

MEDIATION IN POLISH LABOUR LAW: COMPARING ITS EVOLUTION AND DEVELOPMENT TO LABOUR MEDIATION IN EU AND US LAW

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ABSTRACT

Mediation was popularized in modern times in the United States. Its origins were found in the mediation of labour disputes between unions and employers, as a means of avoiding strikes, and currently it is used more and more frequently in individual employment matters. While mediation is not as widespread in Poland to date, its use in labour and employment cases appears to have a similar arc of development. Since the 1990s, mediation has had a central and positive role in resolving collective labour disputes, and now it is being used increasingly in individual employment cases. This paper explains these developments, with a particular focus on the evolution and scope of employment mediation under Polish and European Union law. The author concludes that although the basic framework exists for mediation to develop further in Poland, further reforms would be helpful to ensure its success.

Key words: mediation, employment law, labour law

1. INTRODUCTION

In discussing labour mediation in Polish labour law, it is first necessary to define several terms. The *labour* mediation of *collective* labour disputes – involves mediating disputes between labour unions and employers¹. On

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¹ Likewise, the mediation of industrial disputes also essentially refers to mediation between unions and companies, see, e.g., Fernando Valdes Dal-Re, “Labour Conciliation,

the other hand, *individual* employment mediation is connected with mediating disputes between individual employees and employers. While both types of mediation addresses problems arising from the workplace, they have developed along distinct paths².

Collective labour mediation has a long history. Mediation was successfully used as a means of resolving disputes between labour unions and employers in the United States (“U.S.”) as early as 1878. By 1947, a new U.S. administrative agency was created, the Federal Mediation and Conciliation Service (“FMCS”), which further formalized the institution of labour mediation³. From that time, mediation has been a mandatory step in the collective bargaining process, prior to a union going out on strike⁴. The FMCS has achieved impressive results, saving countless work hours by successfully mediating disputes between unions and companies, thereby avoiding costly strikes⁵. As the strength of American labour unions has declined in recent years, mediation has spread its roots into individual employment matters. Currently, numerous employers have formal, internal mediation programs, where employees can try to solve both minor, every-

Mediation and Arbitration in the European Union Countries”, Madrid: Ministerio de Trabajo y Asuntos Sociales 2003, 29.

² In Polish labour law, Art. 1 of the Act on the Resolution of Collective Disputes provides the definition of a collective labour dispute (Journal of Laws 2018. 399 consolidated text with amendments). A collective dispute always concerns a specific group of employees, sometimes all those employed by a given employer, and even an entire industry, as well as the employer or its organization. In the case of an individual dispute, the participants are the individual and the employer. One can agree with the statement that there is a functional relationship between an individual and a collective dispute, since a proper resolution of the collective dispute results in a reduction in the risk of potential disputes between an employer and its individual employees.

³ See Jerome Barrett, „The Origin of Labour-Management Mediation: United States Conciliation Service in the U.S. Department of Labour”, Labour Law Journal, Vol. 67, Issue No. 4, Winter 2016: 2.

⁴ See, e.g., Douglas E. Ray, William R. Corbett and Christopher David Ruiz Cameron, „Labour-Management Relations: Strikes, Lockouts and Boycotts”, 2017:§ 1:18 citing 29 U.S.C. § 158(d)(3).

⁵ See 61 APR Disp. Resol. J. 4 (Feb-Apr 2006): 4 (indicating that the FMCS saved 9 billion dollars over 6 years by using mediation to avoid strikes; also indicating that where the mediation took place before the collective agreement expired, the chance of strike was reduced by 84%, and even where strikes occurred, they were 46% shorter).

day workplace problems, and major, serious discrimination issues with the assistance of a mediator. Federal and state courts in the U.S. likewise refer many employment law cases to mediation after a complaint with the court has been filed⁶.

Polish labour and employment mediation may well follow a similar progression. Mediation between Polish labour unions and employers has been a requirement in Polish labour law since the early 1990s. As in the U.S., it is an obligatory step that must be taken by the parties prior to a strike taking place⁷. Likewise, it is also had a successful track record, and numerous strikes and related inconveniences have been avoided as a result. Presently, there are greater prospects for its use in individual employment cases in Poland. In large part, this is connected with the push from the European Union (“EU”) since the early 2000s (and especially with the introduction of Directive 2008/52/EC of 21 May 2008 (“Mediation Directive”⁸)) to make mediation generally more widespread in its member states, including Poland. It is currently permissible to mediate individual employment cases in Poland.⁹ While most Polish legislation concerning mediation (including that introduced in response to the Directive) has been generally applicable to civil cases, there are specific issues that arise – under both Polish labour law and EU law – when these rules are applied to employment cases.

