

Iwona Sierocka

University of Białystok, Poland

i.sierocka@uwb.edu.pl

ORCID ID: <https://orcid.org/0000-0003-1659-1717>

General Clauses in the Act on So-Called Collective Redundancies

Abstract: This work is focused on aspects of the general clauses used by the legislator in the Act on Collective Redundancies of 2003, i.e. reasons not attributable to an employee and their exclusivity. The first clause covers all cases of termination of an employment relationship that are caused by circumstances affecting the employer or independent of the parties to the employment relationship. On the other hand, “exclusivity” of the reasons not attributable to an employee is confirmed if circumstances not attributable to the employee and the way of performing employment relationship duties thereby constitute the original cause of a definite termination or a notice of change. Analysing the scope of application of the said indeterminate phrases, the author also refers to the principles of community life. **Keywords:** exclusivity of reasons, principles of community life, reasons not attributable to an employee

Introduction

In legal science, general clauses are understood as indefinite terms referring to non-legal rules that allow law enforcement authorities to freely evaluate whether a given legal norm should be used in a given case¹. Therefore, they enable every case to be approached individually². General clauses can be classified in many ways; the doctrine distinguishes between general clauses of the first and second types. The first group of clauses, known as incidental terms, includes expressions that change their

1 T. Zieliński, *Prawo pracy. Zarys systemu. Część II. Prawo stosunku pracy*, Warsaw/Krakow 1986, p. 73.

2 T. Zieliński, *Klauzule generalne w prawie pracy*, Warsaw 1988, p. 56.

semantic scope depending on the judgments made by a law enforcement authority. In particular, one can consider as such the phrase “unjustified termination of an employment contract.” The latter group of clauses includes expressions referring an interpreter to non-legal rules, i.e. to the principles of community life and the socio-economic purpose of life. There are also general application clauses referring to relationships governed by the Labor Code and specific provisions, limited application clauses regarding certain labor relationships and temporary application clauses taken into account at a specific time.

General clauses can also be classified according to the kind of aspects that they concern. In this respect, the clauses that protect an employee from the loss of a job play an important role³. Such expressions include “reasons not attributable to employees”⁴ and “exclusivity of the reasons for termination of an employment relationship” used by the legislator in the Act of 13 March 2003 on the specific rules of termination of employment relationships with employees for reasons not attributable to employees⁵. The analysis below will focus on how the general clauses identified are understood. As the expression “reasons not attributable to employees” was also used in the Council Directive 98/59 / EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies⁶, it is reasonable to consider in this respect the judicial decisions of the Court of Justice of the European Union. Not only will this help the analysis of this expression be more thorough but it will also lead to the determination of how Polish law reflects the regulations.

1. Reasons Not Attributable to Employees

According to Art. 1(1) of the Act on Collective Redundancies, the provisions of the said act are applied if an employer must terminate an employment relationship for reasons not attributable to employees. It is generally assumed that the reasons not attributable to an employee mean any circumstances that are not related to the physical and mental characteristics of an employee or the manner of performance

3 See A. Wypych-Żywicka, *Prawo podmiotowe w prawie pracy*, (in:) K.W. Baran (ed.), *System prawa pracy*. Vol I. Część ogólna, Warsaw 2017, pp. 1364–1366.

4 A. Dral, *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*, Warsaw 2009, pp. 264–265. According to K.W. Baran and M. Lekston, the expression “justifying reasons not attributable to an employee” should be considered as such: K.W. Baran and M. Lekston, *Ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników*, (in:) *Zbiorowe prawo zatrudnienia. Komentarz*, Warsaw 2019, p. 609; A. Wypych-Żywicka proves that this expression cannot be qualified as a general rule, A. Wypych-Żywicka, *Zwolnienie z przyczyn niedotyczących pracowników* (in:) K.W. Baran (ed.), *System prawa pracy*. Vol. V. *Zbiorowe prawo pracy*, Warsaw 2014, p. 982.

5 *Journal of Laws of 2018*, item 1969, hereafter “Act on Collective Redundancies.”

