HUNGARIAN LABOUR LAW
E - J O U R N A L

# Strike Restrictions in Contemporary Polish Labour Law

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## 1. Introductory note

### *1.1. Fundamental rights and freedoms to organize, to bargain and to strike*

The Constitution of the Republic of Poland of 2.4.1997 guarantees a freedom of association in trade unions, socio-occupational organizations of farmers and in employers' organizations [article 59 (1)]. All entitled persons may benefit from the above mentioned guarantee of association. Employees and other employed persons, who are not employers, may form and join trade unions. Also the unemployed and pensioners maintain the right to belong to trade union organisations. Individual farmers who are not in employment relationship, who are engaged in self-employed business activity, who use help of their family members, have the right to associate in socio-occupational organisations of individual farmers.

Employers are guaranteed the right to form and join employers' organisations. Article 58 (1) of the Constitution of the Republic of Poland guarantees 'to everyone the freedom of association'. The above mentioned fundamental principle of freedom, considered one of the fundamental human rights, may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party [article 59 (4) of the Constitution]. Law prohibits only such associations the purpose or activity of which is contrary to the Constitution of the Republic of Poland or to law enacted by the Parliament. Only courts may decide on the refusal to register an association, a trade union, an organisation of individual farmers or employers' organisation [article 58 (2)].

Trade unions, socio-occupational farmers' organisations and employers' organisations enjoy a specific status and are not subject to the act of 7.4.1989 – Law on Associations (OJ 2/89, item 104 as amended) or to the forms of administrative supervision of state prescribed by the Law. The Constitution of the Republic of Poland guarantees to trade unions and employers and their organizations the right to bargain collectively and to conclude collective agreements and other normative arrangements

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regulating wage and working conditions [article 59 (2)]. Under article 59 (3) of the Constitution, trade unions shall have the right to organize workers' strikes or other forms of protest.

The limits of the afore-mentioned entitlement are laid down in the act on resolution of collective disputes of 23.5.1991 (consolidated act – OJ 255/15, item 295 as amended). The mentioned article 59(3) of the Constitution confirms the competences of the legislative authority (both Chambers of the Parliament) to adopt an act which may restrict, in the interest of the 'public good', the organisation of strikes or establish a prohibition on the organisation of strikes by certain categories of employees in 'certain areas', which means spheres, sectors, scopes or domains of the activity. The act of 23.5.1991 on resolution of collective disputes restored the balance between the core relationship – the right to organize, the right to bargain, the right to strike, on which collective labour relations are based in a free and democratic state.

In the most current Third Polish Republic, after the change of the political and economic system, there were three separate acts adopted on 23.5.1991:

- the Act on Trade Unions (consolidated act – OJ 167/2014, item 167 as amended),
- the Act on Employers' Organisations (OJ 55/91, item 235 as amended) and
- the Act on Resolution of Collective Disputes (consolidated act – OJ 295/2015, item 295).

These laws guarantee to employees and employers the right to form and to join trade unions and employers' organisations, respectively. The purpose of the legally guaranteed freedom of association is to regulate the foundations and legal framework enabling representation of separate interests of social partners and protection of their rights in amicable manner and, ultimately, in a legal form of collective disputes.

### *1.2. International Legal Sources Relating to Strike Regulations*

The right to organize, the right to bargain collectively and in particular the right to strike derive from interpretation of the provisions of international law and labour law standards of the Council of Europe – the European Social Charter of 18.10.1961. The Social Charter requires Poland to recognize the right of workers and employers to collective action in cases of conflict of interests, including the right to strike.[2]

The Committee of Freedom of Association of the Governing Body of ILO considered that the right to strike is an inherent consequence of employees' right to organise in trade unions protected under article 3 of ILO Convention no. 87 on the Freedom of Association and Protection of the Right to

[2] A. M. Świątkowski: *Labour Law: Council of Europe.* 2 ed. AH Alphen aan den Rijn, Wolters Kluwer Law & Business, 2016. 238.

Organise.[3] The right to strike is one of the essential legal instruments through which employees and trade unions may effectively pursue and protect their economic and social interests.[4]

An identical standpoint was taken by the European Committee of Social Rights of the Council of Europe which interprets article 5 of the Charter of Social Rights of the Council of Europe – the right to organise – in connection with article 6 (4) of the above Charter which clearly stipulates that the Contracting Parties ratifying the provisions of the Charter shall 'recognize the right of workers […] to collective action in conflicts of interest, including the right to strike […]'. Poland ratified the ILO Convention no. 87 and the Charter.[5] Given the above, the state authorities, already during the previous political period, adopted provisions on trade unions, which adapted the national system of collective labour law to the international standards.

## 2. The Right to Strike

### *2.1. Formal and legal requirements*

The freedom to strike is different from the right to strike in that the former is not limited by any formal or legal requirement established by applicable labour laws. The act of 23.5.1991 on resolution of collective disputes currently in force regulates in chapter 4, 'Strike' (articles 17–27), the procedures of legal exercise by the workers of the right to strike and of organisation of strikes by trade unions. The Polish legislature differentiates between the right to strike, which is an individual right of every employee whose freedom to strike was not limited by applicable laws, from the right to organise strikes. The latter is granted only to trade union organisations.

