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Łukasz Bolesta
Maria Curie-Skłodowska University (Lublin), Poland
ORCID: 0000-0001-9336-4302
lukasz.bolesta@mail.umcs.pl

Contractual Limitation of Taking by the Employee on Additional Jobs That Are Non-Competitive to the Employer

Umowne ograniczenie podejmowania przez pracownika dodatkowego zatrudnienia (działalności) o charakterze niekonkurencyjnym wobec pracodawcy

ABSTRACT

This research paper examines the issue of contractual restrictions on undertaking by an employee additional professional activity of a non-competitive nature with regard to the current employer. This issue has been a subject of dispute among labour law scholars for many years. Research in this area has become newly relevant due to recent amendments to the provisions of the Labour Code as a result of the implementation in the Polish legal system of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union. As a result, Article 26^1 § 1 was introduced in the Labour Code, in which a prohibition was expressly stated, addressed to the employer, to prohibit the employee from taking up and remaining in additional employment. The legislature thus reinforced the employee's freedom to undertake additional employment and emphasized the primacy of freedom of labour over protection of the interests of the employer against the uncompetitive additional activity of the worker, which could potentially undermine these interests. However, the content of the cited regulation raises interpretive questions as to whether the prohibition set out therein applies only to unilateral action by the employer or also to contractual terms agreed between the employee and the employer in this respect. Providing an answer to the above question, apart from its legal doctrinal value, is also of significant importance for the practice of legal transactions in Poland.

Keywords: labour relationship; employee; employer; limitation of additional employment

CORRESPONDENCE ADDRESS: Łukasz Bolesta, PhD, Assistant Professor, Maria Curie-Skłodowska University (Lublin), Faculty of Law and Administration, Institute of Legal Sciences, 5 Maria Curie-Skłodowska Square, 20-031 Lublin, Poland.

INTRODUCTION

The issue of contractual limitation of the employee's undertaking of additional professional activities of a non-competitive nature in relation to the employer should be considered topical due to the dispute among labour law scholars that has been under way for many years, regarding whether the parties to the employment relationship may undertake such activities or not. This is of crucial importance for the practice of legal transactions. Although it may seem at first glance that additional professional activity of the employee does not pose a threat to employer's interests, it is beyond doubt that it may negatively affect the scope of employee's availability and due performance of his or her obligations for the main employer.[1] The nature of such employment may also contradict the values and ethical standards of the main employer and thus may affect employer's image. Such concerns became the source of doubts about the possibility of contractual restriction of employee's freedom to undertake additional non-competitive employment.

This issue is also topical in view of the recent changes in the Labour Code provisions,[2] which took place as a result of the implementation of the provisions of the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[3] in the Polish legal order. As a result, the provisions of the Labour Code expressly articulate the prohibition addressed to the employer to prohibit an employee from taking on and performing additional jobs (Article 26^1 § 1 LC), except in the cases referred to in Article 26^1 § 2 LC.

Despite the fact, as it might seem, the legislature has resolved the dispute on the possibility for employers to restrict employees from taking on additional employment, the content of Article 26^1 § 1 LC still raises certain interpretive doubts. The literal interpretation of the regulation does not provide a clear conclusion as to whether the prohibition set out therein applies only to employer's unilateral action or also to contractual arrangements between the employee and the employer in this respect. In the author's opinion, the normative scope of this provision extends to both these situations, as will be discussed in more detail further herein.

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[1] J. Iwulski (*Umowny zakaz dodatkowego zatrudnienia*, [in:] *Prawo pracy i prawo socjalne. Teraźniejszość i przyszłość. Księga jubileuszowa dedykowana Profesorowi Herbertowi Szurgaczowi*, eds. R. Babińska-Górecka, A. Przybyłowicz, K. Stopka, A. Tomanek, Wrocław 2021, p. 107) rightly noted that the employer is always interested in the employee not taking up additional employment, as there is never a situation in which the employer does not have an interest in the employee providing work exclusively for him.

[2] Act of 26 June 1974 – Labour Code (consolidated text, Journal of Laws 2025, item 277, as amended), hereinafter: LC.

[3] OJ L 186/105, 11.7.2019.

