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Model of Employment Relationship in Higher Education – A Theoretical Approach

Model stosunku pracy w szkolnictwie wyższym – ujęcie teoretycznoprawne

SUMMARY

There is no uniform model of employment in Polish legislation. The shape of the employment relationship of an academic employee is strongly influenced by the specific normative relationship that exists between the Labour Code and the Law on Higher Education. It should be noted that the Law on Higher Education is not a sufficient regulation. It regulates, in principle, sufficiently those issues that require, due to its nature, a different than regulatory code. The relations between these two acts are diverse, which results from the construction of Article 5 of the Labour Code. The statutory regulations affect the shape of the employment relationship. Each college as part of its autonomy can regulate various issues, creating many different hybrid work relationship models.

Keywords: Labour Code; Law on Higher Education; statute; employment relationship; academic employee

INTRODUCTION

To start with, it should be noted that Polish legislation does not use a uniform employment model[1]. The vast majority of employees are subject to the model set by the provisions of the Labour Code[2]. However, staff hiring is sometimes subject to specific labour regulations, which are statutory and autonomous in relation to

[1] J. Piątkowski, *Kodeks pracy a ustawa – prawo o szkolnictwie wyższym*, [in:] *Zatrudnianie nauczycieli akademickich*, red. W. Sanetra, Warszawa 2015, p. 63 ff.

[2] Act of 26 June 1974 – Labour Code (Journal of Laws 2016, item 1666).

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generally binding rules. The Labour Code sets a certain minimum requirement, while specific labour regulations are intended to precise elements of the employment relationship for a given group of employees.

It should be noted in the context of the subject of this paper that the position of higher education employees is primarily defined in the Act of 27 July 2005 – Law on Higher Education[3], which forms the so-called model of academic labour law. The hiring of higher education staff, in particular academics, requires the introduction of *lex specialis* regulations into the labour legislation. When determining the status of universities and academic staff employed therein, the legislature had to consider the distinctions in the character of academic teacher jobs. Any university, as a defined organisational structure, carries out the tasks, which primarily include R&D activity and teaching activity.

The form of the employment relationship of academic staff is determined by the specific normative relationship between the Labour Code and the Law on Higher Education. On the other hand, it should be noted that the higher education institutions have broad autonomy, demonstrated by the power to independently adopt the by-laws of the university, the act governing the functioning of the university, including the elements of the employment relationship of academic teachers not specified in the Law on Higher Education[4]. It should be stressed that any higher education institution may regulate differently within its autonomy specific issues expressly permitted by the legislature, thus creating multiple hybrid models of the employment relationship.

The main research objective in this article is to analyse the normative scope of application of the Labour Code in the context of the Law on Higher Education and the influence of university by-laws on the employment relationship in higher education[5]. The discussed issues, concerning the scope of application at three levels (the code, statutory, and by-laws levels), are important in the context of employment contracts in higher education. From the point of view of the application of the law, and in particular for interpretative reasoning, the proper construing of norms from rules forming part of the legal system results in an appropriate determination of the content and scope of the norm[6].

[3] Journal of Laws 2017, item 2183.

[4] *Prawo o szkolnictwie wyższym po nowelizacji*, red. M. Czuryk, M. Karpiuk, J. Kostrubiec, Warszawa 2015, p. 49.

[5] This paper does not cover the issues of the application of other legal acts affecting the academic labour law.

[6] L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2004, p. 139 ff.; L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 158 ff.

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THE COMPLEMENTARY NATURE OF THE LABOUR CODE AND THE LAW ON HIGHER EDUCATION

The relationship between the Labour Code and the Law on Higher Education is of a complementary nature[7]. The lack of comprehensive regulation in specific employment rules of the higher education law results in that only by construing the legal norms contained in the two acts analysed would lead to explaining the legal position of people employed in universities. This results from the principles of legislative methodology[8]. The legislative process and the special role of the principles of legislative methodology in this process have repeatedly been mentioned by the Polish Constitutional Tribunal, which linked these concepts with the existing legislature's obligation to respect the principles of the democratic rule of law[9]. This is so because violation of the rules of correct legislative methodology entails a non-compliance of the contested regulation with Article 3 of the Polish Constitution[10]. The principles of correct legislation constitute a sort of "praxeological standard"[11]. Moreover, they require that the regulations be provided in a manner that is precise, clear and appropriate for the purposes of the legislature[12]. These rules should also be logical and consistent, respect the system-wide principles and be compliant with specific axiological standards[13].