The above monopoly of trade unions to organise strikes and other industrial actions was criticised by the Council of Europe as being not in compliance with article 6 (4) of the European Social Charter. The Council of Europe revised the abovementioned critical view following determination of easy-to-meet conditions for entry of an established trade union organisation into a register stipulated in the act on trade unions of 23.5.1991.

Chapter 4 of the act on resolution of collective disputes titled 'Strike' does not lay down any restrictions on the exercise of the right to strike, but it sets out formal and legal requirements which should be met by a trade union – an organiser of a strike.[6] These include:

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3 A. M. Świątkowski: *Międzynarodowe prawo pracy, Tom I.* (International labour law, Volume I) [Międzynarodowe publiczne prawo pracy – standary międzynarodowe, wolumen 2] Warsaw, 2008. 44.

4 R. Ben-Israel: *International Labour Standards: The Case of Freedom to Strike.* Deventer, Antwerp–London–Frankfurt–Boston–New York, Kluwer, 1988. 71.

5 A. M. Świątkowski: *Charter of Social Rights of the Council of Europe.* Alphen aan den Rijn, Kluwer Law International, 2007. 189.

6 A. M. Świątkowski: Ustawa o rozwiązywaniu sporów zbiorowych. (Act on resolution of collective disputes.) In: J. Wratny – K. Walczak (eds.): *Zbiorowe prawo pracy. Komentarz (Collective labour law. Commentary.)* Warsaw, 2009. 245.

1) Voluntary cessation of work by a group of employees [article 17 (1) in connection with article 18].
2) Use of statutory procedures for amicable resolution of a collective dispute: bargaining and mediation. Strike is a last resort measure. Basically, with two exceptions laid down in the said provision, a strike cannot be legally organised if legal instruments for amicable resolution of a collective dispute have not been exhausted [article 17 (2)].
3) Consideration by the organiser of strike of proportionality of the demands put forward by a trade union and losses which will be caused as a result of interruption of work [article 17 (3)].
4) Prohibition on the participation in a strike by workers employed in the work positions, operating equipment or supervising installations, where stoppage of work poses risk to human life and health or jeopardises the state security [article 19 (1)].
5) Prohibition on the organisation of strikes in public institutions listed in article 19 (2) (army, police and other militarized and paramilitary organisations).
6) Prohibition on strike action by employees who do not enjoy the right to strike, employees employed in the public authorities, central and local government administration, courts and prosecution service [article 19(3)].
7) Statutory obligation of an organiser of a strike to obtain consent of a majority of voting employees employed at the establishment where the strike is to be organised. In the case of an undertaking, which consists of two or more establishments, the consent for organisation of a strike must be given by a majority of voting workers employed at the establishments, which are to be covered by the strike. The strike referendum should be attended by at least 50% of employees employed at the establishments where the strike is planned [article 20 (1)–(2)].
8) The employer should be informed of declaration of a strike at least five days before its commencement [article 20 (3)].
9) Strikes cannot restrict a manager of the work establishment and other employees who do not participate in the strike in performing their duties relating to the protection of property of the establishment and uninterrupted work of facilities, equipment and installations the disruption of which might pose risk to human life or health or might prevent resumption of regular operations of the establishment after the strike ends [article 21 (1)];
10) Organisers of a strike are obliged to cooperate with a manager of the work establishment in the fulfilment of the obligations set out by the legislature in article 21 (1) of the act on resolution of collective disputes.

The jurisprudence has extended the legal restrictions on organisation of strikes not in compliance with law. The ban on strike applies to strikes, which are legal but pose risk to life or health of persons who participate in such strike. Such strike is a hunger strike prohibited by the Supreme Court (a judgment of 27.11.1997, I PKN 393/97, OSNP 1998, no. 17, item 511) because of a disproportion

between potential benefits and losses which may occur as specified in article 17 (3) of the act on resolution of collective disputes.

### *2.2. Types of strikes*

The act of 23.5.1991 mentions two types of strikes organised in compliance with its provisions:

1) official ('real') strike and
2) sympathy (solidarity) strike.

The former may be organised exclusively in the case of a collective dispute initiated by employees represented by a trade union (article 2), concerning working conditions, social benefits, trade union rights and freedoms of workers or other groups of employed persons who are entitled to associate in trade unions (article 1).

The jurisprudence of collective labour law specifies the following types of strikes:

1) basic (classic) strike;
2) warning (preventive) strike;
3) sympathy (solidarity) strike.[7]

The act in force does not provide for a prohibition on organisation of strikes aimed at achievement of political purposes. It was recognized that strikes accepted by the legislature, organised for the achievement of specific benefits in the categories of matters listed in article 1 of the act of 23.5.1991 on resolution of collective disputes: working conditions, social benefits, trade union rights and freedoms. These may be and usually are related to political issues. Economic, social and occupational interests cannot be separated from political issues. For that reason, the laws governing strikes currently in force do not include the prohibition on organisation of strikes for political purposes.

