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THE NON-COMPETITION CLAUSE IN LABOUR LAW- IMPLEMENTATION OF THE DIRECTIVE 2019/1152

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Purpose: Issues related to the non-competition clause are the subject of numerous publications. The stimulus for creating this article was the coming into force on 26 April 2023 of the amendment to the Labour Code, aimed at implementing into the Polish legal order two European directives: Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, known as the Work–Life Balance Directive; and 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. The Act brought a range of changes to the Labour Code, among others, with respect to the non-competition clause. The new regulations will undoubtedly be challenging for employers and bring the non-competition clause in the labour law once more to the forefront of discussion.
Design/methodology/approach: The deliberations are based on the related subject literature and an analysis of the legal provisions applicable in the area under discussion.
Findings: As a result of the implementation of Directive 2019/1152 to the Labour Code, Art. 261, under which an employer cannot prohibit an employee from having a concurrent employment relationship with another employer or a concurrent legal relationship that is a basis for providing work other than the employment relationship, nor can they subject an employee to unfavourable treatment because of this. This provision strengthens the freedom of employees in terms of accepting employment. Since the legislator did not introduce transitional measures regarding the application of said provision, it should be assumed that the ban on prohibiting of additional employment is applicable to employment relationships initiated after the changes came into force as well as those relationships initiated before 26 April 2023. If an agreement with a new employee is concluded after the date of this amendment, the employer will be obligated to conclude such an agreement in a different form to other agreements.
Violation of Art. 261 of the Labour Code by the employer results in employer's liability.
If the employee is not bound by the employer to a non-competition agreement, provision of work by the employee for another employer does not have any negative consequences, and the employer cannot terminate the employment agreement for this reason.
Practical implications: Entrepreneurs will need to implement far-reaching organisational changes in adjusting their businesses to the new legal requirements, and hence it is increasingly important that employers are knowledgeable about the non-competition clause.
Originality/value: This article raises the issue of the non-competition clause, which is important from the prospective not only of the employee but also from that of the entrepreneur employer.

Keywords: labour law, implementation, non-competition clause, entrepreneurs' obligations, employee.

Category of the paper: viewpoint, literature review.

1. Introduction

Legal regulations concerning the non-competition clause were introduced into the Act of 26 June 1974, The Labour Code in 1996 (The Act, 2022, Item 1510). These provisions are extensions of the employee's obligations to act in the best interest of the workplace, protect its property, and maintain confidentiality of information that, if disclosed, could harm the employer (The Act, 2022, Item 1510, Art. 100 § 2 Point 4), and they allow the employer to obligate the employee to additional adherence to the non-compliance clause resulting from the contractual provisions (Masłowski, 2009).

The non-competition clause concluded and agreed by the employer and the employee should be put in writing, under pain of nullity. Finalising of such an agreement can take place at the same time and within the same document as the employment agreement but can also happen in a separate document, as long as it falls during the period of the employment relationship.

The non-competition clause itself, according to Art. 101^1, § 1 of the Labour Code, can take the form of refraining from competitive activity in relation to employers, as well as not accepting employment with a different party undertaking a competitive activity (either within the employment relationship or on any other legal basis). The subject matter of the non-competition clause resulting from Art. 101^1, § 1 of the Labour Code cannot be contractually extended. Unfortunately, since this provision is formulated broadly, doubts can arise in specific situations as to whether it has been violated (Góral, 2014).

The employee can undertake to adhere to the non-competition clause during the period of the employment relationship as well as after termination of such relationship (Kārkliņa, 2021). The period within which the employee is bound by the agreement is particularly important due to the fact that it determines the way in which the agreement is terminated and the potential remuneration (Aromińska, 2014). A party to a non-competition clause during the employment can be any physical person with the status of an employee within the meaning of the Labour Code (Kryczka, 2012).

On 26 April 2023, an act amending the Labour Code act and some other acts (The Act 2023, Item 641) entered into force. This act implemented into the Polish legal order two European directives: Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers, and repealing Council Directive 2010/18/EU, known as the Work–Life Balance Directive (Directive, 2019, Item 188); and 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 (Directive, 2019, Item 186).

The aim of the above-specified directives is to improve the employment conditions of employees on the labour market, and their implementation into Polish law required amendment, in particular of the Act of 26 June 1974, The Labour Code, (The Act, 2023, Item 641). The amendment covered four main areas: the content of an employment contract, information handed over to the employee, additional information for employees sent to work outside of Poland, and additional employment of the employee. In the last of these areas, the addition of Art. 261 of the Labour Code is particularly important as it guarantees to employees freedom to accept additional employment in their free time (except for cases specified in the Act).