The main research method used in the article is the legal-dogmatic method involving an analysis of the applicable legal provisions, primarily the Polish Labour Code. They were analysed using linguistic, systemic and teleological interpretation. As an auxiliary means, the legal-historical method was also used by referring to currently non-applicable Article 101 LC.[4]

PROHIBITION OF TAKING ON ADDITIONAL EMPLOYMENT IN VIEW OF EXISTING LEGISLATION

Analyses concerning the issue of contractual restrictions on an employee taking up additional employment (activities) that is not competitive to the employer's activity should begin with recalling now ineffective Article 101 LC,[5] which provided that a full-time employee may not take on additional jobs without the consent of the work establishment, unless a special provision provides otherwise. This provision has been repealed pursuant to Article 1 (31) of the Act of 7 April 1989 amending the Labour Code and certain other laws.[6] This regulation was removed from the legal system due to, as it seems, the recognition that it constituted a restriction of a general nature, contrary to the principle of freedom of labour.[7]

The literature on Article 101 LC points out that taking on additional employment by an employee without the consent of the existing work establishment constitutes a breach of the obligation of full and effective use of working time, resulting in particularly blatant cases, even in termination of the employment contract without notice through the employee's fault. The obligation to obtain the approval of the work establishment for additional jobs did not arise when the employee, while still bound by a legal bond with the existing work establishment, was temporarily relieved of work duties and the work establishment was not allowed to dispose of his or her person.[8] As noted in the literature on the subject, the regulation in question was not about market competition (as it is today) but about competition

[4] Article 101 LC was effective for the period from 1 January 1975 until 1 May 1989.

[5] For more detail on the evolution of the legal regulation of additional employment, see B. Cudowski, *Zmiany regulacji prawnej dodatkowego zatrudnienia*, "Studia Iuridica Lublinensia" 2015, vol. 24(3); H. Szewczyk, *Ewolucja regulacji prawnej w zakresie dodatkowego zatrudnienia pracowników*, [in:] *Verus amicus rara avis est. Studia poświęcone pamięci Wojciecha Organiściaka*, eds. A. Lityński, A. Matan, M. Mikołajczyk, G. Nancka, D. Nawrot, Katowice 2020.

[6] Journal of Laws 1989, no. 20, item 107.

[7] For example, see B. Cudowski, *Dodatkowe zatrudnienie*, Warszawa 2007, p. 25; K. Walczak, *Zakaz konkurencji jako prawne narzędzie pracodawcy wymuszenia realizacji pracowniczego obowiązku dbałości o dobro zakładu pracy*, [in:] *Pracodawca jako podmiot ochrony w stosunku pracy. Wybrane zagadnienia*, eds. T. Wyka, A. Nerka, Warszawa 2017, p. 71.

[8] W. Masewicz, [in:] *Kodeks pracy. Komentarz*, ed. J. Jończyk, Warszawa 1977, p. 382 ff., as cited in K. Walczak, *op. cit.*, p. 70.

for an employee (workforce), the psycho-physical condition affected by working for two employers.[9]

Various forms of restriction on taking up additional employment, regardless of its nature, are still provided for by some internal workplace regulations, in particular those regulating employment in the public sector.[10] They introduce for certain categories of workers: a prohibition to take on additional jobs, the obligation to notify the employer of the undertaking of such job, or the necessity to obtain the consent of a specific authority or employer for such work.

It is worth noting that a contractual restriction on additional employment of the employee cannot be equated with a contractual prohibition of competition as regulated by the Labour Code. There is only a partial overlap between the terms "non-competition" and "prohibition of additional employment". Competitive employment is a special type of additional employment.[11] It is obvious that not every additional job of the employee will be of a competitive nature. The purposes of introducing these prohibitions are also not the same. In the case of a prohibition of competition, it is to protect the employer against the damage caused by the worker's competitive activities. The rationale of the prohibition of additional employment is to increase the efficiency and quality of work, to prevent employee burnout, to make the employee more attached to the employer, to strengthen his or her loyalty and sense of identity with the work establishment.[12]

ADMISSIBILITY OF ESTABLISHING A CONTRACTUAL RESTRICTION (PROHIBITION) ON AN EMPLOYEE TAKING UP ADDITIONAL EMPLOYMENT

As mentioned earlier, the admissibility of establishing a contractual restriction (prohibition) on the employee's undertaking of additional employment has so far been a contentious issue in the relevant literature and case law. Consideration in this regard should begin with two rulings of the Polish Supreme Court which, despite presenting different positions, are of fundamental importance in the matter at

[9] J. Czerniak-Swędzioł, *Pracowniczy obowiązek ochrony interesów gospodarczych pracodawcy*, Warszawa 2007, p. 172.

