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A fixed-term contract as a threat to the rights of temporary workers

Umowa na czas określony jako zagrożenie dla praw pracowników tymczasowych

Summary

Temporary work was regulated in the Act of 9 July 2003 on the Employment of Temporary Workers (Journal of Laws of 2003, No. 166, item 1608) allowing to hire a temporary worker based on a fixed-term employment contract and a civil law contract. According to the provisions of labour law, these persons are employees and on this basis "have the right to employee privileges" and "social security benefits". The problem analyzed by the author concerns the issue of concluding one-day fixed-term contracts with temporary employees. From the point of view of the provisions of the above-mentioned Act on the Employment of Temporary Workers and the Labour Code, there are no contraindications to concluding such short-term contracts. In the event of illness, the temporary worker does not acquire, for example, the right to sickness benefit or sickness benefit itself.

Keywords: temporary work, temporary worker, employment contract, flexicurity, fixed-term contract, sickness benefit

Streszczenie

Praca tymczasowa została uregulowana w Ustawie z dnia 9 lipca 2003 r. o zatrudnianiu pracowników tymczasowych (Dz.U. z 2003 r., Nr 166, poz. 1608). Pozwala na zatrudnienie pracownika tymczasowego na podstawie umowy o pracę na czas określony oraz umowy cywilnoprawnej. Z punktu widzenia podstawy dwóch kategorii uprawnień pracowniczych osoby pracujące na podstawie umowy zlecenia nie są pracownikami w rozumieniu prawa pracy, a tym samym ich prawa pracownicze w zakresie szeroko rozumianego ubezpieczenia społecznego są minimalne. Inaczej sytuacja wygląda w przypadku pracowników tymczasowych zatrudnionych na czas określony. Zgodnie z przepisami prawa pracy osoby te są pracownikami i na tej podstawie mają prawo do przywilejów pracowniczych oraz świadczeń z ubezpieczenia społecznego. Analizowany problem dotyczy kwestii zawierania jednodniowych umów na czas określony z pracownikami tymczasowymi. Z punktu widzenia przepisów ww. ustawy oraz Kodeksu pracy nie ma przeciwwskazań do zawierania takich umów krótkoterminowych.

Słowa kluczowe: praca tymczasowa, pracownik tymczasowy, umowa o pracę, flexicurity, umowa na czas określony, wynagrodzenie chorobowe

Introduction

The transformations taking place in the economy have forced the Polish labor market to become more flexible to enable the quick adjustment of the amount of paid work to the current rapidly changing demand. The rapid development of technology and new technologies had a direct impact on the creation of employment relationships. An example of such an impact on labor law was computerization and the development of digital connectivity (Spytek-Bandurska, Szalko-Skoczny 2008, 11).

The increasingly common access to computers and the internet has even distinguished the so-called telework. Technological progress created new jobs requiring very high qualifications; it also resulted in the need to shape an employment relationship adapted to its nature and in a different way than the adopted one. Competition in the market and the increasingly difficult conditions for employers to act due to it imposed the necessity to reduce costs. For companies, the most important thing was to achieve more and more profits, and they achieved this goal by continually reducing expenses to stay on the market. In addition to introducing new, more efficient production methods and effective personnel management, the search was also for cheaper and more tailored employment forms. To avoid excessive costs associated with the traditional employment relationship, they had to focus on atypical forms of employment. Deregulation causes, at the same time, increasing the flexibility of the labor market, its segmentation. Unusual forms of employment effectively reduce unemployment (Makowski 2016, 80). Their crucial effect is the individualization of work and its better adjustment to employers and employees' needs, better time management, and the possibility of reconciling work with other obligations resulting from individuals' personal family situation (Wojnowska 2007, 9). I notice a huge demand for temporary agency employees during the COVID-19 pandemic, who also supply industries where employers were most affected by financial losses and were forced to lay off workers. Often, dismissed employees are looking for temporary work to provide themselves and their families with a new income source. Temporary work was regulated in the Act of July 9, 2003, on temporary workers' employment (Journal of Laws 2003 No. 166 item 1608)[1]. It allows for the employment of a temporary worker basis of a fixed-term employment contract and based on civil law contract. From the point of base of two categories of employees' rights, persons working based on a mandate contract are not employees within the meaning of labor law, and thus their employee rights and rights in the field of broadly understood social insurance are minimal. The situation is different for temporary agency employees

[1] Report: temporary work in the times of COVID-19, https://hrappka.pl/blog/rekrutacja/branza-pracy-tymczasowej-a-covid-19; Temporary work industry and COVID-19, https://hrappka.pl/blog/rekrutacja/branza-pracy-tymczasowej-a-covid-19 [accessed 12.03.2021].

