Chapter 2. Organisation of the system of legal protection in labour disputes

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§ 1. Models of legal protection in individual labour disputes

1.1. Legal protection bodies and the judiciary in individual labour disputes

I should start the analysis of legal protection and the judiciary in individual labour disputes with definition of these two concepts. The starting point for further deliberations will be an observation that these concepts are not identical, neither at the objective nor at the subjective level.

According to a prevailing view[1], a legal protection means a sustained and organised activity undertaken for the compliance with law. It means implementation of applicable normative regulations, starting with conciliation and mediation, through jurisdiction, and ending with legal assistance.

The situation is completely different as regards the concept of the judiciary[2]. In the jurisprudence this term has different definitions, despite unequivocal colloquial connotations. In schematic terms, there are three basic approaches: material, personal and heterogeneous one.

[1] See: *S. Włodyka*, Ustrój organów ochrony prawnej *[System of the legal protection bodies]*, Warsaw 1975, *passim*.

[2] See: *K. Lubiński*, Pojęcie i zakres wymiaru sprawiedliwości *[The concept and scope of the judiciary]*, Studia Prawnicze 1987, No. 4, p. 3 ff; *M. Mędrala*, Funkcja ochronna… *[The protective function…]*, p. 111 and the literature referenced there.

According to a material approach[3], a judiciary means an activity which consists in binding resolution of conflicts arising from legal relationships or even any activity which consists in resolution of disputes in compliance with law, on behalf of the state. On the other hand, according to a personal approach[4] the judiciary means the activity of courts which consists in concretisation and implementation of legal norms. This is governed by the constitutional provisions[5], in particular Art. 175 of the Constitution of the Republic of Poland.

According to a heterogeneous approach, the judiciary means the activity of courts limited to resolution of civil law or criminal law disputes or other disputes if these were referred under law for resolution by the courts. At a more detailed level[6] this means an imperative activity of courts which consists in imposition of penalties or resolution of legal conflicts or non-conflicting matters relating to fundamental rights and freedoms of citizens in order to secure compliance with applicable laws.

Despite major differences[7] between the above concepts of the judiciary, they have one thing in common. Each of the three presented approaches refers directly (the material and heterogeneous approach) or indirectly (the personal approach) to the jurisdiction as a method of activity of the judiciary. Such standpoint is supported also by the legislation in force. I am thinking here of Art. 2 § 1 of the Law on the system of general courts *(prawo o ustroju sądów powszechnych)*. It provides that the tasks of the judiciary are performed by judges only. Also, the differentiation of the status of courts and tribunals introduced by Art. 175 of the Constitution of the Republic of Poland is a strong argument in support of this view.

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[3] See: *C. Jackowiak*, Zakładowe organy wymiaru sprawiedliwości *[Law enforcement bodies in the workplace]*, Poznań 1965; *J. Skupiński*, Gwarancje orzekania na tle sporu o pojęcie wymiaru sprawiedliwości *[Guarantees of jurisdiction in the context of a dispute over the concept of judiciary]*, PiP 1972, No. 8–9, p. 89; *J. Stelina* [in:] *K.W. Baran* (ed.), Zarys systemu prawa pracy. Część ogólna prawa pracy *[An outline of labour law system. General part of labour law.]*, vol. 1, Warsaw 2010, p. 128 ff.

[4] See: *K. Korzan*, Wykonywanie orzeczeń w sprawach o roszczenia pracowników ze stosunku pracy (Studium teoretyczno-procesowe) *[Enforcement of judgements in matters involving employment-related claims (Theoretical and procedural aspects)]*, Katowice 1985, p. 51–52; *T. Ereciński*, Aktualne problemy ustroju sądownictwa *[Current problems of the judicial system]*, PiP 1981, No. 5, p. 19.

[5] See: *A. Wasilewski*, Władza sądownicza w Konstytucji Rzeczpospolitej Polskiej *[Courts in the Constitution of the Republic of Poland]*, PiP 1998, No. 7, p. 6–7; *P. Sarnecki*, Władza sądownicza w Konstytucji RP z 2.4.1997 *[The court system according to the Constitution of the Republic of Poland of 2.4.1997]*, Rejent 1997, No. 5 (73), p. 136 ff.

[6] *K. Lubiński*, Pojęcie… *[The concept...]*, p. 27.

[7] In the jurisprudence there are also opinions according to which in order to discontinue the disputes over the concept of the „judiciary", it would be desirable that this term is no longer used. See: *H. Suchocka, L. Kański*, Zmiany konstytucyjnej regulacji sądownictwa i prokuratury w roku 1989 *[Changes in the constitutional regulation of the judicial and prosecution system in 1989]*, PiP 1991, No. 1, p. 28.

For methodological reasons, it is necessary to clarify the concept of relations between the judiciary and the legal protection bodies. The starting point for further deliberations will be an observation that in logical terms there is a relation of inclusion which means that all judicial authorities enjoy the status of legal protection bodies while not all legal protection bodies enjoy the status of judicial authorities. Therefore, in subjective terms, undoubtedly the former is narrower than the latter.

