The Employment Law Review

Seventh Edition

Editor
Erika C Collins

Law Business Research

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EDITOR'S PREFACE

Every year around this time when we update and publish *The Employment Law Review*, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this seventh edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past six years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up to date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2015 in nations across the globe, and is the topic of the second general interest chapter. In 2015, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where homosexuality is a crime, and multinational companies have many challenges still with promoting their diversity programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Because companies continue to implement 'bring your own device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. 'Bring your own device' issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our fourth and newest general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this seventh edition of *The Employment Law Review* includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Roberton and Sophie Arkell, for their hard work and continued support. I also wish to thank all of our contributors and my associates, Michelle Gyves and Ryan Hutzler, for their efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2016

Chapter 35

POLAND

Roch Pałubicki and Karolina Nowotna-Hartman[1]

I INTRODUCTION

Polish employment law is primarily regulated by the Labour Code of 26 June 1974, which has been substantially amended. There are numerous laws and regulations apart from the Labour Code that address employment law.

Polish law states that certain internal acts issued by a particular employer constitute sources of labour law. This includes collective bargaining agreements as well as other collective arrangements, regulations and policies. The provisions of such internal policies may not be less favourable to employees than the provisions of the Labour Code or other statutory laws.

Labour courts are included in the framework of the common courts in Poland, constituting specialised divisions of such courts.

The State Labour Inspectorate (SLI) is the competent authority to enforce employment laws. The primary tasks of the SLI include: supervision and inspection of compliance with labour law; taking legal action in cases related to the establishment of labour relations (reclassification); and prosecuting infringements of employees' rights and other infringements related to the performance of work and legality of employment.

II YEAR IN REVIEW

Following a long discussion about the need to alter the law concerning fixed-term employment agreements, and summons of the European Commission claiming that the

1 Roch Pałubicki is a partner and Karolina Nowotna-Hartman is an attorney-at-law at Sołtysiński Kawecki & Szlęzak. A wider team of Sołtysiński Kawecki & Szlęzak's associates has contributed to this chapter both in its initial redaction and the subsequent updates. The authors wish to thank all those contributors and specifically Agnieszka Gałka.

Labour Code did not conform with the EU directive in this respect,[2] in June 2015 the Polish Parliament passed a bill introducing significant changes to the Labour Code and other relevant statutory regulations. The primary purpose of the new provisions is to limit abuses of fixed-term agreements, often concluded for very long periods, which are in general less favourable to employees than open-ended contracts. The main difference between fixed-term and open-ended agreements – that the termination upon notice of the latter requires a legal justification – remains unchanged. The amendment enters into force on 22 February 2016.

Although the current flexibility in the use of such contracts will be materially limited by the new law, it will also add further flexibility in certain areas. The maximum total duration of one or more fixed-term contracts with the same employee will be limited to 33 months, although the maximum number of fixed-term contracts between the same parties has been increased simultaneously from two to three. The foregoing limitations do not apply in certain instances justified by the reasonable business needs of the employer, for example, the need to find a replacement for an absent employee.

The notice period applicable to earlier termination of fixed-term contracts will be the same as for open-ended ones – up to three months, depending on the seniority (overall length) of employment of the employee. As an added flexibility, all fixed-term agreements will be terminable upon notice prior to the lapse of the agreed term, even if no early termination is stipulated.

In addition, the employer's right to put an employee on garden leave during the notice period has finally been confirmed in the new provisions with respect to both fixed-term and open-ended contracts.

On 2 January 2016, an amendment to the Labour Code concerning parenthood-related leaves enters into force, which constitutes another step towards facilitation of combining work and childcare. The amendment *inter alia* gives employees who are parents the possibility to have more flexibility in planning their leaves.

III SIGNIFICANT CASES

2015 brought significant case law, which is likely to impact future judgments.

In its ruling of 2 June 2015,[3] the Constitutional Tribunal declared the provisions of the Trade Unions Act, which as a rule grant the right to set up and join trade unions to employees only, to be incompliant with the Constitution. In the Tribunal's opinion, the right to unionise is granted by the Constitution to employees understood as all persons who have paid employment, such as contractors or the self-employed, and not only individuals employed under an employment contract. An expanded list of categories of persons authorised to join trade unions, and the principles on which they may unionise, are to be determined in new regulations.