[7] K. Walczak, [in:] *Kodeks pracy. Komentarz*, red. W. Muszalski, Warszawa 2017.

[8] Regulation of the President of the Council of Ministers on the "Rules of legislative methodology" (Journal of Laws 2002, No. 100, item 908; consolidated text Journal of Laws 2016, item 283).

[9] See judgement of the Constitutional Tribunal of 15 September 1999, K 11/99, OTK ZU 1998, No. 5, item 64; judgement of the Constitutional Tribunal of 11 January 2000, K 7/99, OTK ZU 2000, No. 1, item 2; judgement of the Constitutional Tribunal of 29 October 2003, K 53/02 OTK ZU 2003, No. 8A, item 83; judgement of the Constitutional Tribunal of 29 May 2012, SK 17/09 OTK ZU 2012, No. 5A, item 53. Cf. S. Wronkowska, *Zasady przyzwoitej legislacji w orzecznictwie Trybunału Konstytucyjnego*, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, red. M. Zubik, Warszawa 2006.

[10] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended); judgement of the Constitutional Tribunal of 11 January 2000, K 7/99, OTK ZU 2000, No. 1, item 2; judgement of the Constitutional Tribunal of 20 November 2002, K 41/02, OTK ZU 2002, No. 6A, item 83; judgement of the Constitutional Tribunal of 9 October 2007, SK 70/06, OTK ZU 2007, No. 9A, item 103; judgement of the Constitutional Tribunal of 29 March 2010, K 8/08, OTK ZU 2010, No. 3A, item 23.

[11] Judgement of the Constitutional Tribunal of 28 October 2009, K 32/08, OTK ZU 2009, No. 9A, item 139.

[12] Judgement of the Constitutional Tribunal of 10 January 2012, P 19/10, OTK ZU 2012, No. 1A, item 2.

[13] Judgement of the Constitutional Tribunal of 23 October 2007, P 28/07, OTK ZU 2007, No. 9A, item 106; judgement of the Constitutional Tribunal of 15 November 2010, P 32/09, OTK ZU 2010, No. 9A, item 100.

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It should be noted that one of the basic principles of prudent legislation is not to repeat in an act a provision regulated by another act. This principle has primarily two purposes. First, it is intended to reduce to a minimum the occurrence of unfounded repetitions in various legal acts. Second, it is to prevent assigning other normative meanings to these repetitions and the ambiguity in their interpretation. The reference to the institutions used within the legal system cannot be *per se* perceived as a breach of the principles of correct legislation. The admissibility of using such a technique is based on § 4 item 3 of the Rules of legislative methodology, which provides for that "the Act may refer to the provisions of […] another law". It should be pointed out that in the acts analysed herein, such references are also set out in Articles 5 and 300 of the Labour Code, as well as in Articles 136 and 128 of the Law on Higher Education. These references have a fundamental effect on the form of the employment relationship in higher education.

THE RULE OF PRIORITY OF PROFESSION-SPECIFIC RULES

The relation between the Labour Code and the Law on Higher Education is determined by Article 5 of the Labour Code, which provides that "if the employment relationship for a particular category of employees is governed by profession-specific rules, the provisions of the Code shall apply to the extent not governed by those rules". This is a general reference clause[14], which defines the primacy of profession-specific rules. The principle of the primacy of profession-specific rules means that the provisions of *lex specialis*, which were regulated in a different way, are given priority over the *lex generalis* regulations of the Labour Code. The application of the conflict-of-laws rule *lex specialis derogat legi generali* results from the comparison of the scope of regulation of both norms and the answer to the question whether the scope of regulation or application of one of the norms is narrower, and therefore more specific[15]. This comparison should entail an in-depth analysis of the evaluation of axiological assumptions taken by the legislature and the reason for introducing specific regulations in the Law on Higher Education[16].

When conducting a subjective analysis of this provision, it should be recognized that the principle of primacy of profession-specific rules applies essentially to academic teachers. The subjective scope of the term "academic teacher" is determined by the enumerative definition in Article 108 of the Law on Higher Education. Academic teachers are the research and teaching staff, teaching staff,

[14] J. Piątkowski, *op. cit.*, p. 74.
[15] L. Leszczyński, *op. cit.*, p. 261.
[16] L. Morawski, *op. cit.*, p. 237.