1.2. Models of organisation of legal protection in individual labour disputes

In discussing the model of organisation[8] of legal protection bodies in individual labour disputes, in the first place attention should be drawn to the modelling processes[9] in the legal studies[10]. Generally speaking, a model object is presented in a simplified form, leaving aside its characteristics which in view of the research objectives have been considered insignificant at the relevant level of discussion. As a result of application of such methodological measures, the developed model is merely a certain convention adopted by the researcher and therefore, by nature, it has an element of subjectivism.

The models of organisation of legal protection bodies in individual labour disputes presented in this study are of descriptive and generalizing nature since at the abstract level they are specific, „idealistic" reconstruction of the existing systems of resolution of such disputes. In constructing each model I took into account, on one hand, the normative status, and on the other hand, the mutual organisational and procedural relations between the bodies resolving workplace disputes. Particularly important was their position in the organisational structure as a functionally integrated whole.

The most general division of the legal protection bodies resolving individual labour disputes is a division into public and non-public bodies. The former are established by public authorities under legal provisions, usually legislative ones. On the other hand, the non-public bodies are appointed usually by the parties to an employment relationship, usually with the participation of trade unions and

[8] I am thinking here of the attributive meaning of the concept of organization. See: *T. Kotarbiński*, Traktat o dobrej robocie *[Treaty on good job]*, Wrocław 1973, p. 137.

[9] As regards „modelling" processes, see: *J. Wróblewski*, Sądowe stosowanie prawa *[The judicial application of law]*, Warsaw 1988, p. 34–36.

[10] I support a view presented by *S. Waltoś* (Model postępowania przygotowawczego na tle porównawczym *[A model of preparatory proceedings – a comparative study]*, Warsaw 1968, p. 9) according to which a model means a set of basic elements of a system that allows it to be distinguished from other systems.

employers' organisations under specific sources of labour law (such as collective agreements). In the countries with centuries-long tradition of free-market economy these are sometimes completely private.

The public legal protection bodies established for resolution of individual labour disputes may be divided into state and non-state bodies. The *principium divisionis* is whether an entity concerned enjoys the status of a state body or not. Such status is not granted to self-regulatory bodies (such as professional association bodies *(organy samorządu zawodowego)* or social bodies (such as trade union bodies). One of the characteristics of state bodies is that they exercise jurisdiction on behalf of the state as a sovereign.

Below is the general scheme of the legal protection bodies which have jurisdiction in individual labour disputes.

According to the above, the structure of the legal protection bodies in individual labour disputes may be divided into two basic homologous models: court and out-of court. As regards the former, the disputes are resolved by the entities which enjoy the status of a court in a material sense. On the other hand, the out-of-court model means such organisational structure where competences to resolve the labour disputes lie exclusively with the legal protection bodies other than courts. Of course, between those two different mechanisms there are normative systems which establish a third, intermediate model which I call a heterogeneous model. It should be clarified that in the legal sciences a court in a formal sense means a body which is called court under applicable laws (such as a court of arbitration)[11]. On the other hand, a court in a material sense means a body which enjoys the status of a court in a formal sense, exercises jurisdiction on behalf of a state-sovereign and provides constitutional and procedural guarantees of fair jurisdiction[12].

As regards the heterogeneous model of legal protection system in individual labour disputes, I make an idealistic assumption that the procedure regarding this category of matters is a three-instance procedure and only one body is competent to rule at the instance concerned. In such case three basic variants may be selected:

[11] See: *S. Włodyka*, Ustrój… *[System…]*, p. 25.

[12] See: *R. Więckowski*, Dopuszczalność drogi sądowej w sprawach cywilnych *[Court jurisdiction in civil-law matters]*, Cracow 1991, p. 12.

	1st instance	2nd instance	3rd instance
1)	out-of-court body	court	court
2)	out-of-court body	out-of-court body	court
3)	out-of-court body	court	out-of-court body
4)	court	court	out-of-court body
5)	court	out-of-court body	out-of-court body
6)	court	out-of-court body	court

The organisational models presented above are usually a compromise between the idea of right of every employee to a fair trial and the organisational and financial capabilities of public authorities. In the practice of employment relationships of the states of industrial civilisation only the first two variants are available. This is because as a rule the courts have judicial supervision over the jurisdiction of the out-of-court bodies (such as disciplinary bodies[13]). The opposite situation should be considered odd and could not be accepted in terms of axiology of the right to a fair trial.

I will analyse the arguments for and against of the court and out-of-court model of legal protection in terms of legality, objectivity and professionalism of the jurisdiction. The three mentioned criteria are the fundamental conditions[14] of fair and efficient resolution of disputes in industrial relations. As regards the out-of-court model, in the further analysis I would like to focus on the „workplace" variant as the most extreme, where its specific characteristics are most highlighted. As regards the judicial model, it is of no relevance whether it is a special courts variant or general courts variant.

According to a widespread opinion[15], the out-of-court model of the deciding authorities ensures a real impact of employees on the method of resolution of disputes in the workplace. In this context a question arises whether the „real impact" is favourable and what is its nature. There are two possible impacts:

[13] Decision of the Court of Appeal in Warsaw of 21.8.2000, III APo 10/00, OSA 2001, No. 2, item 7.