Despite numerous publications on the non-competition clause, the implementation of the EU law into the Polish law that took place on 26 April 2023 brought this issue back to the fore. The goal of this article is to indicate changes in the Labour Code caused by the amendment with respect to the non-competition clause, and the challenges that employers currently face as a result of such modifications.

2. Freedom to work

The term *freedom to work* is a universal law, "common to all people (*ius commune*) universal in the sense that it is understood always and everywhere, in every country, and takes into account the natural characteristics of an individual. The freedom to work is thus one of the natural rights of humans (…) The reason for existence of such and no other content of these rights are the human beings who, by nature, are focused on their development and therefore have a relationship with the goods that are due to them. The final reference point for a legal system should thus not be laws on their own, but the wellbeing of an individual, with this being the goal of the application of such laws" (Piechowiak, 1997).

In accordance with the rule of freedom to work, expressed, among others, in Art. 65, Section 1 of the Constitution of the Republic of Poland, freedom of choice, pursuit of profession and selection of workplace (Constitution, 1997) is guaranteed for all. According to Art. 10 of the Labour Code, everyone is free to select their work (in particular with respect to selecting a profession and the place of work (The Act, 2023, Item 641). "Freedom to work means unrestricted selection of employer, freedom to resign from employment, and freedom to accept additional employment. It is unacceptable to force one into performing work. The motivational aspect of the actions of an employee who terminates an employment contract does not affect their freedom to resign from employment" (II PK141/17). This right is complemented by the freedom of the parties to the employment relationship in terms of establishing and shaping the content of this relationship (The Act, 2023, Item 641, Art. 11).

Although the principle of freedom is not absolute, limitations to it can only be introduced under statutory law (K 32/00). Restrictions on the freedom to work will always interfere with the sphere of relations between private entities, and thus with the constitutionally guaranteed freedom of contract. At the same time, when introducing such restrictions, the legislator should be aware of the obligation to protect the weaker party to the employment relationship while respecting the rights and freedoms of the stronger party (Florczak-Wątor, 2021).

The principle of freedom to work is complemented by the principle of freedom to establish an employment relationship, expressed in Art. 11 of the Labour Code (Sobczyk, 2023). This principle guarantees the employee's freedom to take up work, as well as the employer's freedom to select candidates for work, subject to restrictions resulting from the prohibition of discrimination. It also includes the parties' freedom to shape conditions of work and pay (Nałęcz, 2023).

This principle applies not only to the very fact of the creation of this relationship, but also to the formation of its content at the time of its creation. Under Article 11 of the Labour Code, it should not be assumed that a change to the content of an existing employment relationship within the scope of changing the terms of employee remuneration requires, for it to be valid in each case, a joint statement of consent from both parties. "Its content refers directly and unambiguously only to the phase of creating a work relationship and not to changes (modifications, reshaping) to the content of already existing (created earlier) work relationships" (II PK 330/07). It should be assumed that a change to conditions during the work relationship can be made while maintaining the norms adequate for the work relationship.

The rule of freedom to work, as well as the rule of freedom to accept an employment relationship, are basic rules of labour law (Holland, Burnett, Millington, 2016). It is worth emphasising that despite some differences in the content of the provision in Art. 65, Section 1 of the Constitution and Art. 10 of the Labour Law, the doctrine of law accepts that both regulations are a guarantee of free choice of profession and work, meant as the place of work. In both cases, it comes down to civil liberty, and in particular, employee liberty. "This position is justified in particular by the placement of this rule among constitutional freedoms, rights and obligations of human beings and citizens in the section on freedoms and economic, social and cultural rights" (Wieleba, 2018).

3. Additional employment

The provision of Art. 9 Section 1 of the Directive 2019/1152 imposes on the Member States the obligation to ensure that an employer does not prohibit a worker from taking up employment with other employers. Moreover, Member States can introduce additional regulations with regard to employers applying limitations in combining job positions, if such limitations result from objective causes (health and safety, protection of trade secrets, conflict of interest).

As mentioned above, freedom to work is one of the basic rules of labour law. It could be thus assumed that before the amendment there had already been grounds for the employee to accept work (including additional work) freely.