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researchers and certified librarians, as well as certified employees, specialised in scientific documentation and information.

When applying the principles stemming from the priority of profession-specific rules, it should be kept in mind that not all *lex specialis* items in the Law on Higher Educations are regulated to a sufficient extent (e.g., regulations related to establishing and termination of employment). The principle of primacy of profession-specific rules applies both to wholly regulated matters and to those regulated only in part.

THE PRINCIPLE OF SUBSIDIARY APPLICATION OF THE LABOUR CODE

The Law on Higher Education does not regulate all the elements of employment contracts of university employees. Many legal institutions that regulate labour relationships are subject to the general scheme of the Labour Code. The normative structure of Article 5 of the Labour Code results in the general rule of applying the Code in matters not regulated in profession-specific rules. This principle was reiterated in Article 136 of the Law on Higher Education which confirms the norm contained in the Labour Code[17]. This fact shows that the norm contained in Article 5 of the Labour Code applies, with no exception, to all other profession-specific rules, not solely to the Law on Higher Education. The Labour Code is applied for determining the content of an employment contract in higher education in matters not governed by profession-specific rules[18].

It should be noted that when analysing the scope of the term "unregulated matters" in the light of Article 136 of the Law on Higher Education, one should apply the meaning established for the terms of unregulated matters provided for in Article 300 of the Labour Code. Therefore, it should be recognized that the "unregulated matter" is a factual situation not regulated by the Law on Higher Education situation or a part thereof which bears the features of any legal significance[19]. The analysed provision is *lex specialis* and regulates only a reference to the norms of the Labour Code. This means that it does not refer to other norms of labour law, because according to the rule *exceptiones non sunt excendendae*, exceptions may not be interpreted broadly.

One should also point to the differences emerging from the comparison of reference norms contained in Articles 5 and 300 of the Labour Code. The provision of Article 300 of the Labour Code points to the application of the Civil Code accordingly to matters not regulated in the Labour Code. However, the construction of

[17] H. Izdebski, J. Zieliński, *Prawo o szkolnictwie wyższym. Komentarz*, Warszawa 2015, p. 409.
[18] *Prawo o szkolnictwie wyższym po nowelizacji*, p. 195.
[19] See judgement of the Supreme Court of 18 October 2011, I PK 54/11, LEX No. 1229539.

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Article 5 of the Labour Code emphasizes that the Labour Code is applicable directly to the matters not regulated in profession-specific rules[20]. This does not raise any doubts as the scopes of these two acts are within one system branch. However, the reference to the Civil Code already creates a cascading mechanism[21].

However, as regards the scope of these two norms, it should be noted that while the application of Article 300 of the Labour Code is not affected by the circumstances consisting in partial regulation of the matter[22], the main problem is the application of Article 5 of the Labour Code in such a situation. Unquestionably, the provisions of the Labour Code apply in accordance with Article 5 of the Labour Code where the given issue is not regulated in the Law on Higher Education at all. However, there is doubt about the state of partial regulation of a given issue in profession-specific rules. Two opposing views have developed in the literature and case law. Advocates of the first view point out that partial regulation of a given problem in profession-specific rules of the Law on Higher Education does not authorize the application of the norm contained in Article 5 of the Labour Code, which is directly applicable and there is no possibility of using a modified norm in this case[23]. Proponents of the second view argue that the application of Article 5 of the Labour Code is possible in a situation where there is an objective legal loophole, which results in insufficient regulation of a given matter. Consequently, the situation of partial regulation of a given issue is not a hindrance to the application of the Labour Code[24].

It seems that the second view is right, provided that the partial regulation of a given issue in profession-specific rules does not affect the fact that the provisions of the Labour Code will apply directly and it will not be in conflict with the issues governed by the Law on Higher Education. Probably the most essential issue is to answer the question of whether a given question was completely regulated in profession-specific rules rather than the question whether it was regulated at all. It seems that the application of the provisions of the Labour Code to profession-spe-

[20] P. Korus, [in:] *Kodeks pracy. Komentarz*, red. A. Sobczak, Warszawa 2017, p. 14. Cf. resolution of the Supreme Court of 8 April 2009, II PZP 2/09, OSNAPiUS 2009, No. 19–20, item 249.

[21] K.W. Baran, [in:] *Akademickie prawo pracy*, red. K.W. Baran, Warszawa 2015, p. 254.