The division of strikes in the Polish legislation and labour law jurisprudence into two types and several kinds of strikes distinguished in terms of their organisational form and methods does not allow distinguishing a strike to which all employees are entitled, regardless of the kind and place of work or type and profile of the employer. Identical right to strikes is granted to all employees whose freedom to strike was not restricted by the legislature. The above means that the legislature cannot divide the legal guarantees resulting from the freedom to strike, granted with no exceptions to all employees, into broader and narrower guarantees.

[7] J. Żołyński: *Strajk i inne rodzaje akcji protestacyjnych jako metody rozwiązywania sporów zbiorowych. (Strike and other industrial actions as the methods of resolution of collective disputes.)* Warsaw, 2013. 231.

The act of 23.5.1991 on resolution of collective disputes does not provide for the situations in which some employees could enjoy the freedom to strike to the full extent, while others could enjoy it only to a limited extent. In practice, the following types of strikes, which are not regulated by the act on resolution of collective disputes, can occur: sporadic strikes, competence strikes, rotating strikes, intermittent strikes, general strikes, absenteeism, demonstration strikes, temporary strikes, permanent, sit-down, work-to-rule strikes, 'wildcat' (illegal) strikes, hunger strikes, obstructionist strikes.

## 3. The scope of coverage of the statutory framework act (23.5.1991) on resolution of collective disputes

The act of 23.5.1991 is generally applicable. It regulates strikes and other industrial actions organised at public and private establishments. The above applies both to legal and 'wildcat' strikes. The legal guarantees of free exercise of trade union freedom apply in both sectors of employment, private and public.

However, it should be noted that the following public institutions mentioned in article 19 (2)–(3) of the act of 23.5.1991 on resolution of collective disputes were considered by the legislature to be establishments at which all the employed persons, both public officers and civil staff performing work under contracts of employment, were deprived of the legal guarantees of the freedom to strike [article 19 (2)]: the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Central Anti-Corruption Bureau, police units and unit of Armed Forces of the Republic of Poland, Prison Services, Border Guard, Customs Guard and fire protection organisational units.

The right to strike was denied also to employees employed in the public authorities, central and local government administration, courts and prosecution service [article 19 (3)]. The same law (act of 23.5.1991) applies to strikes organised in the private and public sector, however, the public sector employees listed in article 19 (2)–(3) of the said act do not enjoy the legal guarantee granted to the private sector employees to organise and to participate in strikes.

As regards initiators of strikes organised in state institutions listed in article 19 (2)–(3) not in compliance with law (illegal) and other employees who fail to fulfil the obligations laid down in the act concerned, the provisions of chapter 5 'Liability for breach of provisions of the act' will apply (article 26 and 27). Employees participating in an illegal strike do not enjoy the immunity guaranteed under article 23 (1) of the act of 23.5.1991 on resolution of collective disputes. The mentioned provision prohibits the employer from classifying participation of an employee in a legal strike as infringement of duties on the part of the employee. Therefore, participation of a state employee in an illegal strike amounts to infringement of duties (misconduct). Depending on the assessment of gravity of the

infringement, an employer may impose disciplinary penalties, including immediate dismissal of the insubordinate employee.

## 4. Statutory restrictions on the right to strike of employees in essential services

### *4.1. Emergency powers*

In the Polish traditional culture, there exists a firmly grounded truth reflected by a saying 'while some must sleep, some must watch'. The legislature rightly considered the human life and health, state security and a material substance of the work establishment employing the workers on strike a 'common good'. Therefore, a disproportion between public services and essential services is not considered by the state employees concerned and by trade unions representing employees of the private sector to be in violation of the sense of social justice.

The argumentation relating to the conviction, that employees of public sector may accept or contest the legitimacy of a division of employees into two unequal categories, one of which, employed in the private sector, has a guaranteed right to strike, while the other, employed directly by the state, is deprived of this right, does not seem to be appropriate if it is based on arguments relating to democratic rules of distribution of funds by the state legislative bodies.[8]

In my opinion, the 'public services' *versus* 'essential services' dilemma cannot be resolved through such argumentation. The state and public officers do not participate, even indirectly in substantive terms, in the legislative process. It can be observed, that some employees employed in the state authorities make attempts to develop 'substitutes' of the right to strike of which they were deprived by the act of 23.5.1991 on resolution of collective disputes.

The above applies to judges deprived of the right to strike under article 19 (3) of the mentioned act. Courts and judges employed at the courts are responsible for administration of justice. Their work consists in resolving matters. Suspension of performance of these basic duties and replacing it with preparatory activities such as reading files or studying case-law on the days when court hearings usually take place can be treated as 'collective refraining from work in order to resolve an interest dispute'.

This is how a strike was defined in article 17 (1) of the act on resolution of collective disputes. Judges, prohibited by law from organising strikes, were raising claims against their employer – state justice authorities – demanding increase of their remuneration for work. Article 178 (2) of the Constitution of the Republic of Poland obligates the state employer to provide judges with appropriate working conditions and the remuneration consistent with the dignity of their office and the scope of their duties.