2 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

3 Verdict of 2 June 2015, K 1/13, LEX 1730123.

In two 2015 rulings,[4] the Supreme Court has taken a firm position where, in the event of a transfer of undertaking, the new employer (transferee) is not bound by a post-employment non-competition clause agreed between a transferred employee and his or her previous employer (transferor). According to the Supreme Court, the law provides for an automatic replacement of the employer as a result of the transfer of undertaking only in employment relationships and not in other relationships existing between employers and employees. A non-competition clause following termination of employment is not part of an employment relationship and as such does not transfer. These two rulings are in opposition to the previously prevailing view. The new ruling affects asset-based transactions as it makes it necessary for the new employer to enter into new non-competition arrangements with transferred employees, should the employer deem it necessary to protect its business against the employee's post-employment competitive activity.

In a judgment, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, [5] the Court of Justice of the European Union (CJEU) took a stand regarding questions of a Finnish court regarding Polish employees posted to Finland to work at a power plant construction site. The employees transferred their receivables for payment of remuneration for work to a Finnish trade union, which is inadmissible under the provisions of Polish law. The trade union had demanded on their behalf that the Polish employer pay the minimum rates of pay in the amount due and payable to Finnish employees. The CJEU confirmed the admissibility of the transfer of receivables to a trade union. Moreover, in the CJEU's opinion, not only are the statutory regulations of a host country in force regarding minimum pay, but also the provisions of collective bargaining agreements in a given industry. The CJEU also specified which elements of the remuneration should or should not be included in the minimum pay. The Court held that the minimum pay included a fixed allowance paid to the Polish posted employees.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment relationship is in principle established on the basis of an employment agreement. There are additional bases for the establishment of an employment relationship, in particular appointment or nomination; however, their significance is marginal.

Polish law defines the employment relationship as an obligation of the employee to perform a certain type of work under the supervision of the employer at a location and time defined by the employer for remuneration paid by the employer. Regardless of the

4 Verdict of 11 February 2015, I PK 123/14, LEX 1628877; resolution of 6 May 2015, III PZP 2/15, LEX 1676374.

5 Judgment of 12 February 2015, C-396/13 *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*; EU:C:2015:86.

type of contract the parties executed, performance of work on the terms and conditions specified above is always considered employment; in particular a civil law contract may not be concluded instead of an employment agreement.

The Polish Labour Code defines two major types of employment agreements:

a employment agreement for an unspecified period (open-ended); and

b employment agreement for a specified period (fixed-term).

Open-ended agreements are offered to employees with whom the employer wishes to have a long-term relationship and are strongly preferred by employees.

A fixed-term employment agreement is also commonly used. This agreement provides for a specific duration and termination date (upon which it terminates automatically).

Employment agreements should contain provisions on:

a conditions of employment and remuneration, such as type of work, place of performance of work and remuneration;

b working time (full-time or part-time); and

c date of commencement of work.

It is advisable that additional issues be regulated in the agreement, such as intellectual property and confidentiality. A written employment contract must be executed and signed by both parties.

The terms and conditions of employment may be changed by the parties upon a mutual alteration agreement or by unilateral notice on the alteration of terms and conditions of employment served by the employer. Should the employee not be willing to accept the alteration notice, he or she may appeal to the courts or decide to terminate employment.

ii Probationary periods

Polish law provides for the possibility to execute a separate probationary period agreement. Such agreement may precede any of the two types of employment agreements discussed above. The maximum probationary period is three months. The employer has no obligation to continue the employment after the lapse of the probationary period.

The probationary period employment agreement may be terminated by either party by notice before the expiration of the probationary period. The notice period depends on the duration of the probationary period and ranges from three days to two weeks.

iii Establishing a presence

A foreign company may employ workers without being registered to carry on business in Poland. It may also use temporary workers provided by an agency or engage individual contractors.

