

Job guarantees scrutinised by the Supreme Court of Poland

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Guarantees of future employment, eagerly sought by Polish trade unions, are detrimental to the employer but also costly to consumers and the State Treasury. Granting job guarantees may also result in civil or criminal liability on the part of the employer or its managers.

There is no legal definition of job guarantees, nor are they covered by generally applicable provisions of labour law. They developed, in practice, during the process of privatisation of state enterprises in Poland following the fall of communism in 1989. Generally speaking, job guarantees are understood to mean a commitment not to terminate employment over a specific time in the future (for several years, a decade or more, or sometimes even for several decades).

Such commitments are agreed between the investor acquiring control of an enterprise undergoing privatisation and the trade unions operating at the enterprise, as part of a “social

package” annexed to the privatisation agreement. They take various forms. They may, for example, involve a prohibition on terminating employment or modifying the terms of employment for reasons not attributable to the employee, or a prohibition on discharging any staff regardless of the reason. When exceptions are negotiated, they typically involve “disciplinary” firings (based on employee misconduct) or negotiated termination (by agreement of the parties). If a job guarantee included in the social package is violated, the employee is typically entitled to receive compensation equal to his or her salary from the date of termination through the end of the job guarantee period.

Job guarantees suffer various fates going forward. Sometimes the guarantees agreed with the investor are assumed by the privatised company as the employer’s own obligation, and then implemented in collective bargaining agreements and employment rules. Then they become a source of employment rights. Other times they are binding only on the basis of the social package as such. For a long time, the Polish Supreme Court did not take a consistent position on whether a social package was a source of employment rights and thus could serve as the basis for employees to assert claims directly against the company employing them. Finally the view prevailed that commitments of this type by the investor are a source of employment rights and are binding on the employer.

In their most restrictive form, however, long-term job guarantees thwart restructuring and other changes that are necessary for the economic success of the company. They also act as a disincentive for efficient and productive employment. With their jobs secure, staff may do the minimum amount of work they can get away with, not bothering to display any commitment to the company. This can lead to a decline in discipline, as well as frustration and dissatisfaction among staff who are not covered by the guarantees, effectively poisoning the whole employment relationship. Work is no longer performed to the employer’s expectations, and it is up to the employee to decide how efficiently he or she wants to work. Low productivity and the employer’s dissatisfaction with the results of the work are not considered sufficient grounds to fire the employee for misconduct, and in practice

are not enough to overcome the job guarantee. The alternative is to proceed with restructuring, but at the risk of claims for damages for violating the job guarantees.

For these reasons, job guarantees should generally be regarded as harmful. If the company is in poor financial condition, job guarantees make it necessary to maintain hidden unemployment, or give rise to claims for heavy damages, and in any case they prevent the employer from pursuing a healthy HR policy. They have no rational justification for the employer or for society. The cost of job guarantees is borne by the enterprise, by other staff, and finally by consumers. The State Treasury stands at the end of the chain of losses, because the investor typically factors the cost of job guarantees into the price it is willing to pay when it buys a stake in the enterprise from the state.

Job guarantees have also come under criticism from the Supreme Court. In the context of specific cases seeking high amounts of damages for violation of job guarantees, the court has found such claims to be inconsistent with the socioeconomic purpose of the law or contrary to public policy, or has permitted damages to be cut to a more reasonable amount. The court has also found that the amount of damages sought was disproportionate when compared to the actual loss, the average wage, the minimum wage, and the unemployment rate. The court has also upheld the fundamental principle of employment law that any employment contract may be terminated upon notice, so long as the employer complies with the statutory notice periods, protective periods, and compensation due for improper termination. Finally, the court has pointed out that the cost of such damages is ultimately passed on to the company's customers.

In its rulings, the Supreme Court focuses primarily on the employee's claims, and it questions those rather than the underlying obligation as such, which it generally regards as valid. The court does, however, admit that such an obligation may be questioned under applicable law, including the constitutional principle of proportionality (Polish Constitution Art. 2). This approach appears to be fully justified, because

if the claims are contrary to public policy then the obligation itself is questionable. Otherwise, there would be a situation in which a valid obligation cannot be enforced because it is based on an invalid claim. This construction would be incoherent from a systemic point of view. For the same reason, such obligations, however established, must be subject to review in terms of compliance with applicable provisions of law, including principles of social policy, if they are regulated contractually.

Apart from employee claims, it is important to bear in mind potential civil or criminal liability of employers or individuals acting for them. This threat appears particularly realistic in light of the criminal proceeding brought recently, commented on in the media, against individuals who signed a termination notice issued by Energa-Operator SA to an employee protected by a job guarantee, which resulted in payment of damages to the employee on the order of a million zloty. The managers were charged with negligently causing a substantial loss to the company, which generally also entails a duty to make up the loss. While in this case the loss arose from termination of the employee's contract, such liability could also be justified by the mere incurrance of such an obligation. Employing a person for many years without any specific job that needs to be performed by the person is equally detrimental to the company, but in that case the loss might be harder to prove because it would be spread out over time in the form of salary for unnecessary work or the pretence of working.

The position of the Supreme Court and of law enforcement authorities should give employers and their managers pause and encourage them to exercise restraint when making concessions in the face of demands by trade unions to establish unreasonably long job guarantees. This could also be an effective argument in negotiations with the unions. The threat of a labour dispute or strike should not outweigh the duty to act in the best interest of the company and to comply with the law. Incurring or carrying out long-term job guarantees is thus not just a financial burden for the company, but in practice may also result in civil or criminal liability for the employer or its managers.

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