

OPEN ACCESS

ISSN 2280-4056

*E-Journal of
International and Comparative*

LABOUR STUDIES

Volume 8, No. 1, January 2019



ADAPT
www.adapt.it
UNIVERSITY PRESS

Scientific Directors

Lauren Appelbaum (USA), Greg Bamber (Australia), Stuart M. Basefsky, (United States), Daria V. Chernyaeva (Russia), Richard Croucher (United Kingdom), Maurizio del Conte (Italy), Tomas Davulis (Lithuania), Tayo Fashoyin (Nigeria), József Hajdu (Hungary), Ann Hodges (USA), Richard Hyman (United Kingdom), Maarten Keune (The Netherlands), Chris Leggett (Australia), Guglielmo Meardi, (United Kingdom), Shinya Ouchi (Japan), Massimo Pilati (Italy), Valeria Pulignano (Belgium), Michael Quinlan (Australia), Juan Raso Delgue (Uruguay), Raúl G. Saco Barrios (Peru), Alfredo Sánchez Castaneda (Mexico), Malcolm Sargeant (United Kingdom), Jean-Michel Servais (Belgium), Silvia Spattini (Italy), Michele Tiraboschi (Italy), Anil Verma (Canada), Stephen A. Woodbury (USA)

Joint Managing Editors

Malcolm Sargeant (Middlesex University, United Kingdom)
Michele Tiraboschi (University of Modena and Reggio Emilia, Italy)

Editorial Board

Lilli Casano (Italy), Emanuele Ferragina (United Kingdom), Antonio Firinu (Italy), Valentina Franca (Slovenia), Erica Howard (United Kingdom), Karl Koch (United Kingdom), Attila Kun (Hungary), Felicity Lamm (New Zealand), Cristina Lincaru (Romania), Nikita Lyutov (Russia), Merle Muda (Estonia), Boaz Munga (Kenya), Peter Norlander (USA), John Opute (UK), Eleonora Peliza (Argentina), Daiva Petrylaite (Lithuania), Aidan Regan (Ireland), Marian Rizov (United Kingdom), Salma Slama (Tunisia), Machilu Zimba (South Africa)

Language Editor

Pietro Manzella (ADAPT Senior Research Fellow)

Book Review Editor

Peter Norlander (Loyola University Chicago)

*E-Journal of
International and Comparative*

LABOUR STUDIES

Volume 8, No. 1 January 2019

@ 2019 ADAPT University Press

Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

The articles and the documents published in the *E-Journal of International and Comparative LABOUR STUDIES* are not copyrighted. The only requirement to make use of them is to cite their source, which should contain the following wording: **@ 2019 ADAPT University Press**.

Benefits Connected with the Development of Professional Qualifications by Employees and the Social Policy of the State on the Example of the Regulations of the Polish Labour Code

Međrala Malgorzata ¹

Abstract

Purpose. The aim of this paper is to illustrate the social character of the statutory benefits connected with the development of professional qualifications in the Polish labour law. This issue is analysed from the perspective of the social policy of the State, social human rights and the interests of employers who bear the financial burdens of such social benefits.

Design/methodology/approach. We examine the role of the development of professional qualifications in the social policy of the State and the legal framework under Polish law.

Findings. It is necessary to notice multiple social aspects of benefits connected with the development of professional qualifications by employees. The issue is also connected with the proportionality of burdening the employers with them.

Research limitations/implications. This research provides a critical debate about the current legal construction of training leaves in Polish law.

Originality/value. The study presents a review of the arguments on social character of the analysed benefits to employees, analyses existing Labour Law literature, jurisprudence and enacted acts.

Paper type. Research paper

Keywords: *professional qualifications, Poland, Labour Code*

¹ Department of Public Law at the Cracow University of Economics (CUE) in Poland, e-mail: medralam@uek.krakow.pl. Paper presented at the conference "Professionalism, Employment Contracts and Collective Bargaining in the context of social innovation" organised by ADAPT, which took place in Bergamo on 30 November and 1 December 2018 in Bergamo (Italy).

1. General remarks

Labour law is always connected with the social policy of the State. It is one of the key fields of its implementation². Supporting the development of employees' professional qualifications is important from the standpoint of the social policy of the State, as its goal is full and productive employment³. Constant improvement of employees' qualifications is a requirement of our times and a standard on the current labour market, which is especially important in the context of international relations and the new technologies that continue emerging in the workplace. Undoubtedly, the prospect of improving one's qualifications at work is a significant motivating factor for employees themselves, whereas for the employer the actions taken in this filed constitute an element of the human-resources policy by motivating the employees and strengthening their attachment to the company, hence creating the company's image.

In this case, private interests of both parties to the employment relationship as well as the public interest collide. On the one hand, there exists a private interest of both employees and employers, and the space for implementing a public interest on the other – an individual's right to education and improving qualifications is every individual's social right (one of the so-called second generation human rights). Improving one's professional qualifications is in the general social interest and bears significance in each country's rational and productive labour market policy. Higher and broad qualifications of employees affect their swift job-to-job mobility and prevent unemployment.