6 *O.J. L 225*, p. 16.

of employment duties thereby⁷. Therefore, the provisions of the act do not concern redundancies for such reasons as a lack of proper qualifications, a breach of work regulations, the employee's failure to perform their duties or their inability to perform work. It is, however, doubtful whether the reasons not attributable to an employee include only those that affect the employer or also circumstances independent of the parties to an employment relationship. In this respect, the theory of law and judicial decisions present two approaches.

The first approach is that the division of the reasons for termination of an employment relationship has a dichotomous character. As a result, all circumstances that are not connected with an employee, even apparently neutral ones such as acts of nature, should be considered as attributable to the employer⁸. This approach is confirmed by the judgment of 20 November 2008 (III UK 57/08)⁹. The Supreme Court declared that the view that the reasons not attributable to an employee also include such circumstances that are not connected with either party to an employment relationship is unjustified. Termination of an employment contract for an unspecified period must be grounded, and the grounds correspond to facts concerning both or one of the parties to the employment relationship, analysed in view of the purpose, contents and manner of execution of such a relationship. Obviously, the circumstances that laid the grounds for the termination of an employment contract with a notice or by agreement do not have to be by fault of the parties or even "caused" by them unconsciously. They must, however, concern an employee or an employer, because otherwise their occurrence does not affect the further existence of the employment relationship.

The other approach assumes that the reasons not attributable to an employee also include the reasons not connected with either party to an employment relationship¹⁰. This was the ruling of the Supreme Court of 6 July 2011 (II PK 51/11)¹¹. The Supreme Court confirmed that the reasons for an employment termination that are not attributable to an employee are reasons on the part of an employer and other objective reasons that do not concern either party, but they are the only reasons leading to the employment termination. A similar position was presented by the Supreme Court in its judgment of 10 October 2019 (I PK 196/18)¹², confirming that

7 See K. Jaśkowski, E. Maniewska, Komentarz do art 1 ustawy o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników, (in:) K. Jaśkowski, E. Maniewska, J. Stelina, Grupowe zwolnienia, Krakow 2004, p. 30.

8 Ł. Pisarczyk, Ogólna charakterystyka zwolnień z przyczyn niedotyczących pracowników, (in:) M. Latos-Miłkowska and Ł. Pisarczyk, Zwolnienia z przyczyn niedotyczących pracownika, Warsaw 2005, p. 30; M. Rylski, Zwolnienia grupowe. Komentarz do ustawy, Warsaw 2016, p. 47.

9 LEX No. 1102538.

10 B. Cudowski, Odprawa ustawowa z tytułu rozwiązania umowy o pracę z byłym członkiem zarządu spółki kapitałowej, "Praca i Zabezpieczenie Społeczne" 2014, no. 4, p. 19; K. Jaśkowski and E. Maniewska, *op. cit.*, p. 30.

11 OSNP 2012, no. 17–18, item 219.

12 LEX No. 2773243.

for the right to severance pay, it does not matter whether an employment relationship is terminated for reasons on the part of the employer, but it does matter whether the reasons are attributable to the employee or not. The reasons for the termination of an employment relationship do not have to be on the part of the employer¹³. The position of the Supreme Court was approved by the Court of Appeal in Gdańsk in its judgment of 21 December 2016 (III AUa 1293/16)¹⁴, which adjudicated that the reasons for an employment termination that are not attributable to an employee are reasons on the part of an employer and other objective reasons that do not concern either party, but they are the only reasons leading to the employment termination.

As far as the interpretation of the phrase “reasons not attributable to an employee” is concerned, I support the latter approach. As the legislator did not use the expression “reasons attributable to an employer,” one can conclude that in the context of statutory regulations all circumstances that are not connected with the employee’s status should be taken into account. Therefore, it is not only about the reasons affecting the employer but also about reasons independent of the employer, e.g. the operation of *force majeure* or another entity¹⁵.

Termination of an employment relationship can be caused by more or less important circumstances¹⁶, directly or indirectly affecting the employer¹⁷. It does not matter whether they are due to an improper management of the business by the employer or are a consequence of events independent of the employer. Among the reasons for termination of an employment relationship not attributable to an employee, one can list in particular economic, organizational and technological reasons¹⁸.

