

Monika Lewandowicz-Machnikowska

SWPS Uniwersytet Humanistycznospołeczny

Wydział Prawa i Komunikacji Społecznej, Filia we Wrocławiu

University of Social Sciences and Humanities

Faculty of Law and Communication in Wrocław

WORK PROTECTION OF PERSONS WITH DISABILITIES

Abstract

This paper presents legal issues related to the protection of disabled people's work. In particular the concept of disabled worker and its specific privileges are discussed. It has also been pointed out that there are serious arguments for incorporating the provisions on the protection of the disabled into the new Labor Code.

Słowa kluczowe: ochrona pracy, niepełnosprawność, pracownicy niepełnosprawni, czas pracy, dodatkowy urlop, usprawiedliwiona nieobecność

Key words: work protection, disability, disabled workers, working time, additional leave, leave of absence

Introduction

The term “protection of work” is a complex concept and functions in the field of labor law in various meanings.¹ In the narrow sense “labor protection” is “protection of the work substance or worker's workforce”² or “the whole of the provisions on the protection of workers' health and life in the work process”³ Traditionally, in the labor law textbooks “protection of work” is divided into so-called general protection of the health and safety of all workers and special protection for a specific occupation or activity, or for an entity that includes workers in need of increased, separate protection such as women, children, young people and the disabled.

The protection of the above-mentioned groups of employees is regulated separately because in view of the psychophysical properties of these persons ordinary protection would not be sufficient for them. And, as the Constitutional Court points out, the

¹ T. Kuczyński, *Ochrona pracy*, w: *Prawo pracy. Zarys wykładu*, H. Szurgacz (ed.), Warszawa 2016, p. 287.

² W. Szubert, *Ochrona pracy: studium społeczno-prawne*, Warszawa 1966, p. 9.

³ W. Szubert, *Zarys prawa pracy*, Warszawa 1980, p. 263.

principle of social justice makes it possible for the legislature to intervene in social and economic relations in such a way as to protect the interests of the weaker and to provide comparable opportunities for the citizen. In this way the state realizes the idea of justice. The aim of justice is, inter alia, restoring balance to the community. A disabled person has theoretically guaranteed freedom to choose a job, but because of his or her disability, the actual freedom of choice in this area is smaller than that of a fully functioning person. It may turn out that a person with a disability depending on the level of disability (degree of disability) will not be able to perform certain types of work or work at all in the conditions in which the fully functioning people can work. Thus, if the society does not create the conditions for a person to work or does not provide adequate benefits to compensate the lack of this feature, it thus does not guarantee freedom and security.⁴ And therefore it does not implement the idea of justice. Creating a labor law provisions on labor protection of persons with disabilities, for example, specific rules regarding working hours, additional leave and other exemptions from work we provide people with disabilities the opportunity to meet their needs, and to participate in common goods, and consequently equal opportunities in the enjoyment of freedom.

It should be borne in mind that although the law regulates many specific issues related to the work of these persons, not all the rules governing their work fall within the concept of labor protection. For example, the provisions of the Labor Code, which stipulates equal treatment of employees, in particular without regard to disability, in terms of establishing and termination of employment, terms and conditions of employment, promotion and access to training for the purpose of improving professional qualifications (Art. 18^{3a} Labour Code), and prohibiting discrimination on the grounds of disability (Art. 11³ of the Labour Code) is not a law on the protection of work in the strict sense of the word. The provisions on the protection of the disabled include provisions on working time limits, as well as ban on night work and overtime and additional breaks included in working time, the right to additional leave, the right to additional sick leave.

Disabled worker

Under the Act on the rehabilitation and employment of persons with disabilities, “disability” means permanent or periodic incapacity to fulfill social roles due to permanent or prolonged impairment of the fitness of the organism, particularly causing incapacity for work. A person with a disability is a person whose disability has been confirmed by a ruling of the adjudicating authorities qualifying to one of three degrees of disability, complete or partial incapacity to work on the basis of separate regulations or disability

⁴ M. Soniewicka, *Granice sprawiedliwości, sprawiedliwość ponad granicami*, Warszawa 2010, p. 55 and following.

statement issued before the age of 16.⁵ The legislator has established three degrees of disability that are applicable to the achievement of the objectives set forth in the Act: (1) substantial; (2) moderate; (3) light. They are defined in Art. 4.⁶ In order for a worker to enjoy special protection and therefore the rights provided for disabled persons they must be disabled within the meaning of the above provisions and, in the case of certain entitlements, they must exhibit a specific degree of disability. It is not enough that a person is actually disabled and it is necessary for them to prove it in the light of law by presenting a specific document.