[14] See in particular: *T. Zieliński*, Nowy model rozstrzygania sporów pracy i ubezpieczeń społecznych *[A new model of resolution of labour disputes and social insurance disputes]*, PiP 1986, No. 2, p. 47–48; *A. Patulski*, Sprawność systemu rozpoznawania sporów pracowniczych (kierunki rozwiązań prawno-organizacyjnych) *[Efficiency of the dispute resolution system in labour matters (legal and organisational mechanisms)]*, NP 1982, No. 11–12, p. 50–51.

[15] See for example: *J. Jończyk*, Projekt zmiany kodeksu pracy *[Draft amendment to the Labour Code]*, PiZS 1981, No. 7, p. 20–21.

„procedural" and „non-procedural" one. It can be taken for granted that the former is favourable in terms of the standard of jurisdiction since the employees – members of a workplace legal protection body know best what is happening at the place where the dispute arose. Undoubtedly, this is a great advantage of the company model of resolution of individual labour disputes. However, it is worth noting that the same may apply to court if lay judges take part in the proceedings. The advantage of such mechanism over the „inter-company" mechanism is that the lay judges are not at all interested in the outcome of the dispute since a judgment issued in the case does not affect their job. Therefore, it undoubtedly serves to ensure the impartiality of the jurisdiction and makes it more objective, and specifically it serves to avoid the personal bias to the parties in a dispute heard.

Participation of lay judges reduces the dangers of „cruel" jurisdiction by professional judges in employment matters. In the past it was often pointed out[16] that the judges did not sufficiently understand the specifics of individual labour disputes, and they therefore tended to apply the same measure to the situation of the worker and the situation of the employer. I think that a panacea for this problem of the judicial model of legal protection is a professional specialization of judges targeted exclusively at labour law matters.

As regards the „non-procedural" influence of employees on the jurisdiction of the workplace deciding bodies, I think that it is not only illegal but also highly detrimental to the objectivity of the jurisdiction. In this respect the courts – regardless of their status, whether of special or general jurisdiction – clearly dominate the workplace bodies. This is because they are outside the structure of an establishment and therefore the threat of influence by the parties involved in the dispute on independent[17] judges and lay judges seems marginal. This is particularly important in the free market economy where the private sector plays a dominant role. It is easy to imagine how difficult it would be for a jurisdiction body operating in a private enterprise to remain objective if the members of such body were employees of that enterprise. Undoubtedly, they would be exposed to vari-

[16] See for example: *S. Rychliński*, Wybór pism *[Selection of documents]*, Warsaw 1976, p. 33; *J. Wengierow*, O sądach pracy w Polsce i zagranicą *[Labour courts in Poland and abroad]*, Warsaw 1929, p. 30; *T.J. Kotliński*, O ustroju i organizacji sądów pracy – w osiemdziesiątą rocznicę ich powstania *[The system and organisation of labour courts – on their 80th anniversary]*, Palestra 2008, No. 3–4, p. 25 et seq.

[17] See in particular: *J. Mokry*, Osobowość sędziego a niezawisłość sędziowska *[The judge and his independence]*, [in:] *M. Jędrzejewska, T. Ereciński* (eds), Studia z prawa postępowania cywilnego. Księga pamiątkowa ku czci *Z. Resicha [Studies on civil procedural law. Memorial book for Z. Resich]*, Warsaw 1985, p. 211 ff.; *K. Korzan*, Niezawisłość sędziowska (sądów) w systemie trzeciej władzy *[Independence of judges (courts) in a system of third power]*, [in:] *B. Czech* (ed.), Filozofia prawa a tworzenie i stosowanie prawa *[Philosophy of law and law-making and implementation process]*, Katowice 1992, p. 421 ff.; *M. Mędrala*, Funkcja… *[The protective function...]*, p. 117 ff.

ous pressure or even harassment from their employer and even if they did not succumb to that, still they might be demagogically accused by their colleagues of the opportunism to the employer. A similar mechanism may also have an opposite effect and result in unfounded accusations of favouring one's own interests or interests of the collectivity of workers. For these reasons I believe that the model of workplace legal protection bodies in the privatised economy may to a greater extent fuel the individual conflicts instead of mitigating them.

However, the above should not lead to a conclusion that I am opposed to any workplace legal protection bodies. I consider it useful when individual disputes in the workplace can optionally be resolved through mediation or conciliation by non-judicial bodies. Well functioning company mediation or conciliation bodies can play a constructive role in mitigating the conflicts in the workplace. Importantly, the irenic resolution of a dispute usually prevents its escalation in court and therefore reduces the extensive juridisation of labour relations. This is important because sociological research[18] has shown that there is an apparent reluctance on the part of employees to go to court to resolve a dispute with an employer. This tendency is even more visible with the increase of unemployment rates. Therefore, from a social point of view the most favourable solution of an individual labour conflict is a situation where employees use the „services" of a court only as the last resort where all other methods of resolution of a dispute in accordance with out-of-court irenic procedures fail.

