WACŁAW SZUBERT*

Protection against Dismissal in Polish Labour Law

A tendency to restrict managerial power to terminate contracts of employment is now widespread. Laws aiming at the protection of workers against dismissal are now in force in countries representing various political and social systems: in West Europe as well as in the East-European socialist countries.[1] Solutions adopted in these laws show some broad and technical similarities resulting to a large extent from the influence of foreign experience and from the impact of the I.L.O. Recommandation no.119 of 1963. Nevertheless, they show also some distinct features reflecting different approaches to protective policies in basic requirements as well as in procedural safeguards.

No less important than formal differences are those related to the functions of dismissal laws and their practical significance in concrete economic and socio-political surroundings[2]. The situation on the labour market, the manpower policies and the mobility of employees due to various factors play an important part in this respect. It is against this background that the laws in force in various countries must be examined and evaluated.

The purpose of this paper is to present the general lines of protection against dismissal in Polish Labour Law with due regard to recent trends in the social and economic policy of the country and in the methods of planning. Accordingly, my considerations will be divided into five parts concerned with: 1) the origins of protective law now in force, 2) the grounds for dismissal, 3) the dismissal procedures including participation of the workers' representatives, 4) remedies of an unlawful (unfair) dismissal. Finally: 5) some conclusions will be drawn as to the effects of the legal regulation now in force and the proposals for its improvement.

My presentation will be limited to the normal mode of terminating the contract of employment by the employer i.e. to the dismisal with notice, leaving out of the account summary dismissal (without notice) which is rather seldom applied in exceptional cases and has to be based on important reasons enumerated exhaustively in the Labour Code (serious violation of

* Professor of Law, Warsaw.

[1] The termination of employment on the initiative of the employer was one of the subject matters discussed at the 10th International Congress of Labour Law and Social Security held in Washington in September 1982.

[2] See Bob Hepple: A functional approach to dismissal laws. "In memoriam of Sir Otto Kahn-Freund", München 1980, pp 477-491.

basic obligations by the worker, an offence which makes further employment impossible, prolonged sickness and some other).[3] Procedures applicable in case of instant dismissal as well as the control exercised by the trade union works' council contribute further to the limitation of its use.

I.

The regulation now in force contained in the Labour Code promulgated in 1974, has been the outcome of a longer evolution of protective provisions against unfair dismissal. Its point of departure may be considered to be the Employment Contracts Laws of 1928[4] which were based on the notion of free termination of contracts subject only to notice that was of 3 months for the white collars and of 2 weeks for the blue collars: a differentiation characteristic of continental labour legislation at that time. The same enactments provided for interdictions to give notice in certain situations: during temporary incapacity to work owing to accident or illness, during holidays with pay, military service, etc. The list of these prohibitions was subsequently enlarged so as to cover the members of trade union works' councils as well as workers charged with other social functions, pregnant women as well as women on maternity leave, elder workers being not more than two years from pensionable age and some other workers in particular situations provided for in statutes and in collective agreements.

Far-going though were these prohibitions (sometimes they were even criticised for that reason) they left unprotected workers who were not covered by specific protective provisions but whose dismissal could be nevertheless prejudicial and unfair in given circumstances. The only remedy available in that case could be based on the concept of abuse of right by the employer consisting in his acting in contradiction to the "principles of social intercourse" laid down in the art. 5 of the Civil Code, which put the worker in the difficult position of having to bear the burden of proof to this effect[5].

It is true that the courts went a long way to help the workers in claiming their rights, which concerned especially the sole wage earners in a family. In this particular case a protective Order of the Council of the Ministers of 1960[6] was recognised as an expresion of the „principles of social intercourse" to be observed by the employer in proceeding to a dismissal of this category of workers. In this way, a considerable part of the burden of proof was shifted from the worker to the employer who had to show that he did not trespass on the principles in question. However, this solution amounted rather to an enlargement of specific protective provisions than to the establishment of a rule providing for a general protection against wrongful dismissal.

