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Out-of-court resolution of employment disputes in Poland

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1. *Introduction*

Article 243 of the Polish Labor Code[1] sets forth the principle that, where possible, employment disputes should be amicably resolved by the parties. It follows from this provision that the employer and the employee should seek an amicable settlement of disputes arising from the employment relationship, even outside the context of a court case. This article analyzes the three majors out of court dispute resolution mechanisms that exist under Polish labor law: conciliation committees[2], arbitration[3] and mediation[4].

These proceedings are not conducted by a common court, but by a conciliation committee, court of arbitration, or mediator, respectively. The court does not participate in such proceedings. Rather, the court may only possibly perform a control function regarding the correctness of the content

[1] Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy (t.j. Dz. U. z 2023 r. poz. 1465) (Labour Code).

[2] Labour Code, Articles 244-258.

[3] Ustawa z dnia 17 listopada 1964 r. Kodeks post powania cywilnego (t.j. Dz. U. z 2023 r. poz. 1550 z pó n. zm.) (Civil Procedure Code), Article 1164 of the Civil Procedure Code.

[4] Articles 183^{1}-183^{15} of the Civil Procedure Code.

of the settlement concluded, ensuring that the rights of the employee under Polish labour law are secured.

At this point in time, all three dispute resolution methods are relatively underused. Existing labour courts are relatively inexpensive for employees to use, and there is an expectation that the court – and not some other body – should finally resolve an individual employment dispute. There are structural issues with conciliation committees and arbitration that do make these methods somewhat problematic in the employment context. However, it is argued in this article that mediation does hold some promise as an effective, quick and inexpensive way to resolve individual employment disputes. Moreover, there are other institutional benefits in increasing the use of mediation in the employment context, rather than exclusively relying on labour courts. Mediation allows both employees and management to develop their own solutions to problems that may arise in the workplace. These solutions may also serve to solve future, similar problems.

2. *The preference in Polish labour law for the amicable resolution of employment disputes and why out-of-court procedures may be helpful*

The nature of labour disputes implies the need to resolve them amicably. It is pointed out that there is a "principle of amicable settlement of disputes", which the Polish legislator established in Article 243 of the Labour Code, according to which "the employer and the employee should strive to settle the dispute arising from the employment relationship amicably". The principle of amicable settlement of disputes applies both to the methods of settling disputes in court and as part of out-of-court procedures. Both: before and outside the court, the parties have legal options that they can use and reach amicable solutions.

Article 243 of the Labour Code, by its terms applies to all types of employment disputes. At the same time, it does not specify the exact manner or method by which the dispute should be peacefully resolved. Therefore, there is no mandatory requirement to use a particular form of dispute resolution. Indeed, amicable dispute resolution could simply take the form of the employer and employee directly agreeing between themselves to settle a dispute.

The rationale set forth for the amicable settlement of labour law cases

in the opinion of the full bench of the Labour and Social Insurance Chamber of the Supreme Court of 20 December 1969, III PZP 43/69 (OSNCP 1970, No. 3, item 40), has remained largely valid. The Supreme Court emphasized that an amicable manner of settling employment disputes has a positive impact on creating an atmosphere of mutual trust and a harmonious work process, and that a settlement is often of a greater value than resolving an employment dispute by a court ruling.

While there is a right to proceed to the labour court, it is not necessarily helpful for the employees or the employer if every single dispute is resolved by a judge. An endless stream of court cases does not create a cooperative or even stable environment at work. Excessive litigation closes dialogue between management and workers, as either side expects the court to ultimately decide whatever employment issues have arisen. Using out of court dispute resolution methods such as conciliation or mediation, on the other hand, forces the parties to work together.

Moreover, there are some institutional barriers for employees in accessing their right to the court, particularly where the employee remains employed by the company. Employees may be afraid to bring formal cases to the court involving disputes over pay, working time, and transfers, for example. They may be reluctant to do so because of possible retaliation – it is better to lose a small amount of pay rather than to lose one's job entirely. In addition, the employee may not feel comfortable bringing a court case because he or she lacks the resources to hire an attorney, and does not possess the legal knowledge or skill to pursue the case themselves[5]. For these reasons, there are many instances where employees' rights actually go unprotected, to the extent the labour court is their only recourse. Once again, less formal mechanisms such as mediation would give employees the opportunity to peacefully and even confidentially vindicate their rights.