In this context significantly important is the access of an employee to a legal protection body. Undoubtedly, that is where the workplace bodies have an advantage because of the place of their functioning. Naturally, an employee will have more difficulties to bring his claim to court since the court operates outside the place of his employment. However, there are legislative mechanisms which serve reduction of such objective obstacle. I am thinking here of certain procedural mechanisms, in particular an alternative territorial jurisdiction *(właściwość przemienna)* and exemption from court fees[19]. Their availability in the procedural labour law restricts or, in some cases, significantly removes the barriers which block employees' access to courts[20].

[18] See: *M. Borucka-Arctowa*, Aktualne problemy przeciążenia sądów (aspekty socjologiczne) *[Overloading of courts – the current problems (sociological aspects)]*, Studia Prawnicze 1988, No. 4, p. 41–45.

[19] A mechanism which is unknown in Poland and which facilitates access to court is an insurance covering the costs of court proceedings and attorney fees (for example *Rechtsschutzversicherung*).

[20] On the other hand, too easy access to court for employees may adversely affect the quality of jurisdiction in individual labour disputes. See more in: *M. Borucka-Arctowa*, Aktualne… *[Overloading...]*, p. 45–46.

In characterising the models of legal protection, some attention should be given to evidence. In the past, there was a view according to which the workplace bodies had better opportunities to properly establish facts of the case because they functioned at the place where the conflict arose. I do not share this opinion because I think that judicial authorities are better prepared to properly establish the facts of a case[21] since they have a number of procedural instruments, including state coercion measures, for determination of objective truth. Moreover, account should be taken of the fact that members of the out-of-court bodies, in particular company bodies, which perform their functions on a voluntary basis, often do not have sufficient knowledge or experience required to conduct the evidentiary procedure. In this respect the professional judges hearing the cases in courts dominate the former.

Referring to this aspect, I have raised a broader problem that is a professionalism of jurisdiction in individual labour disputes. The deficiencies existing in this area of jurisdiction directly affect its objectivity and legality. In discussing this issue it should be kept in mind that individual labour disputes are often very complex matters, both in terms of facts and law. Members of the out-of-court bodies do not have sufficient legal knowledge of labour law, in particular where hearing the cases is their additional job performed on a voluntary basis – and this is the situation usually when they sit in the company bodies. In my opinion this is another important argument in favour of the court model[22]. There is no doubt that the judiciary is the area which requires professionalism and cannot be based solely on the good will of the members of the deciding bodies. In this respect a necessary element is expertise based on sound legal knowledge. In practice this may be guaranteed only by judges specialising in the labour and employment matters.

Supporters of the out-of-court model of legal protection in individual labour disputes often raise an argument that court proceedings are too complicated for an employee. In opposition they point out the company procedures which are based on the simplest mechanism. I personally support the view[23] that the simplicity should not be above the merits. The core values on which accurate jurisdiction should be based include professionalism, legality and objectivity. Therefore, if simplification of the procedure undermines – even indirectly – one of these factors, then such procedure is unacceptable in a democratic rule of law. Of course, no one can reasonably deny that in the court proceedings there are far more procedural nuances than in the workplace procedure. However, there are

[21] See also: *A. Patulski*, Sprawność… *[Efficiency...]*, p. 56.

[22] *J. Jończyk* warned against overestimating the role of an employee in resolving individual labour disputes – Projekt… *[Draft...]*, p. 20–21.

[23] *T. Zieliński*, Nowy… *[A new…]*, p. 49–50, footnote 31.

mechanisms in place which prevent the risk of damage on the part of the employee resulting from ignorance of procedural laws. In particular, I am thinking here of the obligation of the court to inform the latter of the procedural consequences of his actions or omissions[24]. Moreover, the entitlement to have the assistance of a lawyer in the judicial proceedings seems to be the factor which significantly reduces the threat of violation of the rights and interests of an employee. It is also worth noting that in the past there were cases where in the in-company proceedings an employee could not be represented by a lawyer while an employer was represented by a qualified professional lawyer. Such asymmetry seriously undermined the principle of equality of the parties to a labour dispute and often distorted the outcome of the process.

The accusation often made against the judicial model is that the proceedings conducted by the courts tend to be lengthy and often last very long. This argument is partly justified. However, it is worth bearing in mind that in many countries the courts hearing the labour law matters follow the principle of speed of process and reduced formalism. Both of these procedural directives significantly reduce the lengthiness of the „traditional" civil procedure in civil matters in a strict sense. This leads to a remark that in practice also the extrajudicial bodies are not free from certain bureaucratic drawbacks[25] which result in excessive duration of the proceedings.

A *sine ira et studio* analysis clearly turns the scales in favour of the judicial model of legal protection as a mechanism which better ensures professional and objective resolution of individual labour disputes. In this context a question arises whether it is justified in organisational terms to separate[26] the labour courts from the structures of the general courts. A key argument in support of this idea is the need to develop a specific style of jurisdiction in resolution of individual labour disputes, adjusted to the specific nature of the work environment. Also, a sub-

[24] See Art. 5 of the Code of Civil Procedure (KPC); See also: *M. Sawczuk*, Niezawisłość sędziowska a granice pomocy stronie *[Judicial independence and the limits of assistance provided to a party]*, [in:] *K. Korzan* (ed.), Studia z procesu cywilnego *[Civil procedure studies]*, Katowice 1986, p. 40.