[22] P. Korus, *op. cit.*, p. 14. Cf. K. Roszewska, *Odpowiednie stosowanie przepisów kodeksu cywilnego do stosunków pracy* (typescript of the dissertation at the Library of the Faculty of Law and Administration of the University of Warsaw), p. 100; S. Dricziński, *Brak regulacji w prawie pracy jako jedna z przesłanek stosowania Kodeksu cywilnego – kilka refleksji ogólnych*, „Praca i Zabezpieczenie Społeczne" 2006, nr 2, p. 12. See also judgement of the Supreme Court of 13 October 2004, II PK 36/04, OSNP 2005, No. 8, item 106.

[23] Judgement of the Supreme Court of 18 February 2011, II PK 197/10, OSNP 2012, No. 7–8, item 91; P. Korus, *op. cit.*, p. 14.

[24] P. Nowik, [in:] *Prawo o szkolnictwie wyższym. Komentarz*, red. M. Pyter, Warszawa 2012, p. 713; S. Dirczyński, *op. cit.*, p. 12; judgement of the Supreme Court of 13 October 2004, II PK 36/04, OSNP 2005, No. 8, item 106.

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cific rules should not be based on an axiological gap, but an actual structural gap. Assessing whether such a gap exists should be made using functional interpretation. The reason for employment in higher education and the distinctiveness of this employment contract compared with the general employment model should be tested on an *ad casum*[25] basis. An example may be the issues related to salaries which are regulated by the Law on Higher Education. It seems that this is not a complete regulation that would determine this issue in a way that waives the application of the Labour Code, especially when it regards the issue of protection of remuneration or equal pay for equal work or work of equal value[26].

On the other hand, derogations from the auxiliary application of the provisions of the Labour Code are possible when the provisions of the Law on Higher Education exclude the application of the Code to a certain extent. Secondly, the provisions of the Labour Code do not apply when the matter is regulated in the Law on Higher Education[27]. In the law application process, one should always keep in mind the legislature's objective, the reason why the legislature decided to differently regulate a given issue in the profession-specific rules of the Law on Higher Education[28]. It should be assumed that it is not permissible to apply those provisions of the Labour Code which are inconsistent with regulations contained in the specific profession rules, and which were included therein due to the specific nature of university staff employment.

BY-LAWS OF A UNIVERSITY AND LEGAL RELATIONSHIP IN HIGHER EDUCATION

It is significant for the purposes of this article that higher education is characterised by a wide range of autonomy. This is a constitutional guarantee[29]. Universities have powers to adopt their by-laws that regulate the matters related to the organisation and functioning of higher education institutions as well as elements of their legal relationship with academic staff. Article 17 of the Law on Higher Education states that "the matters related to the university operation not regulated in the Act shall be

[25] Resolution of the Supreme Court of 8 April 2009, II PZP 2/09, OSNAPiUS 2009, No. 19–20, item 249.

[26] For more, see J. Piątkowski, *op. cit.*, p. 86 ff.; resolution of the Supreme Court of 25 May 2010, I PZP 4/10, OSNAPiUS 2011, No. 1–2, item 1; judgement of the Supreme Court of 19 July 2005, II PK 18/05, OSNP 2006, No. 7–8, item 113.

[27] K. Walczak, *op. cit.*, p. 22; judgement of the Supreme Administrative Court of 19 April 1984, II SA 451/84, OSPiKA 1985, No. 2, item 27.

[28] P. Korus, *op. cit.*, p. 12.

[29] Article 70 § 5 of the Constitution of the Republic of Poland: "The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute".

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governed by the university by-laws". This provision does not authorize universities to shape the content of the employment relationship with the academic staff based on the by-laws. It also does not authorize them to regulate the problems not governed by the Act. The university by-laws are not intended to modify or supplement the provisions of the Act, but only to regulate issues that have not been covered by the Act[30].

It should be noted that the relationship between the Act and the by-law issued on its basis indicates that the by-law may not govern the matters going beyond the limits of statutory authorization. If the by-laws contain such provisions then these provisions are not effective, and legal actions made thereunder are defective[31]. The provision of Article 17 of the Law on Higher Education is not a reference provision, unlike Article 136 of the Law on Higher Education. Basically, the regulation of given issues in the by-laws should result from a specific authorization[32]. Moreover, the by-laws should not regulate issues that have already been regulated in other labour law legislation. If the Act tackles these issues in a complete manner, it should be emphasized that there is no possibility of "supplementing" the statutory matter with the provisions of the by-laws, especially if it is contrary to the provisions of the Act[33]. The exception is a special statutory authorization to do so. It is also worth mentioning the judgement of the Constitutional Tribunal of 10 June 2003[34] which provides that "the university by-laws must be compliant with the statute, and where the legislator clearly regulates statutory matters, these by-laws may not go beyond the statutory authorization".