In the case of employees who perform public tasks, *e.g.* public sector employees or the employees working in the field of science and education, the issue of continuous improvement of qualifications is also especially significant from the standpoint of the interest of citizens and of the public interest. Some of the Polish business pragmatics imposes on the employees such duties directly⁴. In the case of employers in the private sector, a duty to improve employees' qualifications is not expressed in Polish law explicitly. However, it can be inferred from employees' general duties as the duty of loyalty or the

² The earlier literature on labour law already tackled the issue of labour law as an instrument of social policy: *cf.* T. Zieliński, *Pravo pracy. Zarys systemu [Labour Law. An Outline of the System]. Part I. Overview*, Warszawa-Kraków 1986, pp. 51 *et seq.* and pp. 264–265; also: W. Szubert, *Zarys prawa pracy [Outline of Labour Law]*, Warszawa 1976, p. 58 *et seq.*

³ According to article 10 § 3 of the Polish labour code, the State pursues a policy with the goal of full productive employment.

⁴ For example, article 6 point 3-3a The Teachers' Charter of 26 January 1982 r. (Dz.U. [Journal of Laws] 2018, item 967).

duty to comply with work-related instructions (article 100 § 1, § 2 point 4 of the labour code).

The considerations in this article are limited to the employees' and employers' duties included in the general regulations of the Polish labour code that apply to the development of professional qualifications and which occur in practice most frequently, in the private sector in particular. The aim of this article is to show the social nature of employee benefits relating to the development of their professional qualifications, to which Polish employers were obliged, and an evaluation of their construction, especially the costs of such benefits in relation to the social human rights and the social policy of the State.

2. The right to the development of professional qualifications as a human right of the second generation

In the international legislations, the right to education and culture is treated as a human right of the second generation, thus one that is included in the broad category of social rights. It is also the case in the Constitution of the Republic of Poland⁵. Many international acts make a reference to such social rights as an individual's right to education, the school system, and culture.

Article 26 item 2 of the Universal Declaration of Human Rights⁶ declares that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Article 27 states about human rights to culture.

The International Covenant on Economic, Social and Cultural Right⁷ declares that technical and vocational guidance and training programmes are instruments of the full right to work for everyone, as one among of the guaranteed social human rights. The human rights to education and culture are mentioned in the articles 13-15 of the Covenant.

The right to the development of employees' qualifications is of interest to the European Union. Article 15 of the Community Charter of Social Rights of Workers⁸ declares the right of every worker to have an access to vocational

⁵ See: article 70 of the Polish Constitution of 2 April 1997 (Dz.U. [Journal of Laws] No. 78, item 483, as amended).

⁶ The Universal Declaration of Human Right proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27 (Dz.U. [Journal of Laws] 1977, No. 38, item 169 attach.).

⁸ Adopted on 9 December 1989 by a declaration of all Member States of the European Community, with the exception of the United Kingdom, established the major principles on which the European labour law model is based and shaped the development of the European social model in the following decade.

training and to benefit therefrom throughout their working life; there may be no discrimination on the grounds of nationality. Also, there is an important role of the competent public authorities, undertakings and two sides of the industry in enabling this human right.

Article 14 § 1 of the Charter of Fundamental Rights of the European Union (CFR)⁹ includes the right to equal access to education and vocational training; it protects the right to compulsory education and the freedom to find educational establishments. The explanations to CFR indicate as a source of the above regulations both constitutional traditions that are common to all Member States, Additional Protocol No. 1 to the European Convention on Human Rights¹⁰ (article 2) as well as the Community Charter of Social Rights of Workers (point 15) and the European Social Rights Charter¹¹ (article 10). Article 53 TFEU¹² forms a legal basis through the EU's implementation of the citizens' freedom of establishment. The issue of mutual recognition of qualifications has significance for the European Union citizens who use the right to freedom of movement for workers and services¹³. Especially significant in this context is the system of recognizing professional qualifications of employees, which makes it possible to perform one's profession acquired in one's country of origin on the territory of another Member State of the European Union¹⁴.

The International Labour Organisation (ILO) Convention No. 14¹⁵ and ILO Recommendation 148¹⁶ of 1974 of the same name define the general standards of paid training leaves¹⁷. The Preamble of the Convention constitutes that paid training leave should be considered as one of the means of meeting the real

⁹ The Charter of Fundamental Rights of the EU of 7 December 2000 brings together in a single document the fundamental rights protected in the EU. It was proclaimed in 2000 and was entered into force by the Treaty of Lisbon in 2009 (OJ of EU C 83 of 30 March 2010).

¹⁰ The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Dz.U. [Journal of Laws] 1993, No. 61, item 284, as amended).

¹¹ The European Social Charter of 18 October 1961, made up in Turyn, ratified partly by Poland in 1997.

¹² The Treaty on the Functioning of the European Union (consolidated version: OJ of EU L 202 of 2012, p. 47).

¹³ M. Szwarc-Kuczer, in: A. Wróbel (ed.), *The Treaty on the Functioning of the European Union, volume I*, Warszawa 2012, p. 895.

¹⁴ This is regulated by Directive 2005/36, amended by Directive 2013/55/EU.

¹⁵ Concerning a paid training leave adopted in Geneva on 24 June 1974 (Dz. U. [Journal of Laws] 1979, No. 16, item 100)

¹⁶ Adopted on 5 June 1974. See: MOP [ILO] No. 148 concerning a paid training leave, <http://www.mop.pl/doc/html/zalecenia/z148.html>.