Economic reasons concern the management of an employing entity and are connected with operating and managing a workplace. Such actions are aimed at achieving the best financial result involving the fewest means and resources. They are cost-reducing and improving actions, the purpose of which is to raise the effectiveness of work and change the employment structure. The reason for such changes can be the necessity to reduce manufacture or employment due to a lower demand for the manufactured goods or services, the computerization of a workplace or automation of manufacturing processes¹⁹. One should also consider as economic

13 Similarly, the judgment of the Supreme Court of 10 March 2016, III PK 81/15, LEX No. 2052409.

14 LEX No. 2191588.

15 I. Sierocka, Nowe przepisy o zwolnieniach grupowych, “Praca i Zabezpieczenie Społeczne” 2003, no. 12, p. 15.

16 Judgment of the Supreme Court of 20 March 2009, I PK 185/08, OSNP 2010 no. 21–22, item 259.

17 Judgment of the Supreme Court of 12 August 2020, II PK 4/19, Legalip.

18 See K.W. Baran and M. Lekston, *op.cit.*, p. 610; B. Wągner, Dopuszczalność wypowiedzenia stosunku pracy z przyczyn dotyczących pracodawcy, “Studia Juridica” 1992, no. 23, p. 181.

19 Compare K.W. Baran, Zbiorowe prawo pracy. Zarys wykładu z kuzasami, Gdańsk/Krakow 1998, p. 178; J. Iwulski and K. Jaśkowski, Ustawa o zwolnieniach grupowych, Warsaw 1995, p. 41;

reasons the outsourcing of certain tasks to persons or entities that are not bound by an employment relationship with the company²⁰.

Organizational changes should be understood as structural transformations by an employer, consisting of the liquidation of certain positions, departments or organizational units. In the judgment of 6 January 1995 (I PRN 119/94)²¹, the Supreme Court confirmed that the work establishment's action, aimed at the transformation of the kinds of contracts under which most of the employees are employed from contracts for an unspecified period into contracts for a specified period, are changes of an organizational nature.

Technological changes are connected with modifications in terms of the processing of raw materials and the modernization of manufacturing lines. They can be caused by a change in the manufacturing profile, the manufactured product range or the manufacturing process. They are usually connected with economic factors consisting in particular of a change in demand for certain goods or services.

One should note that not only actions directly taken by an employer but also actions of an employee, the results of which are the same as the results of termination of an employment relationship by the employer upon legal regulations, should be considered as termination for reasons not attributable to an employee. As a consequence, termination of an employment contract without notice by the employee due to grave violations of the employer's basic duties, such as delayed payment of salary, failure to make remuneration payments or to pay social insurance contributions (Art. 55 § 1¹ of the Labor Code), justifies the assumption that the employment relationship was terminated for reasons attributable to the employer²².

When interpreting the general clause "reasons not attributable to an employee," it is worth referring to the provisions of Council Directive 98/59 / EC, which specifies that the expression "group redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned (Art. 1(1) (a)). This kind of circumstance includes not only redundancies for structural, technological or cyclical reasons but all cases of termination of an employment contract against the employee's will and without his/her consent. The reasons for

T. Liszcz, Komentarz do ustawy z dnia 28 grudnia 1989 r. o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn dotyczących zakładu pracy oraz o zmianie niektórych ustaw, (in:) Z. Salwa (ed.), *Prawo Pracy*. Part II, Warsaw 1999, p. II/D/192.

20 See judgment of the Supreme Court of 12 July 2001, I PKN 541/00, OSNP 2003, no. 11, , item 268.

21 OSNAP and US 1995, no. 12, poz. 147.

22 Judgment of the Supreme Court of 20 November 2008, III UK 57/08, LEX No. 1102538; the same in the resolution of the Supreme Court of 2 July 2015, III PZP 4/15, LEX No. 1747384, providing that termination of an employment relationship in this manner authorizes an employee to acquire the right to severance pay referred to in Art. 8 in conjunction with Art. 10(1) of the Act on Collective Redundancies if such reasons constitute the sole ground to terminate the employment relationship.

a dismissal do not have to reflect the employer's will. Therefore, in this respect, the cases of declaring bankruptcy, liquidation and similar procedures, compulsory purchase, fire or other *force majeure* cases should also be taken into account²³.

