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General Clauses and the Abuse of Subjective Right in the Polish Labor Code

The article is devoted to general clauses regulating abuse of law in the Polish Labor Code. The author defined the meaning of the concept of a general clause and its functions. He also discussed the legal mechanism of the functioning of the socioeconomic abuse of law category and principles of social coexistence in individual and collective labor law.

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The issue of subjective right abuse in the Polish labor law system is of a very complex nature. The essence of the problem is whether a legal action taken by the employer or the employee, which formally falls within the objective scope of the given legal norm, is effective if it violates the *ratio laws* of a specific legal norm. In Polish law, this issue is regulated by the provisions of Art. 8 of the Labor Code, which stipulates that no right may be exercised in a manner that would be contrary to its social and economic purpose or social norms[1]. Any such action or omission by an entitled person is not deemed an exercise of that right and is not protected by law. In its wording, this provision fully corresponds to the content of Art. 5 of the Civil Code[2]. However, it is worth noting that its interpretation in labor law differs from that in civil law[3].

The question of to what extent general clauses determine the application of this provision in practice is of vital importance. The starting point for further deliberations will be a closer analysis of the problems of general clauses in the Polish legal system. The views on this matter are strongly polarized. Two central positions may be distinguished here. According to the first one, these are legal provisions characterized by „the property of unclarity" and exist in legal regulations[4], such as labor law. According to the second view, these are imprecise statutory formulations that refer to extralegal (usually ethical and moral) standards and assessments. They are often classified as formulas that generate so-called room for decision-making in applying the law[5]. The latter concept seems more accurate about Art. 8 of the Labor Code, so that it will become the basis for further discussion here.

Ab initio, the axiological origins of Article 8 refer to the universal legal maxim formulated in *Institutions* by the Roman jurist Gaius: *male nostro*

1 Cf. Alina Wypych-Żywicka in: *System prawa pracy*, vol. I, *Część ogólna*, ed. Krzysztof W. Baran (Warsaw: Wolters Kluwer, 2014), 1349 ff. and referenced literature, Krzysztof W. Baran in*: Kodeks pracy. Komentarz*, ed. Krzysztof W. Baran (Warsaw: Wolters Kluwer, 2022), 75 ff.

2 Due to the fact that it is literally identical to art. 5 of the Civil Code, *de lege lata* the application of this provision in labor law has no justification.

3 Cf. e.g. Adam Szpunar, *Nadużycie prawa podmiotowego* (Krakow: Polska Akademia Umiejętności, 1947), passim; Piotr Machnikowski in: *Kodeks cywilny. Komentarz*, ed. Edward Gniewek (Warsaw: C.H. Beck, 2008), 14 ff.

4 Cf. e.g. Aleksander Wolter, *Prawo cywilne. Zarys części ogólnej* (Warsaw: Państwowe Wydawnictwo Naukowe, 1972), 71

5 Cf. e.g. Tadeusz Zieliński, *Klauzule generalne w prawie pracy* (Warsaw: Państwowe Wydawnictwo Naukowe, 1988), 36 ff.

iure uti non debemus (we ought not to abuse our legal rights). In widely understood employment relationships, Article 8 of the Labor Code provides a specific "safety valve" in employment relationships[6], aiming to protect the participating entities from actions performed *in fraudem honestatis* (in fraud of honesty). Thus, in practice, it may be a tool that mitigates pathologies in the work environment by applying the structure of law abuse that refers to ancient wisdom – *summum ius summa iniuria*. Hence, the norm constitutes a deviation from the classical principle *neminem laedit, qui suo iure utitur* (He who exercises his legal right inflicts upon no one any injury). In practice, Article 8 means that the given entity is deprived of the right to which it is entitled according to the provisions of subjective law. Generally, it is assumed that the person entitled exercises their rights in a lawful manner. As a result, applying the institution of law abuse weakens the principle of law certainty. It interferes with the assumption that rights are exercised in a manner consistent with their social and economic purpose and social norms. Therefore, the application of the construction of law abuse is, in principle, acceptable only as an exception and must be supported by a detailed and clear substantive justification[7]. In particular, it has to be supported by rules that are as specific as possible, primarily referring to ethical, moral, and social issues. Due to the exceptional nature of its application, this provision authorizes the court to assess to what extent the action or omission of the entitled party is not considered to be exercising their rights and is thus not protected by law, only in an inseparable connection with all the circumstances of the analyzed case. Therefore, the Labor Court, considering the action of the given entity to abuse the law, has to demonstrate that in the given, individual, and specific situation, the typical behavior of the entity exercising their right determined by the binding legal norms cannot be accepted due to moral considerations (which determine the principles of social coexistence) because, in the specific, atypical circumstances, it threatens the fundamental values on which social order is based and which the law should serve.