These legal issues can and should be clarified, so that mediation in employment cases may expand further. Indeed, Mediation’s successful use in collective bargaining disputes –in Poland and abroad – demonstrate its promise in resolving problems at work. There is promise that employment

⁶ See generally, Vivian Berger, “Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment”, 5 U.Pa.J.Lab. & Emp. L. 487 Spring, 2003: 487; Lisa Bingham, Cynthia Hallberlin, Denise Walker and Won-Tae Chung, „Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace”, 14 Harv. Negot. L. Rev. 1, Winter, 2009: 11-22.

⁷ Act of 23 May 1991 on resolving collective bargaining, art. 17 ust. 2, (Journal of Laws 2018. 399 consolidated text with amendments).

⁸ Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union L 136/3, 24.5.2008.

⁹ Code of Civil Procedure (CCP) art. 183¹-183¹⁵.

mediation will be similarly successful. Article 243 of the Polish labour code contains the principle of amicably resolving employment disputes¹⁰. According to this principle, employers and employees should seek to resolve disputes amicably. It is described as a duty to try to peacefully settle labour disputes. This duty rests on both the employee and the employer¹¹. Even though Article 243 is not absolutely binding and its violation does not cause any negative sanctions for either the employee or the employer, it still has symbolic value in creating an impetus for parties to seek out and use mediation in employment matters.

2. AN OVERVIEW OF MEDIATION IN LABOUR MATTERS

2.1. Mediation in Collective Labour Disputes in the Polish legal system

Mediation in collective disputes was first introduced into the Polish legal system as a procedure for resolving such cases as early as in 1991¹². In the act on resolving collective disputes, mediation was indicated by the legislator as the second way of solving a collective dispute, apart from direct party-to-party negotiations. Pursuant to its obligatory nature, parties to a collective labour dispute must attempt mediation before any contemplated strike action may take place¹³. It is specifically limited to disputes between labour unions (representing a group of employees) and employers.

¹⁰ Act of 26 June 1974 Labour Code, Art. 243 Labour Code (Journal of Laws 2018. 917 consolidated text with amendments).

¹¹ Andrzej M. Świątkowski., *Kodeks pracy. Komentarz 2016*, Legalis, commentary to art. 243. Jakub Stelina, In: Urszula Jackowiak, et al, *Kodeks pracy. Komentarz*, Legalis, wyd. IV, 2004, commentary to art. 243 k.p.; Maria T. Romer., *Prawo pracy. Komentarz*, wyd. V, 2012, Legalis, commentary to art. 243 k.p. Act of 28 July 2005 amending the Code of Civil Procedure and certain other acts, (Journal of Laws 2005. No 172 item 1438).

¹² Act of 23 May 1991 on resolving collective bargaining, (Journal of Laws 2018. 399 consolidated text with amendments) (Act on resolving collective bargaining); for a characterization of mediation and other settlement methods in resolving collective bargaining after the Act was implemented, see: Baran Krzysztof W., “Model polubownego likwidowania zbiorowych sporów pracy w systemie prawa polskiego”, *Praca i Zabezpieczenie Społeczne*, nr 3, 1992: 20-24.

¹³ Art. 17. 2, Act on resolving collective bargaining.

Labour mediations take place with the participation of a third party – a mediator. The Act on solving collective disputes does not specify any minimum qualifications required for the mediator. The regulations only indicate that the mediator must guarantee his or her impartiality¹⁴, and his or her task is to facilitate the parties' conclusion of an agreement¹⁵. A mediator may be a person on the list established by the minister competent for labour issues, in consultation with trade union organizations and representative employers' organizations at the national level¹⁶.

It would seem to be important that the mediator should have a sufficient amount of economic and legal knowledge, but the law does not formulate such a requirement. These issues should be taken into account when registering on the list of permanent mediators kept by the Minister. As a general rule, parties should choose a mediator within 5 days. If they do not agree on this matter within the indicated time, at the request of one of the parties further proceedings are conducted with the participation of a mediator appointed by the minister competent for labour from the list of mediators¹⁷.

The Act does not regulate many details of the mediation process. The choice of mediation methods therefore depends, in fact, largely on the mediator. The mediator's powers are solely consultative and procedural. The Act indicates, for example, that the mediator may propose to make detailed or additional arrangements related to the subject matter of the

¹⁴ Art. 10 Act on resolving collective bargaining. For the importance of impartiality of the mediator in resolving collective bargaining, see: Włodzimierz Broński, "Mediacja w rozwiązywaniu sporów zbiorowych", *op. cit.*, p. 39.