Persons with disabilities are entitled to special employee rights – which will be discussed below - from the date on which they were included in the employment status of persons with disabilities. (rt. 20c of the Act) The principle is that a person with a disability is included in the employment status of people with disabilities starting from the day the employer receives the disability statement (Art. 2a of the Rehabilitation Act). However, there are exceptions to this rule when a person with disabilities presents consecutive disability decision [Art. 2a (2)–(4) of the Rehabilitation Act]. In case of presenting the subsequent decision confirming the disability, the disabled person shall be included in the employment status of the disabled person from the date of the request for a ruling, if the ruling shows that the person was disabled during that period and the application for a ruling was made no later than on the day following the expiry date of the previous disability decision. Regardless of the date of the application for the next ruling declaring a disability, the disabled person shall also be included in the employment status of the disabled within the period of up to 3 months preceding the date of submission of the subsequent ruling if the content of this ruling shows that the person had been disabled during this period.

Special privileges of people with disabilities

Working time of disabled workers

An important element of the protection of the health of disabled workers is the introduction of a specific legal regulation of working time towards them. According to the general rule of art. 129 of Labor Code. The working time of all employees is 8 hours per day and an average of 40 hours on an average of five working days in a given accounting period not exceeding 4 months. Exceptions to this rule are, inter alia, employment regulations for people with disabilities. So art. 15 of the Rehabilitation Act stipulates that the working time of a disabled person must not exceed 8 hours per day and 40 hours per week, and the working time of a disabled person with a significant or moderate disability may not

⁵ See Art. 3 of the Act of 27 August 1997 on occupational and social rehabilitation and employment of persons with disabilities, Journal of Laws 2016, item 2046, as amended.

⁶ For the concept of disability and incapacity, see, e.g., Ł. Trochimiuk, *Zatrudnienie osób niepełnosprawnych, przywileje i obowiązki pracodawcy*, Monitor Prawa Pracy 2007, 7, p. 351.

exceed 7 hours per day and 35 hours per week. It follows from the above that, in the case of people with disabilities, the legislator does not allow the accounting of working time with regards to a given accounting period. Which means that the working time standards applicable to persons with disabilities have rigid limits.⁷ As a consequence, the legislator prevents the introduction of certain working time systems, such as equivalent working time, in the case of people with disabilities. There may, however, be further exceptions from the above rule. Thus, special provisions may provide for more favorable regulations in such cases as for example blind workers employed in positions requiring contact with the patient. Although the current regulation of the working time of people with disabilities is no longer controversial (as of 10.07.2014), it is worth mentioning that the current legal status is the result of a change in the legal regulations under the ruling of the Constitutional Court of 13 June 2013 K 17/11, Art. 15 (2a) of the Act removed the non-compliance of the current regulations with the Constitution of the Republic of Poland. A person with a disability, regardless of the degree of disability, is also entitled to an additional break in work for rehabilitation or rest. The break time is 15 minutes and is included in the working time. This does not violate Art. 134 of the Act of 26 June 1974 – Labor Code (Journal of Laws 1998, 21, item 94, as amended). Apart from a different standard of working time, the legislator prohibited hiring disabled workers for night and overtime work.

There is, however an exception provided from the limitations in Art. 15, that is to say, the provisions contained therein do not apply to persons engaged in guardianship and where, at the request of the employed person, a physician carrying out preventive examinations of the staff or, in the absence thereof, the physician taking care of the person expressly agrees. This provision is formulated vaguely, which creates a number of difficulties in its application in practice. First of all, it is not clear whether it takes under consideration employees who have obtained the consent of the appropriate physician or two separate groups of employees. It is also possible to wonder whether, when talking about employees engaged in guardianship, the legislator was referring to all employees engaged in guarding, or a specific group of security guards, such as those employed in guarding property. In the literature it is assumed that, despite the use of the conjunction “and” in the regulation, there are two separate groups of workers: (1) persons employed for guardianship and (2) disabled workers for whom a physician conducting preventive examinations or, in the absence of a physician, the caretaker of the person expresses his consent.⁸ If the employee presents to the employer a medical certificate in which the physician has given their consent for the work of the disabled person in normal working hours, the employer should take it into account.

⁷ L. Klimkiewicz, P. Nowacki, M. Rączka, *Zatrudnianie pracowników niepełnosprawnych*, in: *Meritum. Prawo pracy*, K. Jaśkowski (ed.), Warszawa 2016, p. 941.

⁸ E. Staszewska, M. Włodarczyk (eds.), *Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych. Komentarz*, Warszawa 2015, Lex, Komentarz do art. 16.

