations are redundant and their objectives can be reached by "ordinary" means an employer has of controlling levels of staffing. These means primarily comprise the Labour Code regulations that define the mode of terminating relationships of employment and of the Collective Redundancies Act. The COVID-19 Act regulations under discussion substantially restrict the practical dimension of the labour law's protective function. Although it is true to say this function of labour law will continue to be fulfilled, I believe it is difficult to accept regulations that are unnecessary for praxeological reasons. At the same time, one should not ignore social consequences of regulations that, by exacerbating the sense of uncertainty and jeopardy caused by the epidemic situation, undermine the principle of legal certainty, derived from Article 2 of the Constitution of the Republic of Poland and from the general principle of the rule of law.

These reservations concerning the COVID-19 Act regulations with reference to the protective function of labour law are particularly topical in relation to employees hired by virtue of appointment. By providing for their dismissal by the "special mode" under the COVID-19 Act, the legislators have in fact undermined the axiom of enhanced duration of relationships of employment based on appointment.

One cannot also ignore the fact the legislator, by providing for mass redundancies of public administration employees, while the extent of public duties discharged by their employers remains unchanged, has admitted the existence of unproductive employment in this sector. Reduced employment will result in either greater and unauthorised workload of the remaining employees or administrative failure at discharge of public duties.

I also remain critical of the limitation of maximum severance packages payable to redundant employees, which can in fact encourage some employers to undertake collective redundancies.

The doubts concerning the regulations of Articles 15zzzzzo–15zzzzzx of the COVID-19 Act obviously should not be raised in abstraction from their objectives. They are intended to reduce costs of payroll in organisations subject to this obligation and, indirectly, to cut public spending on employment. The Constitutional Tribunal regards the state of public finances as a good subject to particular protection. In its judgement of 4 May 2004, the Tribunal declared that good is so high in the hierarchy of constitutional values that it is protected by a constitutional restriction, that is, an absolute prohibition against the state taking excessive debt.[36] In its judgement of 26 November 2001, the Tribunal in turn formulated the directive of a "harmonious reconciliation" of constitutional values and the priority status of budget balance and

[36] Judgement of the Constitutional Tribunal of 4 May 2004, K 40/02, OTK-A 2004, no. 5, item 38.

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stability of public finances.[37] I am convinced the labour legislation from "the times of COVID-19" is an expression of the harmonious reconciliation of diverse constitutional values: labour protection, market economy, and budget balance.

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[37] Judgement of the Constitutional Tribunal of 26 November 2001, K 2/00, OTK ZU 2001, no. 8, item 254.

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ABSTRAKT

Epidemia COVID-19 od początku 2020 r. w istotnym stopniu wpływa na działania legislacyjne polskiego ustawodawcy. Jednym z przewidywanych następstw epidemii jest spowolnienie gospodarcze i idące za nim zmniejszenie dochodów budżetu państwa. Okoliczność ta sprawiła, że w ustawie COVID-19 znalazły się przepisy wprowadzające do polskiego prawa pracy przepisy będące *lex specialis* do przepisów zawartych w Kodeksie pracy i w niektórych pragmatykach pracowniczych określających rozwiązywanie stosunków pracy w niektórych jednostkach organizacyjnych administracji publicznej. Istota nowej konstrukcji prawnej sprowadza się do ustanowienia dla pracodawców zwalniających pracowników daleko idących ułatwień w procesie zmniejszania zatrudnienia. W konsekwencji dochodzi do ograniczenia ochronnej funkcji realizowanej przez przepisy prawa pracy, wyrażającej się w ochronie trwałości stosunku pracy. Regulacji ustawy COVID-19 w tym zakresie nie sposób zaakceptować. Każda regulacja powinna wynikać z obiektywnie stwierdzonych potrzeb prawnego uregulowania stosunków społecznych, nie powinna wprowadzać inflacji przepisów oraz obniżać poczucia zaufania obywatela do tworzonego przez pracodawcę prawa. Postulat o takim kierunku prawnego określania stosunków społecznych jest szczególnie doniosły w odniesieniu do stosunków pracy, w tym zwłaszcza do stosunków pracy na podstawie mianowania w administracji publicznej. Wprowadzenie możliwości jednakowego traktowania pracowników zatrudnionych na różnej podstawie tylko pozornie wpisuje się w konstytucyjnie chronioną równość prawa. Nie kwestionując prawa pracodawców do determinowania poziomu zatrudnienia, nie wydaje się konieczne uchwalanie w związku z epidemią COVID-19 nowych przepisów, gdyż cele, jakim mają służyć, mogą zostać osiągnięte przy zastosowaniu zwykłych środków prawnych przewidzianych prawem pracy.

Słowa kluczowe: COVID-19; ochronna funkcja prawa pracy; rozwiązywanie stosunków pracy; mianowanie; administracja publiczna