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General Clauses that Define the Scope of Contractual Freedom in Concluded Settlements in Disputes Between the Employee and the Employer

Abstract: This paper aims to present the issue of general clauses that define the scope of contractual freedom in settlements which have been concluded in disputes between the employee and the employer. The aspect of mutual concessions is also discussed. The violation of the problem of justified interest is considered. The paper shows that general clauses are not mutually exclusive, but usually overlap in a settlement. Therefore, a given settlement may violate various general clauses. The vagueness of their conceptual scopes sometimes generates significant practical problems worth to be observed.
Keywords: employee settlements, general clauses, justified interest of the employee, principles of social coexistence

Introduction

The main legal instrument that fulfils the principle of the amicable settlement of disputes between employees and employers, stipulated in Art. 243 of the Labor Code[1], is settlement. In the Polish labor law system, such settlements may be concluded at various stages of the dispute and before various legal protection authorities[2]. The essence of all settlements entered into in labor law cases is mutual concessions. In

1 Cf. J. Piątkowski, (in:) K.W. Baran (ed.), Kodeks pracy. Komentarz, vol. 2, Warsaw 2020, p. 1709 ff.
2 Cf. K.W. Baran, (in:) K.W. Baran (ed.), Procesowe prawo pracy. Wzory pism, Warsaw 2013, p. 131 ff.

this matter, the provisions of Art. 917 of the Civil Code[3] are applicable, taken together with Art. 300 of the Labor Code[4]. The judicature[5] has given the notion a broad scope. Concessions may consist not only in the limitation of substantive legal claims, but also in the waiver of procedural rights by a party[6]. The latter case refers to the waiver of obtaining a judgment based on the seriousness of *res judicata*. A court judgment is a legal act with the power of *res judicata*, so the rights of the parties determined therein have a stronger legal basis, and thus are more difficult to challenge, than the rights that arise from a court settlement[7], which does not have the power of *res judicata* and may be repealed much more easily than a valid judgment. Possessing a right, even if the same, but based on a stronger legal title, is already a material benefit for the party. By entering into a settlement in or outside court, the party waives this benefit.

Here it should also be emphasized that the mutual concessions made by the parties in the settlement do not have to be objectively equivalent. Subjective equivalency is sufficient for the validity of the settlement. The position of the parties themselves is decisive in this respect. It is precisely this aspect that should be the reference point when the content of the settlement is assessed by a legal protection authority in terms of its compliance with fair (justified) interest. It is also worth noting that the objective limits that the concessions may reach are specified for different types of settlements by statutory provisions (of the Civil Code or the Code of Civil Procedure).

As for the nature of the mutual concessions in the substantive law sphere, they may consist either in reducing the rights to which the given party is entitled[8], or in acknowledging the increased rights of one party by the other party[9]. It will be useful to analyse how these mutual concessions, specified in Art. 917 of the Civil Code, are manifested in practice, i.e. in settlements concluded in individual employment cases. They may take various forms: quite often, the settlement is concluded because the employee withdraws from pursuing claims that were excessively high. This usually happens in remuneration-related disputes, i.e. in situations when the employee received, pursuant to the agreement, a financial consideration (e.g. remuneration) from the employer and the amount was lower than originally demanded, because it was determined before an organ of legal protection that the filed claim was only partly justified. The second category of settlements where mutual concessions may take place with a narrow meaning of the term are situations when the employee

3 Cf. T. Wojciechowski, Charakter prawny ugody sądowej, "Przegląd Sądowy" 2002, no. 6, p. 36 ff.
4 Cf. K.W. Baran, (in:) K.W. Baran (ed.), Kodeks pracy, *op. cit.*, p. 1841 ff.
5 Cf. judgment of the Supreme Court of 21 February 2017, I PK 76/16 Vol. 1, LEX No. 2259788.
6 Cf. judgment of 2 December 2011, III PK 28/11, LEX No. 1163947, thesis 1.
7 This view seems to be applicable *mutatis mutandis* also to non-court settlements concluded in individual labor disputes.
8 This refers also to future rights. Cf. judgment of the Supreme Court of 16 October 2009, I PK 89/09, LEX No. 558563, thesis 3.
9 Cf. e.g. judgment of the Supreme Court of 12 May 2004, I PK 603/03, OSNP 2005, No. 3, item 34.

receives a different consideration in return for withdrawing from the original claim. Such a situation occurs when the labor law regulations foresee alternative rights for the employee. An example may be a settlement pursuant to which the employee receives compensation[10] instead of the initially demanded reinstatement.