8 M. Mironi – M. Schlachter (eds.): *Regulating Strikes in Essential Services – a Comparative Law in Action Perspective.* Kluwer, 2018.

Disputes initiated or supported by the social and professional organisations of judges met the conditions laid down in the act of 23.5.1991 to be considered collective disputes. This is because they related to wage and working conditions. The only obstacle to recognition of such disputes as collective disputes within the meaning of article 1 of the mentioned act is a condition introduced by the legislature, which refers to employees or other groups of employed persons having the right to associate in trade unions.

### *4.2.Restrictions on the Statutory Immunities*

The prohibitions and restrictions laid down in article 19 (1), (2) and (3) and article 21 (1) of the act of 23.5.1991 on resolution of collective disputes take one of the following legal forms:

1) the prohibition on cessation of work by the employees employed in the positions, on installations and equipment where stoppage of work poses risk to human life and health or jeopardises the state security [article 19 (1)];
2) the prohibition on organisation of strikes by state employees mentioned in article 19 (2);
3) the prohibition on strike by state employees mentioned in article 19 (3);
4) the prohibition on refraining from work by the employees on strike who are obligated by the legislature to ensure protection of employer's property and uninterrupted operation of the facilities, equipment and installations, the disruption of which might pose risk to human life or health or prevent resumption of regular operations of the establishment [article 21 (1)].

According to the provisions of collective labour law mentioned above, the essential services are protected by the obligation of certain employees to continue work during a strike, the prohibition on organisation of strikes by all state employees mentioned by the legislature, depriving other employees mentioned by the legislature of the right to strike and an obligation to perform certain activities necessary to maintain in proper condition or resume the operations of the establishment where the strike is organised.

The beneficiaries of the abovementioned prohibitions and restrictions are employers. The prohibitions laid down in article 19 (1) and article 21 (1) serve to protect interests of all employers, both public and private. At the same time, the prohibitions laid down in article 21 (1), (2) and (3) apply only to public employers, primarily the institutions which protect public security and organisational units of judicial authorities.

The addressees of the mentioned legal norms are employees and trade union organisations. The prohibitions laid down in article 19 (1) and article 21 (1) apply to employees who enjoy the right to fully exercise the freedom of strike and its guarantees which take a form of the right to strike and

to organise strikes guaranteed by the provisions of the act of 23.5.1991. The prohibition laid down in article 19 (2) of the act of 23.5.1991 does not apply to employees mentioned there but to trade union organisations which are exclusively authorised to organise strikes of certain category of employees they represent.

The problem is that the state institutions listed in that provision employ public officers who enjoy a limited right of association in the trade unions listed by the legislature (for example police officers may currently join only police trade unions), and other state employees, who constitute a majority and who are deprived of the right of association in trade union organisations.

Professional soldiers of Armed Forces of the Republic of Poland are not entitled to form or join trade unions. Article 19 (2) lays down a prohibition on organising strikes in state institutions in which trade unions cannot be formed and therefore a strike cannot be legally organised. A grammatical interpretation of the analysed provision may lead to a conclusion that public officers employed in state institutions listed in that provision might exercise the right to strike, if there existed a trade union organisation entitled to organise a strike.

The above example is not impossible to imagine. The Armed Forces of the Republic of Poland as well as other state institutions mentioned in the analysed provision employ not only public officers, including professional soldiers, but also civil employees of the army. The latter may be in an employment relationship with the army concluded under a contract of employment. Such persons may fully enjoy the freedom of association and the related rights, in particular the right to strike.

Article 19 (2) of the act of 23.5.1991 is addressed to all persons employed in the public institutions listed in this provision. It applies both to persons who do not have the right of association in trade unions and are therefore deprived of the possibility to organise a strike and to employees who enjoy the legal guarantee of association and the right to strike, which cannot be exercised by them, because of the prohibition on organising strikes laid down in article 19 (2).

## 5. Securing Essential Services by Exclusion from Collective Labour Rights

### *5.1. Complete exclusion ex ante particular group of employees*

Article 19(1) of the act of 23.5.1991 imposed a prohibition to strike on all employees employed in work positions, on installations and equipment where stoppage of work poses risk to human life or health or jeopardises the state security. The above prohibition to strike is not of a general nature. It does not apply to all employees employed by a particular employer. It is not a personal prohibition since the legislature clearly indicates which employees are subject to this prohibition. It is rather a material exclusion. It applies only to the employees who during a strike appear to be necessary for the

operations of the establishment in such sense that their absence from work caused by participation in a strike would threaten fundamental values protected by the legislature that is human life and health and state security.

The prohibition laid down in this provision is specific. It was established in such a manner, that it covers a situation before commencement of a strike, however, it may further be specified during the strike. An organiser of the strike is, therefore, obliged to assess the likelihood of risk to human life and health or to state security, which may arise as a result of participation of particular employees in the strike.