¹⁷ A. M. Świątkowski, *Międzynarodowe prawo pracy, t. I, Międzynarodowe publiczne prawo pracy. Standardy międzynarodowe, vol. 2* [International labour law, vol. I, International public labour law. International standards, vol. 2], Warszawa 2008, p. 552.

needs of the individual workers in a modern society. This means breaking the link between training and work. The meaning of training refers to the “society” that justifies the perception of the issue as a human right rather than just a worker’s right¹⁸. The institution of the paid training leave in principle is aimed at facilitating one’s acquiring, improving and adjusting their qualifications that are necessary to pursue a profession or occupation in accordance with the requirements resulting from developments in science, technology, and economic and social changes. The aforementioned legal acts are uniform in their definition of the paid training leave. It is a leave an employee is granted for training purposes for a specific period of time during one’s working hours and involves a provision of the appropriate financial benefits. The convention obligations haven’t decisive nature for the member states which have ratified it because the state has a duty to only carry on the policy that aims at supporting paid leaves for workers who wish to improve their professional qualifications and whose development and implementation should take place by way of cooperation between public authorities of member states, organizations of employers and employees, institutions, or governing bodies¹⁹. ILO Convention 140 leaves the manner and sources of financing of training leaves to member states to regulate them in the national law of the member states.

In turn, Article 10 § 3 of the European Social Rights Charter obligates the Member States to facilitate training opportunities for adult workers and the attention was drawn to the need for special facilities to train adult workers alongside the technical advancements and when new tendencies appear on the labour market. This duty is relative in its nature and the assessment of the need to introduce appropriate instruments was allowed at the discretion of the member states.

The aforementioned legal acts allow one to draw a general conclusion that every person who works has the right to develop their professional qualifications. Furthermore, all instruments under labour law as regards facilitating the employee’s professional qualifications have a cross-society dimension. The facilitations within solutions under labour law, in particular, a training leave or a leave of absence during working hours to participate in the educational activities not only aim at the improvement of one’s qualifications (necessary or required at a given employer’s) but at improving everyone’s general qualifications. The aims are, therefore, typically social. Consequently, we can say about the implementation of the rights of a working individual (who performs a gainful work that constitutes the individual’s source of

¹⁸ See: Ł. Pisarczyk, *The obligation of facilitating to employees of development their professional qualifications*, in: *Praca i Zabezpieczenie Społeczne [Work and Social Protection]* 2003, issue 4, p. 29.

¹⁹ A.M. Świątkowski, *Międzynarodowe prawo pracy [International labour law]*, p. 543.

income), rather than private interests of an entrepreneur only. The above also justifies the view that the payment of any benefits to employees by employers is, in this respect, and to at least some extent, social in its nature. At the same time, all said legal acts give member states a lot of flexibility as to the implementation of the facilities in this matter.

3. The development of professional qualifications and the social policy of the State in the system of education

The market and social dimensions of improving one's qualifications also require attention. Developing professional qualifications by an employee is an integral part of the state's policy concerning the labour market. The literature on the subject correctly points out that vocational education increases the worker's ability to adapt not only within a work establishment but also within the entire labour market by making it possible for them to change the type of work they provide, including finding new employment after a loss of the previous one. At the same time, trainings are also attractive for the employers as they prevent a constant rotation of staff, bind the employee to the company and increase competitiveness²⁰.

The ILO report *Global Employment Agenda*²¹ indicates that one of the priorities of the global employment policy is the ability to find oneself in the employment market and to adjust to its changing conditions. The goals are to be achieved by the actions promoting continuing education as an instrument that allows an individual to prepare for employment at present and in the future.²²

The development of professional qualifications leads, therefore, to the increase of the employee's adaptability within the work establishment (so-called functional flexibility)²³ and on the labour market. In this way, the an employee

²⁰ See: A. Ludera-Ruszel, *Podnoszenie kwalifikacji zawodowych przez pracowników na gruncie kodeksu pracy oraz wybranych ustaw szczególnych* [The development of employees' qualifications in the Polish labour code and some selected statutes], Warszawa 2016, p. 274 *et seq.*

²¹ Presented during the Global Forum on labour which took place in Geneva in November 2001.

²² See: I. Boruta, *Strategie zatrudnienia organizacji międzynarodowych UE* [Employment Strategies of EU International Organizations], MOP, OECD, Warszawa 2002, pp. 23–25.

²³ Functional flexibility is based on the assumption of comprehensive preparation of employees who, if necessary, can perform other work or work on a different position, which in consequence makes it possible to avoid redundancies – see: Ł. Pisarczyk, *Przeobrażenia prawa pracy i jego funkcja ochronna* [Amendments to labour law and its protective function], in: B. Wagner, E. Hofmańska (eds.) *Studia prawnicze. Rozprawy i materiały* [Legal Studies. Dissertations and materials], Krakow 2010, p. 29.

is better protected from the undesired unemployment after the end (for various reasons) of the current employment²⁴.

In the era of the digital society and globalization, knowledge has become a universal substitute, a precious commodity comparable to a capital²⁵. Contrary to the industrial economy, in the knowledge economy the main resource – a product of strategic value are the people, their skills, the know-how and the experience that they have²⁶. The performance of the transnational businesses and corporations in the global market of products and services depends, to a large extent, on the level of education of their workers. Continuous training of the employees and their flexibility in adjusting and changing their qualifications according to the needs of the economy is, still, a significant instrument of regulating the supply and demand on the labour market. On the one hand, it contributes to the reduction of the unemployment levels among those who do not have a job, as it offers the possibility to retrain and acquire the missing professional qualifications. On the other hand, it prevents this phenomenon from occurring in the future among the persons who are professionally active and who, while being under-qualified, could lose their employment²⁷. Ultimately, the investment in the employee training indirectly contributes to the economic development of the country.