¹⁵ For more on the role of mediator in labour mediation, see: Włodzimierz Broński, "Mediacja w rozwiązywaniu sporów zbiorowych", *RNP*, (26), 2016: 38 and next; Łukasz Pisarczyk, *Pokojowe (ireniczne) metody rozwiązywania sporów zbiorowych*, In: Krzysztof W. Baran, *System Prawa Pracy. Tom V. Zbiorowe prawo pracy*, Warszawa: Wolters Kluwer, 2014, p. 628 and next; also the different role of a mediator is explained in G. Goździe-wicz, *Arbitraż i mediacja w prawie pracy*, In: *Arbitraż i mediacja w prawie pracy. Doświadczenia amerykańskie i polskie*, Grzegorz Goździe-wicz, Lublin: Wydawnictwo KUL 2005, p. 18 and next.

¹⁶ Art. 11 (1) Act on the resolution of collective disputes; Monika Lewandowicz-Machnikowska, Agnieszka Górnicz-Mulcah, "Mediacja w sporze zbiorowym", *Kwartalik ADR*, no 2 (14) 2011: 53 (dividing mediators into those selected on an ad hoc basis, and those selected from the minister's list).

¹⁷ Art. 11 (2) Act on the resolution of collective disputes.

dispute, to propose an expert opinion, and after taking these steps, to request a postponement of the start date of the strike¹⁸. The parties decide on whether or not to accept the mediator's suggestions. The mediator cannot impose a decision or resolution of the dispute upon the parties¹⁹. Finally, the mediation procedure ends with the signing of an agreement or when the parties acknowledge that no agreement can be reached²⁰.

As can be seen, mediation in collective disputes has only been regulated at a very general level. To a large extent, it is the parties themselves that primarily decide what course this procedure will take. There has been some debate about the mandatory character of mediation in collective disputes, which has its supporters and opponents²¹. Without analyzing the positions of either side in this debate in any detail, due to the focus of this article, to summarize it should be pointed out that in practice, mandatory labour mediation brings positive results to the parties. Statistics show that medi-

¹⁸ Art. 13 Act on the resolution of collective disputes; the Act on the resolution of collective disputes indicates only these three competences for the mediator, see Małgorzata Kurzynoga, *Mediacja jako obligatoryjny etap procedury ogłoszenia strajku*, In: *Mediacje obligatoryjne*, Katarzyna Antolak-Szymanski, Warszawa: Difin 2017, p. 127.

¹⁹ Zbigniew Hajn, *Zbiorowe prawo pracy. Zarys systemu*, Warszawa: Wolters Kluwer 2013, p. 187; Małgorzata Kurzynoga, *Mediacja jako obligatoryjny etap procedury ogłoszenia strajku*, supra... p. 28.

²⁰ Art. 14 Act on the resolution of collective disputes.

²¹ Supporters of the idea of mandatory labour mediations are for example: M. Seweryński, *Problemy legislacyjne zbiorowego prawa pracy*, pp. 425-426, B. Cudowski, *Spory zbiorowe pracy*, In: *Prawo pracy RP w obliczu przemian*, eds. Maria Matey-Tyrowicz, Tadeusz Zieliński, Warszawa: C.H. Beck 2006, p. 487, Małgorzata Kurzynoga, op. cit., p. 134. More scepticism is provided by Włodzimierz Broński, He suggests voluntary labour mediation as a more effective model, more in line with the theoretical model of ADR as a voluntary means of resolving disputes. He also advocates a greater use of social arbitration, which will make the process of dispute resolution faster and also will result in greater involvement of the parties in the negotiations which take place prior to arbitration. Włodzimierz Broński, *Mediacja w rozwiązywaniu sporów zbiorowych*, op. cit., p. 46. Another sceptic of mandatory labour mediation is Zbigniew Góral, who suggests voluntary mediation in such cases, with some exceptions. In his opinion only this type of mediation will achieve the twin goal of reaching an agreement and not unduly postponing the strike action where an agreement is impossible. Zbigniew Góral, *Mediacja jako sposób rozwiązywania zbiorowych sporów pracy*, In: *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2007, p. 237 and next.

ation is an effective method of solving collective labour disputes. In 2012, 48% of labour mediations ended with the signing of the agreement, in 2013 almost 60%, and in 2014 almost 65%²². The conclusion of an agreement in mediation means that a strike will not take place, and therefore all the various negative effects of the strike are avoided.

In describing mediation as one of the more effective measures for resolving collective disputes, it should also be pointed out that the procedures for resolving collective disputes have been addressed in detail by the International Labor Organization. The most important norm is Convention No. 98 of 1948, concerning the principles of the right to organize and collective bargaining, and Convention No. 154 of 1981, regarding the promotion of collective bargaining. More detailed regulations in this field are contained in ILO Recommendation No. 92 of 1951, regarding voluntary conciliation and arbitration.