A problem arises, when the assessment made by the employer and this made by the organiser of the strike differ. The discussed act of 23.5.1991 does not include any legal norm, which might be used by the social partners concerned, the organiser of the strike (trade union) and the employer to resolve a dispute on the legal nature of the strike: whether the strike is legal or not. No judicial authority was authorised by the legislature to resolve such disputes. While, interpreting the provisions of the act of 23.5.1991 establishing a total prohibition on strike as regards employees employed in the positions in which work cannot be stopped because of the need to protect human life and health or the state security, it is only possible to use a guideline adopted under the *in dubio pro libertate* principle.[9]

### *5.2. Controlled ad hoc right to strike in medical services*

Deliberations on the prohibition to strike laid down in article 19 (1) of the act of 23.5.1991 should be illustrated by an example concerning a specific strike of professional hospital employees (medical staff): doctors, nurses, laboratory assistants.[10] A factor, which is essential for the assessment, whether a strike organised in a hospital is legal or not, is the number of persons on strike in each of the three above mentioned groups of medical personnel.

Undoubtedly a general participation in the strike by all medical personnel of a hospital would pose risk to life or health of patients, since there would not be any member of the hospital staff, who could undertake and perform the necessary specialist medical operations in the event of threat to life or health of patients. A common practice followed by trade unions organising strikes of medical staff in hospitals is refraining from work by the members of staff except the personnel on emergency duty who remain on standby, ready to undertake the necessary emergency operations in sudden and unexpected situations.

The emergency duty is a common way of taking care of life and health of patients during days and hours which are days and hours off for the medical personnel. At that time no previously planned

9 Judgment of the Supreme Court of 7.2.2007, I PK 209/06; a decision of a Court of Appeal in Katowice of 14.3.2016, III APz 8/16.

10 M. Kurzynoga: Kwestia prawa do strajku lekarzy. (Doctors' right to strike). *Praca i Zabezpieczenie Społeczne,* 2012/5. 18.

medical treatments are performed. A hospital is an institution, which should guarantee fulfilment of the obligation to provide treatment to sick persons. Therefore, an organiser of a strike must decide how many members of operational staff should be excluded from the planned strike in each of the three above mentioned professional categories (doctors, nurses, laboratory assistants) so that the planned strike can be organised legally, without a risk of being accused of endangering life or health of patients.

The assessment of the situation may change. An organiser of strike must be flexible, which means, that he/she should include into and exclude from the category of employees on strike a certain number of members of operational medical staff necessary to allow the management to perform both planned and emergency operations connected with protection of life and health of patients.[11] Most likely for these reasons the act of 5.12.1996 on the profession of doctor and dentist (OJ 27/2011, item 1634) does not contain provisions on the doctor's right to strike.

Medical Code of Ethics adopted in 1993, a collection of ethical standards not considered applicable law,[12] requires that a doctor on strike should provide professional help to a patient in a situation, where non-fulfilment of the moral obligation might cause threat to life or health. Every doctor, both the one on strike and the one who performs work, has a moral obligation to secure the well-being of his patient. Doctors, nurses, laboratory assistants, who are employed by the hospital, under a contract of employment or otherwise, and who participate in a legal strike must provide their employer with all the necessary information on the patient's situation in order to ensure continuance of treatment during their absence from work caused by the strike.

Under labour law, participation of an employee in a strike constitutes a justified reason of employee's absence from work. Only some of the criminal lawyers share the above opinion of labour law specialists.[13] Other lawyers specialising in criminal law present other views concerning strike of medical personnel. According to some of them, a doctor on strike may be exempted from liability for ill health, serious damage to health or death of his patient if it is established that a manager of the hospital had a real possibility to ensure appropriate care to the patients.[14] It is therefore not clear, whether the participation of medical personnel in a strike organised in compliance with law is treated as exercise of a right, which guarantees to the persons on strike a leave from duties, or it also plays a role of an immunity protecting a doctor from criminal liability.

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11 A. M. Świątkowski: Kontrolowany model prawa do strajku w służbie zdrowia. (Controlled Model of the Right to Strike in Medical Services.) *Prawo i Medycyna,* 2017/2. 5.

12 Decision of the Constitutional Tribunal of 7.10.1992, U 1/92.

13 E. Zatyka: *Lekarski obowiązek udzielenia pomocy. (Doctor's obligation to provide medical assistance.)* Warsaw, 2011. 124.

14 A. Zoll: Obowiązek udzielenia pomocy lekarskiej a prawo lekarza do strajku. (Obligation to provide medical assistance and doctor's right to strike.) *Prawo i Medycyna,* 2008/1. 11.

