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The Concept and Entitlements of the Unemployed with Disabilities

Abstract: Under Polish law, the disabled who are unemployed are included in the group of the unemployed in a specific situation on the labour market. This means that the legislator recognises the difficulties this group faces in finding suitable employment. It has therefore introduced a number of mechanisms to make it easier for this group to enter or re-enter the labour market. However, making use of them is often hindered by the fact that the person concerned must first acquire the status of a disabled person under the Act on Vocational and Social Rehabilitation and Employment of Disabled Persons. He or she then has to meet numerous conditions included in the Act on Employment Promotion and Labour Market Institutions in order to obtain the status of an unemployed person. In principle, the only entitlement that is granted is the priority to be assigned to special programmes. However, district labour offices are not obliged to run such programmes. Therefore, in the Polish legal system there is a large gap in terms of helping the unemployed with disabilities to enter the labour market or return to the labour market. Considering the fact that many employers complain about the shortage of workers, stimulating the professional activity of the disabled could be of huge importance for the country's economy.

Keywords: unemployment, disability, employment, professional activation

1. Introduction

Notwithstanding that unemployment is a complex and multi-faceted issue that should not be reduced to a mere statistic, at the end of the first quarter of 2018 it stood at 6.8% (4.4% according to the methodology of the Labour Force Survey)¹ its lowest recorded level in decades, which is conducive to the improvement of living standards. However, demographic factors, duration of unemployment, the quality of workplaces, the length of service of the unemployed and their characteristics, which

1 Registered unemployment in the first quarter of 2018, Central Statistical Office, Warsaw 2018, p. 13-14.

may result in difficult access to the labour market, are also of significance here. Such characteristics include in particular age, gender and disability. Therefore, the structure of unemployment and its causes is not to be overlooked. After all, employment is one of the most important factors affecting social status and plays a vital role in the life of every individual. This role is greater for the unemployed with disabilities. It is also gaining new relevance in terms of vocational and social rehabilitation and the social integration of people with disabilities.

The legislator recognises the complexity of the problem of unemployment among people with disabilities. This issue is subject to legal regulations under two acts: the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities² (hereinafter: the Act on vocational rehabilitation) and the Act of 20 April 2004 on employment promotion and labour market institutions³ (hereinafter: the Act on employment promotion). Yet, it is difficult to state that these laws complement each other, instead they are in a certain correlation. This phenomenon can be noticed already in an attempt to determine the personal scope of the concept of the unemployed with disabilities.

2. The concept of the unemployed with disabilities

Pursuant to the Act on vocational rehabilitation, in Article 2(2) the legislator indicated quite enigmatically that “an unemployed person with disabilities is an unemployed person with disabilities within the meaning of the provisions on employment promotion and labour market institutions”. The reference to the Act on employment promotion is not very helpful. This normative act does not define this concept but, curiously enough, it makes use of it. The legislator indicated only in Article 49(6) of the Act that the unemployed with disabilities are persons who are in a specific situation on the labour market. At the same time, it does not define the concept of the unemployed with disabilities nor the specific situation on the labour market.

Consequently, when determining the personal scope of the concept of the unemployed with disabilities, it is necessary to juxtapose the legal regulations contained both in the Act on employment promotion and the Act on vocational rehabilitation. In this respect, it should be noted that the legal concept of an unemployed person with a disability, or as defined by the legislator of a “disabled unemployed person”, consists of two elements. First of all, the person must acquire the status of a disabled person under the Act on vocational rehabilitation. Secondly, the conditions set forth in the Act on employment promotion must be fulfilled in

2 Uniform text Journal of Laws of 2018, item 511.

3 Uniform text Journal of Laws of 2018, item 1265.

order to qualify for registration as an unemployed person in the relevant district labour office.

The concept of disability has been subject to numerous regulations in international legislation. The United Nations Convention on the Rights of Persons with Disabilities⁴, adopted on 13 December 2006 includes in its Article 1 persons with disabilities who suffer from long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may impair their full and effective participation in society on an equal basis with others. This view is reflected in the Act on vocational rehabilitation. In Article 3(1), the legislator distinguished three degrees of disability: severe, moderate and mild. The description of the degrees of disability has been elevated to the rank of a normative definition by including them in Article 4. A person with severe disability can be considered to have been seriously disabled if he or she is impaired and, at the same time, incapable of work or able to work only in a sheltered environment. Furthermore, it is also a person who requires the permanent or long-term care and assistance of other persons in order to perform social roles due to their inability to live independently (Article 4(1)). By contrast, a moderate degree of disability refers to a person with impaired physical fitness, unable to work or able to work only in sheltered working conditions or requiring temporary or partial assistance from other persons in order to perform social roles (Article 4(2)). A mild degree of disability means that a person has a reduced physical fitness which results in a significant impairment of the ability to perform work, compared to that of a person with similar professional qualifications and full mental and physical capabilities, or who has limitations in the performance of social roles which can be compensated for by means of equipment with orthopaedic appliances, aids or technical means.