Of course, any out of court dispute resolution processes must satisfy certain minimum requirements, consistent with the objectives of Polish labour law, in order to ensure that the interests of the workers are protected. In order for the proper functioning of out-of-court procedures and for the parties to apply them effectively, it is important to guarantee: the independ-

[5] PATULSKI, *Spory ze stosunku pracy a inne rodzaje sporów*, Wydawnictwo Prawnicze, 1984, p. 26; GONERA, *Kodeks pracy. Komentarz*, wyd. VII, red. FLOREK, Wolters Kluwer, 2017, Articles 244, 245, 246, 247. GONERA, *sub* Articles 244, 245, 246, 247, in FLOREK (ed.), *Kodeks pracy. Komentarz*, Wolters Kluwer, 2017.

ence and professionalism of the entities involved in conducting these proceedings, the balance of power between the parties, and the speed and low costs of these procedures. If these requirements are effectively implemented, out-of-court methods should be an effective way of resolving disputes while respecting the protection of workers.

3. *Different types of out of court dispute resolution procedures applicable to individual employment matters*

Of course, it is possible for an employee to directly negotiate a settlement of a dispute with his or her employer, either before a labour case is filed, or while the case is pending. This, too, would be a form of amicable dispute resolution within the meaning of Article 243 of the Labour Code. However, given the inherent imbalance of bargaining power between employees and employers, there are legitimate concerns over whether such a settlement would be considered fair. The provisions of Polish labour law do place a number of limitations on the content of agreements between employers and employees, in light of the disparity of bargaining power between the two parties. For example, Article 84 of the Labour Code, states that an employee may not waive the right to remuneration[6]. In addition, because of the disparity of power, the employee may often be reluctant to approach the employer to discuss a settlement in the first place.

Taking into account these difficulties, the parties may consider institutionalized forms of amicable settlement of labour disputes. A more structured procedure is possible in the form of conciliation proceedings before a conciliation committee appointed by a given employer (Articles 244–258 of the Labour Code). This procedure is conducted at the request of the employee. There is also the possibility of calling for a settlement attempt before filing a lawsuit. It is a conciliation proceeding which is conducted by the court after being initiated by one of the parties (Civil Procedure Code, Article 184-186). It should also be pointed out that a settlement may be reached before the court in the course of judicial proceedings (Civil Procedure Code, Article 223). The legislator also offers the parties mediation proceedings,

[6] Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Articles 94-304(5), wyd. VI, red. Baran, Wolters Kluwer, 2022, Article 243. Piątkowski, *sub* Article 243, in Baran (ed.), *Kodeks pracy. Komentarz*. Vol. II, Articles 94-304(5), Wolters Kluwer, 2022.

which can be used before or during court proceedings (Civil Procedure Code, Article 183^1–183^{15}). Finally, it is also possible to submit the dispute, once it has arisen, to an arbitration court for resolution (Civil Procedure Code, Article 1164).

It should be noted that some of the above-mentioned amicable actions do involve the participation of a judge, as part of court procedures. On the other hand, strictly out-of-court procedures in which the court does not participate include mediation, proceedings before the conciliation committee and the arbitration court.

The specifics of the out-of-court possibilities offered in the Polish system of resolving out-of-court employment disputes will be presented below.

4. *Workplace Conciliation Committees*

The Polish Labour Code allows for the possibility of out-of-court proceedings, in which disputes may be resolved as part of proceedings before workplace conciliation committees (Articles 244–258 of the Labour Code)[7].

Conciliation Committees are social bodies of legal protection, established in workplaces, in order to settle employment disputes amicably. The Commission is intended to provide the employee with the opportunity to settle the dispute as quickly as possible, in an informal manner and close to the workplace, i.e. without the need to commit additional time and financial resources, and with the participation of people who are familiar with the working conditions in a given plant and who enjoy the trust of its staff[8].

Article 244 § 1 of the Labour Code explicitly states that conciliation committees may be appointed in order to amicably settle disputes over employees' claims arising from the employment relationship, because the employee has the right to request the initiation of proceedings before the company conciliation committee before referring a specific case to court[9]. If such a committee

[7] Introduced by the Act of April, 18th, 1985 on the examination of cases in the field of labour law and social insurance by courts (Dz.U. No. 20, item 85, as amended).

[8] GONERA, *Kodeks pracy. Komentarz*, wyd. VII, red. L. FLOREK, Wolters Kluwer, 2017, articles 244, 245, 246, 247; PIĄTKOWSKI, *Kodeks pracy. Komentarz*. Tom II. Articles 94-304(5), wyd. VI, red. K. W. Baran, Wolters Kluwer, 2022, Article 244. GONERA, *sub* Articles 244, 245, 246, 247, cit.; PIĄTKOWSKI, *sub* Article 244, cit.