The admissibility of introducing limitations to the freedom of undertaking additional employment by the parties in a work relationship under an employment contract raises a range of doubts in the doctrine of law as well as the judicature (Jaśkowska, Maniewski, 2023). Until now, the Labour Code did not refer directly to the matter of general prohibition of undertaking additional employment. Labour laws only included regulations concerning contractual non-competition clauses, and that could in the future bring accusations from the European Commission regarding the lack of adequate implementation of the Directive (EU) 2019/1152 of the European Parliament and of the Council. The problematic issue was whether the employer could prohibit the employee from undertaking other employment outside of the non-competition clause; e.g., within the same employment agreement (Jaskulska, 2023). In the decision of 2 April 2008, the Supreme Court shared an opinion that "the provisions of an employment contract envisaging a prohibition from undertaking additional employment within the scope of non-competitive activity with respect to the employer is not valid (Art. 58, § 1 of the Labour Code in conjunction with Art. 300 of the Labour Code), as it constitutes a bypass of the prohibition resulting from Art. 101^1, § 1 of the Labour Code" (II PK 268/07). While in the decision of 14 April 2009, the Supreme Code took the position that "crystallization of the obligation of caring about the condition of the workplace can take the form of contractual limitation to the employee undertaking additional employment through an appropriate prohibition of necessity to obtain the employer's approval to undertake such employment (activity). Such limitation cannot be introduced if there are no grounds for it in the real interest of the workplace" (III PK 60/08). In the decision of 6 December 2018, the Supreme Court emphasized that in the Polish situation, employees' search for additional employment is often determined by their economic situation, and the application by an employer of a ban on additional employment without guaranteed fair remuneration, if such employment does not affect the economic situation of the employer and its position among its competition, violates the principle of freedom to work (II PK 231/17).

Finally, Art. 261 was added to the Labour Code, in accordance with which an employer cannot prohibit an employee from concurrently having a work relationship with a different employer or concurrently having a legal relationship that is the basis for providing work, other than the work relationship; nor can the employer subject an employee to unfavourable treatment for this reason. The legislator decided to introduce the above provision, thus following the instructions of Directive 2019/1152 and at the same time strengthening the freedom of the employee with respect to accepting employment.

Since the legislator did not introduce transitional provisions concerning the application of the said provision, it should be assumed that the ban on additional employment applies to work relationships created after the changes came into force as well as those created before 26 April

2023. If an agreement with a new employee is be concluded after the amendment, the employer will be obligated to conclude it in a different form than for other agreements.

The fact that the wording of Art. 9 Section 1 of the Directive 2019/1152 ("Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers…"), was adopted by the Polish legislator almost verbatim, can cause serious problems with its interpretation. The use of the word "prohibits" can mistakenly suggest that a contractual exclusion of the right of the employee to undertake employment with a different employer is permissible under Art. 261 of the Labour Code.

It seems correct to take the position according to which the provision of Art. 261 of the Labour Code should be considered as a ban on an employers' interference in the private matters of employees, and the additional employment itself should be undertaken solely in the employee's free time. The undertaking of additional work (by an employee or non-employee) cannot lead to poor quality of provided work by such employee (Sobczyk, 2023). It is without doubt that in the event that an employee undertakes additional employment with a different employer, it is possible to terminate a work agreement with such an employee if such additional employment results in non-performance or inadequate performance of that employee's work obligations.

What is important is that Art. 261 of the Labour Code refers to any kind of provision of work; i.e., providing work under an employment relationship as well as under civil law contracts (contracts of mandate for providing work, contracts for specific work), volunteering contracts, contracts for providing work by an employee as a sole trader, partnership or corporation, if the employee has the status of a partner.

In view of Art. 29 § 1 of the Labour Code, the reason for justifying termination of an employment agreement or its dissolution without notice of termination or a reason for conducting an activity having the same effect as termination of an employment agreement cannot be the concurrent employment relationship with another employer or a concurrent legal relationship that is a basis for providing work other than the employment relationship, unless limitations in this extent result from separate provisions, or an event specified in Art. 101^1, § 1 of the Labour Code (The Act, 2022) has occurred.

The Act also transferred onto the employer the burden of proof that the termination of an employment agreement or undertaking of an action having the same effect as termination of the employment agreement is not based on inadmissible premises. In other words, the employer, in the event of a dispute, has to demonstrate that the decision made by the employer to lay off an employee was based on objective criteria and was not solely a result of the additional employment.

If the employee thinks that the reason for terminating a trial-period employment agreement by notice or for an action having the same effect as termination of the employment agreement was the concurrent employment relationship with another employer or a concurrent legal relationship other than the employment relationship, the employee can, within 7 days from the

submission of the statement of intent by the employer concerning the termination of an employment agreement or undertaking an action having the same effect as termination of an employment agreement, submit to the employer, on paper or online, a request to present duly justified reasons for such termination or such action (The Act, 2022, 29, § 3). On the side of the employer, this will create an obligation to provide the employee with an answer to the request to present duly justified reasons for termination of an employment agreement or undertaking of an action having the same effect as termination of an employment agreement, on paper or online, within 7 days from the submission of the request by the employee.