[10] For more detail on the subject, see A. Dubowik, *Dodatkowe zatrudnienie i inne zajęcia pracowników sfery publicznej*, "Praca i Zabezpieczenie Społeczne" 2005, no. 10, pp. 15–23.

[11] B. Cudowski, *Ustanie zakazu konkurencji w razie niewywiązywania się pracodawcy z obowiązku wypłaty odszkodowania*, [in:] *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej Profesor Barbary Wagner*, ed. A. Sobczyk, Warszawa 2010, pp. 24–28.

[12] W. Chmurak, *Zakaz podejmowania dodatkowego zatrudnienia niebędącego działalnością konkurencyjną – glosa – II PK 268/07*, "Monitor Prawniczy" 2010, no. 20, p. 1144.

issue. As a side note, it is worth noting that none of them has been welcomed with widespread acceptance by labour law scholars.

Chronologically, one should start with the judgment of the Supreme Court of 2 April 2008, stating that "a provision of an employment contract prohibiting additional employment to the extent that is not competitive to the employer's business is invalid (Article 58 § 1 of the Civil Code[13] in conjunction with Article 300 LC), as it constitutes a circumvention of the prohibition under Article 101^1 § 1 LC".[14] It was pointed out in the substantiation of the judgment that the prohibition on taking on additional jobs by an employee during the employment relationship may be introduced in the non-competition agreement, and therefore may only apply to activities that are competitive to those of the employer. In the Supreme Court's opinion, the provision of Article 101^1 § 1 LC sets limits to the permissible restriction on the employee's freedom to undertake additional employment. It was also noted that, since certain statutory provisions of general and special labour law provide for prohibitions on taking up additional (competitive) employment, any contractual extension of these prohibitions would be invalid as less favourable to the employee. The Supreme Court also indicated in the above-mentioned judgment that the nature of the employment relationship and the need to comply with the principles of labour law in the first place, in accordance with Article 300 LC speak in favour of an interpretation of the provisions of the Labour Code concerning the prohibition of competition in a way that would lead to a limitation of the principle of freedom of contract under Article 353^1 CC. In conclusion, although the parties to an employment relationship may conclude an agreement prohibiting taking on additional jobs by the employee, their freedom to determine the type of activity that an employee may not engage in is limited solely to competing activities.

This position of the Supreme Court has not been welcomed with widespread acceptance in the literature on the subject. This is manifested in, e.g., commentaries on the judgment, which criticise especially the thesis assuming that a contractual restriction of additional employment is only permissible with regard to competitive activities through the conclusion of a non-competition agreement.[15] It has also been argued that the non-competition provisions do not comprehensively regulate the prohibition of additional employment. Thus, it is permissible for the parties to the employment relationship to contractually limit the possibility of taking on additional

[13] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2024, item 1061, as amended), hereinafter: CC.

[14] Judgment of the Supreme Court of 2 April 2008, II PK 268/07, OSNP 2009, no. 15–16, item 201.

[15] See commentaries on this judgment: T. Rogala, *Zakaz podejmowania dodatkowego zatrudnienia niebędącego działalnością konkurencyjną – glosa – II PK 268/07*, "Monitor Prawniczy" 2010, no. 16; P. Kwaśniewski, *Znaczenie określenia „w odrębnej umowie" w rozumieniu art. 101(1) § 1 oraz art. 101(2) § 1 w zw. z art. 101(1) § 1 k.p. Glosa do wyroku SN z dnia 2 kwietnia 2008 r., II PK 268/07*, "Glosa" 2011, no. 4; W. Chmurak, *op. cit*.

employment (not only competitive activity) as long as it is beneficial for the employee, e.g. the employee will receive appropriate (equivalent) remuneration in return.

The view of the Supreme Court presented above deviates from another statement of this court on the same matter in its judgment of 14 April 2009.[16] Due to the significance of the main thesis of that judgment, it is worth quoting it in full: "The obligation to take care of the welfare of the work establishment may consist in a contractual restriction on the taking up of additional employment by the employee in the form of an appropriate prohibition or the need to obtain the employer's consent to undertake such employment (activity). This restriction cannot be introduced unless it is reasonable in the light of an interest of the work establishment. The introduction in the employment contract of a prohibition on additional employment or the obligation to obtain the prior consent of the employer, which does not meet this requirement, is invalid (Article 58 § 1 CC in conjunction with Article 300 LC)".