[9] Article 242 § 2 of the Labour Code.

has not been established at the employer or if the employee does not want to use its services, the case may be immediately referred to the court. On the other hand, the employer is not able to initiate proceedings before the Conciliation Committee, which are only conducted at the employee's request.

The legislation does not make it mandatory to set up a conciliation committee; this is left to the autonomous discretion of the social partners. This decision, regardless of the type and size of the workplace, is therefore made by the employer together with the staff, which is represented by all trade unions, and if none of them is active for a given employer, the employees express their positive opinion in this regard, usually in the form of a referendum[10].

The provisions governing the possibility of conciliation committees also leave it to the social partners to decide on the rules and procedure for appointing the commission, the number of committee members and the duration of their term of office (Article 245 of the Labour Code), and to the conciliation committee itself to determine the rules of conciliation procedure (Article 247 of the Labour Code).

Thus, the number of members of the conciliation committee depends on the will of the conciliation committee appointers. The minimum number of such persons may not be less than three persons, according to Article 249 of the Labour Code. Due to the fact that the costs of the commission's activities are borne by the employer, it should be assumed that the employer will not be interested in a larger number of members of the committee.

Pursuant to Article 246 of the Labour Code, the committee may not include persons managing the workplace on behalf of the employer, chief accountants, legal counsels and persons handling personal, employment and payroll matters. These exclusions indicate the legislator's preference that the commission will be objective. Other staff members have the ability to be a member of the Conciliation Committee, regardless of their position. The legislation does not lay down any requirements for qualification to serve as a member of the Conciliation Committee. However, such requirements may be specified in the internal rules of the committee's functioning[11].

[10] Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. Florek, Wolters Kluwer, 2017, articles 244, 245, 246, 247; Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Articles 94-304(5), wyd. VI, red. K. W. Baran, Wolters Kluwer, 2022, Article 244. Gonera, *sub* Articles 244, 245, 246, 247, cit.; Piątkowski, *sub* Article 244, cit.

[11] J. Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Art. 94-304(5), wyd. VI, red. K.W. Baran, Wolters Kluwer, 2022, art. 244. Piątkowski, *sub* Article 244, cit.

The Conciliation Committee initiates proceedings at the request of the employee (submitted in writing or orally to the minutes) and conducts them collectively in accordance with the procedure laid down in the Rules of Conciliation adopted by the Committee. Conciliation proceedings are to be conducted quickly and within 14 days from the date of filing the application should lead to the conclusion of a settlement (Article 251 of the Labour Code).

If the proceedings before the Conciliation Board have not led to a settlement, the Conciliation Board shall, at the employee's request within 14 days of the end of the conciliation procedure, immediately refer the case to the Labour Court. An employee's request for an amicable settlement by the Conciliation Board replaces the lawsuit. Instead of the above-mentioned demand, the employee may also file a lawsuit with the labour court under the general rules (Article 254 of the Labour Code).

A settlement concluded before a conciliation committee which the employer does not voluntarily implement is enforceable under the provisions of the Code of Civil Procedure after it has been made enforceable by the court (Article 255 § 1 of the Labour Code), and after the court examines whether the settlement is not contrary to the law or the principles of social coexistence (Article 255 § 2 of the Labour Code). Notwithstanding this, an employee may, within a specified period of time (30 days or 14 days in cases concerning termination, expiry or establishment of an employment relationship from the date of conclusion of the settlement), apply to the labour court for a declaration that it is ineffective if he or she believes that the settlement violates his or her legitimate interest.

Conciliation committees only attempt to settle labour disputes amicably, without being authoritative in nature. As part of the commission's activities, no decisions are made that are binding on the parties to the dispute. At the same time, it should be emphasized that the initiation of proceedings before the Conciliation Committee was reserved exclusively for the employee. On the other hand, the costs of the Conciliation Committee are borne by the employer, who provides the Conciliation Committee with the premises and technical means to enable it to function properly.

It can be assumed that the staff of the Conciliation Committees have the opportunity to actually participate in the search for solutions to disputes that have arisen. The members of the committee are familiar with the situation in their workplace and can help find a solution to the dispute.

However, practice shows that these proceedings are not used, despite the fact that conciliation boards could prevent the escalation of the dispute and may lead to relieving the courts of the burden of deciding cases in which the parties have reached a settlement[12]. Due to the experience gained so far and the specific features of the commission's operation (including the initiation of proceedings solely on the initiative of the employee, and the imposition on the employer of the committee's operating costs), it is difficult to expect that the commission will be used in a popular way in the future.