working under a fixed-term contract. According to the labor law provisions, these persons are employees and on this basis „are entitled to employee privileges" and „social security benefits". The author's problem concerns the issue of concluding 1-day fixed-term contracts with temporary workers. From the point of view of the provisions of those mentioned above temporary workers' employment Act and the Labor Code, there are no contraindications for concluding such short-term contracts. In sickness of the temporary employee, he will not acquire the right, for example, to sick pay or sickness benefit. Previously in 2013, I indicated that the provision of work by temporary agency employees based on a fixed-term contract, creating a legal and employment status, generates unequal treatment and discrimination of temporary agency employees based on employment (Kobroń 2013, 117–191). In the light of the above comments, after A. Dral, it should be concluded that the tendency to reduce the standards of protection of the durability of the employment relationship (protective measures: the author's own note) or even to repeal them, under the catchwords of deregulation and liberalization of labor law, remains in contradiction to making the labor market more flexible and making the labor market more flexible (Dral 2009, 509).

Flexibility does not exclude the protective function of labor law

As part of this presentation of the problem already indicated in the article's title, several comments should be made that make up the process of making the labor market more flexible and, consequently, the weakening of protection standards for temporary agency employees. The flexicurity policy is defined by three components: 1. flexible and secure contractual arrangements, 2. effective active labor market policy to strengthen the security of transformation, 3. modern social security, which also contributes to good mobility on the labor market (Bekker, Wilthagen 2008, 68). The concept of flexicurity supports flexibility (Wilthagen, Tros 2004, 166–186). Flexicurity assumes flexible and safe contractual arrangements, effective active labor market policy to strengthen the security of transformation, modern social security, which also contribute to good mobility on the labor market (Bekker, Wilthagen 2008/el). The concept of flexicurity rightly assumes that a high level of social protection is a fundamental element in the labor market's functioning, which is characterized by a high degree of flexibility. One should agree with M. Latos-Miłkowska (2009) 's thesis, who claims that employment based on temporary work is sometimes the result of labor market instability (Latos-Miłkowska 2009, 117–122). It is therefore necessary to maintain a balance between flexibility and social protection, it is a necessary canon for the conduct of this policy (Dral 2009, 511; Philips Eamets 2007). This is quite an optimistic assumption, even though employment flexibility, i.e. a quantitative approach, is a feature of the modern labor market. Flexibility is also the ability to adjust

the number of employees employed by "employers of employees to changing conditions: economic situation, profitability, real wages, labor productivity, caused by technical and technological progress or caused by social policy" (Kryńska 2007, 1; Bąk 2006, 3–4; Patulski 2007, 207). The ubiquitous flexibility of the labor market also means the possibility of employing temporary or temporary workers. From the point of view of the presented issue, we are interested in the possibility of employment by a temporary employment agency based on a fixed-term contract. Apart from the civil law contract, the Act lists the second basis for establishing an employment relationship with a person performing gainful work for the user employer is a fixed-term contract (Article 7 of the Act on Temporary Employment) (Reda 2012, 33–38). A fixed-term employment contract concluded with a temporary agency employee is a fixed-term contract concluded to perform work for the user employer on his behalf and under his direction. An interesting remark was indicated by W. Sanetra, who emphasized that from the point of view of the content of these contracts and their actual meaning, they should be considered as fixed-term employment contracts of a separate type, and the employment relationships that arise on their basis belong to employment relationships of a different type (Sanetra 2009, 334).

A fixed-term contract and its "atypical"

The provisions of the Act on the Employment of Temporary Workers are influenced by Poland's obligations resulting from the ratified Convention No. 181 of the International Labor Organization and the applicable EU directive. Besides, mention should be made of the ILO Convention, which obliges the legislator to provide temporary workers with several employment rights, ranging from minimum wage, working time, safe and hygienic working conditions, statutory social security benefits, access to training, compensation in the event of accident or illness, insolvency compensation and protection of employees' claims, protection of parental benefits. The Polish Act on Temporary Workers excludes the temporary worker from concluding an employment contract for an indefinite period, although it is worth noting that the directive on temporary agency work (Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary work OJ L 327, 5.12.2008) does not explicitly specify the type of employment contract that should be concluded between the parties in the case of temporary work (Łapiński 2011, 196). Other conclusions can be drawn from the preamble to directive 2008/104/EC (point 18), namely that the directive allows the extension of protection standards to temporary agency employees. According to point 18, increasing the minimum protection of temporary agency workers should be accompanied by a review of restrictions and prohibitions that may have been imposed on temporary work. The Act on Temporary Workers introduces