A diagnosed disability can also be mentioned in the case of a medical certificate issued by a physician certified by the Social Insurance Institution on the basis of the footnotes of the Act of 17 December 1998 on Pensions from the Social Insurance Fund⁵ (hereinafter: the FUS Act). Such certificates are treated in the same way as defined degrees of disability. A certificate of complete inability to work pursuant to Article 12(2) of the FUS Act and a certificate of inability to lead an independent life pursuant to Article 13(5), are treated as equal to a certificate of a severe degree of disability. Complete inability to work, determined on the basis of Article 12(2) of the FUS Act, is treated as a decision on a moderate degree of disability. On the other hand, a certificate of partial inability to work is equated with a mild degree of

4 Journal of Laws of 2012, item 1169.

5 Uniform text Journal of Laws of 2018, item 1270.

disability pursuant to Article 12(3) and a decision on the advisability of retraining pursuant to Article 119(2) and (3).⁶

Consequently, it must be concluded that the disability must be recognised by a competent authority once the statutory conditions have been satisfied. A person who subjectively assesses his or her fitness as limited but who does not have a disability certificate⁷ issued by a recognised body⁸ cannot therefore be considered disabled.

The second element of the concept of an unemployed person with a disability is the definition of an unemployed person contained in Article 2(1) and (2) of the Act on employment promotion. This definition refers to disability in only one aspect. In contrast to fully functional unemployed people, who need to be able and ready to work full time, people with disabilities are required by the legislator to be able and willing to take up at least part-time paid employment for the type of work in question. It is worth noting that people with severe or moderate certified disabilities and with certificates issued by a physician appointed by the Social Insurance Institution (ZUS) may perform paid work at workplaces adapted to the degree of disability and the nature of impairment of the body's fitness⁹, as well as in the form of teleworking. Moreover, according to Article 15(1) of the Act on vocational rehabilitation, in the case of disabled persons with a certified mild disability, working hours may not exceed 8 hours per day and 40 hours per week. This standard is undoubtedly in correlation with Article 129(1) of the Labour Code¹⁰, which indicates the maximum permissible standard for working time of the same amount, while developing this standard by limiting the working week to an average of five days, and the reference period should not exceed 4 months with certain exceptions. However, in the case of persons with moderate or severe disability, the working time may not exceed 7 hours per day and 35 hours per week (Article 15(2) of the Act on vocational rehabilitation). At the same time, regardless of their degree of disability, they cannot work overtime or at night. Therefore, the Act on employment promotion does not require a disabled person to be able and ready to perform work within the maximum permissible working hours provided for by the Act on vocational rehabilitation.

As far as other prerequisites for acquiring the status of an unemployed person are concerned, they remain the same for people with disabilities as for people who are fully fit. These numerous prerequisites were divided by the legislator into two

6 See H. Pławucka, Risk of inability to work for disability benefits - structure and content, (in:) P. Bieniek, O. Rawski (ed.), *Inability to work as a risk in social disability insurance*, Warsaw 2014, pp. 31-54.

7 See E. Staszewska, Commentary to Art. 49, (in:) Z. Góral (ed.), *Act on employment promotion and labour market institutions. Practical commentary*, Warsaw 2016, p. 509.

8 See M. Paluszkiwicz, Commentary to Art. 6, (in:) M. Włodarczyk (ed.), *Act on Vocational and Social Rehabilitation and Employment of Disabled Persons. Commentary*, Warsaw 2015, p. 126.

9 Judgment of the Supreme Court of 8 December 2000, II UKN 134/00, Lex no. 46842.

10 Uniform text Journal of Laws of 2018, item 917, as amended.

groups: positive prerequisites and negative prerequisites. In the first group, the main indications are being unemployed and not doing any other gainful activity, as well as not learning (with some exceptions). In the second group of prerequisites, on the other hand, there are those related to age. A person can be considered unemployed if he/she is over 18 years of age and has not reached retirement age (60 for women and 65 for men). Additionally, an unemployed person is not a person who, among others, has acquired the right to a retirement pension, disability pension, social pension and does not receive pre-retirement benefit, pre-retirement allowance, rehabilitation allowance, sickness allowance or maternity allowance. The negative prerequisites also include not running a business activity or not owning agricultural real estate with an area exceeding two hectares after conversion. In principle, it can be stated that according to the Act on employment promotion, an unemployed person is not a person who does not have a job and is looking for a job, but a person who does not have a job, is looking for a job and does not have any means of subsistence¹¹.