Since Art. 8 was placed in the general section of the Labor Code; the entitled parties believe, based on the *rubric* argument, that this provision applies to all rights stipulated by the provisions of labor law, both individual and collective. It applies to all entities actively participating in employment

6 Cf. verdict of the Supreme Court of the 7.06.2017, I PK 178/16, LEX No. 2319693.

7 Cf. verdict of the Supreme Court of the 20.12.2013, II PK 91/13, LEX No. 1448329, thesis 1.

relationships and collective ones, such as trade unions, associations of employers, or participation organs. Moreover, I believe that it is applicable even if the entitled entity does not act personally, but a trade union or association of employers is working on their behalf. This type of interpretation option considers the principle of harmonizing normative contexts.

The hypothesis of the norm expressed in Art. 8 of the Labor Code covers instances of law abuse. This structure includes precisely those cases in which the behavior of a specific entity (such as the employee or employer) meets all formal requirements foreseen by law, yet, due to other non-legal considerations, this behavior is not worthy of legal protection. Here, it is worth referencing the statement of the Polish Supreme Court[8], which stated that the content of the general clause provided in Art. 8 of the Labor Code is interpreted objectively, not subjectively. It does not shape subjective rights, nor does it change or modify the rights resulting from other legal provisions. This regulation authorizes the labor court to assess to what extent the entitled entity's action or omission is not considered exercising its rights and is not subject to legal protection in the given factual state.

In the objective aspect, Art. 8 of the Labor Code refers both to property and nonproperty rights of the parties to the employment relationship, regardless of the stage of their realization. In practice, exercising a specific right can constitute both a factual and a legal action. Among the latter, those that play an essential role in employment relationships are shaping rights (e.g., termination of the work and/or remuneration conditions). In light of the provisions of Art. 8 of the Labor Code, the question arises of whether it applies to procedural actions in labor law cases. Due to the substantive nature of the norm, one should adopt a heterogeneous interpretation, i.e., that it is possible only then if the procedural action aims to exercise a substantive law claim (e.g., filing a claim for the payment of remuneration). This means that it is not applied to petitions for determination in employment cases.

Article 8 of the Labor Code states explicitly that one must not use their rights in a way that would be contrary to its social and economic purpose or social norms. This provision introduces two autonomous prerequisites that restrict the exercise of rights in employment relationships. Both are of the nature of general clauses, i.e., statutory phrases without a precisely defined scope, whose meaning is determined, at least partially, based on

8 Cf. verdict of the Supreme Court of the 22.9.2020, I PK 197/19, LEX 3106219.

norms and assessments of a non-legal nature[9]. In practice, this means that attempts to define them for specific circumstances are *a priori* doomed due to their semantic properties. As a result, both prerequisites allow the legal protection authorities that function in employment relationships to adapt their verdicts and decisions to specific, real-life situations[10], and thus to treat the problem on a case-by-case basis. The assessment of whether the provisions of Art. 8 of the Labor Code are applicable in each case falls into the limits of free judicial discretion[11], having considered the whole case[12]. This provision introduces the necessary element of equity and flexibility in employment relationships. According to the Supreme Court[13], Art. 8 of the Labor Code forces to make a balanced assessment. The interests and attitude of the employer are equally important. This provision moves the deliberations to extralegal territory (morality, equity, and decency).