[25] See: *M. Piekarski*, Rozpoznawanie przez sądy spraw z zakresu ubezpieczeń społecznych *[Court jurisdiction in social insurance matters]*, Palestra 1985, No. 7–8, p. 3.

[26] See in particular: *S. Dalka*, Idea jednolitego sądu w sprawach cywilnych *[The idea of uniform court in civil matters]*, [in:] *M. Jędrzejewska, T. Ereciński* (eds), Studia z prawa postępowania cywilnego – Księga ku czci Z. Resicha *[Studies on civil procedural law – Memorial book for Z. Resich]*, Warsaw 1985, p. 70–71; *K. Korzan*, Znaczenie jedności postępowania cywilnego dla gwarancji praworządności *[The importance of the unity of civil proceedings for the guarantee of the rule of law]*, PiP 1981, No. 6, p. 64–65; *G. Bieniek*, Sądownictwo pracy – propozycje modelowe *[Labour courts – proposed models]*, NP 1981, No. 10–12, p. 3–10; *W. Siedlecki*, O zmianie systemu rozstrzygania sporów o roszczenia pracownicze ze stosunku pracy *[Change of the system of resolution of employment disputes]*, NP 1981, No. 4, p. 74.

stantive complexity of such disputes[27] justifies the necessity to ensure the high level of professionalism among judges, based not only on the knowledge of labour legislation but also on the knowledge of reality of industrial relations. In practice, achievement of these objectives seems easier in the special courts and not in the general courts and this is because of the fact that in the specialized courts the cases are heard by separate judicial corps which are not subject to staff fluctuations. In the organizationally integrated general court there is always a risk that the judges will be moved from one organisational unit (division, chamber) to another. This does not help the professional specialization and poses a threat of transposition to the labour court of the style of jurisdiction characteristic of civil matters.

However, on the other hand it is worth noting that also the model of general courts in individual labour disputes has certain advantages. It guarantees the necessary uniformity[28], stability and versatility of the jurisprudence[29]. An instrument serving that purpose is a uniform court procedure. At the functional level it is also important that the existence of special courts makes access to the legal protection more complicated as it creates uncertainty as to the scope of jurisdiction of particular deciding bodies. Moreover, an advantage of any consolidation is that it reduces costs of operation of the entire justice system which is not without importance given the permanent budgetary deficit in Poland and the resulting crisis of public finances adversely affecting also the judiciary.

The arguments mentioned above to a large extent seem to be reasonable. However, I think that the place of the courts hearing individual labour disputes in the structure of the judiciary is, as a matter of fact, of secondary importance. I assume that their organisational status in the structure of the judiciary does not significantly affect the level of professionalism of judges or, all the more, the professionalism of their jurisdiction. I think that the necessity to guarantee professionalism of jurisdiction in individual labour disputes does not necessarily have to determine the structural organisation of the judiciary as it seems that the professionalism is mainly a matter of specialization of judges in labour law. Therefore, I believe that in every court hearing such cases, regardless of whether it is a general or a special court, it is highly useful to introduce mechanisms promoting professional specialization in the labour law matters. Undoubtedly, in a labour

[27] See: *J. Wengierow*, O sądach… *[Labour…]*, p. 30.

[28] As rightly pointed out by *A. Murzynowski* and *T. Zieliński* (Ustrój wymiaru sprawiedliwości w przyszłej konstytucji *[The system of the judiciary in the future constitution]*, PiP 1992, No. 9, p. 8) the unity of the judiciary should be understood to mean „(…) a unity of fundamental substantive principles of the judicial system and of the proceedings before courts and not a bureaucratic uniformity of judicial structures".

[29] See: *T. Ereciński*, Aktualne… *[Current ...]*, p. 21–23; *S. Dalka*, Idea… *[The idea...]*, p. 70–72.

court separated from the structure of general courts and focused exclusively on individual labour disputes such task is easier to tackle. However, it seems that also in a general court it is possible to create conditions for specialization of judges through introduction of appropriate organizational and systemic instruments.

1.3. Models of organisation of legal protection in individual labour disputes in the Polish legislation

Following the presentation of abstract theoretical models of organization of legal protection in individual labour disputes it is necessary to describe the legal mechanisms applicable in the Polish legislative system. The starting point for further deliberations will be an observation that starting from 1918 until the Third Polish Republic there existed a mosaic of various models, including a court model, a heterogeneous model and an out-of-court model.

During the Second Polish Republic the jurisdiction in individual labour disputes lied with the courts. Initially these were general courts and industrial and trade courts[30]. The labour courts were established on 22.3.1928 under a regulation of the President of the Republic of Poland[31]. These were special courts[32] which heard „labour cases" in the first instance. Their formal and organisational status was not uniform. There were two types of organization: independent labour courts and labour courts attached to the municipal courts. In the former case, the territorial jurisdiction of the courts covered a territory of a municipality or a part of municipality; in the latter case the territorial jurisdiction was the same as the area of jurisdiction of a municipal court. The most serious deficiency in the structure of the judiciary during the entire interwar period was a small number of courts. Their competence did not cover the whole territory of the country[33]. Despite theat fact that in 1936 their jurisdiction was extended to include the lands of former Prussian Partition[34], they could not be considered

[30] See: *A.M. Świątkowski*, Kontynuacja i zmiana instytucji indywidualnego prawa pracy w Polsce *[Continuance and change of individual labour law institutions in Poland]*, Studia z zakresu prawa pracy i polityki społecznej *[Labour law and social policy studies]*, Cracow 1999–2000, No. 5, p. 136–137.