In addition to the standard working time for disabled workers, the legislator also regulated the direct remuneration issue. Thus, the application of the working time norms referred to in Art. 15 does not cause a reduction in the amount of monthly salary paid. On the other hand, hourly rates of basic salaries corresponding to the personal grading or grading of the work performed, in the transition to the working time limits referred to in Art. 15, are elevated in relation to the existing working time to these standards. The purpose of this provision is that a disabled worker will not be adversely affected by a reduction in pay if he or she enjoys the right to a reduced working time. For the application of the regulation, it does not matter whether it is a worker who was deemed to be a disabled person during his or her employment, or a person beginning work. The differentiation of the situation of persons with disabilities depending on when they become disabled that is whether in the course of employment or before entering into an employment relationship would violate the provisions on equal treatment of employees as there are no objective reasons for introducing such discrimination. However, the fact that the formulation of the rules has so many interpretative doubts has to be assessed negatively.

Additional holidays and sick leave

Protection of the work of the disabled is also expressed by providing disabled workers with additional leisure time. Thus, a person with a substantial or moderate degree of disability is entitled to 10 additional working days off in a calendar year. The right to the first additional leave is acquired after one year from the date of entering one of disability categories. However, the holiday mentioned above does not entitle persons who are granted holidays exceeding 26 working days or additional leave on the basis of separate provisions. On the other hand, if the amount of additional leave referred to above is less than 10 working days, the person is entitled to additional leave of 26 working days.

Irrespective of the right to additional leave, a person with a substantial or moderate degree of disability is also entitled to leave of absence while retaining the right to remuneration. First of all, it is an exemption for up to 21 working days to participate in a rehabilitation holiday, not more than once a year, provided that the person is referred to it at the request of the attending physician. The employer grants leave from work for rehabilitation on the basis of a request from a physician who takes care of that person. In the application the doctor determines the type of stay and its duration. Referral for a rehabilitation program for a person with a significant or moderate degree of disability shall be presented to the employer within a time limit that will enable him or her to ensure a normal work cycle at the workplace. At the same time, the basis for payment

of compensation for leave of absence time is a document submitted to the employer confirming the stay on the rehabilitation program, issued by the organizer.⁹

A person with a substantial or moderate degree of disability is also entitled to leave from work with the right to retain remuneration for specialized examinations, medical or rehabilitative treatments, and to obtain orthopedic supplies or repairs if these can not be performed outside of normal working hours. The compensation for the leave time referred to above is calculated as the monetary equivalent of the leave. Total length of additional leave and exemption from work in order to participate in a rehabilitation may not exceed 21 working days in a calendar year.

Legal regulations conclusions *de lege ferenda*

From the point of view of the subject of this paper, attention should be paid to the regulation of the issues of labor protection of persons with disabilities. Although the protection of disabled people's work has a long tradition, dating back to the 1960s, and attempts to settle the issue were made shortly after the Second World War,¹⁰ the provisions on this matter were not included in the Labor Code which was created in 1974. In so far as the protection of the work of women, children and adolescents is contained simply in the labor code and discussed in all labor law manuals, the protection of persons with disabilities is regulated in a separate legal act. Currently it is the Act of 27 August 1997 on occupational and social rehabilitation and employment of people with disabilities.¹¹ Such a method of regulation implies that the legislator treats the work of people with disabilities as part of their social rehabilitation. According to this law, "rehabilitation" of disabled people means a set of activities, in particular organizational, curative, psychological, technical, educational, and social, aiming at attaining the highest possible level of their functioning, quality of life and social inclusion (Art. 7). Occupational rehabilitation is designed to make it easier for a person with a disability to obtain and maintain adequate employment and career advancement by enabling them to use vocational guidance, vocational training and job placement (Art. 8). This type of reasoning is also confirmed by case law, eg in the justification of the Constitutional Tribunal's judgment of 13.06.2016 (K 17/11), the Court explicitly states that the employment of people with disabilities is part of their occupational rehabilitation. It also seems that such a way of thinking predominates in the approach to work of people with disabilities. At the same time, however, attention should be paid to the fact that the approach to the work of people with disabilities is changing, inter alia, under international regulations, in particular the

⁹ See Regulation of the Minister of Economy, Labor and Social Policy of 22 May 2003 on detailed rules of granting exemptions from work to persons with significant or moderate degree of disability in order to participate in the rehabilitation holiday, Journal of Laws 2003, 100, pos. 927.

¹⁰ See Justification for the judgment of the TK – K 17/11.

¹¹ Dz. U. of 2016, pos. 2046.

Convention adopted by the UN General Assembly on 13 December 2006 on the Rights of Persons with Disabilities signed by the Government of Poland On 20 March 2007, then ratified by Poland on 6 September 2012.¹²

The Convention specifically addresses the issue of disabled people's work. It states in particular that States Parties recognize the right of persons with disabilities to work on the basis of equality with others. This includes the right to make a living through work that is freely chosen or accepted on the labor market and in work environment open, inclusive and accessible to people with disabilities.