The issues related to, i.a., establishing an employment contract were left for autonomous internal regulations of each university. For example, Articles 114 and 115 of the Law on Higher Education set out the so-called "minimum eligibility requirements to be met by an academic teacher"[35], while additional requirements and professional skills of the people employed as an academic teacher are to be specified by the by-laws and it is the by-laws which have a major impact on the scope of these requirements. The by-laws of higher education institutions establish more or less comprehensive regulations in this area. At the same time, they go beyond the scope of statutory authorization, that is, they contain such principles that do not concern the professional requirements of teachers and strictly professional qualifications[36].

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[30] *Prawo o szkolnictwie wyższym po nowelizacji*, p. 49.

[31] Judgement of the Supreme Court of 19 March 2008, I PK 227/07, MoPr 2009, No. 1, p. 29; judgement of the Supreme Court of 28 May 2008, I PK 263/07, LEX No. 818823.

[32] P. Matyjas-Łysakowska, *Statut szkoły wyższej jako źródło prawa pracy*, Warszawa 2016, p. 59 ff.

[33] Judgement of the Supreme Court of 4 December 2008, II PK 155/08, OSNP 2010, No. 11–12, item 135.

[34] SK 37/02, OTK-A 2003, No. 6, item 53.

[35] H. Izdebski, J.M. Zieliński, *op. cit.*, p. 300.

[36] W. Sanetra, [in:] *Prawo o szkolnictwie wyższym. Komentarz*, red. W. Sanetra, M. Wierzbowski, Warszawa 2017, p. 253.

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CONCLUSION

The form of the employment relationship in the higher education system is influenced by a specific normative relationship that takes place on the three levels discussed herein (the code, statutory, and by-law levels). Relations between the Labour Code and the Act on Higher Education are of a diverse nature[37], which results from the structure of Article 5 of the Labour Code. The regulations contained in the Law on Higher Education as *lex specialis* should be applied using the priority principle, while the matters not regulated in the Act should derive from the universal regulation of the Labour Code by way of a general reference. The provisions of the Labour Code should be applied directly, not *mutatis mutandis*. It should be assumed that if a given norm is not sufficiently regulated in the act, the provisions of the Labour Code may be applied to it, provided that the code regulations are not contrary to the norms of the act as profession-specific rules with different characteristics regulating the employment relationships of a particular group of employees. Moreover, it should be stated that derogations from the subsidiary application of labour law provisions are possible when the legislation explicitly excludes such a possibility or when a given issue has been regulated sufficiently. The Law on Higher Education may shape the legal relationship of academic employees more or less favourably, and determine other models of responsibility. Moreover, higher education institutions, exercising their autonomy, can independently influence the shape and some elements of the employment relationship. It should be kept in mind that the by-laws alone cannot define the content of the employment relationship. It does not provide an authorization to regulate the problems not governed by the act either.

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[37] J. Piątkowski, *op. cit.*, p. 100.

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STRESZCZENIE

W polskim ustawodawstwie nie występuje jednolity model zatrudniania pracowników. Na kształt stosunku pracy pracowników akademickich zdecydowany wpływ ma swoista normatywna relacja, jaka zachodzi pomiędzy kodeksem pracy a ustawą o szkolnictwie wyższym. Wskazać należy, że ustawa o szkolnictwie wyższym nie ma charakteru regulacji wystarczającej. Reguluje w sposób co

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do zasady wystarczający te kwestie, które wymagają – z uwagi na swój charakter – odmiennej niż kodeksowa regulacji. Relacje zachodzące między tymi dwoma aktami mają charakter zróżnicowany, który wynika z konstrukcji art. 5 Kodeksu pracy. Na kształt stosunku pracy wpływ mają unormowania statutowe. Każda szkoła wyższa w ramach swojej autonomii może dane kwestie uregulować różnie, tworząc wiele hybrydowych modeli stosunku pracy.

Słowa kluczowe: kodeks pracy; Prawo o szkolnictwie wyższym; statut; stosunek pracy; pracownik akademicki

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