No such protection was provided in the collective agreements although they imposed on the employers the duty to agree the dismissal decisions

[3] Art. 52 and 53 of the Code (Journal of Laws 1974, no. 24 item 141).
[4] Journal of Laws 1928, no. 35 items 323 and 324.
[5] See W. Szubert: La rupture abusive du contrat de travail en droit polonais. "Rivista di Diritto Internazionale e Comparato del Lavoro" vol. VIII no. 1/1968 pp. 45-59.
[6] Monitor Polski no. 36 item 180.

with the trade unions works' councils. The vague wording of these provisions gave rise to countless disputes and controversies as to their legal effect and it was only in the early seventies that the courts adopted a more decisive line of interpretation admitting that a dismissal not agreed upon with the works' council ought to be deemed null and void.

A general dissatisfaction with this state of regulation as being to diversified, unclear and failing to establish general lines of protection provoked a search for new solutions that were discussed and tried in specific pieces of legislation and eventually adopted in the Labour Code of 1974.

II.

By the time the Labour Code was under preparation there was a common opinion that no dismissal should be allowed without a valid reason justifying the termination of the contract of employment. However, no such agreement concerned the method of regulation serving this purpose. An alternative taken into consideration consisted in the enumeration of reasons for dismissal with notice: a solution which has been adopted in other socialist countries of Eastern Europe except Hungary and which vas tried, but without evident success, in some specific pieces of legislation in Poland (especially in the Act of 1968 dealing with the employees of the local government)[7]. The idea of establishing such a comprehensive list of reasons for dismissal had many supporters. On the other side, however, it was criticised as supplying apparent rather that real safeguards against wrongful dismissal because of the difficulty to specify all the valid reasons for it in concrete terms leaving no ambiguity and room for various interpretations.

That is why this idea was eventually abandoned and replaced by the adoption of a general clause stipulating simply that each dismissal should be "justified" without any indication (even by way of exemple) of the grounds admitted or criteria of their evaluation. Accordingly, the decisions as to what does and what does not justify a dismissal has been left entirely, in case of disputes, to the discretion of the courts upon cosideration of factual circumstances.

The 8 years' experience since the promulgation of the Labour Code resulted in the elaboration of some rules and precedential decisions but it brought also into relief considerable difficulties in this respect[8]. It was admitted as a matter of course that the valid reasons for dismissal include incapacity as well as misconduct of the worker manifesting itself in disobedience, absence without leave, carelessness and inefficiency, insolence or rudeness, bad faith, etc. However concrete decisions in this respect had to consider the circumstances of each case, such as gravity of the worker's contravention, his length of service and previous performance, whether the incidence was an isolated or recurrent one, whether prior warning or other disciplinary action was taken etc, and no general formula could give precise indications as to the proper evaluation of all these circumstances.

[7] Journal of Laws no. 25 item 164.

[8] See J. Brol: Nieuzasadnione wypowiedzenie umowy o prace wedlug art. 45 kodeksu pracy (Unjustified dismissal according to art. 45 of the Labour Code), "Panstwo i Prawo" no. 8-9/1977 p.128 ss.

Similar difficulties arose in case of dismissals justified by operational requirements of the enterprise connected with re-organisation, technological changes etc, when it ought to be examined whether these requirements virtually left no possibility of continuing former employment or offering the worker a suitable alternative employment, to say nothing about the ticklish problem of selection of workers to be dismissed in case of redundancy.

There arose also some controversies around the question whether the notion "justified dismissal" implies the existence of a valid reason only or suppose also that it should be socially adequate i.e. not prejudicial to the worker considering his social status, poor health or other personal circumstances. The former alternative was less favourable to the worker as compelling him, in case of dismissal assumed prejudicial although having a valid reason, to make a claim based on the concept of abuse of right and to prove that it has been exercised by the employer in contradiction to the principles of social intercourse generally accepted in the life of the community (as required now by art. 8 of the Labour Code). No final solution of this question has been accepted but it has been admitted by the courts that the onus of proof of circumstances rendering a dismissal socially prejudicial rests with the worker whereas that of proving the existence of valid reasons for it rests with the employer.

There were also some doubts whether the mere fact that a worker has reached pensionable age and acquired the right to a pension may be considered a valid reason for his dismissal: a problem having far-reaching implications pertaining to the very notion of the right to work and to the foundations of social security. As a matter of fact, there was for some time a tendency to dismiss pensioners, which was prompted by the employment agencies in order to increase the chances of the younger generation. However, the courts did not approve this line of policy and refused to admit that age may by itself be a valid reason for dismissal.