The aim of the general clause on the social and economic purpose of a right is to protect the general social and economic interest in employment relationships. Hence, it should be interpreted in the context of the standards of social market economy. In the normative aspect, it constitutes a mechanism that restricts the abuse of rights and freedoms, also in the collective dimension, so that it may also be applied in situations of abuse of the right to strike or to protest (e.g., mass use of the "holiday on demand" by employees). Art. 8 of the Labor Code also applies to abuse related to employee participation or social dialogue. In this context, it is worth quoting the position of the Supreme Court[14] , which stated that a claim of an employee being a representative of the employer, based on the provisions of a collective agreement concluded by that employee, is not subject to protection.

9 Cf. Zieliński, *Klauzule generalne w prawie pracy*, passim and referenced literature. Baran in: *Kodeks pracy. Komentarz*, 75 ff.

10 Cf. decision of the Supreme Court of the 11.04.2003, I PK 558/02, OSNP 2004/16, item 283.

11 Cf. verdict of the Supreme Court of the 25.04.2014, II PK 193/13, LEX No. 1495939, thesis 2; see also: verdict of the Supreme Court of the 31.05.2017, II.

12 Cf. verdict of the Supreme Court of the 26.06.2012, II PK 275/11, MPP 2012/11, p. 584–587 and the verdict of the Administrative Court in Katowice of the 19.10.2018, III APa 56/17, LEX No. 2612145.

13 Cf. verdict of the Supreme Court of the 22.10.2020, II PK 93/19, LEX 3096745.

14 Cf. verdict of the Supreme Court of the 26.04.2011, II PK 271/10, LEX No. 858744.

In practice, the mechanism of the general clause of abuse of the law is fundamental in the sphere of the rights and freedoms of trade unions[15]. In particular, it may be applied when a trade union is established only to obtain special protection of the durability of the employment relationship for its members. In this light, the view formulated in the jurisprudence of the Supreme Court states that appointing an employee as a member of the governing bodies of the trade union organization only to protect them from the termination already made by the employer may be considered contrary to the social and economic purpose of the right[16]. Other manifestations of the so-called collegiate immunity in employment relationships (e.g., the refusal to grant consent for termination of employment without notice if an employee under special protection committed an apparent violation of the important interest of the employer) should be classified similarly. Using statutory release from work by employee representatives (Art. 31, item 3 of the Act on Trade Unions) for private purposes also enables the application of Art. 8 of the Labor Code.

The general clause of the abuse of law also fully applies to the individual rights and claims of the parties to an employment relationship. For example, it is justified to consider the situation where an employee demands a severance payment for the termination of employment in an amount that is disproportionately high to their contribution, as an abuse of the social and economic purpose of the right. The Supreme Court spoke in this vein[17], considering the claim of an employee for the payment of additional severance payment for termination of employment before the expiry of the period specified in the employment contract or the internal documents of the company to be contrary to the social and economic purpose of the right if the employer has provided the durability of the employment guaranteed in the employment contract for the agreed period. The lump sum compensation due under the social contract for the termination of an employment contract in the period of guaranteed employment may also be considered in gross excess and subject to limitations[18].

15 Cf. Krzysztof W. Baran, *Zbiorowe prawo pracy. Komentarz* (Warsaw: Wolters Kluwer, 2010), 291.

16 Similarly: the Supreme Court in the verdict of the 30.01.2008, I PK 198/07, MPP 2008/6, p. 316.

17 Cf. verdict of the Supreme Court of the 4.06.2002, I PKN 371/01, OSNP 2004/7, item 119.

18 Cf. verdict of the Supreme Court of the 16.11.2017, I PK 274/16, LEX No. 2435670.

In practice, the abuse of the social and economic purpose of law is often directly correlated with the infringement of the rights of others or even the violation of its status. In this aspect, Art. 8 of the Labor Code realizes the universal principle *ex iniuria non oritur ius* (the law does not arise from injustice) in industrial relations. This means that a party to the employment relationship cannot effectively pursue the claims to which it is entitled if it has significantly violated its duties. In this light, the view of the Supreme Court expressed in the verdict of 17.11.1999, I PKN 366/99[19], deserves approval. According to the judgment, the demand to return to work a member of the workplace trade union organization who, by his behavior consisting of causing an unjustified inspection and notifying the law enforcement authorities about actually nonexistent irregularities, interferes with the proper course of the work may be considered as contrary to the social and economic purpose of the right. I believe that claims of employees who have committed offenses or torts against the employer's or their coworkers' interests should be qualified similarly.