5. *Arbitration proceedings in labour law disputes*

Another option that can be used by the employee and the employer, instead of initiating court proceedings to pursue their claims, is to begin proceedings before an arbitration court. This possibility was created as part of the amendment to the Code of Civil Procedure in 2005[13].

As a result of arbitration proceedings, an award is made by the arbitrator or a panel of arbitrators, but it is also permissible for the parties to directly reach a settlement. Pursuant to Article 1164 of the Civil Procedure Code, an arbitration clause covering labour law disputes may be drawn up after the dispute has arisen and must be in writing. Therefore, this provision provides for the admissibility of submitting labour law disputes to arbitration, but only after they have arisen.

This means that the employer and the employee may decide in a written arbitration clause that the dispute that has arisen between them will be resolved by the arbitration court. The main difference between the regulations concerning an arbitration clause in labour law disputes and in civil law disputes is that in labour cases, the clause may be drawn up only after the dispute has arisen. It must be emphasized that such a provision cannot be included

[12] J. Piątkowski, *Kodeks pracy. Komentarz*. Tom II. Art. 94-304(5), wyd. VI, red. K.W. Baran, Wolters Kluwer, 2022, art. 244. Piątkowski, *sub* Article 244, cit. On the other hand, K. Gonera sees the reasons for the lack of conciliation committees in the fact that 'employers generally do not tolerate the pursuit of workers' claims at all, regardless of whether it is a conciliation procedure or a court proceeding". Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. L. Florek, Wolters Kluwer, 2017, art. 244, art. 245, art. 246, art. 247. Gonera, *sub* Articles 244, 245, 246, 247, cit.

[13] The Act of July, 28th, 2005, amending the Code of Civil Procedure and certain other acts (Dz.U. No. 172, item 1438).

in the employment contract[14]. The wording of the provision should indicate the subject matter of the dispute and the legal relationship from which the dispute has already arisen[15].

It is argued that the restriction on the possibility of drafting an arbitration clause only after a labour law dispute has arisen has made this procedure unpopular in employee-employer relations[16]. However, it is difficult to predict whether an amendment allowing for the possibility of an arbitration clause when concluding an employment contract itself would contribute to a wider use of arbitration in employment disputes.

Some, however, see positive effects of expanding the possibility of using arbitration in employment disputes, stating that "the decision is issued in the form of an award, which is only subject to recognition or enforceability under Civil Procedure Code Article 1212 et seq. The firm nature of an arbitration award is therefore an important alternative to settlements concluded under other methods of amicable dispute resolution. In a speedy arbitration proceeding, therefore, the parties are not forced to compromise, as a settlement requires"[17].

It should be noted, however, that Article 1164 of the Civil Procedure Code does not specify a catalogue of labour law cases that may be submitted to arbitration. Therefore, this option should be applied broadly, because pursuant to Civil Procedure Code Article 1157, unless a specific provision provides otherwise, the parties may submit to arbitration the following disputes: disputes over property rights and disputes over non-property rights, if they may be the subject of a court settlement[18]. Moreover, an arbitration clause

[14] Morek, *Mediacja i arbitra (art. 183[1]-183[15], 1154-1217 KPC). Komentarz*, C.H. Beck 2006, p. 150; Muszalski, Walczak (red.), *Kodeks pracy. Komentarz*. Wyd. 13, C.H. Beck, 2021, *commentary on Article 243 of the Labour Code*. Morek, *Mediacja i arbitra (art. 183[1]-183[15], 1154-1217 KPC), Komentarz*, C.H. Beck, 2006, p. 150, *commentary on Articles 183[1]-183[15], 1154-1217 of the Code of Civil Procedure*; Muszalski, Walczak (eds.), *Kodeks pracy. Komentarz*, C.H. Beck, 2021, *commentary on Article 243 of the Labour Code*.

[15] Wójcik, *Kodeks post powania cywilnego. Komentarz aktualizowany.* Tom II. Art. 730-1217, red. A. Jakubecki, LEX/el. 2019, art. 1164. Wójcik, *sub* Article 1164, in Jakubecki (ed.), *Kodeks post powania cywilnego. Komentarz aktualizowany*, vol. II, Articles 730-1217, LEX/el. 2019.

[16] Witkowski, Wujczyk, *Przyszłość s dów pracy*, in *PS*, 2009, 11-12, p. 43.

[17] Raczkowski, Gersdorf, Rączka, Raczkowski, *Kodeks pracy. Komentarz*, wyd. III, Wolters Kluwer, 2014, art. 243. Raczkowski, *sub* Article 243, in Gersdorf, R czka, Raczkowski, *Kodeks pracy. Komentarz*, M. Raczkowski, Gersdorf, Rączka, Raczkowski, *Kodeks pracy. Komentarz*, wyd. III, Wolters Kluwer 2014.