III.

The most important part of dismissal procedure is the obligatory consultation of the trade union works' council, which is conceived as a preliminary safeguard against unjustified termination of contract by the employer. Unlike French law, the Polish Code does not provide for an obligatory interview with the worker before notice but imposes on the employer the duty to inform the trade union works' council in writing of his intention to dismiss an employee and of the reasons for it. The purpose of this information is not to start negotiations and to concert final decisions because the works' councils in Poland, unlike in other socialist countries, have no right to co-determination in this field but are confined to a consultative role, which enables them to influence dismissal decisions by informal pressure and argument without taking the responsibility for them that rests solely on the employer[9].

Accordingly, the councils may make a reasoned objection only (within 5 days) which is not binding on the employer but which may not be rejected

[9] See M. Matey: Zwiazkowa kontrola rozwiazywania unów o prace w prawie pracy (The trade union control of the termination of employment in labour law), Waszawa 1975.

by him without consulting the superior trade union unit (that must be done within 5 days). Finally, the manager is free to take dismissal decision which ever is the standpoint of the latter trade union agency i.e. even if it upholds the objections raised by the works' council. However, the neglect to follow the procedure laid down in the Labour Code constitutes a contravention which may lead to the annulment of the dismissal decision[10].

The individual worker is not involved in this procedure and does not derive any rights from it. He may, however, lodge an appeal against the decision of the manager (irrespective of the fact whether the works' council has raised any objections) to a labour appeal committee which consists of a professional judge and two other lay members. There is also a further possibility of appeal from the decision of this committee to the Labour Court which is also tripartite. The decision of the Labour Court is final except for a special review which may be made by the Supreme Court on the application of the Minister of Labour, the Minister of Justice, the First President of the Supreme Court or the Public Prosecutor General in case the decision concerned is manifestly contrary to the law or the interest of the Polish People's Republic. The Supreme Court may also issue detailed guidelines, which it did for the application of the rules related to the participation of trade union agencies in the dismissal procedure thus emphasizing its particular importance,

There is no formal link between the participation of the works' council and the worker's right to appeal against dismissal decisions but the former may exercise some influence on the prospects of the latter because the position of the individual worker will be strenghtened if the works' council decides to object to the dismissal. In practice the works' councils were often reproached for making too little use of this right even in cases of virtually wrongful dismissal (cases won afterwards by the worker before the labour appeal committee).

It must be noted however that the works' councils have often tried with success to protect the workers in an informal way by inducing the management to retract the proposal to dismiss, instead of raising formal objections.

The statistics of cases referred to Labour Courts show that the majority of them (about two thirds) are decided in favour of the management[11]. This proportion may be explained by the influence of labour shortage which deters the employers from proceeding to dismissals without really important reasons, even in case of operational requirements justifying a reduction of personnel.

A few words must be said about modification of the terms of employment. It goes without saying that the manager is not entitled to make such modifications (unlike technical changes in methods and organisation of work) unilaterally, he may however give a notice to the worker with the purpose to modify his contract and leading to dismissal only in case if the proposal for new terms of employment is not accepted by the worker. This so-called "notice of cancellation of contractual conditions of employment" provided in

[10] Art.38 of the Labour Code.

[11] See E. Warzocha: Rozwiazanie umoy o prace za wypowiedzeniem w orzecznictwie ... (Termination of the contract of employment in the jurisdiction of the courts), "Praha i Zabezpieczenie Spoleczne" no. 3/1977 p. 35 ss.

art. 42 of the Labour Code (resembling the German "Änderungskündigung" or the French "congé conditionnel) is subject to the same procedure as dismissal with notice i.e. it must be previously consulted with the works' council which may raise objections to the modification as such and to the proposed new terms of employment[12]. That is why it seems this consultation should be obligatory even in the case when the works' council did not object formerly to a dismissal of the worker and the manager decided afterwards to replace it by the modification of the contract. The latter procedure is rather frequently used, it is even admitted that it should be always envisaged before proceeding to a dismissal which is the worse alternative for the worker.