4. The employee's right to the development of professional qualifications in the regulations of the Polish Labour Code

The employee's right to the development of their professional qualifications is implemented under the regulations of the Polish labour code. In accordance

²⁴ Functional flexibility is based on the assumption of comprehensive preparation of employees who, if necessary, can perform other work or work on a different position, which in consequence makes it possible to avoid redundancies – see: Ł. Pisarczyk, *Przeobrażenia prawa pracy i jego funkcja ochronna [Amendments to labour law and its protective function]* p. 29.

²⁵ Analyst A. Toffler believes that 'knowledge is an ultimate substitute for all other resources of every organization. Thanks to knowledge, modern enterprises achieve greatest successes and people have careers; see: J. Podlowska, *Jakość kształcenia zawodowego – priorytetem w Europie [Quality professional education – a priority in Europe]* Meritum 2006, No. 2(2), p. 22.

²⁶ See: E. Skrzypek, *Wiedza jako czynnik sukcesu w nowej gospodarce [Knowledge as a success factor in the new economy]*, in: E. Skrzypek, A. Sokół (eds.), *Zarządzanie kapitałem ludzkim w gospodarce opartej na wiedzy [Human resources management in the knowledge-based economy]*, Warszawa 2009, p. 139; K. Kuźniar, *Stan i perspektywy rozwoju społeczeństwa informacyjnego w Polsce w świetle dążeń do gospodarki opartej na wiedzy [State and perspectives in the developing of information society in Poland in the light of the pursuit to knowledge-base society]*, in: *Zarządzanie kapitałem ludzkim w gospodarce opartej na wiedzy [Human resources management in the knowledge-based economy]*, Warszawa 2009, p. 3.

²⁷ I. Ostoj, *Wpływ wykształcenia na kształtowanie się bezrobocia [Effect of education on unemployment]*, in: *Nierówności Społeczne a Wzrost Gospodarczy [Social Inequalities and economic growth]*, 2005, No. 6, pp. 303, 306-307.

with Article 17 thereof, employers are obligated to enable employees to improve their professional qualifications. The duty to facilitate the development of the employees' professional qualifications in the above-mentioned article of the labour code is qualified as one of the fundamental principles of labour law (Chapter II of the labour code)²⁸. The duty is repeated in article 94 point 6 thereof, which defines the fundamental duties of the employer. The counterpart to the obligation of the employer is the right of the employee to use the facilities enabling the development of their professional qualifications.

In this context a question arises, whether and when the employers' obligations to facilitate the development of employees' professional qualifications (arising from art. 17 and art. 94 point 6 of the labour code) are indeed demanding in their nature. As judicial decisions point out, the concept of "facilitating" cannot be interpreted as an absolute duty to organize, conduct or pay for the training chosen by an employee. Despite the imperative wording of the regulation, the employer, in principle, does have a duty to create conditions for obtaining specific qualifications²⁹, including the duty to bear the costs of the employees' education. In fact, the only duty that employer has towards all his employees is related to the regulations on health and safety at work (articles 237²–237⁵ of the labour code)³⁰ and the employed adolescents³¹. The duty described under art. 94 point 6 of the labour code does not mean that an employee may demand a specific support from the employer in developing his/her professional qualifications, for instance, organizing and conducting a computer training by the employer. The employee's right is not recognised as a claim which makes it considerably more difficult to pursue. The employer does not have a duty to train employees; however, the employer has the duty to enable them to improve their qualifications if they wish to do so. It is stressed that it is the employee who should be primarily interested in improving their

²⁸ This rule is stated in Chapter II labour code: Fundamental Principles of Labour Law.

²⁹ Supreme Court Judgment resolution of 10 March 2005, II PZP 2/05; see also: Supreme Court Judgment of 25 May 2000, I PKN 657/99, OSNAPiUS 2001, No. 22, item 660, with gloss by E. Engel-Babska, OSP 2002, No. 6, item 89.

³⁰ Pursuant to article 237³ § 1 of the Polish Labour code no employee shall be allowed to perform work without the qualifications and skills required to perform that work, and without the sufficient knowledge of the provisions on and principles of occupational health and safety. An employer shall provide induction training in occupational health and safety before an employee is allowed to perform any work, and shall organise periodic training in health and safety at work. The above trainings shall be conducted during working hours and at the employer's expense.

³¹ Improving their qualifications is the employer's primary duty. See: e.g. E. Maniewska, commentary to art. 17 labour code, in: K. Jaśkowski, E. Maniewska, *Kodeks pracy. Komentarz*, [Labour code. Commentary], LEX 2012. Cf.: regulations of section 9 of the Polish labour code.

qualifications, thereby showing their own initiative and engagement in the process, whereas the employer has a duty to make this easier for the employee³². The employer is obligated to facilitate the employee's gaining qualifications provided that this will not be in a significant conflict with the work the employee is entrusted with. And yet, even in this case, the possibility of terminating a contract of employment without notice (article 55 § 1¹ labour code) should be considered as doubtful. Judicial decisions indicate³³ that creating a positive atmosphere for learning and avoiding unjustified refusals for any form of education chosen by an employee also means that the employer is enabling employees to develop their professional qualifications. The employee, on the other hand, will be able to use the claims arising from the violation of the principle of non-discrimination if they are able to prove that, as regards creating a possibility to develop professional qualifications, they were not treated equally with other employees. In accordance with article 18^{3a} § 1 of the Polish labour code, employees should be treated equally in relation to the promotion opportunities and access to training in order to improve professional qualifications.