*5.3. Total ban on strikes, restricted right to organise and prohibition to bargain collectively*

Employees who may not strike are those employed in: the President Office, the legislative offices of Parliament, the Prime Minister Office, particular ministries, national and central offices, such as for example: the Central Customs Office, the General Customs Inspectorate, the National Security Bureau, the Securities and Exchange Commission, the National Atomic Energy Agency, the State Election Commission, the Office of the Committee for European Integration, the Pension Fund Supervision Office, the Public Procurement Office, the Office for War Veterans and Victims of Oppression, the Office of Technical Inspection, the National Employment Office, mining authorities – State Mining Authority and Regional Mining Authority, the Patent Office, the Office of Competition and Consumer Protection, the Office of the Surveyor General of Poland, the Central Standardisation Inspectorate, the General Civil Aviation Inspectorate, the Central Office of Measures, the National Reserve Board, the Chief Inspectorate of Environmental Protection, the General Customs Inspectorate, the Office of the Inspector General for the Protection of Personal Data, the General Directorate of State Forests, the Central Flood Control Committee, the National Council of the Judiciary of Poland, the National Broadcasting Council, the National Rescue Coordination Centre the State Insurance Supervision Office, the Polish Committee for Standardisation; government administration offices (such as capital provincial offices); specialised administration offices (such as tax offices and tax chambers, customs offices and the bodies of the National Labour Inspectorate, the National Inspectorate of Environmental Protection, the National Trade Inspectorate, the National Veterinary Inspection, the Main Inspectorate of Plant Health, the National Telecommunications and Posts Inspectorate, the State Agency for the Protection of Monuments; local government administration offices, such as: local commune offices and marshals' offices; municipal guards; courts of general competence, administrative courts and the Supreme Court; the general and military prosecution units.

Employees, who may join trade unions, but have no right to bargain collectively, are those, who have the status of public officers: civil servants and employees of state offices employed under nomination or appointment, local government employees employed under election, nomination and appointment in marshal's offices, district offices, commune offices, offices of associations of local government units. Local government administration means a part of the public administration operating at all levels of the basic country's territorial division – commune, district, region, performing de-centralised portion of public tasks. Local government administration comprises bodies, which constitute local government units, which include a commune council, district council, regional assembly, executive bodies of the local government units: heads of communes, mayors, management boards of district with their chairmen, and mayors, including the auxilliary offices – commune offices, district offices, regional offices.

## 6. Legal strikes and the contract of employment

### *6.1. The effect of strike on individual contract of employment*

Employees, who participate in a legal strike, cannot bear any consequences. If a strike takes place, the contract of employment is not terminated. Therefore, the effect of a legal strike is not to terminate the employment contract, but to suspend it. On the other hand, participation in an illegal strike may be considered by the employer equal to infringement of duties [article 23 (1) of the act of 23.5.1991]. In such situation the employer may apply any and all penalties for breach of order in the workplace or disciplinary penalties governed by the provisions of the Labour Code or specific provisions applicable to employment relationships of a particular category of workers. Employers are entitled to withhold wages or male deductions from wages when faced with no performance or partial performance of work by employees engaged in strike.

### *6.2.Criminal and tort liability and the statutory immunities*

Employees may be criminally liable to a fine or restriction of liberty if:

1) in connection with the position held or a function performed, they hinder initiation of a collective dispute or disturb lawful collective dispute [article 26 (1)(1) of the act of 23.5.1991];
2) they fail to comply with the obligations laid down in this act [article 26 (1) (2)];
3) they lead an illegal strike [article 26 (2)].

An organiser of an illegal strike – a trade union - is liable under civil law to compensation for damage caused [article 26 (3)]. A liability for organising an illegal strike is governed by the act of 23.5.1991 on resolution of collective disputes. Article 26 (1) of that act applies to persons leading a strike organised contrary to the provisions of the act in question. Only an organiser of an illegal strike can be punished by a fine or restriction of liberty. An organiser of an illegal strike is also liable under article 415 of the Civil Code for the damage caused by a tort, which is the illegal strike. The organiser is liable solely for the consequences of results of actions, which are in adequate causal link with the illegal strike. Employees participating in an illegal strike do not enjoy the immunity against liability for breach of duties.

## 7. The quid pro quo for denying or limiting the right to strike

### *7.1. Conciliation, mediation and arbitration*

Act of 23.5.1991 does not provide for alternative instruments, which could be used by the employees, who were not guaranteed the right of association in trade unions and/or the right to bargain collectively. The same applies in a situations, where employees have the right to strike guaranteed, but the applicable laws restrict the possibility to exercise such a right, because of the need to meet the essential public interests (protection of human life and health and state security).

The prohibition on strike of employees employed in the positions, which must be operated without interruption for the sake of protection of human life and health and state security, are not deprived of the right to initiate collective disputes and to use the methods of amicable resolution of such disputes. Similarly to the employees, who enjoy the freedom to strike guaranteed by the act of 23.5.1991, the employees employed in the positions listed in article 19 (1) of the act concerned and trade unions representing their interests are entitled to bargain with the employer, submit the dispute to mediation and eventually take an attempt to resolve the dispute by submitting it for resolution by a social arbitration panel.