There is some difficulty in drawing distinction between new situations that may be ordered by the manager as falling within the concerted terms of employment, and those that demand a new contract as creating what is essentially a new job[13]. Such doubts may concern especially changes in hours, in shift system, in the work load, minor changes in the mode of remuneration, etc. Decisions in dubious cases are taken by the courts. The Labour Code has laid down one rule in this respect only, specifying that the worker may be entrusted in case of operational requirements of the enterprise with another work than that determined in the contract for a period not exceeding 3 months in a calendar year[14]. Such a temporary change of job may be therefore ordered by the manager without proceeding to the modification of the contract, it ought not however involve any loss of pay and should correspond to the worker's skill.

IV.

The remedies for the breach of contract of employment were traditionally confined to an action for damages and so it was under former Polsh laws of 1928 that provided in this case for a compensation equal to the pay for the period of notice. No action for specific performance was admitted to the contracts of service. This state of things was, however, provoking a keen dissatisfaction inspired by the recognition of the right to work as one of the fundamental civic rights. It was argued that no cash compensation can make up to the worker for the loss of a job which may have for him not only a material but also a moral value and besides may be difficult to replace by another in the same trade or locality. That is why the remedy of reinstatement was introduced[15], first in 1956 in case of dismissal without notice and subsequently by the Labour Code of 1974 as the primary remedy for every unjustified dismissal.

Art. 45 of the Labour Code provides for an unjustified dismissal with notice to be without effect and if the period of notice (which in from 2

[12] Art. 42 § 1 of the Labour Code.

[13] See H. Lewandowski: Uprawnienia kierownicze w umownym stosunku pracy (The employer's right to control and to give orders to his employees), Warszawa 1977 and T. Binczycka-Majewska: Zmiana treści umownego stosunku pracy (Modification of the Contract of Employment), Łódz 1981 p. 21 ss.

[14] Art.42 § 4 of the Labour Code.

[15] See W. Szubert: La réintégration au travail en droit polonais. "Rivista di Diritto Internazionale e Comparato del Lavoro", 1962 no. 3 pp. 243-256.

weeks to 3 months according to the length of service) has already elapsed and consequently the contract has already been terminated, for the reinstatement of the worker on the previous conditions. The same remedy is to be applied in case of notice given in contravention of legal rules i.e. despite an explicit prohibition relative to the workers specifically protected or without following the prescribed procedure (esp. without consultation of the works' council). The order of reinstatement has a formative effect i.e. it entails the revival of the employment relationship unduly terminated. It is then the duty of the worker concerned to announce within 7 days of his reinstatement his readiness to take up his work without delay and if he fails to do so, without reasons beyond his control, the manager may refuse to re-employ him. The effect of the reinstatement is therefore subject to the conduct of the worker concerned and in case of unjustified delay on his part to the discretion of the manager.

A cash compensation is provided as a subsidiary remedy according to circumstances. If dismissal is declared null and void during the period of notice no compensation at all is due to the worker because he is still entitled to remuneration under still persisting employment relationship. If however the contract has already been terminated, the worker has the right to remuneration for the time when he was not employed, which is subject to his resuming employment in the former establishment and limited to one or two months' pay according to the length of the period of notice. The latter restriction does not apply to the woman worker pregnant or on maternity leave as well as to other workers specifically protected (who have the right to remuneration for the whole period for which they were not employed). Remuneration as the sole remedy is provided only in case of wrongful dismissal during the trial period or of the worker employed under a contract concluded for a definite period.

From what has been said it appears that the worker wrongfully dismissed with notice (unlike those summarily dismissed) has no choice of remedies. He cannot content himself with a compensation because it is awarded as an auxiliary sanction only and subject to his resuming former employment. Moreover, the amount of compensation is not only limited, as already stated, but also reduced by the amount of any remuneration earned by that time elsewhere, which further diminishes the importance of this remedy.