According to the Supreme Court, the introduction of a contractual prohibition on an employee taking on additional employment does not constitute a breach of the principle of freedom of labour derived from Article 65 (1) of the Polish Constitution[17] and Article 10 LC. It has been assumed that currently, in place of the statutory restriction on additional employment (repealed Article 101 LC), it should be considered permissible to regulate this matter contractually. In its deliberations, the Supreme Court pointed out that the contractual prohibition of additional employment which is an embodiment of the duty to take care of the welfare of the work establishment does not violate the constitutional principle under Article 65 (1), since no direct employer's obligations stem from it. On the other hand, the principle under Article 10 § 1 LC, should not be equated with the prohibition of contractual restriction on additional employment. According to this view, a contractual restriction on employee's additional employment is possible and is not exclusively related to activities that are competitive to the employer.

In an approving commentary on this judgment, J. Czerniak-Swędzioł pointed out that a contractual restriction on the employee's possibility to take on additional employment should be understood as specification and detailing of the employee's duty of care and loyalty under Article 100 § 2 (4) LC. It may consist of obliging the employee not to take on additional employment during the employment relationship or making such a possibility conditional on the prior consent of the employer. However, assessing the permissibility of the above action requires taking into account the employer's business, its market environment, the nature of the work and its importance for the operation of the workplace, the tasks incumbent on the

[16] Judgment of the Supreme Court of 14 April 2009, III PK 60/08, OSNP 2010, no. 23–24, item 287.

[17] 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 is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.6.2025).

employee, including the working hours, and parties' intentions behind the entering into the employment contract.[18]

It should be noted that the subsequent case law of the Supreme Court has not clearly resolved the discrepancy in the interpretation performed in the judgments cited above, i.e. of 2 April 2008 (II PK 268/07) and of 14 April 2009 (III PK 60/08). The Supreme Court seems only to have unquestionably accepted the possibility of the employer obliging the employee to provide information about the intention to undertake and about the undertaking of additional professional activity.[19]

The issue also stirred much controversy among scholars in the field of labour law. A frequent opinion was that questioning the validity of such contractual provisions.[20] As an example, in M. Raczkowski's opinion, the prohibition of additional jobs beyond the competitive activity is illegal and therefore invalid. The non-competition agreement is an exception to the principle of freedom of labour and therefore the rule of *exceptiones non sunt extendendae* must be followed in this regard. On the other hand, according to this author, as regards the principle of contractual freedom, which is usually presented as a rationale for the admissibility of the contractual prohibition on additional activities, that principle, "in labour law is subject to an exception under Article 18 § 1 LC".[21]

In the literature, however, a prevailing position until recently was to allow a contractual restriction on additional employment (business), also of a non-competitive nature, conditional on the pursuit of the legitimate interests of the employer and the granting of adequate compensation to the employee in order to preserve the principle of favouring the employee, e.g. in the form of higher salary.[22] In the opinion

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[18] J. Czerniak-Swędzioł, *Umowny zakaz podjęcia dodatkowego zatrudnienia – obowiązek pracownika dbania o dobro zakładu pracy – zakaz konkurencji – sankcje naruszenia obowiązków przez pracownika. Glosa do wyroku Sądu Najwyższego z dnia 14 kwietnia 2009 r., III PK 60/08*, "Orzecznictwo Sądów Polskich" 2011, no. 7–8.

[19] As ruled by the Supreme Court in judgment of 19 January 2017, I PK 33/16, OSNP 2018, no. 3, item 30.

[20] J. Iwulski, *op. cit.*, p. 107; R. Tazbir, *Ochrona interesów pracodawcy przed działalnością konkurencyjną pracownika*, Kraków 1999, p. 61; Z. Kubot, *Dodatkowe zatrudnienie kierownika publicznego zakładu opieki zdrowotnej*, Wrocław 2006, p. 48; H. Lewandowski, *Nawiązanie i zmiana stosunku pracy (zarys problematyki)*, [in:] *Prawo pracy RP w obliczu przemian*, eds. M. Matey-Tyrowicz, T. Zieliński, Warszawa 2006, p. 131; A. Dubowik, *op. cit.*, p. 15; I. Jaroszewska-Ignatowska, *Zatrudnienie w niepełnym wymiarze czasu pracy*, LEX/el. 2018.

[21] M. Raczkowski, *Komentarz do art. 101[1]*, [in:] M. Gersdorf, K. Rączka, M. Raczkowski, *Kodeks pracy. Komentarz*, LEX/el. 2014.