The issues that require separate treatment are the aims of a settlement concluded between the employee and the employer, as it seems that the main goal of each settlement is to facilitate the fulfilment of an obligation. It may be manifested by eliminating the uncertainty concerning the claims that result from such a relationship. The aim of the settlement is then to transform an uncertain employment relationship into a certain one. This means that the emergence of subjective doubts concerning the scope of the mutual rights and obligations of the parties that result from the legal relationship between them, and the resulting need to make them precise, are sufficient to enter into a settlement. Such a situation occurs if the parties conclude a settlement in cases concerning the determination of the existence or absence of a right or legal relationship. In this way, the parties may eliminate the uncertainty that exists between them. Apart from that, the aim of the settlement may be to make the legal relationship between the employee and the employer indisputable, in case a dispute might arise on these grounds or to prevent the occurrence of such disputes. It should be noted that a settlement may become effective not only if the obligation has already been violated, but also in situations where only a threat of such violation exists.

Impact of General Clauses on the Scope of Contractual Freedom in Settlements

Discussing the issue of contractual freedom in settlements concluded between the employee and the employer, I would like to emphasize that in labor law cases, this freedom is limited by norms[11] that contain general clauses. The starting point will be the statement that in the labor law system, a legal action, also including a settlement, may only contain such content that is not forbidden by the legal system[12]. This results from the universal assumption of *quo lege non prohibitium, lici tum est.* The view expressed here is fully compatible with the belief[13] that modern legal systems

10 Cf. decision of the Supreme Court of 6 May 1999, I PKN 183/99, OSNAPiUS 2000, No. 13, item 515.

11 Cf. Art. 58 §1 of the Civil Code and Art. 469 of the Code of Civil Procedure.

12 This directive is formulated in the light of civil law in a different, positive, way by P. Grzybowski, Prawo cywilne. Zarys systemu, Warsaw 1973, p. 245.

13 Z. Radwański, Zarys części ogólnej prawa cywilnego, Poznań 1978, p. 208; M. Czachorski, A. Brzozowski, M. Safjan and E. Skowrońska-Bocian, Zobowiązania. Zarys wykładu, Warsaw 2009, pp. 149–150; C. Żuławska, Wokół zasady wolności umów, "Acta Universitatis Wratislaviensip. Prawo CCXXXVIII" 1994, no. 1690, p. 173 ff.

are based on the model of general competence that does not prevent the freedom to shape the content of legal actions within the framework provided in statutory schemes (types) of legal actions.

In this light, the question arises of what limitations[14] are imposed on settlements entered into between employees and their employers. The scope of contractual freedom is similar for various types of settlements. This results from the fact that it is defined by statutory formulas, referred to as general clauses, whose meaning is determined in specific situations based on non-legislative evaluations and rules. This applies, first of all, to such notions as the principles of social coexistence and the violation of the justified interest of the employee. In practice, the provisions of a specific settlement may be classified as violating two negative prerequisites at the same time.

In settlements concluded in labor law disputes, the scope of contractual freedom is defined not only by legal regulations, but also by the principles of social coexistence. These principles are a classical general clause in the Polish legislation system. The point is that the mutual concessions that are provided in the given settlement should comply with these principles. The issues of principles of social coexistence have been widely discussed in literature, including both legal science publications and the jurisprudence of the Supreme Court. However, the characteristics of this extensive and, at the same time, complex topic are not the subject of this study[15]. Here, I will focus only on determining what it means that a settlement should be compliant with the principles of social coexistence.