Most of the double tax treaties (DTTs) to which Poland is a signatory are based on the OECD Model Convention and set forth regulations allowing a contractor to be considered a permanent establishment (PE) of the company. A contractor creates a PE of the company when he or she acts on behalf of the company and has and habitually

exercises, in a given country, an authority to conclude contracts in the name of the company. In such cases, the company is deemed to have a PE in that country in respect of any activities of such contractor, unless they are limited to those listed in the DTT that if exercised through a fixed place of business would not make it a PE as well as unless the contractor acts merely as an 'independent agent' under the DTT.

The commencement of activity by the foreign company in the form of a PE is treated as the start of a business activity in Poland. Therefore, the company would be subject to corporate income tax (in relation to profits derived from activities performed in Poland) and business activity of the company performed through a PE would be subject to VAT in Poland. However, in principle Polish law requires that a foreign entrepreneur conducting business activity in Poland either establishes a branch or representative office in Poland.

A Polish branch or a representative office of a foreign company becoming an employer is obliged to deduct and pay to the tax authorities income tax advances for each employee being Polish tax resident. In principle, it is also necessary to deduct social security dues from the gross amount of the employee's remuneration. If the employees are employed directly by a foreign company, they are responsible for paying the income tax advances during the year by themselves. In certain instances (in particular when the employees are employed by a company from the EU), deduction of social security dues remains the responsibility of the foreign employer. An EU-based foreign employer and an employee may execute an agreement on payment of social security dues on the basis of which the employee undertakes to pay his or her social security dues.

V RESTRICTIVE COVENANTS

An employer may conclude non-compete agreements with its employees. If the non-compete restriction covers the period of employment, compensation does not have to be provided to an employee.

When a given employee has access to particularly important information, the disclosure of which may expose the employer to damage, the employer may execute a non-compete agreement for the period following termination of employment with that employee. The non-compete restriction for a period following termination of employment should include compensation for the employee of at least 25 per cent of his or her previous earnings during the corresponding period immediately preceding the termination of employment.

VI WAGES

i Working time

The basic working time system allows for a maximum of eight hours' work per day and an average of 40 hours a week based on a 'reference period', which in principle cannot exceed four months but may be extended up to 12 months under certain circumstances. Weekly working time (including overtime) cannot exceed an average of 48 hours per week (balanced over the entire period of reference). The minimum daily rest period is 11 hours, and the minimum weekly rest period is 35 hours.

According to Polish law, night work encompasses eight hours of work (chosen by the employer) between 9pm and 7am. An employee whose schedule of working time includes at least three hours of night work every day or where at least a quarter of whose working time in the reference period falls during night time is deemed a night worker. The working time of a night worker may not exceed eight hours if the employee performs particularly dangerous work or work requiring a high physical or mental effort.

ii Overtime

For every hour of overtime an employee is entitled to an additional 50 per cent of his or her remuneration; however, this is increased to 100 per cent in certain instances, such as if overtime work is performed during the night-time, at weekends or on a public holiday, which is not a usual working day of the employee. Persons in managerial positions are entitled to overtime benefits to a limited extent.

Upon a written request, the employer may grant an employee a release from work for a period corresponding to the duration of overtime worked (instead of the aforementioned overtime compensation). The employer may also grant the employee time off without the employee's request; however, this is at the ratio of 1.5 hours of time off for each hour of overtime worked. The statutory overtime limit is 150 hours in a calendar year. It is possible to increase this to 416 hours.

VII FOREIGN WORKERS

Employers are not subject to a legal obligation to keep a special register of foreign workers, although for practical reasons, such information should be easily accessible, for example, in case of an SLI inspection. There is no legal limit on the number of foreign workers a company can employ.

A foreign national may perform work in Poland, *inter alia*, in the following situations:

a he or she has a work permit and relevant residence title in the territory of Poland (e.g., a visa) or a (joint) residence and work permit;

b he or she has been granted refugee status, temporary protection, subsidiary protection, a permanent residence permit, a residence permit on humanitarian grounds, a permit for tolerated stay or a long-term EC residency permit;

c he or she is a citizen of an EU Member State, a citizen of another European Economic Area (EEA) Member State, a citizen of a non-Member State of the EEA who may enjoy freedom of movement on the basis of a treaty executed between the state and the EU and its Member States, a family member of a foreigner in one of the categories in this item c (subject to additional criteria); or

d he or she has a residence permit for a specified period of time granted to practice a profession requiring high qualifications.