[22] Cf. B. Cudowski, *Dodatkowe zatrudnienie…*, p. 20 ff.; M.T. Romer, *Dodatkowe zatrudnienie a uprawnienia pracownicze*, Warszawa 1995, p. 11; I. Wieleba, *Umowne ograniczenie podejmowania dodatkowego zatrudnienia jako przejaw lojalności pracowniczej. Wybrane zagadnienia*, "Annales UMCS sectio G (Ius)" 2018, vol. 65(2); S. Pochopień-Belka, *O dopuszczalności kreowania umownych ograniczeń w podejmowaniu przez pracownika dodatkowego zatrudnienia*, [in:] *Prawo pracy i prawo socjalne. Teraźniejszość i przyszłość. Księga jubileuszowa dedykowana Profesorowi Herbertowi*

of S. Pochopień-Belka, agreements prohibiting taking on additional employment are permissible and are based on the principle of freedom of contract, subject to the existence of a sufficiently important legal interest on the part of the employer that needs to be protected. These agreements, in the author's opinion, have the status of autonomous clauses. They constitute agreements shaping the content of the employment relationship, distinct from the employment contract, and therefore the provisions of the Labour Code on the employment contract sensu stricto, and therefore also the principle of favouring the employee,[23] do not apply to them.

This view was also adopted in the practice of legal transactions, where one could find contractual restrictions (prohibitions) agreed by the parties with regard to the employment relationship in terms of the possibility for the employee to take up additional employment (job) of a non-competitive nature or the obligation to obtain prior consent from the employer. To prevent any infringement of the principle of favouring the employee in such activities, it was considered necessary to establish equivalent compensation in the form of an increase in the employee's salary to such an extent as to exclude an economic factor that normally affects the employee's intention to engage in additional gainful activity.[24] In order to agree the restriction in question, the mutual will of both parties to the employment relationship was necessary. The literature indicates that a contractual restriction on additional employment may, on the one hand, aim to ensure the maximum lawful availability of the employee and focus employee's attention (all professional activity and abilities) solely on the pursuit of the employer's interests in the primary workplace. On the other hand, it was emphasized that this procedure helps protect a valuable employee from excessive burdens of additional duties, the risk of an accident at work or an occupational disease, and protects the employer's image.[25]

Szurgaczowi, eds. R. Babińska-Górecka, A. Przybyłowicz, K. Stopka, A. Tomanek, Wrocław 2021, p. 169. P. Prusinowski (*Komentarz do art. 101[1]*, [in:] *Kodeks pracy. Komentarz*, vol. 2: *Art. 94–304(5)*, ed. K.W. Baran, LEX/el. 2022) holds that it is possible for the parties to the employment relationship to conclude agreements other than the non-competition agreement under Article 101[1] § 1 LC, which will implement the duty of care (in the broad sense) for the welfare of the work establishment. In the author's opinion, the function of these agreements or provisions may coincide with the purpose of the non-competition agreement, and their scopes need not to intersect.

[23] S. Pochopień-Belka, *op. cit.*, pp. 168–169.

[24] As in, i.a., I. Wieleba, *op. cit.*, p. 321.

[25] T. Rogala, *op. cit.*, p. 915; S. Pochopień-Belka, *op. cit.*, pp. 168–169.

CHANGES INTRODUCED BY THE ACT OF 9 MARCH 2023 AMENDING THE LABOUR CODE AND CERTAIN OTHER LAWS

On 26 April 2023, the Act of 9 March 2023 amending the Labour Code and certain other laws[26] became effective. Under this Act, the provisions of Directive 2019/1152 were implemented in the Polish legal order. Thus, according to Article 9 (1) of Directive 2019/1152, Member States have been required to ensure "that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so". On the other hand, Article 9 (2) of Directive 2019/1152 authorises Member States to introduce in their internal legal order derogations from the principle expressed in para. 1, namely to establish conditions for the application by employer of restrictions on combining jobs. Such restrictions can only result from objective reasons, e.g. health and safety, protection of business secrets, integrity of the civil service or avoidance of conflicts of interest.