In the judgment of 3 March 2011 on the joined cases from C 235/10 to C 239/10, David Claes and others against Landsbanki Luxembourg SA, in liquidation²⁴, the Court of Justice of the European Union confirmed that Articles 1 to 3 of Council Directive 98/59 must be interpreted as applying to a termination of the activities of an institution that is an employer as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect.

The Court of Justice expressed the opinion that making unilateral and significant changes to essential elements of the employee's employment contract to their detriment, for reasons not related to the individual employee concerned, falls within the definition of "redundancy" for reasons not attributable to employees²⁵. This summary was sustained in the judgment of 21 September 2017 in case C 429/16, Małgorzata Ciupa and others against II Szpital Miejski im. L. Rydygiera w Łodzi, now Szpital Ginekologiczno-Położniczy im. dr. L. Rydygiera Sp. Z o.o. w Łodzi²⁶, which concluded that if an employer makes a insignificant change to an essential element of the contract of employment for reasons not related to the individual employee concerned, unilaterally and to the detriment of the employee, or makes a significant change to a inessential element of that contract for reasons not related to the individual employee, it may not be regarded as a "redundancy" within the meaning of that directive.

23 Judgment of the Court of Justice of the European Union of 12 October 2004 in the case Commission of the European Communities v. Portuguese Republic (C 55/02), LEX No. 223747, in which the Court of Justice decided that by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic failed to fulfil its obligations under Articles 1, 6 and 7 of Council Directive 98/59 / EC.

24 Paragraph 49, ECLI:EU:C:2010:339.

25 Judgment of the Court of Justice of the European Union of 11 November 2015 in case C 422/14, Cristian Pujante Rivera v. Gestora Clubs Dir SL, Fondo de Garantía Salarial, EU:C:2015:743, paragraph 55.

26 Paragraph 28, ECLI:EU:C:2017:711. A similar judgment is the judgment of 21 September 2017 in case C 149/16, Halina Socha and others v. Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu, ECLI:EU:C:2017:708, paragraph 26; see: M. Frąckowiak, Ustawa o zwolnieniach grupowych a wypowiedzenie warunków pracy i płacy w świetle orzecznictwa TS, "Monitor Prawa Pracy" 2018, no. 10, p. 11.

2. “Exclusivity” of Reasons for the Termination of an Employment Relationship

Art. 10(1) of the Act on Collective Redundancies specifies that the provisions of the act should be applied accordingly if it is necessary for the employer to terminate employment relationships for reasons not attributable to the employees if such reasons are the only ground justifying the termination of an employment relationship upon a notice or its termination upon agreement of the parties. In colloquial speech, the term “exclusive” means “having nothing else,” “existing as the only one, owned by only one person or vested in only one person”²⁷. Therefore, following linguistic principles, one should assume that the exclusivity of the reasons not attributable to an employee occurs where there are no circumstances connected with the employee²⁸.

Judicial decisions explain the expression “exclusive reason” more broadly. In the judgment of 10 October 1990 (I PR 319/90²⁹), the Supreme Court confirmed that the reasons specified in Art. 1(1) of the said act “constitute the exclusive ground justifying termination of an employment relationship” if, without the occurrence of such reasons (a reduction of the number of employees for economic reasons or in connection with organizational, manufacturing or technological changes), an individual decision to lay off an employee would not be made by the head of the work establishment. In addition to the above reasons, there may be other circumstances affecting termination of the employment contract with a particular employee (e.g. improper performance of work duties, a breach of work discipline or chronic excused absence from work) that as such, without the reasons specified in Art. 1(1) of the act, could not lead to a decision on the termination of the employment relationship. Therefore, termination of an employment relationship exclusively for a reason not attributable to an employee is a case in which termination of the employment relationship would not be justified. The fact that an employee, due to his/her prudence, starts a new job immediately after being made redundant for the reasons specified in Art. 1(1) of the act is not a ground to question the statement that such reasons were not the exclusive reason for making him/her redundant³⁰.