In principle, the work permit may be issued for a period not exceeding three years, although it may be extended. In certain specific situations, the work permit may be issued for five years. Following receipt of the work permit, the foreigner is obliged to apply for an employment visa or a residence permit. Instead of applying for two documents

referring separately to work and residence legalisation, a joint residence and work permit may be applied for. The period for which it may be issued may not exceed three years. The permit may be subsequently renewed.

A foreigner employed in Poland is covered by the minimum requirements of Polish labour law, in particular those relating to working time and overtime payments, minimum remuneration, length of holiday leave, health and safety at work, non-discrimination and the rights of employees related to parenthood. The employer is obliged to pay taxes and social security dues for the foreign worker, subject to double tax treaties and any similar international treaties related to social security and to the provisions of the pertinent EU regulations.

VIII GLOBAL POLICIES

Global policies are enforceable only to the extent to which they are compliant with Polish law and only if they are properly introduced. It is legally required that such policies are in Polish. Depending on the contents of such global policies, it may be recommended to obtain the employees' consent (familiarisation forms).

Disciplinary procedures are provided for by Polish law and are very formalised in relation to:

a types of disciplinary offences (breach of order at work, health and safety regulations, fire prevention regulations or the method of confirming presence at work and excusing absence from work);

b procedural requirements (which are very formal and include the right to appeal to court); and

c penalties.

Such disciplinary procedures should be addressed in the employment regulations (a specific document described below) and not in global policies or in employment contracts.

Once an employer has 20 employees, it is obliged to introduce internal labour regulations, namely employment regulations and remuneration regulations (unless there is a collective bargaining agreement in force). The employer is also obliged to establish a social fund and issue social fund regulations, unless it has been agreed that no fund is to be established with the employees' representative or trade unions. The employer is obliged to ensure that every individual employee is acquainted with the regulations and policies. The regulations and policies may be made available to the employees in the manner customary to a given employer, including posting on the intranet.

The employer is obliged to agree on the employment regulations and remuneration regulations with trade unions active at the employer's business. Furthermore, some specific provisions of the employment regulations and remuneration regulations need to be agreed with the trade unions or the employees' representatives for their validity (e.g., extension of the reference period up to 12 months). In other cases, such regulations are not subject to the consent of the employees, unless such regulations worsen their terms and conditions of employment.

Polish law prohibits discrimination, sexual harassment and corruption. Such issues can be more specifically regulated in company policies. Neither global policies nor internal regulations issued by Polish companies have to be filed with or approved by any government authority, however, it is required that the copies of agreements on extension of reference periods to 12 months or introducing the flexible working time are submitted to a labour inspector and the inspector is notified of some specific working-time systems if they are introduced at the employer's business.

IX TRANSLATION

Employment documents must have a Polish version if the following conditions are jointly met:

a the employee is a Polish resident when concluding the employment agreement; and

b the work is to be performed in Poland.

Certified translation or notarisation is not required; however, with respect to agreements, regulations and the like, the Polish versions need to be the official ones in the sense that they are executed (signed). Unofficial translations of documents executed in a foreign language are not sufficient.

A parallel foreign language version is admissible, but the Polish version prevails if the employee is a Polish citizen.

However, as an exception from the foregoing rule, if an employee is not a Polish citizen, has been instructed on his or her right to receive an employment agreement or other employment-related document in Polish and requests that the document is prepared in another language (with which he or she is familiar) then the Polish version is not required.

The Polish language requirement is applicable to all employment documents and in particular to employment contracts, confidentiality agreements, restrictive covenant agreements, proprietary information and assignment agreements, internal regulations, bonus or other incentive compensation plans, employee handbooks or other policies, etc.

Documents without the required Polish versions are in principle still enforceable (as long as the employee comprehends the foreign language version), but the person responsible for their preparation is subject to a fine.