Taking into account the aforementioned provisions of Directive 2019/1152, the Polish legislature introduced into the Labour Code Article 26^1. Pursuant to its § 1, "an employer may not prohibit an employee from simultaneously remaining in an employment relationship with another employer or from simultaneously remaining in a legal relationship which is the basis for the provision of work other than under the employment relationship". This prohibition relates to preventing an employee from engaging in any additional professional activity, thus not only that under the employment relationship, but also under a civil law contract or business activity. The prohibition shall not apply to the non-competition agreement referred to in Article 101^1 § 1 LC, and in cases governed by separate regulations (Article 26^1 § 2 LC).[27]

Under the aforementioned provision of Article 26^1 § 1 LC, the employer is required to refrain from taking action to prevent the employee from taking on additional employment. However, it should be noted that the prohibition laid down in the norm contained in Article 26^1 § 1 LC, given its literal wording, does not relate to contractual waiver of the possibility for an employee to undertake additional professional activity. This is so because the provision uses the phrase "an employer may not prohibit an employee" and thus refers expressis verbis only to unilateral legal actions taken by the employer. This entails certain interpretive problems. Since the regulation under consideration does not expressly mention the prohibition of a contractual restriction on taking up additional employment, it can be concluded

[26] Journal of Laws 2023, item 641.

[27] Examples of "separate legislation" include Article 80 of the Act of 21 November 2008 on civil service (consolidated text, Journal of Laws 2024, item 409, as amended) or Article 125 of the Act of 20 July 2018 – Law on higher education and science (consolidated text, Journal of Laws 2023, item 742, as amended).

that only unilateral action taken by the employer to prohibit the employee from concurrently having an employment relationship with another entity is prohibited.

However, I support the contrary view expressed in the literature that the above interpretation should not be accepted.[28] This position arises primarily from an analysis of the content of Article 26^1 § 2 (1) LC, according to which the prohibition expressed in Article 26^1 § 1 LC is not applicable to a non-competition agreement within the duration of the employment relationship. Since the provision itself refers to an exception consisting of an act of a contractual nature, it is impossible to consider that the prohibition under Article 26^1 § 1 LC relates only to unilateral acts of the employer. With this assumption, the exception set out in Article 26^1 § 2 (1) LC would go beyond the scope of that prohibition. Thus, it follows from the above that the prohibition under Article 26^1 § 1 LC also applies to acts of a contractual nature.

The literature on the subject also contains a view that the provision of Article 26^1 § 1 LC, understood as referring exclusively to unilateral activities of the employer, would be redundant, as under general labour law the employer does not have the power to restrict the worker's freedom to engage in other gainful activities.[29]

Moreover, as A. Tomanek rightly points out, Article 26^1 LC must also be looked at from the perspective of its systemic context.[30] A reference to the prohibition expressed in this provision can be found in the new Article 29^4 LC, in which the legislature defined the so-called negative ground for termination of the employment contract or its termination without notice, which is important from the point of view of this analysis.[31] According to Article 29^4 § 1 (2), the concurrent employment relationship with another employer or the concurrent legal relationship for the performance of work, other than the employment relationship, cannot be a ground for termination of the employment contract or its termination without notice by the employer, a ground for preparation for termination of the contract without notice or the application of an action having an effect equivalent to termination of the

[28] As in J. Stelina, *Komentarz do art. 26 (1)*, [in:] *Kodeks pracy. Komentarz*, ed. A. Sobczyk, Legalis 2023; I. Jaroszewska-Ignatowska, *Komentarz do art. 26 (1)*, [in:] *Kodeks pracy. Komentarz*, ed. K. Walczak, Legalis 2012; A. Tomanek, *Umowny zakaz dodatkowego zatrudnienia po nowelizacji Kodeksu pracy*, "Praca i Zabezpieczenie Społeczne" 2023, no. 8, p. 6.

[29] K. Jaśkowski, *Komentarz do art. 26[1]*, [in:] *Kodeks pracy. Komentarz aktualizowany*, eds. E. Maniewska, K. Jaśkowski, LEX/el. 2024.

[30] A. Tomanek, *op. cit.*, p. 5.

[31] Other examples of negative grounds for termination of employment may be found in Article 18^{3e} § 1 LC, according to which the exercise by an employee of his or her rights due to a breach of labour law, including the principle of equal treatment in employment, may not form the basis for any unfavourable treatment of the employee and may not cause any adverse consequences for the employee, in particular it may not constitute a ground for termination of the employment relationship or its termination without notice by the employer, or in Article 23^1 § 6 LC, according to which the transfer of the work establishment or part of it to another employer shall not constitute a ground for termination of the employment relationship by the employer.

employment contract; unless the restrictions in this respect result from separate provisions or there is a case specified in Article 101^1 § 1 LC.