Legal norms on the procedures for peaceful resolution of collective disputes are also found in European law. Article 6, paragraph 3 of the European Social Charter of the Council of Europe of 1961 provides that in order to effectively exercise the right to bargain collectively, the parties support the establishment and use of appropriate conciliation mechanisms and voluntary arbitration for the settlement of collective disputes. Additional standards emphasizing the importance of procedures for peacefully resolving collective disputes are found in European Union law. In § 13 of the Charter of Fundamental Social Rights of Workers of 1989, which is not binding, it states that in the resolution of collective disputes, the introduction and application of negotiation, arbitration and conciliation should be facilitated at the appropriate level, in accordance with the customs adopted in a given country.

In Polish law, mediation as a means for resolving collective disputes has its authority in the Constitution of the Republic of Poland of 1997. First, a source for the legal status of labour mediation should be seen in the constitutionally protected social dialogue, as the preamble indicates. In addition, art. 20 of the Constitution of the Republic of Poland states that the dialogue and cooperation of social partners form the foundation of the

²² Ministry of Labour and Social Policy, "Settlement of Industrial Disputes", Informator 2013, Warsaw: 2015, p. 52.

social market economy. One of the forms of social dialogue are peaceful procedures for resolving collective disputes. The right to peacefully resolving collective conflicts was also provided directly in art. 59 par. 2 of the Constitution. This provision stipulates that trade unions and employers and their organizations have the right to bargain, in particular to resolve collective disputes²³.

Of critical importance, then, are the following points. First, labour mediation is widely used in Poland, because it is mandatory. Before a strike may occur, both unions and management must attempt to solve the dispute through negotiations and mediation. Second, it has a relatively long history in Poland, since 1991. This means there is, by the present date, a group of experienced labour mediators²⁴, and also that the parties themselves have a lot of experience with this institution. The quality of the mediation process has improved as a result of this experience. Finally, labour mediation has been successful, with statistics showing at least half of collective disputes being solved through mediation in recent years. These points all have implications for the prospects for individual employment mediation.

2.2. Mediation in Employment Cases – Selected Issues Regarding EU and Polish Law

EU legal issues

According to Polish law, an employer and an employee may resolve their conflict amicably by reaching a settlement (privately or with judicial help). They may do it before the conciliation commission (Art. 244-258 labour code), before the court of arbitration (Art. 1154 to 1217 CCP) and finally also in mediation (art. 183¹ – 183¹⁵ CCP).

It is important to consider at this point the impact of EU law on the threshold question of whether employment cases may be mediated. Even though it is permitted by Polish law, under supremacy principles, if em-

²³ See: Małgorzata Kurzynoga, *Mediacja jako obligatoryjny etap procedury ogłoszenia strajku*, supra..., p. 124.

²⁴ Notwithstanding their experience, it would still be preferable if either Polish labour law was revised to require reasonably higher qualification standards for labour mediators, or for unions and employers to collectively set such standards.

ployment mediation is prohibited by EU law it would likewise be illegal in Poland. Making the question slightly more complicated is the fact that employees generally cannot agree in advance (through a contract or otherwise) to submit employment disputes another form of alternative dispute resolution (“ADR”)- binding arbitration. Like consumers, employees are in a weaker bargaining position vis-à-vis a larger entity (in their case, the employer) and could not fairly agree to waive their right of access to the court. Mediation, however, is distinct from arbitration in various key respects. In particular, unlike an arbitrator, a mediator does not have any power to make a final and binding decision. If the parties cannot reach an agreement in mediation, they have a right to return to the court and have their dispute resolved there. Thus, in the vast majority of instances, mediation does not involve any loss of due process or a right to go to the court.

The Mediation Directive specifically addressed certain aspects of mediation in civil and commercial matters, including labour cases. As the title of the Directive indicates, it should apply in civil and commercial matters in cross-border disputes. It may also be applicable to domestic disputes. Many EU member states did not have any mediation law in place prior to the Mediation Directive; as noted earlier, unlike the U.S., much of Europe did not have a long tradition of mediation. Consequently, for these member states, it would not make much sense to adopt two new laws on mediation, one for cross-border matters and one for purely domestic disputes. Instead, a better practice would be to simply introduce one generally applicable (to both domestic and cross-border matters) mediation law that brought the state into compliance with the Mediation Directive. Moreover, the preamble to the Mediation Directive expressly states that *nothing should prevent Member States from applying such provisions also to internal mediation processes*²⁵.