Legal provisions in force in this respect as well as their implementation call for various comments. The primacy of reinstatement, even if theoretically sound, gives rise in practice to some doubts. It is true that a psychological barrier on the part of the workers and of the management is likely to be overcome, especially in large enterprises where human relations are to a large extent depersonalized and the workers can be easily re-absorbed under different supervision. Nevertheless, in case of acute conflicts a return of the worker to the enterprise that has dismissed him, may not be an easy one. No extensive research has been made in this field but from the available data it appears that a great part of those reinstated by the courts do not actually return to their former employers or quit them soon after reinstatement[16]. Their appeal against the termination of contract is therefore inspired

[16] See B. Skulimowska; Skuteczność prywrócenia do pracy (Effectiveness of the reinstatement to work). "Polityka Spoteczna" no. 2/1981 pp. 12-16.

rather by a desire to reverse the dismissal decision for psychological reasons than really to resume the former employment.

Under these circumstances the remedy of reinstatement is not likely to play an effective role as a deterrent restraining the dismissal decisions. Nor can the cash compensation, which is negligible and besides, under the still existing financial system, the charges of this kind do not really affect the interests of the enterprise and of the management. The most important restraint in this respect has been, however, till now the relatively continuous full employment situation which strengthens the position of the workers and deters the employers from dismissing them, even in justified cases, for fear of not being able to get the necessary workforce in case of increased requirements.

The essential traits of this situation are reflected in the labour market statistics which show that the workers are much more frequently terminating the contracts than the employers, and even abandon their jobs without notice in order to make use of a chance to get better working conditions and pay elsewhere[17]. As a matter of fact, this undesirable mobility of labour is causing much trouble to the national economy but no means taken till now to stop it have brought any significant results. Of little effect have been also the legal sanctions provided for in the Labour Code which, besides, have been often criticised as unjst because the fault for leaving a job may not always be clearly ascribed to the worker. The problem is still under discussion and a substantial modification of legal provisions now in force is contemplated within a general amendment of the Labour Code.

It is against this background that the protection against dismissal must be seen in order to be rightly evaluated. Its role and social significance cannot be isolated from the larger context of labour market situation and employment policy that have a direct impact on dismissal decisions and their social effects. Present situation gives rise to criticism which stimulates the search for new solutions. The protection now afforded to the workers is considered in some respects still inadequate while in others it is supposed to hamper the desirable mobility of employees. A new approach to these problems seems therefore necessary, one that would take into consideration recent trends in the development of Polish Labour relations.

V.

Protection against dismissal is an important but not the only safeguard of the right to work. It must be therefore harmonized with other guarantees which under present cicumstances are likely to grow in importance. The economic reform which is now gradually put in operation is bound to bring new requirements in this respect. Its essential element is expected to be the new position of the enterprises that will be run on the self-governing and self-financing basis, without being subordinated to the state economic agencies. Direct orders specifying the production tasks will be replaced by

[17] See B. Przadka: Wypowiedzenie umowy o prace przez zatad pracy (Termination of employment on the initiative of the employer), Warszawa 1978 p. 6 and K. Pawlikowska: Przyczyny porzucania pracy przez pracowników (Causes of abandoning jobs by the workers), Warszawa 1976.

the general guidelines and economic instruments influencing indirectly the development of enterprises. The economic effectiveness will regain its importance as a decisive criterion of their achievements and condition of their growth. Under these circumstances, new incentives will be created for rational and economical use of labour force, for suppressing the "overmanning" and excessive employment that has often masked the wastage of labour resources. A reorientation of economic policy is also expected, a shift of resources from the production of capital goods to the industries catering for the needs of the population, and to agriculture.

For all these reasons some transfers of manpower will be necessary in order to improve the allocation of human resources and to adapt it to the changes in the economic situation. Under these circumstances the employment agencies will be confronted with new tasks concerning forecasting labour demand, promoting geographical mobility, as well as training and retraining facilities, etc.[18]. All this supposes new trends in the full employment policies which would not necessarily mean that the worker has the right to remain in the same job or occupation (and locality) permanently but that he has the chance of getting a new job in case he cannot retain his former employment.

Hitherto, the employment policies have been directed rather towards the former goal and the latter has been neglected. The role of the employment agencies was practically reduced to the registration of vacancies and those in search of a job, which did not cover all the situations concerned because a great part of those interested did not rely on the services performed by the employment agencies and were trying to arrange their affairs in other ways. Consequently, a great part of vacancies were filled outside the employment agencies without being registered with them despite the legal obligation to do so. Little help was provied by them in the way of guidance, advice and facilities to meet the demands resulting from changes in the economic situation. The understaffing of employment agencies and inadequate qualifications of their personnel were contributing to these deficiences.