X EMPLOYEE REPRESENTATION

There are two basic forms of employee representation: works councils and trade unions. Each form is governed by different rules. A works council and trade union organisation may exist at one employer independently from each other. In such case, certain issues would need to be separately discussed with the unions and the council (e.g., collective redundancies). Polish law also provides for various *ad hoc* employee representatives elected for specific purposes in the absence of trade unions.

i Works council

The works council is a body representing the employees of a given employer, employing at least 50 employees. The number of employees is established based on the average headcount during the six preceding months. The employer is obliged to inform the works council of:

a the activities and economic situation of the employer and contemplated developments in this regard;
b the situation, structure and contemplated development of employment, as well as actions aimed at retaining the level of employment; and
c actions that are likely to lead to substantial changes in the work organisation or in contractual relations.

Under certain circumstances the employer may refuse to make some information available to the works council.

The matters specified in items (b) and (c) above should also be subject to consultation with the works council. The council does not have any approval or co-determination rights.

The procedure for information and consultation should be agreed between the works council and the employer. There are no formal rules as to the frequency of works council meetings; however, the employer is bound to inform the works council in the case of any contemplated actions that are statutorily covered by the information procedure; that the employer has agreed to inform the works council of; and at the written request of the works council. Any action subject to information or consultation should only be taken following the completion of the process.

The works council members are elected by the employees. Should the average headcount reach 50 employees (calculated in a specific way), a group of at least 10 per cent of the employees may ask the employer, in writing, to organise the election of a works council. The election procedure is established by the employer but should be fair and democratic.

The term of office of works council members lasts four years from the day of the election.

The number of members of the works council depends on the number of employees and is as follows:

a three members if there are between 50 and 250 employees;
b five members if there are between 251 and 500 employees; and
c seven members if there are more than 500 employees.

There are certain advantages for the employees connected with their membership of the works council; in particular, the employer is not allowed to unilaterally terminate their employment while they are a member of the works council without the council's consent.

ii Trade unions

Trade unions are established by virtue of a resolution adopted by eligible persons (in principle employees). The trade union acquires legal personality upon registration by the court. Usually, the organisers of a company trade union join an existing nationwide

union, which allows them to save on time and formalities and take advantage of the expertise of experienced union activists. Trade unions have powers that are much broader than those of works councils. Generally, as well as the right to be informed and consulted, the trade unions have co-determination rights in certain areas.

Some of the employer's fundamental obligations towards trade unions are:

a the obligation to agree certain internal regulations with the trade union;

b the obligation to consult the trade union regarding any collective redundancies;

c the obligation to inform and in some cases to consult the trade union regarding the issues related to a transfer of undertaking;

d the obligation to obtain the consent of the trade union to termination of the employment agreement of that trade union's officers (as a primary rule, their exact number is dependent on the number of members of the trade union organisation), or to a change of the terms of their employment;

e the obligation to obtain the consent of the trade union for termination without notice of employment agreements of employees enjoying special protection (e.g., pregnant employees, employees on maternity leave); and

f the obligation to consult the trade union before terminating an employment agreement for an unspecified period, or changing the terms of employment of employees employed for an unspecified period (no union approval is needed).

In individual matters, the company trade union organisation has the right and obligation to represent individual employees who are members of the organisation or non-members who give their consent to being represented by the organisation. When taking a position regarding the employer in matters concerning collective rights and interests, the company trade union organisation represents all employees.

XI DATA PROTECTION

The basic rules concerning processing of personal data are set forth in the Act on Personal Data Protection of 29 August 1997 (PDP), which transposes into the Polish legal system the terms of Directive 95/46/EC of the European Parliament and of the Council.

i Requirements for registration

In principle, there is an obligation to register data-filing systems in a special register kept by the data protection authority – the Inspector General for Personal Data Protection (GIODO). However, those controllers who appoint (which is no longer obligatory) and register a data protection officer – an administrator of information security (ABI) – and who do not process data in their IT systems are released from the obligation to register their personal data filing system with GIODO. In that case the ABI's duties include, among others, keeping a register of personal data filling systems and preparing reports for GIODO.