[31] Journal of Laws [Dz.U.] of 1928, No. 37, item 350.

[32] As regards the status of these courts, see: *J. Wengierow*, O sądach… *[Labour…]*, *passim*; J. *Gutman, M. Gutman*, Nowe prawo o sądach pracy *[The new law on the labour courts]*, Cracow 1935, *passim*; *T.J. Kotliński*, O ustroju… *[The system…]*, *passim*.

[33] A regulation of the President of the Republic of Poland of 24.10.1934 – law on the labour courts *(prawo o sądach pracy)* (Journal of Laws [Dz.U.] of 1934, No. 95, item 854) was a basis for a major reform of labour courts. See: *J. Wengierow*, Reorganizacja sądownictwa pracy w Polsce *[Reorganisation of labour courts in Poland]*, Praca i Opieka Socjalna 1934, No. 3, p. 277 ff.

[34] See more in: *J. Wengierow*, Unifikacja sądownictwa pracy na obszarze całego państwa *[Nationwide unification of labour courts]*, Praca i Opieka Socjalna 1936, No. 4, p. 377–378.

generally accessible courts[35]. However, in the areas where they functioned, the labour courts played a crucial role in promoting respect for the labour legislation.

The parties had access to appropriate remedies against decisions of labour courts. Such remedies were heard by the courts of general jurisdiction. An appeal *(apelacja)* was heard by a regional court *(sąd okręgowy)* composed of either three judges or a professional judge as a presiding judge and two lay judges. In cases where a matter in dispute was of greater value, the parties were entitled to lodge a cassation appeal *(skarga kasacyjna)* to the Supreme Court *(Sąd Najwyższy)*.

Considering the above, it seems reasonable to conclude that in the interwar Poland, in individual labour disputes there applied a heterogeneous model of the judiciary. It seems that this structure was an improved version of a French model.

After the end of the World War II, labour courts resumed their activity under the provisions of the law of 1934. However, in 1950 they were liquidated as part of the „socialist" reform of the civil procedure[36]. A jurisdiction in employment matters was granted to the courts of general competence[37]. Therefore, formally in the years 1950–1954 in the Polish legislative system there applied the 5th variant of the court model.

Liquidation of the labour courts was accompanied by establishment of extrajudicial legal protection bodies. In 1951, under a resolution of the Presidium of the Government *(Prezydium Rządu)*, in certain large state-owned enterprises[38] the so-called works conciliation commissions *(zakładowe komisje rozjemcze)* were established. Further, under a decree of 24.2.1954, the commissions were created in other establishments.

In the 50s, in the Polish legislative system, a predominant model of resolution of individual labour disputes was a trade-union model based on the Leninism-Stalinism ideas, in particular an idea of withering away of the state in the industry. However, with the process of de-Stalinization, the model gradually evolved towards submission of jurisdiction of the conciliation commissions to judicial control. The first step was the adoption in 1962 of the Act on the Supreme

[35] See: *M. Święcicki*, Instytucje polskiego prawa pracy w latach 1918–1939 *[Institutions of the Polish labour law in the years 1918–1939]*, Warsaw 1960, p. 259 and 262.

[36] A decree of 26.10.1950 on the transfer of labour court cases to the jurisdiction of the courts of general competence (Journal of Laws [Dz.U.] of 1950, No. 49, item 446).

[37] See: *J. Jodłowski*, Z zagadnień polskiego procesu cywilnego *[Several issues of the Polish civil procedure]*, Warsaw 1951, p. 47.

[38] See a resolution no. 636 of the Presidium of the Government of 5.9.1951 on the temporary establishment of works conciliation commissions in certain industrial plants *[uchwała w sprawie tymczasowego powołania w niektórych zakładach przemysłowych zakładowych komisji rozjemczych]* (Official Gazette of the Republic of Poland 1951, No. A-87, item 1199). See also: *C. Chmielewski, M. Święcicki*, Zakładowe komisje rozjemcze *[Works conciliation commissions]*, PiP 1952, No. 4, p. 638.

Court[39] *(ustawa o Sądzie Najwyższym)* which established a Labour and Social Insurance Chamber *(Izba Pracy i Ubezpieczeń Społecznych)* in the Court – an organisational unit specialising in resolution of employment matters. Also the Code of Civil Procedure (KPC) adopted in 1964 reinforced the above tendency (in a procedural sphere)[40]. However, despite the increasing criticism of the model of organisation of legal protection in individual labour disputes, the commission/trade union structure remained unchanged until 1975 when the Labour Code (KP) entered into force.