For all these reasons a reform of this institution is deemed necessary with a modification of its legal basis. The underlying idea is to reinforce the role of the employment agencies in stimulating the proper use of the workforce and to make the labour market policies more reliable and flexible. Full employment is still considered as a fundamental principle of social and economic policy, it will however have to be ensured in conditions of technological and structural changes and greater mobility of employees, which supposes more interruptions between subsequent employments with proper help including not only guidance and training facilities but also cash benefits.

New trends in the labour market policies will not, in the least, diminish the importance of protection against dismissal. On the contrary, in the face of inevitable changes in the allocation of human resources and increased mobility of employees it will become still more necessary than it used to be till now. That is why an improvement of protective provisions now in force is being contemplated taking into consideration the experience gained in the

[18] See: Terenowa stuzba zatrudnienia. Doświadczenia i kierunki usprawnień (Employment agencies. Experience and prospectis for improvements), Warszawa 1977.

course of their application and the present needs. Four statements seem particularly relevant in this respect.

The first of them concerns the indication of valid reasons for the termination of employment. A general clause stipulating that each dismissal should be "justified" is now deemed insufficient and varous proposals are made for its concretisation. The most far-going one tends to replace the general clause by a list of objectively valid grounds for dismissal, which is now supposed (despite former objections) to have the merit of indicating the reasons for dismissal more concretely and thus facilitating the task of the courts. Other proposals insist on the indication of reasons that cannot justify a dismissal (such as membership of a particular union).

Another important issue is the collective dismissals for economic reasons which have not been regulated hitherto by any specific provisions because they were a rather rare occurrence. The procedure of these dismissals will have to be provided in order to prevent their use except in cases of real economic necessity. The selection of the workers to be affected by such dismissals will have to be determined in such a way as to avoid arbitrary decisions and discrimination. A list of criteria for the selection of those to be discharged will be needed, including such cicumstances as the worker's suitability, his length of service and his performance but also his age, social status, etc. The principles laid down in the I.L.O. Recommandation no. 119 as well as those adopted in countries with experience in this field may be of substantial help in this respect.

Apart from statutory provisions the collective agreements may be an useful instrument in defining the selection procedures. It is also generally admitted that a cash compensation exceeding the sum due hitherto to the workers wrongfully dismissed should be awarded in case of redundancy so as to enable the persons concerned to re-arrange their affairs and to be retrained if need be according to the requirements of the new employment or other gainful activity. As a matter of fact, such an award, up to six months' pay, as well as special loans and tax reliefs, have been provided by the Ordinance no.169 of the Council of Ministers of 17 August 1981 respecting the rights of persons changing or leaving their employment in the nationalized sector of economy[19].

The forms of collective worker participation in the process of making decisions to dismiss is another issue that must be reconsidered in the light of new developments. It is true that no substantial changes are envisaged as to the character of this participation. The workers' representative body is assumed to keep its consultative (and not determinative) role in this domain. The very character of this body is, however, to be redefined in consequence of changes in the structure of trade union movement[20].

The last issue to be reconsidered are the remedies for the irregular breach of the contract of employment by the employer. Reinstatement will certainly be still provided for in this case but no longer as the only remedy for unjustified dismissal with notice. According to the prevailing opinion, the cash compensation ought to be applied not only as a subsidiary but also as an alternative remedy, the choice being left to the disretion of the

[19] Monitor Polski 1981 no. 21 item 195.

[20] According to the law of 8 October 1982 (Journal of Laws no. 32 item 216) which provided for the dissolution of all the unions hitherto registered and for gradual reconstruction of trade union movement on new principles.

worker who may be interested in challenging the managerial decision to dismiss him without desiring to return to his former employment. It is also argued that the amount of cash compensation should be increased so as to ensure a fuller offset of the worker's losses and to discourage the employers from proceeding to dismissals without serious reasons. The dissuasive impact of these charges is supposed to be felt more intensely in the new model of self-financing enterprises that is now being launched in Polish economy.

These are the most important modifications of the dismissal laws that are envisaged in the next future. It is believed that they will contribute to the reinforcement of the protection of employees and to its integration with the full employment policies.