[18] Jakubecki, *Kodeks post powania cywilnego. Komentarz*. Tom V. Art. 1096-1217, red. T.

should not prevent the parties from using conciliation proceedings before labour committees[19].

The advantages of arbitration proceedings, such as speed and informality, could support the popularity of its use in resolving employment disputes. The conclusive nature of an arbitral award is an alternative to litigation. It is also necessary to recall that it would still be possible to conclude a settlement before an arbitration court.

However, despite the advantages of this procedure, it cannot be said that this method is used in practice by employers and employees in resolving their labour disputes. This may be influenced by, among other things, issues related to the settlement of the costs of arbitration proceedings, including the determination of the remuneration for the arbitrator(s), as well as the joint and several liability of the parties for them[20]. Pursuant to Civil Procedure Code, Article 1179, § 1, an arbitrator has the right to be remunerated for his or her activities and to reimbursement of expenses incurred in connection with the performance of such activities, and the liability of the parties in this respect is joint and several. Thus, arbitration proceedings may be costly for the parties, which in the case of an employee, in particular, may discourage them from agreeing to the arbitration agreement after the dispute has arisen.

Arbitration proceedings may also be relatively formalized, due to the possibility of taking evidence. The arbitration court may take evidence by hearing of witnesses, considering documents, inspections, as well as other necessary evidence. Moreover, if the parties do not exclude such a possibility, the arbitration court may appoint experts to consult them and require the parties to provide the expert with relevant information or to present docu-

Wiśniewski, Wolters Kluwer, 2021, art. 1164; M. Bąba, *Zapis na sąd polubowny w sporach z zakresu prawa pracy*, p. 5 et seq., ADR Quarterly No. 4(8)/2009. Jakubecki, *sub* Article 1164, in Wiśniewski (dir.), *Kodeks post powania cywilnego. Komentarz*, vol. V, Articles 1096-1217, Wolters Kluwer, 2021; Bąba, *Zapis na sąd polubowny w sporach z zakresu prawa pracy*, in *KADR*, No. 4(8)/2009, p. 5 ff.

[19] Even before the admissibility of the arbitration clause in labour law cases was introduced, W. Muszalski argued that proceedings before the company's conciliation committee did not preclude an arbitration clause (in: Muszalski Nałęcz Orłowski Patulski, *Kodeks pracy z komentarzem*, ODDK 1998, p. 237); Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. L. Florek, Wolters Kluwer, 2017, art. 243; Gonera, *sub* Article 243, cit.)

[20] Gonera, *Kodeks pracy. Komentarz*, wyd. VII, red. Florek, Wolters Kluwer, 2017, art. 243. Gonera, *op. ult. cit.*

ments or other objects to the expert or make them available for examination (Civil Procedure Code, Article 1191). Therefore, participation in arbitration proceedings may be difficult to conduct on one's own, especially for an employee who does not always have the resources to hire an attorney.

6. *Mediation proceedings*

Mediation is another method of resolving labour disputes outside of court, provided for by the Polish legislator, as part of the amendment to the Code of Civil Procedure in 2005. Provisions governing mediation proceedings have been introduced into the provisions of this Code (Civil Procedure Code, Articles 183^1–183^{15})[21]. The legislator provided for the application of the provisions on mediation to employment disputes, generally assuming that in cases in which the conclusion of a settlement is admissible, the court strives to settle them amicably at any stage of the proceedings, in particular by persuading the parties to use mediation (Civil Procedure Code, Article 10). The regulation applies to all cases in the field of labour law, and in the light of the provisions of Article 1 of the Civil Procedure Code, even to cases related to labour law relations[22]. There are no specific rules for the mediation of labour disputes.

Mediation is intended as a voluntary procedure in which an impartial mediator assists the parties in reaching a settlement. The principle of confidentiality of mediation, referred to in the legislation as the secrecy of mediation, has also been guaranteed.

The voluntary nature of mediation is reflected in the fact that mediation can take place on the basis of an agreement between the parties or a request from one of them, even before the case is initiated before the court (this is called contractual mediation, also known as pre-litigation mediation). In addition, the labour court may refer the parties to mediation at any stage of

[21] The Act of July, 28th, 2005, amending the Code of Civil Procedure and certain other acts (Dz.U. No. 172, item 1438).