States Parties are also to protect and promote the realization of the right to work, including those who become disabled during their employment, by taking appropriate steps, including by legislative means. In addition, States are required to take measures to protect the rights of persons with disabilities on the basis of equality with others, to fair and favorable working conditions, including equal opportunities and equal pay for equal work, safe and hygienic working conditions. States Parties shall also take measures to ensure that rational improvements for persons with disabilities are made in the workplace. Although the Convention does not establish new rights for people with disabilities, this is an important impetus for the reform of law on disability and should therefore be taken into account in particular when preparing new legislation.¹³

Such new legislation currently being prepared includes the new Labour Code, in which the drafting of the issues of labor protection of groups covered by special protection, should not lack the regulations on labor protection of persons with disabilities. As rightly pointed out in the literature, the separation of regulations concerning the work of persons with disabilities in a separate act instead of the Labor Code is not currently validated and should not be continued. K. Roszewska is right in pointing out that the current way of regulation fixes looking at the work of people with disabilities as an element of their rehabilitation and not a source of subsistence, thereby maintaining the professional isolation of people with disabilities and pushing the problems of their employment into the margin of labor law.¹⁴ The legislator should not maintain the isolation of people with disabilities by leaving the provisions on the protection of the work of the disabled in the Act on Rehabilitation but, on the contrary, should give expression of a new approach to the work of the disabled by including these provisions as part of labor law in the Labor Code.

A remaining question is, however, whether the content of the current regulation on the protection of disabled persons work is adequate and whether it requires changes. Before moving laws protecting disabled persons work additional questions should be asked. Does the scope of the existing labor protection regulations really ensure proper

¹² Dz. U./ Journal of Laws of 25 October 2012, pos. 1169.

¹³ M. Zieliński, *Nowe zasady wdrażania praw osób niepełnosprawnych w praktyce UE*, Państwo i Prawo 2011, 11, p. 45.

¹⁴ See K. Roszewska, *Aksjologiczne podstawy unormowania zatrudnienia pracowniczego osób z niepełnosprawnościami w kodeksie pracy*, Praca i Zabezpieczenie Społeczne 2014, 12, p. 8 and following.

and full protection of the interests of people with disabilities?¹⁵ And moreover, does the current differentiation of the situation of persons with disabilities give them truly equal opportunities of development? Are the privileges of people with severe and moderate disability relevant to their situation? Is the protection not a barrier to employment and, therefore, does not, in fact, worsen the situation of those persons on the labor market?

Finally, are the measures currently used by the legislator in the field of the protection of the work of the disabled adequate for the purposes it imposes, for example, on the implementation of the Convention on the Rights of Persons with Disabilities, in particular do they ensure the inclusion of disabled persons on an equal basis with persons without disabilities in the professional field?

The answer to these and other questions requires not only a thorough analysis of the applicable legal regulations but also taking advantage of the achievements of science, experience and good practices in other countries.

References

- Klimkiewicz L., Nowacki P., Rączka M., *Zatrudnianie pracowników niepełnosprawnych*, in: *Meritum. Prawo pracy*, K. Jaśkowski (ed.), Warszawa 2016.
- Kuczyński T., *Ochrona pracy*, w: *Prawo pracy. Zarys wykładu*, H. Szurgacz (ed.), Warszawa 2016.
- Roszevska K., *Aksjologiczne podstawy unormowania zatrudnienia pracowniczego osób z niepełnosprawnościami w kodeksie pracy*, *Praca i Zabezpieczenie Społeczne* 2014, 12.
- Roszevska K., *Ochrona praw i interesów osób niepełnosprawnych*, w: *Prawo pracy między gospodarką i ochroną pracy. Księga pamiątkowa Profesora Ludwika Florka*, M. Latos-Miłkowska, Ł. Pisarczyk (eds.), Warszawa 2016.
- Soniewicka M., *Granice sprawiedliwości, sprawiedliwość ponad granicami*, Warszawa 2010.
- Staszewska E., Włodarczyk M. (eds.), *Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych. Komentarz*, Warszawa 2015.
- Szubert W., *Ochrona pracy: studium społeczno-prawne*, Warszawa 1966.
- Szubert W., *Zarys prawa pracy*, Warszawa 1980.
- Trochimiuk Ł., *Zatrudnienie osób niepełnosprawnych, przywileje i obowiązki pracodawcy*, *Monitor Prawa Pracy* 2007, 7.
- Zieliński M., *Nowe zasady wdrażania praw osób niepełnosprawnych w praktyce UE*, *Państwo i Prawo* 2011, 11.

¹⁵ See K. Roszevska, *Ochrona praw i interesów osób niepełnosprawnych*, w: *Prawo pracy między gospodarką i ochroną pracy. Księga pamiątkowa Profesora Ludwika Florka*, M. Latos-Miłkowska, Ł. Pisarczyk (eds.), Warszawa 2016, p. 377.