On the other hand, it cannot be disregarded that the legislator clearly specified the employers' duty to facilitate their employee's professional qualifications development as set forth in art. 17 and art. 94 point 6 of the labour code. Therefore, within their duty, the employer should implement at least all the organizational solutions to enable self-developing employees to participate in the trainings, as far as it does not collide with their duties and work organization within the company. In my opinion, the claiming nature of this duty could be possible, however hard to prove, e.g. in case when the employer was able, without significant organizational and staff-related obstacles, to organize the employee's work in a different way or to enable him/her to work additional hours as a compensation for the leave taken for training, on the condition that the employee him/herself proposes such a solution and shows interest in implementing it.

In practice, under Polish labour law, most frequently the duty to improve one's professional qualifications takes on a concrete demanding character if the employer's duties are regulated by the normative internal regulations at a work establishment's, e.g. collective agreements or rules and regulations, in an employment contract, or in code-regulated agreements on improving qualifications concluded between an employee and the employer (art. 103¹-103⁶

³² Supreme Court Judgment of 25 May 2000, I PKN 657/99, OSNAPiUS 2001, No. 22, item 660.

³³ See: rationale of the Supreme Court Judgment of 10 March 2005, II PZP 2/05, OSNP 2005, No. 16, item 240.

labour code). Only in such cases, the employee may demand, with no additional stipulations, that the obligations imposed on the employer and concerning the latter's facilitating the professional development of employees can be demanded.

Articles 103¹–103⁶ of the labour code made the form of the employer's duty to facilitate improvement of professional qualifications more specific. As follows from the articles, the development of professional qualifications is understood as acquiring and implementing the knowledge and skills by the employee, by the employer's initiative or by his consent (art. 103¹ § 1). In other cases, we can speak of an employee acquiring or updating their knowledge according to other principles (art. 103⁶ of the labour code). Furthermore, only in the case of his improving professional qualifications by the employer's consent or initiative, the employee is entitled to benefits relating thereto, *i.e.* training leave and release from the whole or part of working day for the time needed to come on time to the obligatory classes as well as for the time of their duration (art. 103¹ § 1 of the labour code³⁴). Furthermore, the employer may grant additional benefits to an employee who improves their professional qualifications; in particular, he may cover education fees, travel, handbooks and accommodation (art. 103³ labour code). In such a case, the additional benefits are subject to tax exemption³⁵. The employer's granting obligatory statutory benefits in the form of a paid leave and training leave as well as the introduction of a tax exemption for additional benefits that employers pay in connection with improving professional qualifications is an expression of the legislator's promoting developing professional qualifications by employees. At the same time, the legislator clearly settled that it is the employer who is the entity which decides about the use of this form of training by the employee.

³⁴ Pursuant to article 103¹ of the Polish labour code, improving professional qualifications is understood as acquiring and implementing the knowledge and skills by the employee by the employer's initiative or by his consent.

The employee improving his professional qualifications is entitled to:

- 1) training leave,
- 2) a leave of absence from the whole or part of working day for the time needed to come on time to obligatory classes as well as for the time of their duration.

The employee retains the right for remuneration for the time of training leave as well as for the time of leave of absence for the whole or part of working day.

³⁵ See: article 21 paragraph 1 point 90 of the act of 26 July 1991 on personal income tax (Dz.U. [Journal of Laws] 2018, item 1509), pursuant to which the value of benefits awarded under separate regulations and granted by the employer for improving one's professional qualifications is tax exempt, save the remuneration received for the time of leave of absence from the whole or part of working day and for the time of training leave.

5. The Social benefits connected with the development of professional qualifications under Polish Labour Code

Article 103¹ § 1 of the Polish labour code, which introduces the definition of improving professional qualifications, makes no distinction as to the kind of the employee qualifications. Therefore, these can be both qualifications that are necessary for one to perform their current work and general qualifications as well. It is the employer that shall decide whether or not a given form of improving one's qualification shall be subject to paid benefits under the labour code.

The Polish legislator also decided that whenever employee improves his qualifications with the consent of the employer or on the employer's initiative, thus in the meaning of the articles 103¹ -103⁵ of the labour code, the employer is obligated under the act to bear the financial costs connected with the work of a social character that are not strictly a remuneration for work, *i.e.* the costs of remuneration for training leave and remuneration for a leave of absence for the entire working day or any part thereof, as required to attend mandatory training on time, and covering the time of that training. The employer can release himself from the costs because they were imposed upon him by the legislator. The duty to cover the costs has, therefore, a social aspect.

The length of a training leave will be dependent on a kind of examinations with which a given form of training ends. In accordance with article 103² § 1 of the Polish labour code, the training leave referred to in article 103¹ § 2 point 1 to which an employee is entitled shall be as follows:

- 1) 6 days - for an employee taking external exams,
- 2) 6 days - for an employee taking secondary school final exam,
- 3) 6 days - for an employee taking an exam confirming professional qualifications,
- 4) 21 days within the last year of the studies in a tertiary education institution - to write a diploma thesis and to take the final exam.

Training leave is granted on the employee's working days according to the agreed working time schedule. The employee is entitled to training leave in the amount allowed in the act and only in the cases of the indicated exams whereas a release from work in an unlimited amount in so far as it corresponds with the purpose, *i.e.* exclusively for obligatory classes arising from the training schedule.