On the basis of the aforementioned regulation, the employee's remaining in a concurrent employment relationship cannot constitute a reason justifying the employer's act listed therein, that is, i.a., termination of the employment contract or its termination without notice. An example is two situations, identical to those set out in Article 26^1 § 2 LC. Thus, Article 29^4 LC has not made the occurrence of the effects provided for therein dependent on whether the prohibition of additional employment is based on a contract or on a unilateral act of the employer. The above may be a source of confirmation of the validity of the position that inadmissibility of the prohibition of additional employment under Article 26^1 LC concerns both a unilateral act by the employer and the conclusion of a relevant agreement by the parties to the employment relationship. In A. Tomanek's opinion, this approach ensures that the provisions being introduced are consistent and complementary in the area under analysis.[32]

THE PERMISSIBILITY OF CONTRACTUAL RESERVATION OF EMPLOYEE'S OBLIGATION TO INFORM THE EMPLOYER OF TAKING OR INTENTION TO TAKE ON ADDITIONAL EMPLOYMENT

Another issue that also needs to be considered in the context of the introduction of new Articles 26^1 and 29^4 LC is the possibility of contractually obliging the employee to provide information about their intention to engage in or actually engage in additional gainful activity. It is clear that no provision of the Labour Code in the past did, nor does it now, oblige the employee to inform the employer of other employment relationship. However, as mentioned earlier, the Supreme Court in its case law allowed the parties to the employment relationship to enter into contractual reservations of this kind. The employer was also entitled to instruct the employee to inform the employer of the employee's intention to take up or taking on additional work activities.[33]

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[32] A. Tomanek, *op. cit.*, p. 6.

[33] The possibility of doing so was confirmed by the Supreme Court, which held that an employer may oblige an employee to provide information about the intention to undertake and about the actual undertaking of "additional professional activity" if it relates to work and is not contrary to the employment contract and the law. Failure to comply with such an instruction constitutes a breach of a fundamental employee' duty (Article 52 § 1 and Article 100 § 2 (4) LC). See judgment of the Supreme Court of 19 January 2017, I PK 33/16, OSNP 2018, no. 3, item 30. The above position of the Supreme Court has received both scholarly approval (for example, see J. Symber, *Możliwość skutecznego zobowiązania pracownika do informowania pracodawcy o dodatkowym zatrudnieniu. Glosa do wyroku SN z dnia 11 stycznia 2017 r., I PK 25/16*, "Gdańskie Studia Prawnicze – Przegląd

It should be noted that the introduction of Articles 26^1 and 29^4 do not refer in any way to the possibility for the employer to oblige the employee to provide information about the intention to undertake or the actual undertaking of additional professional activity. This issue must therefore be considered separately from the prohibition of the employee from carrying out additional non-competitive activities. With this in mind, in the author's opinion, also under the current legislation the employer may oblige the employee to provide the information in question on the basis of a prior contractual arrangement between the employee and the employer, as well as through an instruction if the imposition of such an obligation relates to work and is not contrary to the provisions of the labour law and the content of the employment contract concluded by the parties.[34]

CONCLUSIONS

The analyses presented above confirmed that under the currently applicable provisions of the Labour Code, except for cases regulated by separate regulations, the employer may not prohibit an employee from taking up additional uncompetitive employment either by way of unilateral action or by way of a contract concluded with the employee. Therefore, the contractual waiver by the parties to the employment relationship of the possibility of taking up additional professional activity by the employee will be invalid under Article 18 § 1 LC.[35] This has reinforced worker's freedom to take up additional employment. The legislature emphasized the primacy of freedom of labour over the protection of interests of the employer against uncompetitive additional activity of the employee, which can potentially harm these interests. It is even pointed out in the literature on the subject that the entering into force of Article 26^1 LC is a manifestation of the constitutional principle

Orzecznictwa" 2018, no. 2) and criticism (for example, see J. Wratny, *Glosa do wyroku SN z dnia 19 stycznia 2017 r., I PK 33/16*, "Orzecznictwo Sądów Polskich" 2017, no. 1).