Another type of general clause decreed in Art. 8 of the Labor Code is the principles of social co-existence[20]. In this aspect, the related issues raise doubts about the law doctrine. J. Nowacki thinks that legal norms also fall within their objective scope. However, this view did not gain complete support. The dominant opinion is that the principles of social co-existence differ from the binding legal standards. It is emphasized that the category of principles of social co-existence includes all standards except legal ones.

In the Polish labor law system, the principles of social co-existence[21] are understood as ethical and moral standards approved by the society as part of the existing dominant system of values. However, in industrial relations, their nature is not universal. In employment relationships, these social norms may be violated both on the individual and collective level. In the second case, this occurs, especially if social partners violate the fundamental principles of honesty. An example may be when the body of a trade union or participation entity uses sensitive information obtained from the employer to benefit a competitive entity. Taking actions aimed at taking over a company's management by a group of disloyal employees may also be

19 OSNP 2002/7, item 220. More on this issue: see also: verdict of the Supreme Court of the 8.03.2013, II PK 208/12, OSNP 2013/21-22.

20 Cf. Wypych-Żywicka in: *Zarys systemu prawa pracy*, 786 ff.

21 Ibidem.

qualified as a violation of the principles of social coexistence. According to the Supreme Court[22], the situation where the actions of an employee are contrary to the important interest of the employer or even detrimental to the employer results in a violation of the principles of social coexistence.

In practice, regarding the violation of social norms, the provisions of Art. 8 of the Labor Code apply, first of all, to the individual (also non-contractual) employment relationship. In this context, it is worth referring to the anti-nepotism verdict of the Supreme Court of the 7.08.2001, I PKN 578/00[23]. According to the judgment, the acceptability of pursuing claims for the protection of the durability of the employment relationship by an employee who received the appointment from the mayor, who was at the same time his father, without meeting the conditions for applying for the position, may be subject to assessment.

The violation of the principles of social coexistence on the employer's part[24] happens very often if the employer's actions harm the employee. Thus, it seems that the Supreme Court rightfully[25] considered the termination of the employment contract of an employee who, after many years of service, lost his health due to performing work in conditions that grossly violated the principles of occupational health and safety to be contrary to these norms. The refusal of the employer to agree to terminate an employment contract upon mutual consent may be treated similarly.

Here, it should be emphasized that not every case of lack of cooperation by the employer can be considered a violation of social norms. Here, it is worth noting that the Polish labor law system does not foresee a social norm that would oblige the employer to offer the employee work in a different position before terminating the employment contract. It is also unjustified to identify the violation of the principles of social co-existence by the employer with the deterioration of an employee's family or property situation that results from the lawful performance of legal actions. For many years, jurisprudence has emphasized that an employer who terminates the

22 Cf. verdict of the Supreme Court of the 8.03.2018, II PK 8/17, OSP 2019/1, item 7, thesis 2.

23 OSNP 2002/4, item 91.

24 Cf. Andrzej Malanowski, *Nadużycie prawa w pracowniczym stosunku pracy* (Warsaw: Państwowe Wydawnictwo Naukowe, 1972), 201; Baran in: *Kodeks pracy. Komentarz*, 75 ff. See also: verdict of the Supreme Court of the 29.04.2005, III PK 2/05, OSNP 2005/23, item 372, thesis 2.