Because Art. 10 of the Act on Collective Redundancies also concerns the employment and remuneration terms notice, the notice of change should also be examined in view of the exclusivity of reasons. In the judgment of 6 January 2009

27 M. Szymczak (ed.), *Słownik języka polskiego*, Warsaw 1993.

28 See A. Wypych-Żywicka, *Komentarz do art. 10 ustawy o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracownika*, (in:) *Zbiorowe prawo pracy. Komentarz*, WK 2016; L. Florek, *Zwolnienia pracowników z przyczyn dotyczących zakładów pracy*, Warsaw 1992, p. 62.

29 “Orzecznictwo Sądów Polskich” 1991, no. 9, item 210.

30 Judgment of the Supreme Court of 3 October 1990, I PR 277/90, “Orzecznictwo Sądów Polskich” 1991, no. 5, poz. 127.

(II PK 108/08)³¹, the Supreme Court concluded that if a proper job was proposed to an employee, the refusal to accept the job could in some cases be treated as one of the reasons for termination of the employment relationship. The above applies if, considering the interests of an employee and a work establishment, as well as the kind and character of the job offered, one would expect that the employee should accept the new conditions offered. A similar position was expressed by the Supreme Court in the judgment of 1 April 2015 (I PK 211/14)³², which stated that if an employer offers an employee objectively acceptable work conditions (a position corresponding to the employee's qualifications and remuneration proper for this position) in a notice of change, the refusal to accept such conditions can be treated as one of the reasons for the termination of the employment relationship. A refusal to accept a position that in the organizational and remuneration structure of the given employer does not differ in terms of the assigned duties and the amount of remuneration from the position occupied so far should be considered as such³³, and likewise if an employee does not accept a job for which he/she has the necessary competencies, and the offered remuneration of an amount lower even by 70% from the remuneration received so far is quite adequate to the skills, knowledge and scope of duties and corresponds to the market rates for the performance of the job offered. The refusal to accept such conditions cannot be treated as reasonable and justified. Therefore it constitutes one of the reasons for the termination of employment³⁴.

The employee's refusal should be interpreted differently if the employment and remuneration terms offered in the notice of change materially downgrade his/her rights and obligations or have the form of a harassment, the purpose of which is to get rid of the employee from the work establishment. Termination of an employment relationship in this way is not one of the reasons. One must assume that the employment relationship was terminated only for reasons not attributable to the employee³⁵. Offering work conditions that are usually offered to persons newly employed for non-managerial positions to an employee who has held managerial positions for many years and has received high remuneration should be considered as objectively unacceptable. Such an offer is only an apparent offer and the real intention behind it is to terminate the employment relationship. The employee's refusal to accept the new conditions of employment and remuneration so unfavourable that the refusal can be predicted should not be treated as the reason for the termination of the employment relationship attributable to the employee³⁶.

31 LEX No. 738347.

32 LEX No. 1745824.

33 Judgment of the Supreme Court of 14 December 2016, II PK 281/15, LEX No. 2200601.

34 Judgment of the Supreme Court of 22 January 2015, III PK 55/14, LEX No. 1677804.

35 Judgment of the Administrative Court in Gdańsk of 23 November 2017, III AUa 735/17, LEX No. 2414631.

36 Judgment of the Supreme Court of 20 October 2015, I PK 290/14, LEX No. 1956555.

In its judicial decisions, the Supreme Court emphasizes that the assessment of whether the refusal to accept new terms of employment and remuneration is one of the reasons to terminate the employment relationship must be made by the court examining the case and should be based on a comprehensive analysis of all aspects of the given case. Resolving the case, the court should take into account the interest of both the employee and the employer. The assessment needs to be objectivized, which means that the court should consider whether in the given circumstances the terms of employment and remuneration offered to the employee are justified by the financial standing of the employer and whether the person made to cope with such a situation as the employee in question should, acting reasonably, accept this offer. The court examining the case should also take into consideration that if there are any reasons that justify the termination of the employment relationship for reasons not attributable to the employee, the employer is not obliged to offer the employee further employment based on changed terms and conditions³⁷.