3. Entitlements of the unemployed with disabilities pursuant to the Act on employment promotion and labour market institutions

As has already been mentioned, pursuant to the Act on employment promotion, the unemployed with disabilities, apart from, among others, the young unemployed up to 30 years of age, the unemployed over 50 years of age or the long-term unemployed, were recognised as unemployed in a specific situation on the labour market. This view of the legislator stems from the assessment of how real it is to be able to find employment for these people. There is no doubt that the risk of being out of work among them is higher than among other groups, which leads to the conclusion that people are not equal in terms of unemployment.¹² Many factors influence the ease or difficulty of re-entering the labour market. Some of them result from the economic situation of the state and employers, as well as from demographics and the overall economic situation. Others are related to the characteristics of an unemployed person: disability, age, gender, place of residence. As a result, it is not surprising that the legislator has provided for some assistance for the unemployed who are in a specific, i.e. difficult situation on the labour market.

11 More broadly: Z. Góral, Definition of the unemployed in the Act on Employment Promotion and Labour Market Institutions, "Praca i Zabezpieczenie Społeczne" 2011, no. 5, p. 23; K. Jaworska, Social Treatment of Unemployment, Olsztyn 2016, pp. 145-161.

12 Z. Góral, Diversification of the Legal Status of the Unemployed (in:) M. Matey-Tyrowicz, L. Nawacki, B. Wagner (ed.), Labour Law and Challenges of the 21st Century. The Jubilee Book of Professor Tadeusz Zieliński, Warsaw 2002, p. 193; E. Staszewska, The concept of "persons in a specific situation on the labour market" in the light of the Act on Promotion of Employment and Labour Market Institutions, "Zeszyty Prawnicze UKSW". 2010, no. 10, p. 233.

This special support, provided for the unemployed with disabilities in the amendment of the Act on Employment Promotion of 12 May 2014, which entered into force on 1 January 2015,¹³ was much more extensive than it is now. For example, it may be pointed out that this group of the unemployed had priority in being sent to perform intervention works, public works or internships. Furthermore, the district labour office was obliged to present the unemployed with disabilities with a proposal of employment, other gainful employment, training, internship, vocational training of adults, employment in intervention works, public works within 6 months from the date of loss of the right to the benefit due to the expiry of the period of its receipt and, in the case of the unemployed without the right to the benefit, within 6 months from the date of registration. After 1 January 2015, this group of the unemployed has only the priority of being able to participate in special programmes.

In the Act on employment promotion, the legislator defined the concept of special programmes twice. The first of these definitions can be found in the glossary to the Act. According to it, special programmes are a set of activities aimed at adjusting professional qualifications and skills or acquiring new ones, as well as supporting those threatened with liquidation or existing and created jobs (Article 2(1), item 27b). The other definition is contained in Article 66a (1). In its wording, special programmes are aimed at the economic activation of persons who are identified in this provision. This raises the question of the relationship between these two objectives set by the legislator for the special programmes. There is no doubt that the concept of professional activation has a broader scope than just the adaptation or acquisition of qualifications and professional skills. The Regulation of the Minister of Labour and Social Policy of 14 May 2014 on special programs¹⁴ may provide some guidance in this respect. In § 4 of the regulation, the minister pointed out that when defining the scope and forms of assistance under the special programme, measures should be planned combining labour market services or instruments with specific elements supporting employment.

The concept of labour market services and instruments needs to be clarified here. In Article 35 (1) of the Act on employment promotion, the legislator indicated that the basic services of the labour market are employment intermediation, vocational counselling and provision of professional information, assistance in active seeking of employment and organisation of training courses. This wording leads to the conclusion that apart from these basic labour market services, there are also other services which are of a different nature. The analysis of the entire Act on employment promotion indicates that labour market services encompass all activities undertaken by public and private institutions in order to help the unemployed find suitable

13 Act of 12 May 2014 amending the Act on employment promotion and labour market institutions and some other acts, Journal of Laws of 2014, item 598.