Moreover, the obligation to register data filing systems does not apply to the controllers of data that are processed in connection with employment by the controller or providing services for the controller on the grounds of civil law contracts. The controller is obligated to keep the documentation describing the method of data processing and

implement technical and organisational measures to protect the personal data being processed in a way that is appropriate to the risks and category of data being protected. Only persons who are granted an authorisation by the controller are allowed to carry out the processing of data.

An employee's consent for the employer to process personal data is not necessary if the personal data is processed in relation to the employment agreement (with regard to personal data indicated in Article 221 of the Labour Code).

ii Cross-border data transfers

With respect to cross-border transfers of personal data of employees, registration of the transfers as such with GIODO is not required. However, it is required to obtain GIODO's consent for the transfer of personal data, if the destination country does not ensure an adequate level of personal data protection in its territory and if none of the conditions allowing for transfer to such countries, as indicated explicitly in the PDP (e.g., the written consent of the data subject, necessity to perform a contract between the data subject and the controller or the response to the data subject's request) is met. The adequacy of the level of personal data protection is to be evaluated taking into account all the circumstances concerning the data-transfer operation, in particular the nature of the data, the purpose and duration of the proposed data processing operations, the country of origin and the country of final destination of the data as well as the legal provisions being in force in a given third country and the security measures and professional rules applied in such country. The consent of GIODO is not required for transfers of personal data to third countries based on EU Model Clauses. Transfers of personal data can also take place on the basis of the Binding Corporate Rules approved by GIODO. If the Binding Corporate Rules have been approved by a Data Protection Authority in another EEA state, GIODO may acknowledge such ruling.

Safe Harbor registration can no longer provide legal grounds for personal data transfer to the USA. On 6 October 2015, the CJEU declared the European Commission's Decision 2000/520/EC of 26 July 2000 invalid. In that decision the European Commission had stated that US entities belonging to the Safe Harbor programme ensured an adequate level of protection as required under Directive 95/46/EU.

As stated above, a written consent of the employee may potentially be one of the instances, in which the transfer may be effected without GIODO's consent, however, as it may be questioned whether the consent was freely given by an employee based on the nature of the employment relationship, obtaining GIODO's consent to a transfer of the employees' personal data is considered a safe approach.

The PDP does not regulate the issue of onward transfer. It is deemed, however, that such transfer is subject to general rules for the data transfer stipulated in the PDP.

iii Sensitive data

Polish law generally prohibits the processing of sensitive personal data. Processing of such data is allowed, as an exception, in cases explicitly indicated in the PDP (e.g., the person whose sensitive data is to be processed expresses his or her consent in writing. Sensitive personal data encompasses data on racial or ethnic origin, political views, religious or philosophical beliefs, religion, membership of political parties or trade unions, medical

information, genetic code, addictions, sexual life and criminal records. Employers are allowed and indeed obliged to process particular medical information that relates to occupational health.

iv Background checks

As a principle, unless specific types of jobs are involved, Polish law does not allow background checks on employees, including criminal records or credit checks. The Polish Labour Code specifically lists information that the employer may request from the employee, in particular, date of birth, education, previous employment and parents' names.

XII DISCONTINUING EMPLOYMENT

i Dismissal

There are three general methods by which employment agreements may be terminated in accordance with the Labour Code:

a termination by mutual agreement;
b termination with notice; and
c termination without notice.

Each type of employment agreement may be terminated at any time by mutual consent of the employee and the employer. In general, such terminations are not subject to the requirement to specify the cause for the termination or to consult with a trade union regarding the termination.

Statutory notice periods are the same for the employee and the employer. Payments in lieu of notice are not allowed (except in certain specific instances, when it is allowed to shorten the notice period). In practice, the employees are often released during the notice period from the obligation to perform work with the right to remuneration retained, however the legality of such action is disputable and could be challenged by the employee.

Termination of an employment agreement for an unspecified period upon notice by the employer requires just cause, which is defined by the courts as a reason that is true, real, specific and important enough to discontinue the employment relationship.

The reasons for termination may occur either on the part of the employee (i.e., underperformance), or on the part of employer (i.e., liquidation or restructuring). The employer has no duty to specify a reason when terminating fixed-term agreements.