[22] K.W. Baran, *Mediacje w sprawach z zakresu prawa pracy*, PiZS 2006, nr 3, p. 2; Mędrala, 2.3. *Mediacja w sprawach z zakresu prawa pracy*, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, Wolters Kluwer, 2011. Baran, *Mediacje w sprawach z zakresu prawa pracy*, in *PiZS*, 2006, 3, p. 2; Mędrala, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, cap. 2.3, *Mediacja w sprawach z zakresu prawa pracy*, Wolters Kluwer, 2011.

the proceedings (Civil Procedure Code, Article 183^1) by issuing an order in this regard. In this case, mediation takes place after the court proceedings have been initiated and is called "court mediation". Both the initiation of judicial and contractual mediation is subject to the consent of both parties.

In the light of the regulation adopted in Civil Procedure Code, Article 183^1 § 2, the mediation agreement should be separate. The doctrine supports the legality of including a mediation clause in an employment contract if it meets the conditions set out in Civil Procedure Code, Article 183^1 § 3, in particular if it specifies the subject matter of mediation[23]. Article 183^1 § 3 of the Civil Procedure Code provides that in a mediation agreement, the parties shall specify in particular the subject matter of the mediation, the identity of the mediator or the method of selecting the mediator.

Article 202^1 of the Civil Procedure Code also applies in labour law cases, according to which, if the parties have concluded a mediation agreement before initiating court proceedings, the court is obliged to refer the parties to mediation in response to the defendant's objection raised before entering into a dispute on the merits of the case.

According to the applicable regulations, mediators may be: *ad hoc* mediators, permanent mediators and mediators from the lists of non-governmental organizations and universities[24]. *Ad hoc* mediators are usually not

[23] Some believe that the subject matter of mediation should be sufficiently specified, as follows: K. W. Baran, D. Książek, *Post powanie mediacyjne w sprawach z zakresu prawa pracy*, p. 35, in: K. Antolak-Szymanski, A. Góra-Błaszczykowska (red.): *Pozas dowe sposoby rozwi zywania sporów pracowniczych*, Elipsa, 2015; Baran, Książek, *Post powanie mediacyjne w sprawach z zakresu prawa pracy*, in Antolak-Szymanski, Góra-Błaszczykowska (eds.), *Pozas dowe sposoby rozwi zywania sporów pracowniczych*, Elipsa, 2015, p. 35, however, the admissibility of a broad approach to the subject of future mediation is also indicated: K. Antolak-Szymanski, *Perspektywy rozwoju mediacji w sprawach pracowniczych. Uwagi de lege lata i de lege ferenda*, pp. 102–103, in: K. Antolak-Szymanski, A. Góra-Błaszczykowska (red.): *Pozasądowe sposoby…*; A.M. Świątkowski, M. Wujczyk, *Przyszłość s dów pracy*, PS, listopad-grudzień 2009, p. 44. Antolak-Szymanski, *Perspektywy rozwoju mediacji w sprawach pracowniczych. Uwagi de lege lata i de lege ferenda*, in Antolak-Szymanski, Góra-Błaszczykowska (eds), *op. cit.*, pp. 102–103; Świątkowski, Wujczyk, *Przyszłość sądów pracy*, in *PS*, 2009, 11–12, p. 44.

[24] K. Antolak-Szymanski, O. M. Piaskowska, *Mediacja w post powaniu cywilnym. Komentarz*, Wolters Kluwer, 2017, p. 113; A. Rutkowska, *post powania cywilnego. Post powanie procesowe. Komentarz aktualizowany*, red. O. M. Piaskowska, LEX/el. 2023, art. 183(2). Wolters Kluwer, 2017, p. 113; Rutkowska, *sub* Article 183(2), in Piaskowska (ed.), *Kodeks post powania cywilnego. Post powanie procesowe. Komentarz aktualizowany*, LEX/el., 2023.

included in the lists of permanent mediators, and the parties appoint them as mediators for mediation proceedings, which usually take place before the commencement of court proceedings, to carry out a specific mediation[25].

Permanent mediators are persons who are entered on the lists of permanent mediators kept by the regional courts pursuant to Article 157a of the Act of 27 July 2001 Law on Ordinary Courts Organization (Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju s dów powszechnych (t.j. Dz. U. z 2023 r. poz. 217 z pó n. zm.). A permanent mediator is included in the list of permanent mediators kept by the president of the regional court. The President of the Regional Court has been empowered both to maintain a list of permanent mediators and to make an entry on that list.

The third group includes mediators from lists kept by non-governmental organizations within the scope of their statutory tasks, as well as higher education institutions, which may also establish mediation centers, which provide assistance to the parties and the court in selecting a mediator suitable for the case.