However, the Mediation Directive also stated that “*it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law*”²⁶. This text raises the question whether the Polish regulations providing for mediation in employment

²⁵ Nr 8 of preamble of Directive 2008/54/EC (emphasis added).

²⁶ Nr 10 of preamble of Directive 2008/54/EC (emphasis added).

matters are not against EU law. Upon taking a closer analysis, the answer is no, at least in the vast majority of cases.

The Mediation Directive is only pointing out that some rights and obligations in employment law, on which the parties should not decide themselves, are excluded subjects from the mediation procedure – but not that all employment matters are excluded²⁷. For example – it should not be possible to mediate a dispute where the employee would give up his right to the minimum salary or minimum wage. Pursuant to the relevant Polish labour code regulations, an employee may not waive his or her right to such salary or transfer this right to another person²⁸. On the other hand, a case involving the non-payment of wages could be mediated, but any agreement reached in mediation in a specific case could not, for example, provide for a settlement lower than the minimum wage which is guaranteed by law²⁹.

In addition, the text of the preamble must be read in concert with the drafting history of the Mediation Directive. In its Green Paper on Alternative Dispute Resolution in Civil and Commercial Law³⁰, the European Commission wrote of “[b]oosting the development of ADR in the labour relations area”³¹ as one of the intentions behind the Mediation Directive. The Commission noted the successful history the member states had in mediating industrial disputes at the national level, and suggested that (along with the European social partners – trade unions and employer organizations) it should consider applying this experience at the transnational level³². Given this expression of purpose, it would be unreasonable to assume the final version of the Mediation Directive would then go and restrict mediation

²⁷ For a Polish perspective that not every aspect of the work relation can be change in mediation agreement: Baran Krzysztof W., “Ugody zawarte przed mediatorem w sprawach z zakresu prawa pracy”, *Studia z zakresu prawa pracy i polityki społecznej*, 2006, pp. 122-123.

²⁸ Art. 84 Polish Labour Code.

²⁹ Art. 10 § 2 Polish Labour Code; This is regulated by the Minimum Wage Act. Law of 10 October 2002 for a minimum wage (*Journal of Laws* 2018.2177 t.j.). It defines the procedure for its determination. In 2017, the minimum monthly remuneration for work was PLN 2,000. Since 1 January 2018 it has been PLN 2100.

³⁰ European Commission Green Paper, Brussels, 19.04.2002 COM(2002) 196 final (hereinafter “Green Paper”).

³¹ *Id.* at Section 2.2.3.

³² *Id.* (emphasis added).

in labour and employment cases. Along the same lines, the International Labour Organization (“ILO”) has generally supported fair mediation and conciliation procedures being used in labour and employment matters, and the Mediation Directive should be read in this light³³.

Polish legal issues on mediation in individual employment disputes in the context of EU law

Polish Legislation on mediation in civil (including employment) matters was adopted on 28 July 2005. Pursuant to the then applicable language of Art. 10 CCP, in all cases where a settlement is acceptable and lawful, it is possible to conclude an agreement through mediation. That means that mediation is applicable to all matters related to labour law, and even to labour relations matters³⁴. The legislator subsequently made changes in the regulation on mediation in civil matters in 2015, which were binding from January 2016³⁵. The goal of these changes was to popularize the use of mediation and other ADR procedures in resolving disputes³⁶. In the revised text of Art. 10 CCP, it states in pertinent part that “*In cases where settlement is admissible, the court shall aim at resolving them in any state of proceedings, in particular by persuading the parties to mediate.*”³⁷.

Even though regulations about mediation have existed in Polish law for over 13 years, the popularity of using mediation in employment mat-

³³ See ILO R092 – Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92); “Labour Dispute Systems: Guidelines for Improved Performance”, ILO Training Center, (Turin, 2013).

³⁴ For an in-depth look at legal regulations on mediation in employment matters in Poland, along with thoughtful proposals and conclusions, see: Włodzimierz Broński, Maciej Jarota, Mediation as an Amicable Way of Settlement in Individual Disputes in Labour Law, In: E. Krzysztofik, Personal Freedoms of the Internal Market of the European Union in the Light of the Changing Political and Economic Situation in Europe, Berlin: DeLurePL 2017, pp. 209-224.

³⁵ Act of 10 September 2015 amending certain acts in relation to the promotion of amicable methods of dispute resolution (Dz.U.2015.1595); Dorota Dzienisiuk, Monika Latos-Miłkowska, “Mediacja a specyfika spraw z zakresu prawa pracy”, Praca i Zabezpieczenie Społeczne, 1/2011: 23.

³⁶ The Act of 10 September 2015 amending certain acts in relation to the promotion of amicable methods of dispute resolution, Dz.U.2015.1595.