Only a trade union may apply for submission of the dispute to the social arbitration panel. The social arbitration panel is presided by a judge of a labour court and it consists of six members, three of them designated by one party and the other three by the other party to a collective dispute. The ruling of the arbitration panel is adopted by the majority of votes. It is binding upon the parties unless either of the parties decides otherwise. The act of 23.5.1991 does *not* provide for an obligatory submission of a collective dispute for resolution to a social arbitration panel.[15]

If an agreement resolving a collective dispute is not reached in a mediation procedure, a trade union is entitled to commence a strike (article 15). However, a trade union representing workers' interest in the dispute may, without exercising the right laid down in article 15 of the act in question, attempt to resolve the dispute by submitting it for resolution to the social arbitration panel [article 16 (1)].

[15] A. M. Świątkowski: *Rozwiązywanie sporów zbiorowych.* (Resolution of collective labour disputes.) [Studia z Zakresu Prawa Pracy i Polityki Społecznej (Studies in Labour Law and Social Policy)] Kraków, Jagiellonian University, 1994. 297.

### *7.2. Strikes, boycotts and picketing*

Virtual strike as the quid pro quo for denying or limiting the right to strike is a legal notion not known in the Polish labour law system. According to a legal definition of strike laid down in article 1 of the act of 23.5.1991, a strike means an actual and not virtual cessation of work by the employees.[16]

A boycott, which is concerted refusal to deal with employer directed against employer immediately involved in the labour dispute (the primary boycott), or the secondary boycott aimed against persons, who deal with the employer actually engaged in the labour dispute, are not regulated by the Polish labour law.

The same conclusion is drawn for the other forms of industrial actions organized by workers and their trade union organizations, such as peaceful or non-peaceful picketing. Picketing is the most effective way of communication between striking workers, their employers and public at large. It can be carried on by employees of the struck plant or by strangers. It may take the form of patrolling pickets or mass pickets. Strike organizers may place signs and their demands in front of the gate to the stroked plant occupied by the union representatives remained nearby ready to explain their demands.

The concept of picketing is based on the free speech principle and as such is protected by the Constitution and statutory regulation. In modern times, the dissemination of information concerning the facts of labour dispute must be regarded as an area protected by law under the principle for freedom of speech. Strikes and other forms of coercion of employers are illegal, when they are organized for certain specified purposes prohibited by law. As there is a concerted suspension of work, the ban on the right to strike as well as participation in connected activities (boycotts and picketing) is illegal only if those actions are not recognized by the state (unlawful strikes), or if these are not organized in good faith with willful disruption of services (boycott and picketing). Not regulated by the state law acts of boycotting or picketing cannot be defined as illegal, if they are not classified as a malicious breach of an employment contract due to the fact that a concerted refusal to work under contractual conditions.

## 8. Securing Essential Services by Other Means

### *8.1. Labour disputes and judiciary*

The jurisprudence, general courts, the Supreme Court and the Constitutional Tribunal do not resolve collective dispute matters except trade union rights and freedoms, since such disputes are not rights disputes but interests disputes. The social arbitration panels presided by judges are not considered judicial authorities. Criminal courts authorised to impose fines on natural persons, institutions and

16 A. M. Świątkowski: Strajk – synteza zjawiska. (Strike – a synthesis.) *Monitor Prawa Pracy,* 2011/2. 69.

legal persons rule on imposition of a fine on persons who violate the provisions of the act of 23.5.1991 on resolution of collective disputes.

### *8.2. Social peace clause*

Social partners may insert provisions in collective agreements, which prohibit or restrict the freedoms and rights to strike guaranteed under collective labour laws. It is a so-called 'social peace' clause. According to it, bodies of a trade union, which is a party to an applicable collective agreement may submit a declaration in which they undertake to refrain from exercising their right to organise strike actions during the term of the collective agreement and to prevent the represented employees from participating in such actions organised by another trade union organisation not bound by the 'social peace' clause.

### *8.3. Industrial action ballots and notice to employers*

There are no legal obstacles in place, which would prevent trade unions from restricting, in the union's by-laws, their rights guaranteed by the generally applicable provisions of the act of 23.5.1991 and developing the strike procedures. Act of 23.5.1991 includes a list of maximum restrictions and prohibitions, which may apply in the positions and to employees in such positions, who are obliged to perform work during a legal strike, in which they should not participate, because of the need to protect human life and health and state security.

The increased restrictions of the right to strike, guaranteed under generally applicable laws, may consist in extension of the period to notify the employer of the planned strike or strengthening the requirements necessary for a decision on organisation of a strike to be taken (a 100% quorum, which means that all persons employed at the establishment concerned must participate in the voting; qualified majority, two thirds or three quarters of votes cast for organisation of a strike). However, it must be emphasized that so far there has been no single case in which trade union organisations would impose 'self-restrictions' upon themselves as regards exercise of their right to organise strikes.

## 9. Conclusion

### *9.1. Legal obligation to maintain balanced compromise between the right to strike and the protection of important common goods*

Nearly forty years ago, at the beginning of the 1980s, strikes organised by persons, who were not members of the 'official' trade unions were common in Poland. 'Solidarity' was a mass social movement, which then transformed into nationwide confederation of trade unions. The movement was based not only on dissatisfaction with wage and working conditions.