It is up to the parties to choose a mediator. However, where the court directs the parties to mediation under Article 183^9 § 1 of the Civil Procedure Code, if the parties have not chosen a mediator, the court shall appoint a mediator with appropriate knowledge and skills in conducting mediation in a given type of case, taking into account permanent mediators in the first place. However, the legislator did not specify in detail the qualifications of mediators, including those to conduct particular types of disputes, such as employment disputes. The requirements for mediators to be entered on the list of permanent mediators are very general (full legal capacity, full public rights, knowledge and skills in mediation, at least 26 years of age, knowledge of the Polish language, not being convicted of an intentional crime or an intentional fiscal crime)[26].

The provisions of the Code of Civil Procedure also do not specify the role that a mediator should play in the mediation process. Article 183^3 of the Civil Procedure Code indicates that the mediator should be impartial in conducting mediation. The provisions of the Code of Civil Procedure concerning mediation have been constructed in a general way, defining the

[25] *Ibidem*.

[26] See Antolak-Szymanski, Cărăba , *The qualifications of mediators in civil matters, including Employment disputes, in Poland and Romania*, in *RECL*, 2023, vol. 53, no. 2, pp. 7-26.

course of this proceeding in a broad manner, which allows the mediator to choose the appropriate techniques in the proceedings. At the same time, the regulations provide for the admissibility of various methods of mediation, indicating that the mediator conducts mediation using various methods aimed at amicable resolution of the dispute, including by supporting the parties in formulating settlement proposals, or, at the joint request of the parties, she or he may indicate ways of resolving the dispute that are not binding on the parties. This indicates the admissibility of evaluative mediation[27] if the parties agree to do so.

The mediation procedure provided for in the Civil Procedure Code may be paid or free of charge. The mediator is entitled to remuneration and reimbursement of expenses related to the mediation, unless he or she has agreed to conduct the mediation without remuneration. On the other hand, remuneration and reimbursement of expenses are borne by the parties (Civil Procedure Code, Article 183^5 § 1). In labour law cases, a situation in which an employee would be charged with the costs of mediation should be regarded as particularly inappropriate from the axiological point of view[28]. However, the permissible coverage of mediation costs by the employer may raise doubts as to the mediator's compliance with the principle of impartiality and whether possible pressure related to the expectations of the employer paying the mediator, somehow could have influenced the mediator's behavior.

Polish law incorporates the principle of confidentiality of mediation, stating that mediation proceedings are not public. The mediator (as well as the parties and other persons participating in the mediation) is obliged to keep confidential all facts that he or she learns in connection with the mediation, unless the parties mutually release themselves from this obligation (Civil Procedure Code, Article 183^4 § 1 and 2). The mediator may not be a witness as to the facts that he or she has learned in connection with the mediation[29]. A protocol should be drawn up on the structure of the mediation procedure, which indicates the place and time of the mediation, as well as the personal data of the parties and the mediator, as well as the outcome of the mediation (Civil Procedure Code, Article 183^{12} § 1). If the parties have

[27] On the methods of mediation, Riskin, *Understanding Mediators Orientations, Strategies and Techniques Grid For the Perplexed*, in *HNR*, 1996, no. 1, pp. 7-51; Id., *Mediator Orientations, Strategies and Techniques*, in *AHCL*, 1994, vol. 12, no. 9, p. 111.

[28] Baran, Książek, *Post powanie mediacyjne*, cit., p. 37.

[29] Art. 259^1, paragraph 1, Code of Civil Procedure.

concluded a settlement, it is included in the protocol or attached to it (Civil Procedure Code, Article 183^{12} § 2 first sentence).

Pursuant to Article 183^{14} of the Civil Procedure Code, the court has the power to approve the settlement reached before the mediator. However, the court will refuse to grant an enforcement clause or to approve a settlement concluded before a mediator, in whole or in part, if the settlement is contrary to the law or the principles of social coexistence, or if it is intended to circumvent the law, or if it is incomprehensible or contradictory (Civil Procedure Code, Article 183^{14} § 3). The doctrine also points to the need to examine the content of the settlement agreement in terms of an additional criterion, the legitimate interest of the employee[30].

Importantly, a settlement concluded before a mediator, after its approval by the court, has the legal force of a settlement concluded before the court. A settlement concluded before a mediator and approved by making it enforceable is an enforceable title (Civil Procedure Code, Article 183^{15}).