³⁷ Art. 10 CCP.

ters is not high. Statistics shows that in the courts of first instance in Poland in 2015 – 512, in 2016 – 1,409 and in 2017 – only 1,751 labour matters were referred to mediation as a result of a court order based on Art. 183⁸ § 1 CCP³⁸. On the other hand, while the absolute numbers are small, there has been a continuing trend of more employment cases being mediated, in terms of the amount of percentage increases.

At the same time, notwithstanding such statistics, the specificity and very nature of the employer-employee relationship suggests that mediation should be a very effective means of resolving labour disputes. The parties often have a potential or existing long-term relationship, and so both sides have an interest in continuing to coexist with one another in a peaceful and productive way³⁹. Moreover, many disputes that arise in the workplace are not actionable in court (at least at the initial stages), and resolving them early through mediation produces significant benefits for both sides. The employer and the employee avoid costly litigation and improve their relationship, which in turn improves productivity⁴⁰.

There is a specific form and structure to employment mediations in Poland. It is important to stress that the legislator in its original and subsequent regulations did not make a particular law relating to employment mediation. This is somewhat unusual. The specificity of employment relations and the special protections for the employee in Polish labour law seem to require special provisions for labour mediation, as well as protections for the employee as a party of mediation⁴¹.

³⁸ Statistics of Ministry of Justice, Joanna Kasprzak, Karolina Orowiecka, www.isws.ms.gov.pl/pl/baza-statystyczna, last accessed: 11.12.2018.

³⁹ Andrzej Majewski, Krystian Mularczyk, „Mediacja jako ADR w prawie pracy”, *Kwartalnik ADR*, No 3 (11)/2010: 46-47.

⁴⁰ Grzegorz Goździewicz *Arbitraż i mediacja w prawie pracy*, p. 16; Andrzej Majewski, Krystian Mularczyk, *Mediacja jako ADR w prawie pracy*, op.cit, p. 45 and next; Andrzej Świątkowski, Marcin Wujczyk, „Przyszłość sądów pracy”, *Przegląd Sądowy*, (11-12) 2009: 44; Lisa Bingham, „Dispute System Design...”, supra, at pp. 23-24; Lamont Stallworth, et al, „Discrimination in the Workplace: How Mediation can Help.” 56-APR Disp. Resol. J. 35, 43-4 (Feb/Apr 2001); Vivian Berger, “Employment Mediation...supra, at pp. 542-543.

⁴¹ Dorota Dzienisiuk, Monika Latos-Miłkowska, *Mediacja a specyfika spraw z zakresu prawa pracy*, supra, p. 19.

There are two methods for initiating mediation in employment cases. First, mediation may be conducted prior to the initiation of proceedings in the court. Secondly – with the consent of the parties (when they both agree) – mediation may take place after the case is filled in the court (Art. 183¹ § 4 CCP). Thus, these two possibilities for initiating mediation can be categorized as private and public: private, when the parties have a mediation contract or an *ad hoc* agreement to mediate the matter, or public, when the mediation is connected to the justice system (also known as court-connected mediation)⁴².

It is important to stress that the mediation procedure may be initiated by both the employer and the employee, because the legislature did not foresee any limitations in this regard. There is a different requirement in place with conciliation commissions – before these commissions, only the employee may start the procedure, which is viewed as a disadvantage and often seen as a one reason why these commissions are not popular⁴³.

A mediation agreement can be independent of the labour contract, or it may be included as a clause in the labour contract itself. It should be permissible for an employment contract to include a mediation clause, subjecting any future disputes arising out of the contractual employment relationship to mediation⁴⁴. There is no such prohibition on this kind of general contractual mediation clause found in the mediation provisions in the Polish Civil Code of Procedure.

There is a question about whether there is any need to specify exactly what types of disputes that arise from the employment relationship are subject to mediation. The better practice would be to make such a specification. Because of the complexity of labour relations, there may be some situations in which it would be wise for the parties to detail exactly what types of disputes that arise from the employment relationship are subject to mediation. Examples would be whether termination of the contract was

⁴² Katarzyna Antolak-Szymanski, Olga Piaskowska, *Mediacja w postępowaniu cywilnym*. Komentarz, Warszawa: Wolters Kluwer 2017, pp. 91-92.

⁴³ Krzysztof Baran, *Postępowanie pozasądowe i przedsądowe w sprawach z zakresu prawa pracy*, In: *System Prawa Pracy*. Tom VI. Procesowe prawo pracy, Krzysztof W. Baran, Warsaw: Wolters Kluwer 2016.