If there are trade unions operating at the employer's business, the employer must seek the trade union's opinion regarding the intention to terminate the employment agreement for unspecified period of an employee represented by such union. Regardless of the trade union's opinion, however, the employer is free to make the final decision to terminate the employee.

The terminated employee has the right to appeal to a labour court. If the labour court finds the appeal well grounded it may, in principle, reinstate the employee in the job (which also involves payment of some compensation) or award the employee damages in an amount basically not exceeding three months' remuneration for the given

employee. Pursuant to one of the views of the Supreme Court further claims for damages on account of the damage suffered by the employee as a result of termination are not excluded, however it is rather controversial in case of terminations upon notice.

Polish labour law provides for the special protection of employment for a variety of groups of employees. In practice, the most important of them are trade union activists, employees in the pre-retirement period, pregnant women, employees on parental or child-care leave, and employees on sick leave.

In case of termination of employment for reasons not related to the employee, an employer employing at least 20 employees is obliged to pay statutory severance pay on the same terms and conditions as in case of a collective redundancy (see below).

The Polish Labour Code allows employers to terminate employment agreements immediately without notice in specifically defined situations, such as a serious violation of basic employee duties.

Apart from social security registration issues, individual dismissals are not subject to notification to any government authorities. In respect of individual dismissals, there are no rehire rights. Obligatory offers of suitable alternative employment are only applicable to selected groups of employees. Social plans are not required.

ii Redundancies

Polish law provides for specific rules applicable to termination of employment for reasons not concerning employees, in particular collective redundancies. The provisions of Polish labour law regarding collective redundancy apply if the employer of at least 20 employees intends to terminate – for reasons not attributable to employees – within a period of 30 consecutive days, employment relationships with:

a at least 10 employees if it employs fewer than 100 employees;

b at least 10 per cent of the employees if it employs at least 100 but fewer than 300 employees; or

c at least 30 employees, if it employs at least 300 employees.

If the above limits are not met the redundancy should take the form of individual dismissals.

In the course of a collective redundancy, trade unions should be notified in writing of the contemplated dismissal. Further, the company is obliged to consult the unions regarding the intended collective redundancy. The consultation should be carried out with a view to reaching an agreement. The agreement should be concluded within 20 days and should set out the rules of handling the matters concerning the employees to be laid off (including severance and outplacement packages). If the agreement has not been reached, the company should issue a regulation dealing with the matters that were to be regulated in the agreement (the collective redundancy regulation).

If no trade unions operate within the employer's business the information should be delivered to and the consultations should be carried out with employee representatives elected for such purpose.

A contemplated redundancy is subject to an information and consultation procedure with works councils. The relevant regulations do not impose any formal requirements of such information and consultation procedure.

The company is also obliged to provide two notifications to the local employment office on the contemplated collective dismissal measures. The first notification is to be made simultaneously with the notification of trade unions or employee representatives. The second one should be made after the consultation process has been completed.

If the company intends to terminate employment relations with at least 50 employees within a period of three months, it is obliged to agree with the local employment office on the scope and forms of assistance (outplacement) to employees who are to be made redundant.

Also within collective redundancies the termination of employment needs to be effected individually with respect to each employee: either a notice must be provided or a termination agreement signed with each employee. Payments in lieu of notice are required if the notice is served and the employer shortens the notice period (applicable to cases where the employee is entitled to a three-month notice period, which may be shortened to no less than one month). In case of signing a termination agreement, payments in lieu of notice (understood as the amount equal to the salary an employee does not earn due to agreeing an immediate or a short-term employment expiration date) are allowed. In the case of collective redundancies the employer is obligated to pay statutory severance pay. The amount of statutory severance is fixed in relation to a given employee's aggregate employment record with the employer and ranges from one to three months' remuneration for the employee. The maximum amount of the severance pay is capped in 2016 at 27,750 zlotys gross. Although this is not required under the provisions of the law, employers often grant additional compensation related to termination of employment to employees. The categories of protected employees are slightly narrower than in the case of individual dismissals. In respect of collective redundancies, there are certain limited rehire rights. Obligatory offers of suitable alternative employment are only applicable to selected groups of employees.