The question could thus be raised whether the adopted construction and its social and labour market aspects are justified.

Firstly, it should be noted that the regulations in the code are constructed in such a way that they do not provide for a possibility to refund the remuneration paid for the period of the leave taken by the employee to

improve his/her professional qualifications, even in the case where the employee has failed to comply with the duty of loyalty. Although the employer may, under a separate so-called loyalty agreement (article 103⁴ of the labour code), obligate the employee to remain employed upon completion of the training leave, but in no case longer than 3 years (article 103⁵ point 2 of the labour code). However, in the event of the employee violating this provision, the employer cannot seek reimbursement of the costs of the statutory benefits paid to the employee for the training. The duty to work for a certain time period upon completion of the training that was financed by the employer based on a loyalty agreement can refer *de facto* to so-called additional allowances (additional to the ones arising from law) only, such as the payment of expenses related to education, travel, books and accommodation *etc.* In no case, however, does the employee have to work off the costs of statutory social benefits, *i.e.* not the cost of remuneration for training leave and the cost of remuneration for a leave of absence to attend mandatory training on time and covering the time of that training.

Despite the fact that improving professional qualifications in the meaning of the labour code (under articles 103¹ – 103⁶ of the labour code), thereby the ensuing training leave and a leave of absence, takes place at present only on the employer's initiative or with the employer's consent, thus being *de facto* an element of additional work-related contract, arguments exist that speak for it that both benefits paid by the employer do have a social nature. For such a nature of the benefits also speak the general social purposes connected with the implementation of social rights of an individual as regards the access to education as well as their role in the social policy of the state. It should be pointed out, that covering the costs of the employees' absence for the time of trainings or the training leaves by the employer, is not a form of remuneration for employees work performed under article 78 of the labour code³⁶, but it constitutes other social work-related benefit. Section III³⁷ and article 77¹ of the labour code clearly differentiate the remuneration for work and other work-related benefits. Other benefits of a social character, the employer is obligated to pay, include, *e.g.*, remuneration for the time of the leave, pension or retirement severance pays, death benefits or temporary incapacity benefits. Their common feature is lack of equivalency, non-reciprocity, obligatory and

³⁶ Pursuant to article 78 § 1 of the Polish labour code, remuneration for work is calculated in such a way that it corresponds in particular to the type of work performed and the qualifications required to perform it, as well as reflecting the amount and the quality of the work performed.

³⁷ The section is titled "Remuneration for work and other benefits."

statutory character, and social purpose³⁸. The criteria for establishing remuneration for work under article 78 of the labour code do not apply to them. They are similar to the social benefits in the meaning of a social policy³⁹. Social policy indicates that special benefits are the measures to fulfil the needs of individuals and families and that are not connected to their own work. The right to social benefits is one of the fundamental human rights⁴⁰.

Furthermore, it is necessary to answer the question on reciprocity of both statutory benefits connected with improving professional qualifications. The possibility of concluding a loyalty agreement with an employee in connection with the additional benefits covering the cost of a training undoubtedly speaks for taking into consideration the business interest of the employer and introduces an element of reciprocity. However, this reciprocity is not reflected in the costs of the granted training leave and a leave of absence because they are not subject to reimbursement⁴¹. In case when the employee does not fulfil the conditions of the loyalty agreement and does not work for agreed time after completing the training, only additional allowances qualify the employer for reimbursement (article 103³ of labour code). The introduction of the condition of the employers' consent or initiatives in this respect defends the legislator against the allegation of this proportionate encumbering of the employers with social costs but, at the same time, it does not exclude the social axiology in the social nature of the discussed benefits.

Additionally, it should be noted that the conclusion of a loyalty agreement is not obligatory. If it is not concluded, we can say that there are only statutory benefits that are facultative in their nature as they are contingent upon the employer's consent or initiative. Even if, however, an agreement on loyalty is concluded (article 103 of the labour code) then we pay an employee for the loyalty and we do so from a statutory level rather than from a contractual one.

³⁸ The literature remarks that the term 'social benefits' should be understood as all cash, tangible goods and services which serve to satisfy the individual needs of an individual and their family. A distinguishing feature of those benefits from among the benefits connected with labour is that they do not constitute remuneration for work because they are acquired on a non-equivalent basis. Cf. B. Rysz-Kowalczyk, *Leksykon polityki społecznej [Lexicon of social policy]*, Warszawa 2002, p. 208. See also: A. Sobczyk, *Konstytucyjne podstawy zakładowej działalności socjalnej [Constitutional foundations of social activities of the employer]*, in: J. Stelina, A. Wypych-Żywicka (eds.), *Człowiek, obywatel, pracownik. Studia z zakresu prawa [Man, citizen, employee. Studies in law]*, Vol. XVII, Gdańsk 2007, p. 224.

³⁹ I elaborate on social benefits in labour law in my new monograph titled *Spoleczny charakter świadczeń w polskim prawie pracy [Social nature of work-related benefits in Polish labour law]*, Warszawa 2019.

⁴⁰ J. Wojnowski (ed.), *Wielka Encyklopedia PWN [Great PWN Encyclopaedia]*, Warszawa 2001.

⁴¹ See: articles 103⁴ -103⁵ of the labour code.