⁴⁴ Krzysztof W. Baran, „Mediacja w sprawach z zakresu prawa pracy”, *Praca i Zabezpieczenie Społeczne* 2006, nr 3: 2 and next.

justified or disputes which concern the implementation of non-competition agreements, in particular after the termination of employment, when the parties have already ended their employee – employer relationship. If only a general mediation clause existed in the original employment contract, there might be some doubt whether it would apply to a post-employment dispute concerning an alleged violation of a non-competition provision⁴⁵. In such cases, it would seem sufficient to make an indication that disputes that may arise under the agreement on non-competition will be resolved in the first instance through mediation. Or in case of the termination of employment, maybe a similar statement could be inserted in the agreement to mediate.

Another important issue is whether there is a restriction in Polish law on the ability of employees to agree to mediate a labour dispute in advance (i.e., to agree to a pre-dispute mediation clause). For example, there are restrictions for arbitration agreements in that matter: employees may only agree to arbitrate labour disputes after they have arisen (post-dispute), and not beforehand (1164 CCP)⁴⁶. With respect to mediation – the legislator did not make any provision in the Code prohibiting pre-dispute mediation clauses. This appears to be an accurate decision since the mediation procedure does not take away the employee's right to the court if the parties do not reach an agreement. Moreover, in a situation where the employer and employee are already in a conflict situation, it is unlikely they will be able to agree upon anything, let alone making a common decision about resolving their dispute in mediation. There is a much better chance for both sides to make this decision earlier when their employment relations are good or at least correct.

Polish law in general does not have stringent requirements for someone to become a mediator, particularly in civil cases⁴⁷. The legislator did not provide that mediators must have any special qualifications in civil

⁴⁵ Katarzyna Antolak-Szymanski, *Perspektywy rozwoju mediacji w sprawach pracowniczych*, op.cit., p. 102.

⁴⁶ Andrzej Świątkowski, *Kodeks pracy. Komentarz 2016*, wyd. 5. Legalis, komentarz do art. 243 Labour Code; Michał Raczkowski, In: *Kodeks pracy. Komentarz*, ed. Małgorzata Gerdsdorf, wyd. III, Lex, 2014, commentary to art. 243 Labour Code.

⁴⁷ Andrzej Majewski, Krystian Mularczyk, *Mediacja jako ADR w prawie pracy*, op.cit., p. 52.

matters, including matters relating to labour law, including any requirements concerning education, vocational training, power or experience. The only general requirement is positive, that the mediator is a natural person with full legal capacity and full use of his or her civil rights (Art. 183² § 1 CCP). However, one negative restriction is expressed in art. 183² § 2 of the CCP, which provides that a mediator cannot be an active judge (thus, creating an exception for retired judges). The mediator may therefore be almost anyone.

However, there is a good argument that there should be higher standards for mediators in labour and individual employment cases. Efforts to popularize mediation in matters relating to labour law should focus on providing qualified, neutral labour mediators (i.e., those mediators with verified qualifications in the area of labour and employment law, perhaps having been placed on a special list of labour mediators), and making employers and employees more aware of these qualifications and about the process of mediation in general. There have been suggestions to introduce some minimum qualifications for mediators in civil matters, including those matters relating to labour law. The new regulations on this matter since 1st of January 2016 define a court appointed mediator as one who has the appropriate knowledge and skills in mediation and has been included on the list of mediators formulated by the president of the district court. The new rules required that a permanent mediator may be a person who: has knowledge and skills in mediation; is at least 26 years of age; knows the Polish language; has not been finally convicted of an intentional crime; and was included in the list of permanent mediators prepared by the president of the district court⁴⁸. It is very important that a mediator in employment matters should know the specific characteristics of the employment relationship, but not only that. It is also important for the mediator to have a minimum knowledge about the labour and employment law, especially the aspects of how the law provides special protections for employees, with regard to both procedural and substantive aspects of a case.

There is also some potential for Poland to expand the use of mediation in labour and employment cases by making its use mandatory in such

⁴⁸ Art. 157a, Law of 27 July 2001. Law on the system of common courts, Journal of Law 2018.23 consolidated text with amendments.

matters. The Mediation Directive in Article 5.1 states that a court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily accessible.

Poland has made some attempts to popularize mediation by taking steps along these lines. Since 2016, the Polish legislator has implemented the regulation which suggests that the “*the court may call the parties to attend an information meeting on amicable dispute resolution, in particular mediation. An information meeting may be led by the judge, judicial officer of the court, assistant or permanent mediator.*”⁴⁹. “*If a party unreasonably fails to show up for a meeting, the court may order to pay the costs incurred.*”⁵⁰. These regulations do not yet make mediation obligatory. They are trying to encourage the parties engaged in a dispute to use mediation more often. According to relevant legal doctrine, even mandatory mediation does not take away the parties’ right to the court. Since, as noted earlier, employment disputes are one of the most appropriate and suitable types of cases for mediation, our legislator can consider, for example, requiring obligatory information sessions about mediation in most employment matters. Their legality depends on the exact provisions of any such regulation, but in general it should not run afoul of the Mediation Directive.