I will start my reflections on the issue of compliance of settlements with the principles of social coexistence with the statement that in legal doctrine[16], these principles have been classified as general clauses, i.e. statutory phrases of non--defined scope, whose meaning is determined based on non-legislative norms and rules[17]. In practice, this means that a settlement is compliant with the principles of social coexistence if its provisions do not raise any objections from the point of view of the ethical, moral, and social norms that are binding in the given worker's community. However, the assessment of whether the given settlement does not violate the principles of social coexistence may be provided only after examining the circumstances of each individual case. The result of such assessment will depend not only on the content of the settlement, but also on the situational context in which it was concluded. According to the accurate view of the Supreme Court that was

14 B. Wagner, Zakres swobody umów, *op. cit.*, p. 160 and *idem*, B. Wagner, Zasada swobody umów w prawie pracy, "Państwo i Prawo" 1987, vol. 6, p. 72.

15 Cf. L. Morawski, Wstęp do prawoznawstwa, Toruń 1997.

16 Cf. e.g. T. Zieliński, Klauzule generalne w prawie pracy, Warsaw 1988, p. 5, p. 9.

17 Cf. A. Wypych-Żywicka, (in:) K.W. Baran (ed.), System prawa pracy. Część ogólna, vol. 1, Warsaw 2017, p. 1359 ff.

expressed in the grounds for the resolution of the panel composed of seven judges of October 17, 1986, III PZP 60/86[18], a settlement that transforms the termination of an employment contract without notice into a termination of the employment contract upon mutual consent of the parties violates the principles of social coexistence, if the reason for termination without notice was the committing of an offence to the detriment of the employer or appearing at work under the influence of alcohol. A settlement that divides the repayment of a large amount of money appropriated by the employer into instalments payable for a period of 50 years is also in gross violation of the principles of social coexistence[19]. Here, we are dealing with a violation of elementary principles of justice[20].

Apart from the moral and ethical limitations specified above, the binding legislation requires settlements concluded in labor law cases to be compliant with the justified interest of the employee. The central directive in this matter is provided in Art. 469 of the Civil Procedure Code. First of all, the term "interest" should be analysed. In particular, it should be considered whether this term is limited to the legal interest of the employee. Personally, I hold the belief that, apart from the legal interest, which is doubtless important, this notion also includes the social, economic, and even personal interest. The concept of understanding the term "interest" presented here is supported by the argument *lege non distinguente nec nostrum est distinguere*. It is not without significance that if the legislator wished to narrow the semantic scope of this term, nothing would prevent using the notion "legal interest" in Art. 469 of the Code of Civil Procedure as it was used in Art. 189 of the Civil Procedure Code. As a result, it seems reasonable to state that the justified interest of the employee includes not only the interest that is directly linked to the legal sphere of the employment relationship, but also any other benefits of an economic, financial, or personal nature that result from employment.

To continue the discussion of this issue, it is worth considering what specifically a violation of this interest may consist of. This is not a place for detailed reflections on equity as a factor that stimulates the application of law. This is a complex issue[21], which results from the fact that equity is an undefined term that is used not only in law, but also in morality, politics, and religion. So it is necessary for me to focus on determining how this factor influences the scope of contractual freedom in settlements concluded between the employee and the employer.

The starting point for further discussion will be the thesis that the term "violation of justified interest" should be classified as one of the phrases that are referred to as