I believe that the significant shortcoming of the current regulations of the labour code in regard to the social construct of the benefits the employer grants to the employees is lack of their mandatory feature arising from law, even in the narrowest extent. The employee in principle has no claim to get a leave of absence or training leave if the employer does not express consent or take the initiative concerning the employee's improving his/her professional qualifications. Only under a rule deriving from the code which enables employees to develop their professional qualifications under article 17 and the duty arising from article 94 point 6 of the labour code, the employee has the right to demand facilities of an organizational character like changing his working schedule or giving him an unpaid leave of absence, which can be qualified as nonmonetary benefits of a social nature⁴². Even development of the employee's knowledge or skills on terms and conditions other than those defined in articles 103¹ to 103⁵ of labour code shall be defined in an agreement between the employer and the employee, especially the term and the length of an unpaid training leave or a leave of absence shall be defined in a such agreement (article 103⁶ of labour code). Claims of cash social benefits are, in principle, optional.

Furthermore, it should also be noted that in the case of some regulations connected with improving qualification by certain professional groups (researchers, defence attorneys, legal counsels), trainings that are fully paid by the employer were provided for regardless of the profile of the employer's activity. In my opinion, such regulations require special attention.

One of the examples can be the remuneration for the period required prior to the defence of the doctoral thesis. In accordance with article 196 of the act of 20 July 2018 on higher education and science⁴³, an employee who is not a member of the academic staff or a researcher, upon his/her own request, is entitled to:

- 1) a 28-day leave of absence to write a doctoral dissertation or to prepare to the defence procedure of the thesis that is granted them within the deadline agreed with the employer, the days being the employee's working days in the meaning of separate regulations; and
- 2) leave of absence from work for the defence of the doctoral thesis.

The employee retains the right to remuneration for the time of the training leave and the leave of absence. The remuneration is paid according to the same rules as the remuneration for the time of statutory annual leave.

⁴² M. Skapski, *Funkcje prawnej regulacji podnoszenia kwalifikacji zawodowych pracowników i zakres ich realizacji w Polsce* [The functions of legal regulations on improving professional qualifications and the scope of their implementation in Poland], in: L. Florek, Ł. Pisarczyk, *Współczesne problemy prawa pracy i ubezpieczeń społecznych* [Contemporary issues in labour law and social insurance], Warszawa 2011, p. 252.

⁴³ Dz.U. [Journal of Laws] 2018. item 1668.

The provisions of article 196 of the law on higher education and science are specific regulations (*lex specialis*) in relations to labour code regulations of training leaves (*lex generalis*) and subsequent regulations (*lex posterior*) and are at the same time more advantageous for the employees; thus, they exclude the application of the provisions of the labour code that regulate training leave. It applies the conflict-of-laws rule: *lex speciali derogat legi generali*, which means that more specific and detailed law must be applied before the more general law.

A doctoral leave is an entitlement that every employee who meets the requirements has a right to be granted, regardless of the employer's profile of activity and of the employer's size. It is not relevant whether the employer expressed consent to the doctoral studies or whether the employee entered into an agreement that defined the mutual rights and obligations of the parties to the development of professional qualifications.

Similar entitlements are provided for legal professions. In accordance with article 34 item 3 of the act of 6 July 1982 on legal counsels⁴⁴, an employee has a right to take a leave of absence that is 30 calendar days long and is paid in 80% of one's remuneration, to prepare for the legal counsel's exam. This right can be exercised only once. Furthermore, the employee is entitled to a leave of absence while keeping the right to remuneration to take an entry exam to the profession of a legal counsel. A similar solution is provided for in article 78c of the law on advocates of 26 May 1982.⁴⁵

Therefore, the legislator starts from the assumption that work and activities of an individual have a special social significance. The costs of their benefits are mandatory by the act and, regardless of the type of their activity, should be fully paid by entities that are employers. Furthermore, the legislator does not provide for any exclusion for smaller employers for whom this type of costs can be a significant burden. The payments have a construction that is typical

⁴⁴ Dz.U. [Journal of Laws] 2017, item 1870. Pursuant to this regulation, an employee who is on the list of trainee legal counsels who obtained the employer's consent to attend legal counsel training is entitled to be released from providing work to attend mandatory classes while keeping the right to remuneration. An employee who is on the list of trainee legal counsels who did not obtain the employer's consent to attend legal counsel training is entitled to be released from providing work to attend mandatory classes without keeping the right to remuneration. An employee is entitled to paid leave of 80% of his remuneration and lasting 30 calendar days to prepare to legal counsel exam. He can use the entitlement only once. An employee is entitled to a leave of absence with the right to remuneration to take entry and legal counsel exams.

⁴⁵Dz.U. [Journal of Laws] 2018, item 1184. Pursuant to this regulation, an employee is entitled to paid leave with 80% of his remuneration and lasting 30 calendar days to prepare of the advocate exam. He can use the entitlement only once. An employee is entitled to a leave of absence with the right to remuneration to take entry and advocate exams.

for social benefits (mandatory, statutory, and nonreciprocal) that are made within an employment relationship.

The above solutions provoke questions about the validity of the current construction of an employee's training leave and employee's leave of absence for trainings in the Polish labour law. Imposing on the employer the duty to grant a training leave in connection with the employee's undergraduate or graduate studies in the amount of as many as 21 days can seem as an excessive burden and discourage the employers from showing initiative or expressing consent to the employees in this regard. In practice, financing such studies can appear as too expensive for the employers from the standpoint of the costs and organization; therefore, employers can approach the studies with particular caution. It has an adverse effect on the young people who, more often than not, work and carry on extramural studies at the same time. Doubtful is also the need to introduce into legislation a training leave to study for extramural exams or for the secondary school final exams in the meaning of separate regulations and which are *de facto* hardly used. In the current labour market realities, the majority of people who start their professional lives already have a high school education. Additionally, disputes exist whether the notion of a "professional examination" means every kind of a training that ends in an exam or just an exam so defined in the meaning of separate laws.