[34] Differently A. Tomanek (*op. cit.*, p. 6), according to whom the employee's obligation to inform the employer about taking on additional employment or other gainful activity that is not in competition with the employer is subordinate to the prohibition on the employee performing concurrent non-competitive work. That is why this author is of the opinion that because a contractual reservation of the prohibition on additional employment is invalid (apart from the exceptions referred to in Article 26^1 § 2 LC), it would be pointless to impose an obligation on the employee to notify the employer of the taking up of the new employment or of the intention to do so. On the other hand, according to K. Jaśkowski (*op. cit.*), the employer may only obtain such information with the employee's consent, which should additionally be compliant with the requirements of Article 7 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119/1, 4.5.2016).

[35] See also J. Stelina, *op. cit*.

of freedom of labour.[36] The importance of this regulation cannot be overestimated, given that it resolves a long dispute among labour law scholars regarding the possibility of a contractual obligation for an employee not to take on additional employment that is of a non-competitive nature in relation to the employer.

Notwithstanding the foregoing, the regulation of Article 26[1] LC in the current version, i.e. in a way that does not leave any discretion to the employee and the employer, constitutes, in the author's view, too far-reaching an interference with the autonomy of the parties to the employment relationship with regard to the power to shape the content of the legal relationship between them. As A. Tomanek notes, allowing a contractual restriction on an employee taking on additional employment would make this institution more flexible and allow the parties to the employment relationship to regulate this issue at their discretion as needed.[37] Failure to introduce such a possibility by the Polish legislature should therefore be assessed with criticism, especially given that, in light of Article 9 (2) of Directive 2019/1152, such action seems to be admissible.

In conclusion, it should be stressed that the discussed regulations introduced to the Labour Code do not affect an employee's duties of diligent and conscientious performance of work, care for the welfare of the workplace, as well as loyalty to the employer. An employee in any place of employment should show psychophysical readiness to perform his or her duties. The taking up of additional employment by the employee must not adversely affect the work performed for the parent employer, including in particular it must not constitute a circumstance excluding the employee's responsibility for the non-performance or improper performance of his or her duties for that employer.[38] Undoubtedly, the mere taking up or concurrent remaining in a different employment relationship will not affect any obligations towards the employer. However, the lack of the required psychophysical readiness to provide work and, therefore, the employee's failure to perform his or her duties with the main employer, whatever the reason, e.g. an excessive workload that may be caused by the taking up of additional employment, may infringe the duty to perform his/her work carefully and diligently and to take care of the welfare of the workplace and of his/her loyalty to the employer.

[36] M. Gładoch, *Umowy o pracę. Nowelizacja Kodeksu pracy. Wzory umów i klauzul. Komentarz*, Legalis 2024.

[37] A. Tomanek, *op. cit.*, p. 7.

[38] J. Stelina, *op. cit*.

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ABSTRAKT

W niniejszym opracowaniu o naukowo-badawczym charakterze analizie poddano problematykę umownego ograniczania podejmowania przez pracownika dodatkowej aktywności zawodowej o charakterze niekonkurencyjnym wobec pracodawcy. Kwestia ta jest od wielu lat przedmiotem sporu w doktrynie prawa pracy. Przeprowadzenie badań w przedmiotowym zakresie stało się na nowo aktualne ze względu na niedawno wprowadzone zmiany w przepisach Kodeksu pracy, które nastąpiły na skutek implementacji do polskiego porządku prawnego przepisów dyrektywy Parlamentu Europejskiego i Rady (UE) 2019/1152 z dnia 20 czerwca 2019 r. w sprawie przejrzystych i przewidywalnych warunków pracy w Unii Europejskiej. W ich wyniku do Kodeksu pracy wprowadzono art. 26^1 § 1, w którym *expressis verbis* wyartykułowano skierowany do pracodawcy zakaz zabraniania pracownikowi podejmowania i pozostawania w dodatkowym zatrudnieniu. Ustawodawca wzmocnił w ten sposób swobodę pracownika w zakresie podejmowania dodatkowego zatrudnienia, a także podkreślił prymat wolności pracy nad ochroną interesów pracodawcy przed niekonkurencyjną dodatkową aktywnością pracownika, która potencjalnie może godzić w te interesy. Treść przywołanej regulacji budzi jednak wątpliwości interpretacyjne co do tego, czy zakaz w niej określony dotyczy wyłącznie jednostronnego działania pracodawcy, czy również umownych ustaleń pracownika i pracodawcy w tym zakresie. Udzielenie odpowiedzi na to pytanie, poza wartością dogmatyczną, ma istotne znaczenie także dla praktyki obrotu prawnego w Polsce.

Słowa kluczowe: stosunek pracy; pracownik; pracodawca; ograniczenie dodatkowego zatrudnienia

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