XIII TRANSFER OF BUSINESS

Poland has implemented Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.[6] Under Polish law, the relevant ramifications pertain in particular to the sale of an enterprise, a part thereof or selected assets as well as to the lease of an enterprise or premises. The case law of the Polish Supreme Court has specifically confirmed that the transfer of a business may also take place even when no assets are transferred, provided that the business is labour-intensive rather than capital-intensive. This might have a material impact on outsourcing projects, since the transfer of an undertaking could also occur in the event of hiring and changing an external provider or insourcing of previously outsourced tasks.

6 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.

If the transfer covers the entire business (all employees of the given employer), the transferee becomes liable with regard to the employees for all employment-related obligations that arose before the transfer and the transferor is no longer liable for those obligations. If the transfer pertains only to a part of the employees, both the transferee and the transferor are jointly and severally liable in relation to the transferred employees for the obligations that arose prior to the transfer. Obviously, both employers can and often do agree between themselves on indemnity regulations; however, this does not affect the principles of third-party liability (with regard to the employees).

If there are trade unions operating at the transferor or transferee, such trade unions should be notified in writing at least 30 days before the anticipated date of transfer of:

a the contemplated date of the transfer;
b the reasons for the transfer;
c the legal, economic and social implications of the transfer for the employees; and
d any measures envisaged in relation to the terms and conditions of employment including working conditions, remuneration and retraining.

If there are no trade unions at either of the employers, a notification of these details should be made in writing to each individual employee of the employer.

Trade union consultation is required if there are any measures envisaged in relation to changing the terms and conditions of employment. A works council should also be consulted about the contemplated transfer (prior to any binding decision being made in this respect), if such council is established at either the transferor or transferee.

Within two months following the transfer, transferred employees may terminate their employment with seven days' notice. For the employee, termination of employment in accordance with the above procedure shall have the same consequences as those envisaged under labour law for termination of the employment relationship upon notice by the employer.

XIV OUTLOOK

In the last quarter of 2015, the conservative and socially oriented Law and Justice Party won the Parliamentary election in Poland. Since it has an absolute majority of votes in the Parliament, one might expect that it would be able to smoothly introduce their programme into force. Below are some of the party's proposals in the scope of employment issues:

a fight the abuse of civil law agreements, used to disguise the employment relationship between the parties. This aim is to be achieved *inter alia* by empowering the SLI to audit civil law agreements, and by empowering the SLI inspectors to declare such civil law relationships to be employment relationships;
b provide for longer parenthood-related leaves, in a way that would make it feasible for the parents to take care of a child until they are six years old, without any breaks;
c limit the exceptions from the general rule that Sundays and holidays are non-working days; and
d increase the minimum salary so that it reaches at least half of the national average salary.

Appendix 1

ABOUT THE AUTHORS

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Roch Pałubicki, attorney-at-law, is a 2001 graduate of the Adam Mickiewicz University Law School in Poznań. Mr Pałubicki is a partner in charge of the employment law department of the Sołtysiński Kawecki & Szlęzak law firm where he has worked since 2000. During his 15 years of practice at the firm he has gained expertise within various aspects of Polish and European employment and social security laws with a particular focus on employee incentives, management contracts, employment aspects of M&A transactions (including transfer of employees), working time and non-competition. He has taken part in the implementation of over 150 employee and management shareholding programmes. Mr Pałubicki participates in conducting and resolving collective disputes, including as a member of the Social Arbitration Panel. He also advises clients in collective and individual redundancies and has supervised major projects related to company closures. Over the past several years Mr Pałubicki has gained a unique experience in negotiations with trade unions, works councils and other employee representatives. He represents clients in employment and social security litigations. Mr Pałubicki speaks fluent English.

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Karolina Nowotna-Hartman, attorney-at-law, is a graduate of the Adam Mickiewicz University Law School in Poznań. She joined Sołtysiński Kawecki & Szlęzak in 2005. Ms Nowotna-Hartman assists clients in all aspects of labour law, including transfers of employees, collective redundancies, employers' internal regulations and policies, harassment and discrimination matters. She has an extensive practice counselling employers in establishing and termination of employment relationships with executives. She also represents clients in employment and social security cases. Ms Nowotna-Hartman is fluent in English and German.

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