Furthermore, at present the Polish legislator does not provide for a possibility to pay only additional benefits to the employee arising from article 103³ of Polish labour code, like fees for education⁴⁶, without the employee's taking a training leave. Moreover, at present the Polish legislator does not provide for a possibility to grant the employee a training leave that is shorter than the statutory one. Such benefits should be treated as the employee's additional income under the employment relationship.⁴⁷

In my opinion, due to the fact that statutory benefits are accompanied by the social axiology and also due to the significant connection to the social policy of

⁴⁶ The payment alone of the costs without granting a training leave and a leave to attend classes provided for in the labour code would be controversial anyway in the context of article 103⁶ of the labour code, which states that an employee who acquires or implements the knowledge and skills according to the principles other than the ones determined in articles 103¹ to 103⁵ can be granted:

- 1) release from the whole or part of working day without retaining the right to remuneration,
- 2) unpaid leave

- in the amount set up in an agreement concluded between the employer and an employee.

Thus, the article does not mention a possibility to pay the studies fees if the employee acquires his knowledge or skills on terms and conditions other than those defined in articles 103¹ to 103⁵ of the labour code.

⁴⁷ *A contrario* to art. 21 item 1 point 90 of the act on personal income tax.

the State, their current construction, for these reasons among others, is not entirely correct and requires a change toward giving the statutory duty of the employer to improve professional qualifications of the employees a more realistic dimension. I believe that this could take place in particular by the introduction of a statutory obligatory paid training leave or paid leave of absence to improve one's professional qualifications every year, thereby the statutory duty to pay social benefits therefor. In such a case, a leave or leave of absence should be reduced, *e.g.* a few days a year for the forms of professional training indicated by the legislator and organized by qualified institutions, and that they would be general and on demand.

In the case of smaller employers, it remains to be considered *de lege ferenda* subsidizing such costs by the State. Such a solution would fully correspond with the construction of social benefits for this purpose and the social axiology of the discussed benefits. The norms of article 17 or article 94 point 6 of the labour code could also take a more realistic dimension. It should be noted that, under the aforementioned special regulations applicable to some groups of employees working in field of science and in the legal field, such mandatory benefits were provided for, with their scope being controversial especially in the case of smaller employers.

6. Conclusions

The development of the employee's qualifications can be considered both in the context of private employees and employers as well as in the context of the general social interest. The possibility of improving employees' professional qualifications constitutes an additional motivating element within the employment relationship. Frequently, the improvement of employees' professional qualifications can also rest in the interest of the employers. The purpose of this entitlement is to make it possible for employees to improve their own competences and skills to the widest extent possible and, consequently, their full professional development. The entitlements in this respect constitute at the same time the emanation of the right to education as second-generation human rights. The duties imposed on the employers to facilitate the improvement of professional qualifications by employees include a public-law element, namely the continuing education of the employees contributes to the growth in the competitiveness of the labour market and its intensified growth. Therefore, we can speak of the State's implementing a social policy.

A significant shortcoming of the current solutions in the Polish labour code is the adopted by the legislator construction of the employee's training leave and employee's leave of absence for working time for training purposes. As shown

above, a number of arguments exist for the fact that such benefits have a social character; so, they have a construction that is close to social benefits in the meaning of social policy.

At the same time, the conducted analysis leads to the conclusion that the current construction of paid training leaves and paid leaves of absence for training purposes in the Polish labour code is controversial. In particular, their dependence on the consent or initiative by the employer that has to be given each time (hence lack of statutory training leaves on demand) stirs doubts as it makes these solutions typically business-like, putting aside their social character, which in turn is noticed in numerous regulations of the international law. On the other hand, the mandatory combination of the employer's consent or initiative with a fairly high amount of statutory leave for training, which is seen most frequently in practice in the case of preparing oneself for writing diploma theses and taking diploma exams, can cause unwillingness on the part of the employers to finance this form of improving professional qualifications by employees, which nowadays involve high costs of social benefits imposed by the legislator. In my opinion, the leaves should be of a general nature to at least a minimum degree but decidedly smaller than the one imposed by the legislator. One's combining extramural studies with providing work is a frequent phenomenon, especially among younger people. In such situations, the leaves that are general and on demand could play a significant social role in the education path among these employees.

For these reasons and *de lege ferenda*, it seems justified to introduce a mandatory general annual training leave (optionally to be used together with the release from the duty to provide work) for each employee to apply professional improvement that is specific for adult employees, for instance a few days. Furthermore, legitimate is to limit a combined amount of training leaves and releasing from the duty to provide work granted annually to an employee for training purposes⁴⁸. Such a solution would not preclude a possibility to give additional leaves for training or other benefits under a contract with the employer. Such a solution would also fully reflect the social construction of the benefits without going beyond the principle of proportionality of burdening the employers with social costs.

⁴⁸ Such a solution is provided for in, for instance, German law.

Adapt International Network



ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

For more information about the E-journal and to submit a paper, please send a mail to LS@adapt.it.