18 OSNC 1987, Nos. 5–6, item 67.

19 Cf. decision of the Administrative Court in Lublin of 22 April 1999, III APZ 1/99, Apel.-Lub. 1999, No. 2, item 10.

20 Cf. judgment of the Supreme Court of 29 April 2010, III PK 69/09, LEX No. 602057, *in fine*.

21 Cf. C. Pereman, Logika prawnicza. Nowa retoryka, Warsaw 1984, p. 109.

general clauses. It is indisputable that the content of the phrase refers to non-legislative norms and evaluations. The labor law doctrine[22] distinguishes between two groups of general clauses. One of them includes phrases that contain direct, clear references to non-legislative norms and evaluations, while the other contains terms and phrases whose denotation changes *in concreto* depending on the non-legislative norms and evaluations that are used by the person who interprets them in specific cases. The phrase "violation of justified interest" should be classified as belonging to the second group, as its meaning differs depending on the circumstances of the given case and the norms used by the interpreting party. In the process of application of the law, this allows each case to be treated on an individual basis, and adequately to the existing factual position. Such a legal structure enables legal protection authorities to issue personalized judgments in each case. As a result, one should note the fact that this indefiniteness of both the discussed phrases will lead to discrepancies in their practical application.

The attempts to eliminate the indefinite nature of the term "violation of the justified interest of the employee" to make it unambiguous in specific circumstances are *a priori* doomed to fail due to their semantic properties. This allows labor courts to adapt their judgments to specific life situations, and thus to treat them on an individual basis. As a result, the same scope of concessions made by the employee in the settlement of one case may be considered as a violation of his or her justified interest, while in different cases it may not be treated as a violation of such an interest.

After these general reflections, it is worth considering how such violation of the justified interest of the employee discussed here may manifest in practice[23]. Typically, the threat of such a situation occurs when the provisions of the settlement deprive the employee of due economic or social advantages. It is also important whether the binding labor law regulations define employee rights in a strict and unambiguous manner or whether they leave a space for decision for the employer. In the first case, limiting employee rights in the settlement should be treated as a violation of the law. In the second case, similar limitations may be qualified as a violation of the justified interest of the employee, depending on the factual circumstances of the case. For example, one may state[24] that it is generally not in the interest of a pregnant employee, who is under special protection, to receive compensation equivalent to one month's remuneration as a result of a court settlement, instead of reinstatement to work.

22 T. Zieliński, Klauzule generalne w prawie, *op. cit.*, p. 5; A. Wypych-Żywicka, (in:) K.W. Baran (ed.), Zarys prawa pracy, *op. cit.*, vol. 1, p. 782 ff.

23 Cf. decision of the Supreme Court of 27 January 1999, I PKN 679/98, OSNAPiUS 2000, No. 7, item 275. Cf. also the decision of the Supreme Court of 21 November 2019 r., II PZ 18/19, LEX No. 3009799.

24 Cf. judgment of the Supreme Court of 5 July 2002, I PKN 172/01, OSNP 2004, No. 8, item 142.

However, not every concession on the part of the employee violates their justified interest. As the Supreme Court accurately noted[25], in certain situations, the waiver of some of the claims (in the substantive legal aspect) by the employee may lie in their well-understood interest[26]. This applies mainly to situations where the determination of the disputable factual position is hindered due to the existence of certain legal or factual ambiguities in the dispute. In such a case, obtaining immediate satisfaction of the claim under a settlement, at the expense of withdrawing from an insignificant part of the filed claim, will not violate the justified interest of the employee. An example of such a case might be a settlement which grants the employee financial consideration equivalent to the arithmetic mean of the equivalent of the most and least advantageous factual position. However, a settlement that would grant the employee compensation that is disproportionately low for the suffered damages would be unacceptable. In my opinion, such a settlement would cause significant detriment to their financial condition, and thus violate their justified interest. It seems, in practice, that the justified interest of the employee is usually violated when the employee who concludes the settlement acts to their disadvantage under coercion (usually psychological) or as a result of deception, or is not aware of the legal consequences of such action at all. Such a situation should be prevented by the legal protection authority that conducts the proceedings by collecting at least the elementary data about the circumstances of the dispute and the employee. However, the acceptability of a settlement in terms of the justified interest of the employee should be evaluated by comparing the content of the settlement agreed pursuant to the directives of Art. 65 of the Civil Code taken together with Art. 300 of the Labor Code with the claims to which the employee is entitled in the referenced factual circumstances[27]. In axiological terms, in this matter one should follow Justinian's principle *iure suo utendo nemini fiat iniuria* (when exercising one's right, nobody should suffer).