The reform of the model of legal protection introduced by the Labour Code was a specific compromise between the judicial model and the extrajudicial model. The jurisdiction of trade unions previously applicable in the second instance was replaced by the court jurisdiction. The powers to hear the appeals were taken over by the newly-established regional labour and social insurance courts[41]. They had a status of special courts and were outside the structure of the general courts. At the same time the provisions of the Labour Code made only minor modifications in the organisation of resolution of labour disputes in the first instance. Still, the main responsibility regarding jurisdiction in those matters lied with the conciliation commissions *(komisje rozjemcze)*[42]. Moreover, there were field appeal commissions *(terenowe komisje odwoławcze do spraw pracy)* established for resolution of disputes in labour matters which were particularly complex in legal terms. As regards the deciding panel of the commissions, it was quite unusual since the „social factor" were professional judges employed in the general courts. In practice, such mechanism had very serious drawbacks. On one hand, the fact that a judge sat in the appeal committee caused erosion of his position in court since the judge was not independent in his jurisdiction, and on the other hand he was not a labour law specialist.

Moreover, the mechanism of resolution of individual labour disputes provided for in the Code appeared to be defective, both in terms of objectivity and pro-

[39] Journal of Laws [Dz.U.] of 1962, No. 11, item 54.

[40] See in particular: *A. Zieliński*, Ochrona roszczeń pracowników w sądowym postępowaniu cywilnym *[Protection of workers' claims in the judicial civil proceedings]*, Warsaw 1965, p. 17 ff.

[41] See the Act of 24.10.1974 on the regional labour and social insurance courts *[ustawa o okręgowych sądach pracy i ubezpieczeń społecznych]* (Journal of Laws [Dz.U.] of 1974, No. 39, item 231). For more see: *F. Rusek, A. Zieliński*, Ustawa o okręgowych sądach pracy i ubezpieczeń społecznych. Komentarz *[The Act on regional labour and social insurance courts. Commentary]*, Warsaw 1977, *passim*.

[42] See: *A. Filcek*, Rozstrzyganie sporów ze stosunku pracy *[Resolution of employment disputes]*, Warsaw 1978, *passim*; *A. Oklejak*, Ochrona roszczeń pracownika w postępowaniu przed komisjami rozjemczymi i odwoławczymi do spraw pracy i sądem pracy i ubezpieczeń społecznych *[Protection of worker's rights in the procedure before conciliation and appeal commissions for labour matters and before labour and social insurance courts]*, ZNUJ 1981, No. 98, p. 58 ff.

fessionalism of the jurisdiction. Therefore, there were suggestions[43] to carry out a thorough reform which were raised following the workers' protests on the Polish Coast in August 1980. They led to the amendment of the Labour Code (KP) and the Code of Civil Procedure (KPC) of 18.8.1985 under which the jurisdiction in labour law matters was conferred on the labour courts. In the years 1985–1990 it was a three-tier system (district labour court *(rejonowy sąd pracy)* – voivodeship labour court *(wojewódzki sąd pracy),* – the Supreme Court *(Sąd Najwyższy)*. In 1990 the appeal courts were established and this led to a four-level hierarchy. Since July 1996 this has been functioning as a three-instance system based on two ordinary legal remedies: an appeal *(apelacja)* and a cassation appeal *(kasacja)*.

In analysing, in historical terms, the mechanisms of resolution of individual labour disputes, it should be borne in mind that since 1980 some of their categories regarding employment in public administration were under the responsibility of the Polish Supreme Administrative Court *(Naczelny Sąd Administracyjny – NSA)*. The case-law of that Court – also in the mentioned category of matters – was subject to the judicial supervision of the Supreme Court *(Sąd Najwyższy – SN)*. Following the introduction in the Constitution of the Republic of Poland (Art. 183 (1) and Art. 184) of a separate jurisdiction[44] of the Supreme Court *(Sąd Najwyższy)* and the Supreme Administrative Court *(Naczelny Sąd Administracyjny)* and establishment in January 2004 of two instances[45] in the administrative court proceedings,[46] in the Polish justice system there now exist two autonomous judicial structures[47] having jurisdiction in employment matters.

[43] See in particular: *W. Siedlecki*, O zmianę systemu rozstrzygania sporów o roszczenia ze stosunku pracy *[Change of the system of resolution of employment disputes]*, NP 1981, No. 4, p. 74 ff.

[44] See: *A. Wasilewski*, Odrębność sądowej kontroli administracji a problem jedności orzecznictwa sądowego *[Separate judicial control of administration and the issue of uniformity of judicial decisions]*, PiP 1999, No. 2, p. 10.

[45] See: *Z. Kmieciak*, Dwuinstancyjność postępowania administracyjnego wobec reformy sądownictwa administracyjnego *[Two-stage administrative procedure and the reform of the system of administrative courts]*, PiP 1998, No. 5, p. 17 ff.

[46] See: *J. Woś*, Reforma sądownictwa administracyjnego – projekty dalekie od ideału *[Reform of administrative courts – projects far from ideal]*, PiP 2001, No. 7, p. 31–33; *R. Hauser*, Założenia reformy sądownictwa administracyjnego *[Lines of reform of administrative courts]*, PiP 1999, No. 12, p. 21; *W. Czerwiński*, Reforma sądownictwa administracyjnego *[Reform of administrative courts]*, Prok. i Pr. 2002, No. 10, p. 90 ff.