The provision of Art. 261 of the Labour Code is excluded in a situation in which the employer applies Art. 101^1, § 1 of the Labour Code or if separate provisions stipulate otherwise.

The first exception refers to a non-competition agreement for the duration of the employment. The employee and the employer can be bound by a non-competition agreement that introduces a ban on undertaking additional employment, but only within the scope of the work provided for an entity with competitive business activity with respect to the original employer.

The second exception concerns statutory provisions limiting additional activity for certain groups of employees, e.g., employees of government offices, academic staff, or civil service workers.

The Directive allows Member States to introduce further limitations to the provision, as long as they are justified. The Polish legislator assumed quite a strict approach to this EU ban, forgoing the possibility of listing exceptions to such an extent as suggested by the Directive 2019/1152 (Makar, 2023).

According to Art. 101^1, § 1 of the Labour Code, it is possible to draw up with an employee a separate non-competition agreement during the employment relationship, which, in order for it to be valid, has to be made in writing. Under the provisions of such agreement, the employee undertakes to refrain from additional work or performing work for another employer (if stipulated so by separate provisions). The latter is applied, for example, to local government employees, who are not allowed by law to undertake employment that would infringe their professional obligations.

It is worth emphasising that "by concluding a non-competition agreement during the employment relationship (Art. 101^1 of the Labour Code), an employee obligation arises, covered by the content of the employment relationship, to refrain from conducting competitive activity with regard to the employer or to provide work within the employment relationship or on a different basis to the entity conducting such activity. The employee is liable for a breach of such obligation under the rules specified in the Labour Code" (I PK528/02). In accordance with the judicature, the Supreme Court accepts that "competitive activity is an activity shown in the same or identical subject matter and addressed to the same audience, covering, even partly, the scope of the main or additional activity of the employer. As a result, activity that infringes on the interests of the employer or threatens the employer can be prohibited.

Competition means rivarlry between entities or persons interested in achieving the same goal. Undertaking competitive activity is thus synonymous with actions taken for economic purposes or with participation in commercial ventures or transactions the results of which are directed (or could be potentially directed), even partly, at the same audience" (II PK 39/06).

Summing up, except for the situations specified in Art. 261, § 2 of the Labour Code, the employer cannot impose on an employee a ban on concurrent employment relationships by a way of an order, nor enter with an employee into an agreement that would introduce such a ban, and this contractual reservation will be invalid under Art. 18, § 1 of the Labour Code (Sobczyk, 2023). This also concerns provisions introducing such a ban that are included in the content of an employment agreement.

Problems can arise in a situation in which employer and employee, before implementing Directive 2019/1152, were not bound by a non-competition clause. The introduction of such limitation will depend on the employee's will, and the employer no longer has the possibility of laying off the employee because the employee remains concurrently in an employment relationship with another employer or concurrently provides services on a different legal basis to what was permissible under the regulations binding at an earlier time.

4. Conclusion

Implementation of the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable work conditions in the European Union strengthened the protection of employee rights in Poland. Although before the amendment to the permissibility, the Supreme Court took the opinion that the provisions of an employment agreement providing for the prohibition of undertaking additional employment in the non-competition area are invalid, adding Art. 261 into the Labour Code undoubtedly strengthened the position of employees and gave them the freedom to undertake additional employment. In view of the above-mentioned provision, the employer cannot prohibit the employee from remaining concurrently in an employment relationship with another employer or remaining concurrently in a legal relationship being a basis for providing work other than the employment relationship, i.e., a relationship based on any civil law agreement, although such provision will be excluded in the event that the employer applies the provisions of Art. 101^1, § 1 of the Labour Code or other separate provisions so stipulate.

An employer can enter into a non-competition agreement with an employee, but it should be remembered that it cannot prohibit the employee from undertaking any work; such a ban can only concern competitive work. It is also worth emphasising that non-competition clauses included in employment agreements concluded before 26 April 2023 are invalid.

It should be emphasised that the sole fact of performing other work by the employee, in accordance with the meaning of Art. 29 of the Labour Code, cannot serve as a basis for unfair treatment of the employee, and in particular cannot cause negative consequences for the employee, i.e., cannot serve as the basis for justifying termination of an employment agreement or its dissolution without notice by the employer.

Due to the short period within which the discussed regulations have become binding, it is difficult to assess their functioning in practice. Only time will tell whether and to what extent they require further amendments and improvement.

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