In this respect, it is worthwhile to return to the relevant provisions of the Mediation Directive and the recent European Court of Justice (“ECJ”) decision in *Menini*⁵¹. Pursuant to the Mediation Directive and *Menini*, mandatory mediation would only be illegal if it took away a party’s right of access to the court. This could occur when the mediation process was unlimited in time (or was otherwise excessively long), conflicting with the age-old principle that justice delayed, is justice denied. It might also occur where the costs of mediation were too high, particularly for an employee. If the cost of mediation was prohibitive, but required, an employee might withdraw her case rather than proceed with mediation. Drawing parallels

⁴⁹ Art. 183⁸ § 4 CCP.

⁵⁰ Art. 183⁸ § 6 CCP.

⁵¹ Mediation Directive, Article 5(2) and Case C-75/16 ECJ (2017) (June 14, 2017).

with consumer cases, any mandatory labour mediation regulation could also not be exclusively done electronically, and would have to allow a court to step in to decide if emergency relief was necessary. The employee should also have a right to withdraw from the mediation process after the initial session without penalty, and not be required to have an attorney during the process. Again, while the Court in *Menini* made these rulings in the context of a consumer mediation case, it is reasonable to apply similar standards to employment mediation. Like consumers with respect to merchants, employees are in a weaker power relationship with respect to their employers.

Finally, the proposals from the report on the implementation of the Directive of the European Parliament and Council Directive 2008/52/CE of 21.5.2008 on certain aspects of mediation in civil and commercial matters⁵² have some interesting recommendations that could also be used in the context of promoting employment mediation. The report shows the powerful statistic that in all EU countries, less than 1% of all cases are mediated. The report suggests some form of mandatory mediation be implemented; and also European Union certificates for mediators; mandatory information about mediation; pilot mediation programs; and education about mediation in faculties of law, all as possible ways to increase the popularity of mediation. In the context of labour and employment relations, apart from implementing some form of mandatory mediation or mandatory information sessions, Poland could create certified labour mediators, have special pilot programs in labour courts that provide free labour mediations, and add a mediation component to labour law courses taught in Polish law schools.

3. CONCLUSIONS

There is not yet a definitive answer whether the above-mentioned potential changes in Polish mediation law will be effective in popularizing the use of mediation by employers and employees, but at least it would

⁵² Giuseppe De Palo, Leonardo D'Urso, Mary Trevor, "Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU", Brussels: Publications Office 2014.

be another step in that direction. Taking steps to popularize mediation in employment matters is necessary, so long as such steps take into account the specific characteristics of labour cases. The benefits of mediation for the judiciary and the parties- employees and employers – would make any such measures worthwhile.

It is critical to understand that mediation in collective labour disputes between labour unions and companies has a long and successful history in many countries, including Poland, throughout the world. As noted in the Green Paper, “ADRs are already a key component of dispute settlement in industrial relations in all the Member States. They have developed on the basis of specific procedures in which the social partners (representatives of employers and employees) predominate. ADRs in industrial relations have demonstrated their usefulness with regard to the resolution of individual and collective disputes relating to interests (on the adoption or modification of collective agreements that require the harmonization of conflicting economic interests) and conflicts relating to rights (on the interpretation and application of contractual or regulatory provisions)”⁵³.

Workplace mediation is therefore effective. As individual employment relationships become more and more important in the new economy, it is important to adopt the success of union-management mediation to disputes between individual employees and their employers. This process has been happening in the United States. Even as American unions have declined in terms of membership and influence, employers and the courts in the U.S. have embraced mediation as a means of resolving a full range individual employment disputes, from minor issues to significant discrimination claims⁵⁴. Indeed, one author noted that mediation and other forms of ADR in the workplace is now “so common that some claim even describing mediation as an “option” is a misnomer”⁵⁵. There is no reason why this transformation cannot happen in Poland.

⁵³ See Green Paper, *supra*, at section 2.2.3, paragraph 52.

⁵⁴ See Lisa Bingham, et al, *supra*, at 2 (“With unionism in decline, a new system of conflict resolution is emerging.”).

⁵⁵ See Susan Hippnesteel, “Revisiting the Promise of Mediation for Employment Discrimination Claims”, 9 Pepp. Disp. Resol. L.J. 211 (2009): 211.

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