Following the amendment of the mediation rules from 2016[31] onwards, the judge has instruments at his disposal to persuade the parties to participate in mediation, determining whether mediation can be used in a particular case. This is achieved through information meetings on amicable dispute resolution and closed sessions (Civil Procedure Code Article 183^{8} § 4 and 5). In addition, the statement of claim should state whether the parties attempted mediation or other out-of-court dispute resolution procedures, and if no such action was taken, explain the reasons why they were not taken (Civil Procedure Code, Article 187).

It should be emphasized, however, that the obligation provided for in Article 10 of the Civil Procedure Code to seek amicable settlement of the case does not mean that the labour court is obliged to mediate[32]. A judge

[30] Gudowski, *Kodeks post powania cywilnego. Komentarz*. Tom III. *Post powanie rozpoznawcze*, wyd. V, red. Ereciński, Wolters Kluwer, 2016, art. 469; Arkuszewska, Bosak, *Mediacja jako metoda rozwi zywania indywidualnych i zbiorowych sporów z zakresu prawa pracy*, J. Olszewski, *Sądy polubowne i mediacja*, Wolters Kluwer, 2008, pp. 169-170. Gudowski, *sub* Article 469, in Ereciński (ed.), *Kodeks post powania cywilnego. Komentarz*, vol. III, *Post powanie rozpoznawcze*, Wolters Kluwer, 2016; Arkuszewska, Bosak, *Mediacja jako metoda rozwi zywania indywidualnych i zbiorowych sporów z zakresu prawa pracy*, in Olszewski (ed.), *Sądy polubowne i mediacja*, C.H. Beck, 2008, pp. 169-170.

[31] Act of Septemper, 10th, 2015, amending certain acts in connection with the promotion of amicable dispute resolution methods (*Journal of Laws*, item 1565).

[32] Gonera, *sub* Article 243, cit.

may not act as a mediator (Civil Procedure Code Art. 183^2 § 2), with the exception of a retired judge. If, at the stage of the court proceedings, the parties agree to mediation proceedings, the labour court issues an appropriate order and refers the case to this out-of-court procedure.

Finally, it must be pointed out that mediation as a procedure for resolving employment disputes, should guarantee effective legal protection mainly for the employee, hence it is important to ensure that it is conducted by professional, impartial mediators with appropriate knowledge in the field of labor law. In addition, mediation should meet other guarantees, namely not only the speed with which the dispute is resolved, but also the non-expendability of the proceedings, and the proceedings should fulfil the protective function of labour law. Therefore, it is important for the legislator to introduce additional protective guarantees aimed at the more complete performance of this function, which would be conducive to parties selecting mediation in these types of cases[33].

[33] MĘDRALA, WSTĘP, *Funkcja ochronna cywilnego post powania s dowego w sprawach z zakresu prawa pracy*, Wolters Kluwer, 2011. MĘDRALA, *Wstęp*, in ID., *Funkcja ochronna cywilnego post powania sądowego w sprawach z zakresu prawa pracy*, Wolters Kluwer, 2011.

Abstract

Amicable dispute resolution helps to alleviate social tensions in the workplace between employees and employers, and fosters a peaceful culture of dispute resolution. The above-mentioned out-of-court institutions for resolving labour disputes are in line with the implementation of the dispute settlement amicable directive established by the Polish legislator. When comparing the practical application of the offered out-of-court employment dispute resolution procedures, it should be noted that at the present time they are not popular among Polish employers and employees. The reasons for this are complex, and have been outlined above. However, mediation can be very helpful in resolving labour disputes, and its use has been steadily increasing since its introduction into the provisions of the Code of Civil Procedure, with the possibility of its use in labour disputes, as indicated by the statistics kept by the Ministry of Justice[34]. This may indicate that there is a growing interest in this new institution and that employees and employers are increasingly interested in using this form of dispute resolution. Mediation may therefore be a way out of a situation in which conciliation committees and arbitration have failed. It is also worth noting that mediation has been used as a well-established form of resolving collective disputes, which demonstrates its effectiveness in the context of labour relations[35].

Keywords

Meditation, conciliation, alternative dispute resolution, arbitration, employment disputes.

[34] The number of cases in which the parties were referred to mediation on the basis of a decision of the district court (Civil Procedure Code Art. 1838 § 1) was as follows: in the first year (2006) the number of individual employment cases referred to mediation was 33. However, the numbers rose significantly in more recent years: in 2021-3636, and in 2022 - 2966.

[35] Act on the Resolution of Collective Disputes. To read more about the use of mediation in employment cases in Polish system, see Antolak-Szymanski, *Mediacja w rozwiązywaniu indywidulanych sporów pracowniczych. Ujęcie modelowe*, Wolters Kluwer, 2024.