25 Verdict of the Supreme Court of the 28.10.1998, I PKN 398/98, OSNP 1999/23, item 751.

employment contract due to the employee's unavailability (understood as the possibility to count on the employee's presence at work at the designated time) does not violate social norms. The opposite of availability understood as defined above is frequent absences of the employee that are caused by the poor health of themselves or their children, as well as other cases of justified absence, which not only lead to the need to organize ad-hoc substitutions but do not allow the employer to expect that the employee will be able to substitute another worker if necessary.

The actions of employees may also violate the principles of social co-existence. In particular, this happens if the employee demands rights or pursues disproportionate or excessive claims compared to the contribution or abuses social benefits[26]. For example, one may state that the amount of compensation for unlawful termination of employment defined in the employment contract and pursued by the employee should not be inadequate for the damages suffered by the employee due to such wrongful termination. In my opinion, other situations where the employee demands the employing entity to pay unreasonably high compensation, e.g., for violating the principle of equal treatment, should be treated similarly[27].

The exercise of rights in employment relationships is evaluated by the labor court in terms of the principles of social co-existence. Moreover, even the court of the second instance may analyze the compliance of the demands in the claim with social norms, even if the appeal has not raised the charges of violation of Art. 8 of the Labor Code[28]. The assessment of whether exercising rights is contrary to social norms should be objective, as the application of the discussed regulation does not depend on the existence of fault or on its extent.

Article 8 of the Labor Code does not shape subjective rights, nor does it change or modify the rights resulting from other labor law provisions. However, it authorizes the labor court to assess to what extent, in the given factual state, the entitled party's action or omission is not considered exercising their rights and is not protected by law[29].

Analyzing the provisions of Art. 8 of the Labor Code, it is worth reflecting on the relations between the general clause on the social and economic

26 Baran in: *Kodeks pracy. Komentarz*, 75 ff.

27 Cf. e.g. verdict of the Supreme Court of the 22.01.2004, I PK 203/03, OSNP 2004/22, item 386.

28 Verdict of the Supreme Court of the 25.08.2004, I PK 22/03, OSNP 2005/6, item 80.

29 Cf. verdict of the Supreme Court of the 22.07.2009, I PK 48/09, LEX No. 529757.

purpose of the right and the social norms clause. *De lege lata,* it is doubtless that these clauses are autonomous. However, they should always serve the purpose of satisfying claims in compliance with the ethical and moral standards that are generally binding in the work environment. In practice, this refers, in particular, to the protection of the justified interest of the employee. This interest is usually of an economic or social nature. However, a situation where there is a threat to the rights or dignity of the employee cannot be excluded. The general clauses discussed here may also be applied to the benefit of the employer in situations where the employee grossly violates their fundamental rights, for example, by obtaining unjustified property benefits. A similar violation of the law will occur if the employee interferes with the proper working process.

In the logical aspect, there is a cross-over relation between these notions. In practice, this means that certain situations may be classified only as contrary to the social and economic purpose of the right. On the contrary, others are only contrary to social norms, but some may also be considered to violate both of these clauses. This happens when the abuse of a right in employment relationships has social, economic, ethical, and moral aspects. An example of the coexistence of both prerequisites under Art. 8 of the Labor Code is when an employment contract for a probationary period is terminated immediately after conclusion, without a possibility to start the work offered.

In conclusion of the deliberations, I wish to state that general clauses play a decisive role in shaping the mechanisms of abuse of law in the Polish legal system. They directly foster the realization of the principle *iure suo utendo nemini fiat iniuria* (nobody should suffer when exercising one's right). To conclude, it is worth recalling that the Polish labor law system is also based on the universal principle *a iure nemo recedere praesumitur* (surrender of a right cannot be simply presumed). These two classical principles should remain in homeostasis in employment relationships. As a result, a person who does not perform their duties or, by their behavior (actions or omissions), violates the standards of performing tasks in labor relationships or the social norms cannot refer to their statutory or specific rights. In its consequences, the application of general clauses under Art. 8 of the Labor Code weakens the fundamental principle of the certainty of law, their application may be acceptable only in exceptional situations and requires exact substantive and formal justification.

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