3. Meaning of the Principles of Community Life

The provisions of labor law require that termination of an employment contract should be justified and take into account the principles of community life³⁸. The latter term means non-legal rules of conduct, closely connected with moral norms, both individual and social, accepted by society at a specific place and time³⁹. In view of the statutory law of 2003, moral aspects play an important role especially in the case of individual redundancies. Both the criteria of the selection of a particular employee to be made redundant and the behaviour of the employed person should be assessed from the perspective of principles of community life. Considering these issues, one should take into account not only the interests of the employee but also the interests of the employer⁴⁰. As a result, a decision to terminate the employment relationship with a particular employee should be made on the grounds of his/her qualifications, work experience, usefulness at the work establishment, age and health condition, as well as his/her family and financial situation⁴¹. Another important factor is

37 Judgment of the Supreme Court of 12 April 2012, I PK 144/11, LEX No. 1219488.

38 See A. Wypych-Żywicka, *Prawo podmiotowe...*, *op.cit.*, pp. 1371–1383; A. Wypych-Żywicka, *Zasadność wypowiedzenia umowy o pracę*, Gdańsk 1996, pp. 115–116; Summary of the second resolution of the Complete Composition of the Supreme Court of 27 June 1985, III PZP 10/85, OSNC 1985, no. 11, item 164.

39 Z. Łyda, *Wzajemny stosunek klauzuli zasad współżycia społecznego i społeczno-gospodarczego przeznaczenia prawa*, "Nowe Prawo" 1988, no. 4, p. 5; Z. Ziemiński, *Teoria prawa*, Warsaw/Poznań 1977, p. 74.

40 Judgment of 7 July 2000, I PKN 728/99, OSNP 2002, No. 2, item 40.

41 T. Liszcz, *Komentarz do art. 10 ustawy o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników*, (in:) *Prawo pracy*, Warsaw 2005,

whether in the given circumstances the newly offered work conditions are justified by the employer's situation and whether one can conclude, assessing properly and objectively the situation of a given employee, that the offer made to the employee should be accepted.

Conclusion

The purpose of the general clauses included in the Act on Collective Redundancies, i.e. the reasons not attributable to an employee and the exclusivity of reasons, strengthened by the principles of community life, is to protect the interests of an employee. In the light of the judgments of the Court of Justice of the European Union and the Polish courts, the first clause concerns all cases of termination of an employment relationship caused by circumstances affecting the employer or independent of the parties to the employment relationship. The result of a broad interpretation of the said indeterminate phrase is that, in many cases, employers must apply the rules specified in the regulations of 2003, especially in terms of the severance pay that is aimed at compensating employees for the job loss. The same is true in the case of the term "exclusivity of the reasons not attributable to an employee." According to judicial decisions, this condition is met if circumstances not related to the employee and the manner of his/her performance of the employment relationship duties constitute the original cause of a definite termination or a notice of change. The reasons on the part of an employee are of a secondary character and do not deprive the employee of the severance pay referred to in Art. 8 of the Act on Collective Redundancies.

As to the notice of change, when evaluating the exclusivity of reasons not attributable to the employee, one should take into account the interests of both the employee and the employer and the scope of the new terms and conditions of employment. The refusal to accept the terms of employment and remuneration that in the given circumstances should be considered justified and reasonable as one of the reasons for the termination of the employment relationship deprives the employee of the right to severance pay. However, the refusal to accept an apparent offer, the purpose of which is in fact to terminate the employment, does not have the effect mentioned above.

LEX; R. Sadlik, Kryteria doboru pracowników do zwolnienia przy zmniejszeniu zatrudnienia z przyczyn niedotyczących pracowników, "Monitor Prawa Pracy" 2020, no. 1, p. 26.

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