A specific general clause that limits the scope of contractual freedom in settlements concluded between the employee and the employer is the clause that forbids performing legal actions with the aim of evading statutory provisions. The essence of such action causes a certain legal consequence which is forbidden by absolutely binding regulations, by shaping the legal actions in such a way that it will have properties not contrary to the law on the outside, in formal terms. Only such legal actions that are aimed at achieving a result that has been negatively assessed by the provision forbidding it may be considered as actions *in fraudem legis*, but

25 Cf. judgment of the Supreme Court of 12 March 1965, I PR 6/65, OSNC 1966, No. 2, item 18.

26 In the decision of 20 June 2000, I PKN 313/00, OSP 2002, vol. 7–8, item 94 (with an approving comment by P. Dalka), the Supreme Court rightly assumed that the justified interest of the employee pursuant to Art. 469 of the Code of Civil Procedure does not have to be identified with obtaining due consideration in the full amount.

27 Cf. decision of the Supreme Court of 21 July 2000, I PKN 451/00, OSNAPiUS 2002, No. 5, item 116.

based on other types of actions, which are not clearly linked to such a ban by another legal regulation, obvious only when it is the specific result that is clearly forbidden, not just the acceptability of using a certain type of legal action[28]. Thus, a settlement may be considered as an action aimed at evading statutory provisions only if the parties thereto intend to achieve a legal result that is forbidden by labor law norms not based on the action to which the ban is directly linked, but precisely based on the settlement. Then the internal will of the parties focuses on achieving a forbidden result. As a consequence, such a settlement causes an indirect cancellation of the provisions of an absolutely binding legal norm. An example that illustrates this type of situation may be a settlement concluded between the employee and the employer in a dispute concerning working conditions, where the employee commits him- or herself to performing work in conditions that do not meet the occupational health and safety requirements in the given sector, in return for a higher remuneration.

Another interesting aspect related to the scope of contractual freedom in settlements is the problem of the mutual relationship between the prerequisites that specify this scope. The discussion of this topic should start with the thesis that these prerequisites are not mutually exclusive. On the contrary, they are quite often convergent in a specific case. The provisions of a specific settlement may violate two negative prerequisites at the same time. In practice, it is most difficult to distinguish between the non-compliance of a settlement with the principles of social coexistence and with the justified interest of the employee. This difficulty doubtless results from the indefinite semantic scopes of both these notions. This does not mean that both of them mean the same. The doctrine notes accurately[29] that the compliance of a settlement with the principles of social coexistence is determined by the evaluation of its content in terms of generally accepted ethical norms, and the fact whether an interest is justified is determined mainly by social and economic aspects. To present the relationship between the terms "principles of social coexistence" and "justified interest" with respect to "employee" settlements in logical terms, one may assume that the relationship between them is defined as crossing. This means that there may be such settlements whose content will violate both the principles of social coexistence and justified interest.

In conclusion, it should be stated that general clauses have a significant influence on the scope of contractual freedom in settlements concluded between the employee and the employer. They allow the shaping of the mutual concessions of both parties to the employment relationship appropriately, without causing harm to any of them. Due to their inherent indefiniteness, legal protection authorities, in particular courts, may react flexibly to situations where moral and ethical standards are violated in employment relationships.

28 P. Grzybowski, Prawo cywilne, *op. cit.*, p. 246.

29 B. Wagner, Zakres swobody umów, *op. cit.*, p. 161.

Conclusion

In the system of resolving individual labor disputes, general clauses constitute an actual, though not the only, element limiting the freedom to contract in settlements. It should be emphasized that they are not mutually exclusive, but usually overlap in a settlement. Therefore, a given settlement may violate various general clauses. The vagueness of their conceptual scopes sometimes generates significant practical problems. To sum up, it should be stated that the agreement's compliance with the principles of social coexistence refers primarily to the ethical and moral categories, and the rightness of the employee's interest refers to personal or social issues. They directly shape the level of mutual concessions of the parties in the settlement concerning the claim for the employment relationship.

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