14 Journal of Laws of 2014, item 638.

employment¹⁵ and employers find the right employees. Taking into consideration the specific situation of people with disabilities on the labour market, labour market services are also aimed at supporting them in choosing an adequate profession, taking into account individual predispositions and conditions prevailing on the labour market.¹⁶

On the other hand, labour market instruments, pursuant to Article 44 of the Act on employment promotion, are intended to support labour market services. This means that they are instruments which promote full and productive employment by bringing the unemployed back to the labour market. This is particularly evident in the case of e.g. subsidised employment in various forms, which is a kind of bridge between unemployment and professional activity.¹⁷

In view of the above, it should be stated that the special programme, in which the unemployed with disabilities are to participate, aims to activate them, in particular by adjusting their professional qualifications and skills or acquiring new ones, and by supporting jobs at risk of liquidation or existing jobs,¹⁸ and to this end all available labour market services and instruments that help achieve this objective may be employed. However, other forms of activation may be used only as an aid. Thanks to special programmes, a starost can therefore finance non-standard measures targeted at the unemployed with disabilities,¹⁹ so that they can return to the labour market more quickly or enter it for the first time. Yet, access to these mechanisms in the case of this particular group of the unemployed may be limited if the district labour office does not run any special programmes. The legislator did not order these labour market institutions to organise special programmes, but only presented them with such an opportunity. Consequently, if the district labour office, competent due to the place of residence of the unemployed person with disabilities, does not run such a special programme, the unemployed person will be able to use the services and instruments of the labour market on the same basis as the unemployed who are fully fit, i.e. without the right of priority.

In this respect, it should be noted that the legislator has shown far-reaching inconsistency. On the one hand, it firmly states that the unemployed with disabilities find themselves in a specific, i.e. difficult, situation on the labour market and that they therefore need special assistance to enter it. On the other hand, it did not guarantee that such special programmes would be implemented in every district labour office. As a result, the unemployed with disabilities do not enjoy any facilitation in the use

15 See M. Włodarczyk, "Adequate employment" in the Act on Employment and Counteracting Unemployment, "Praca i Zabezpieczenie Społeczne" 1998, no. 7-8, p. 38.

16 S. Ricca, Public Employment Services. A handbook for employers, Warsaw 1995, p. 40.

17 M. Kabaj, Programme for Countering Poverty and Unemployment, Warsaw 2000, p. 67.

18 M. Paluszkiewicz, Commentary to Article 66a, (in:) Z. Góral (ed.), *op. cit.* p.126.

19 A. Wasilewska, H. Rogala, Special Programmes - an opportunity to be taken, "Służba Pracownicza" 2012, no. 3, p. 16.

of assistance provided for in the Act on employment promotion, especially as it may be very difficult for them to acquire the status of an unemployed person due to the number of prerequisites of a negative nature.

4. Entitlements of the unemployed with disabilities pursuant to the Act on vocational and social rehabilitation and employment of persons with disabilities

Certain regulations concerning assistance to the unemployed with disabilities in returning to the labour market are provided for in the Act on Vocational Rehabilitation. The Act contains Chapter IV, Entitlements of the Unemployed. However, the act basically makes reference to the Act on employment promotion. One of the novelties provided for by the Act on Vocational Rehabilitation is the possibility of providing one-off assistance to the unemployed with disabilities to start up a business, agricultural activity or to start up a business in the form of a social cooperative.²⁰ This assistance is financed from the funds of the State Fund for Rehabilitation of the Disabled, and not from the funds of the Labour Fund, as is the case under the Act on employment promotion. And the condition of acquiring the right to this aid is not using such aid from the Labour Fund in the past. Unemployed persons with disabilities may receive up to six times the average salary if they commit themselves to doing business for at least 12 months. In the event of an intention to run a business for a period of at least 24 months, the financial support for setting up a farm or a social cooperative may amount to up to 15 times the average salary. Facilitating access to labour market

5. Conclusion

The analysis of the solutions of both legal regulations leads to the conclusion that the Act on employment promotion is aimed at facilitating access to the labour market by the unemployed also those with disabilities, and the Act on vocational rehabilitation focuses rather on the disabled who are already in the labour market and on incentives for the employer to employ this disabled person, e.g. by way of employment subsidies. Nevertheless, the literature indicates that only programmes financed by the State Fund for Rehabilitation of Persons with Disabilities, social employment and the social economy constitute instruments for facilitating access to labour market the unemployed with disabilities.²¹ However, this claim is stigmatising already at its roots. Omission of the rich range of services and instruments of the

20 See K. Jaworska, Social Cooperatives, "Studia Prawnoustrojowe" 2010, no. 11, p. 341.

21 M. Garbat, Professional activation of people with disabilities - barriers and costs, Zielona Góra 2013, p. 40.

labour market results in marginalisation of forms of assistance provided for in the Act on employment promotion.

There is no doubt that there is a certain gap in the Polish legal system in terms of supporting people with disabilities in their return to the labour market. Given the fact that only 28.9% of people with disabilities of working age are economically active,²² this gap should be covered as soon as possible.

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22 Persons with disabilities on the labour market, Ministry of Family, Labour and Social Policy, Warsaw 2018, p. 4.