[47] The deficiencies regarding the uniformity of case-law resulting from such regulation were pointed out by *A. Wasilewski*, Odrębność… *[Separate…]*, p. 10–11.

§ 2. Organisational status of conciliation commissions

The conciliation commissions *(komisje pojednawcze)* are independent, workplace legal protection bodies[48], appointed to resolve amicably the disputes regarding employees' claims arising out of employment relationship in extrajudicial conciliation procedure *(pozasądowe postępowanie pojednawcze)*. In view of the applicable constitutional provisions, they are not considered judiciary bodies, neither in the personal nor material sense. Their activity is not jurisdictional[49] and does not involve the power to expound the law *(ius dicere)*. They are not legally competent to resolve, on a binding basis, the labour disputes submitted to them.

According to Art. 244 § 1 of the Labour Code (*KP*), the conciliation commissions can only make attempts to settle labour disputes[50] amicably. Without a statutory authorisation their activity cannot transform into resolution of disputes. This is because conciliation involves only non-imperative methods. This means that the decisions taken by the commission in the course of the conciliation procedure are not secured with state coercion.

Members[51] of the conciliation commission perform their functions on a voluntary basis. This means that the mediation activities which they undertake for amicable resolution of a dispute do not fall within the scope of their employment or professional responsibilities. Moreover, they are not required to have legal education completed. Importantly, they fulfil their tasks free of charge. However, they retain the right to remuneration for the time not worked as a result of their participation in the work of the commission.

The conciliation commissions do not form any hierarchical structure. The laws governing the extrajudicial conciliation procedure do not provide for any appeal mechanisms. This is perfectly understandable since there are no imperative decisions regarding rights and obligations of the parties taken in the course of such procedure which would require verification as to the merits. The relations between commissions and courts and other entities functioning in the labour relations are subject to the principle of independence[52]. In prac-

[48] In this context the view presented by *A. Świątkowski* (Komentarz do kodeksu pracy *[Commentary to the Labour Code]*, vol. 2, Cracow 2002, p. 445) seems disputable.

[49] They are not quasi-judicial bodies. See: *J. Piątkowski*, [in:] *K.W. Baran* (ed.), Kodeks pracy. Komentarz *[Labour Code. Commentary]*, Warsaw 2012, p. 1311–1312.

[50] See: *K.W. Baran*, Status prawny komisji pojednawczych po nowelizacji kodeksu pracy z 2.2.1996 roku *[Legal status of conciliation commissions after amendment of the Labour Code of 2.2.1996]*, Studia z zakresu prawa pracy i polityki społecznej 1997, No. 3, p. 327 ff.

[51] See: *J. Brol*, Sądownictwo pracy I *[Labour courts I]*, PiZS 1985, No. 7, p. 17.

[52] See: *K.W. Baran*, Charakter działalności komisji pojednawczych *[Characteristics of the activity of conciliation commissions]*, PS 1987, No. 7, p. 22–23.

tice this means that the commissions are autonomous bodies and are not subordinated to the judicial authorities. They do not enjoy the status of employer's body since they do not perform tasks assigned by the employer. On the contrary, through their activity they correct, in a manner specified by law, the decisions taken by the employer in individual employment matters.

As regards the legal and organizational status of conciliation commissions, their normative relation to the staff at the establishment cannot be overlooked. It seems that personal relations are the most significant aspect. The members of the commission may only be the workers of the organizational unit within which the commission operates. The reason for this is that they best understand the possibilities of amicable resolution of a dispute.

The conciliation commissions may be established in all organisational units which employ workers. This applies also to the entities which are natural persons. These include public and private undertakings, as well as commercial companies, cooperatives and any other organisational structures employing workers. There are no legal obstacles to establishing the conciliation commissions in the local administration offices or government administration offices. However, in the latter case these might operate only in a limited material scope[53].

According to the provisions of Art. 244 § 3 KP, a conciliation commission is appointed jointly by the employer and a workplace trade union organisation. For such appointment to be valid, the employer and the trade union organisation must act jointly. If there is more than one trade union organisation at the establishment, all the trade union organisations are entitled to appoint the commission[54]. If, however, they do not reach an agreement in this regard, in the context of a literal interpretation of Art. 244 § 3 KP, it is sufficient if only one of them gives consent. Arbitral appointment of the commission by the employer in a situation where there is at least one trade union at the establishment means exceeding statutory powers. Eventually, such act should be declared invalid. However, the defective manner of appointment of the commission does not affect the substantive validity of a settlement agreement. Nevertheless, such settlement agreement will not constitute enforceable title within the meaning of the provisions of the Code of Civil Procedure.

If there is no trade union organisation at the establishment concerned, the employer may appoint such commission upon obtainment of a positive opinion from employees[55]. The law does not specify the method for obtainment of

[53] See Art. 38 of the Act on personnel of public offices *(ustawa o pracownikach urzędów państwowych).*

[54] See: *K.W. Baran*, Zbiorowe prawo pracy *[Collective labour law]*, Cracow 2002, p. 189.

[55] See more in: *R. Nadskakulski*, Związkowa reprezentacja zbiorowych praw i interesów (wybrane zagadnienia) *[Trade union representation of collective rights and interests (selected problems)]*, [in:]