More than 10 million members sought to change the political and social system in the country. Most of the workers participated in strikes, also those who were obliged to protect the essential goods such as human life and health and state security. The assumption of the 'essential nature' of the services does not correspond with the developed catalogue of types of job, positions in which employees should not be guaranteed a natural right to exercise their freedom to strike and trade unions should not be guaranteed the freedom to organise strikes.

Act of 23.5.1991 on resolution of collective disputes, still in force, strictly connected with two other acts adopted on the same date: 1) on trade unions and 2) on employers' organisations and the Labour Code, which in 1974 guaranteed to the social partners the right to bargain collectively, meet the requirements laid down in the international law (ILO) and in the European labour law (Council of Europe) regarding the interdependence between the right to: 1) form and join trade unions granted to workers and other employed persons; 2) bargain collectively; 3) conduct collective disputes.

In evaluating the legal mechanisms currently in force, regarding restriction of the right to strike justified by the need to perform work during a strike in the positions in which work cannot be ceased because of a possible risk to the goods of major importance for people: 1) human life and health and 2) state security, I think that the choice made more than a quarter of a century ago, in the act adopted in 1991 and concerning protection of the mentioned essential goods, was the right choice.

The method of protection of such goods was also appropriate. It consisted in a general specification of prohibitions on strike in relation to the positions, in which work cannot be temporarily ceased, because of the possible risk to one or the other common goods, or two legally protected, most important values at the same time. The legislature defined in general terms, ex ante, the essential goods, which were subject to legal protection laid down in the provisions establishing temporary prohibitions on strike. The laws indicated not the employees, who should not exercise the freedom to strike but the positions in which participation in a legal strike was prohibited. The organisers of strike and employers affected by the strike action could take *ad hoc* decisions, depending on the situation and the level of risk for the fundamental, legally protected goods.

The model of legal protection of, on one hand, the fundamental freedom of a worker to decide on participation in a strike action, and on the other hand, the obligation to protect human life and health and state security is unique as it combines the characteristics of selective and dynamic ex-ante and ad hoc models accepted in all systems of collective labour law as model conduct aimed at ensuring a balanced compromise between those who want to strike but for the protection of two important common goods should not stop their work even if they could do it.

### *9.2. Lack of standards for labour dispute injunctions*

However, the model adopted by the collective labour law system is not complete. The act of 23.5.1991 on resolution of collective disputes does not indicate an independent body to resolve disputes between organisers of strike and workers who intend to participate in a legal strike and the employer and his idea of how many positions necessary to guarantee protection of human life and health and state security should be subject to an *ad hoc* prohibition to strike. A divergence in this respect between the parties to a collective dispute is resolved only where a judicial authority specialising not in labour law but in criminal law, authorised to impose sanctions towards persons who violate the provisions of the act on resolution of collective disputes, finds that a strike posed risk to human life or health or to state security because a too large group of employees participated in it and some of these employees should not have stopped their work because by continuing their work they guaranteed security of goods protected by law.

### *9.3.Missing equality of weapons during labour disputes*

The second critical argument relates to the lack of legal instruments which would guarantee balance to the parties in a collective dispute. In the event of diverging opinions between an organiser of a strike (trade union) and an employer, who believes, that the employees on strike are employed in the positions, in which they should not strike for the sake of protection of human life and health and state security, the employer has no possibility to exert pressure on the organiser of the strike to stop the strike. It seems that in such a case the attitude of the persons on strike and organisers of strike could change if the employer declared a defensive lockout.

In the Polish system of resolution of collective disputes lockout is a legal instrument not regulated in the collective labour laws. If employers were granted the right to organise lockout in certain situations, without a fear of criminal liability for breach of provisions of the act of 23.5.1991, this would contribute to restoration of balance in the collective labour relations. It would also facilitate

agreement between the parties to a dispute regarding determination, which employees employed in the positions, on installations and equipment covered by the prohibition to strike are needed by the employer to safeguard human life and health or state security and therefore cannot participate in a strike action.

Article 19 (1) of the act of 23.5.1991 provides that work cannot be stopped as a result of strike action in certain, generally described, work positions. Therefore, it was left to the discretion of the parties in a collective dispute, acting as social partners in the collective labour relations, to resolve matters relating to determination, how many workers employed in sensitive jobs in terms of protection of the goods mentioned in that provision should not participate in a strike concerned.

If provisions of collective labour law guaranteed equal status to the parties by granting the employer threatened by a strike a right to organise a defensive lockout, it would contribute to restoration of imbalance in the last, non-irenic stage of resolution of a dispute, following the end of mediation or arbitration. If employees were aware that the employer affected by the strike may exercise his right to declare lockout against employees on strike, this should result in opening of negotiations. Such negotiations would be limited to selected issues regulated under article 19 (1) of the act 23.5.1991, however they might contribute to implementation of a modern concept of social partnership also at the last stage of a collective dispute.[17]

[17] A. M. Świątkowski: *Gwarancje prawne pokoju społecznego w stosunkach pracy. (Legal guarantees of social peace in labour relations.)* Warsaw, 2013. 245.