several provisions that should be considered a manifestation of protection standards in the context of labor law. It is unacceptable to employ temporary workers for particularly hazardous work within the meaning of the Labor Code provisions (Article 8 (1)). The user employer under Art. 9 sec. 2a provides the temporary employee with health and safety training, work clothes and footwear, personal protective equipment, as well as drinks and preventive meals. It also carries out and informs about occupational risk. The employer (user), following the obligations set out in the Labor Code, the user is the party to the employment relationship, ensuring the proper organization of work for the employee (Art. 14). Under article 15, the principle of equal treatment of permanent and temporary workers must apply – working and employment conditions for those and, following art. 16 temporary employee concerning whom the user employer has breached the principle of equal treatment, in the scope of the conditions specified in art. 15, has the right to claim compensation from the temporary employment agency in the amount specified in the provisions of the Labor Code regarding the compensation due to the employee from the employer for breach of the principle of equal treatment of employees in employment. The right to leave of 2 days is ensured for each month at the disposal of the user employer, and in the event of not using it, the employee receives a cash equivalent from the temporary employment agency (article 17 (1) and (3)). Temporary and permanent workers use the user's employer's social facilities on equal terms (Art. 22). All the above rights of temporary agency employees mean that the protection standards provided for in the Act on Temporary Workers are consistent with those specified, for example, in the Labor Code (Kobroń 2013, 177; Pańków 2012, 65; and also: Raczkowski 2013; Krzyśków 2010). The apparent equality in terms of protection standards is not visible in employee entitlements, it seems to correspond to the atypical standards of a fixed-term employment contract. At this point, I do not pose a question regarding, for example, stabilization in terms of timely employment, because the literature provides us with studies in this area, to which I refer. I share the thesis that an employment contract for an indefinite period fulfills the primary protective function of labor law, as it fully implements the rights and obligations of employees and employers. In the case of choosing between a fixed-term employment contract and a civil law contract – the choice seems to favor the first option. It is characterized by a stronger bond between the parties to the employment relationship (Suknarowska-Drzewiecka 2006, 1; Wagner 1980, 35–39; Stelina 2015, 45; Jaśkowski 2015, 3). The fixed-term employment contract's primary purpose in question is to be bound by the contract only until a specific date, which is convenient for both parties and depends on their will (Florek 2015, 80), and significantly weakens this purpose by introducing shorter notice periods for temporary workers. However, it should be indicated that this goal is also met when the temporary employment agency concludes an employment contract with an employee for a specified period, e.g. for one day. This purpose will no longer

correspond with the need to employ an employee during the vacation period or to supplement staff during a period of greater demand), or the employee himself (e.g., a student taking up work during the vacation period). Finally, it is not intended to stabilize the workforce of the user employer. To sum up, a fixed-term employment contract is the most fully applicable and at the same time fulfills its functions where it is justified by the actual nature of the employment and not by minimizing social security burdens.

Sick pay

The protection of these „atypical" employees employed under a fixed-term contract, for example, for 1 day, provides for employee protection standards and excludes social security standards. Pursuant to Art. 92 of the Act of June 26, 1974, the Labor Code (Journal of Laws 1974 No. 24 item 141), the employee is entitled to remuneration for the first 33 days of incapacity for work (and in the case of an employee who has reached 50 years of age – the first 14 days) for the reasons set out in § 1 under the same conditions and in the same amount (except as provided for in § 3 point 1) as the sickness benefit. At the same time, based on the Act of 25 June 1999 on the money benefits from social insurance in case of illness and maternity (Journal Of Laws of 1999 No. 60, item 636), the employee is not entitled to remuneration in cases where he is not entitled to a sickness benefit (§ 3 points 2), i.e. when: – the period of the first 30 days of employment has not yet expired (article 4 (1) (1) of the Act of 25 June 1999), unless the incapacity for work was caused by an accident on the way to work or from work (article 4 (3) (2) of the Act of 25 June 1999) or the employee has a prior 10-year period of compulsory sickness insurance (article 4 (3) (3) of the Act of 25 June 1999); – incapacity for work occurred during unpaid leave, childcare leave, temporary arrest or imprisonment (article 12 (2) of the Act of 25 June 1999 on – was dismissed from work due to suspicion of carrying the germs of an infectious disease, if employee did not undertake other work proposed to him by the employer, not forbidden to such persons, corresponding to his professional qualifications or which he may perform after prior training (article 14 of the Labor Code); – the inability to work was caused as a result of an intentional crime or offense committed by this employee (article 15 (1) of the Act of 25 June 1999), whereby this circumstance must be confirmed by a final court decision (article 15 (2) of the Act of 25 June 1999); – the inability to work was caused by alcohol abuse; then the remuneration is not due for the period of the first 5 days of incapacity (art. 16 of the Act of 25 June 1999); – during the period of the dismissal, the employee performs other gainful work, or when he uses the leave in a manner inconsistent with the purpose of the dismissal (article 17 (1) of the Act of 25 June 1999) or the medical certificate has been forged (article 17 (2) of the Act of 25 June 1999.

The purpose and function of sick pay and sickness benefit are identical, despite each of these benefits' different legal nature. However, one can get the impression that transferring the obligation to pay sick pay to the employer has only one purpose. It is about relieving the sickness and accident insurance fund (Prusinowski 2020, art. 92). W. Koczur rightly observes that the conditions for acquiring the right to sickness allowance and the amount of this benefit concerning temporary agency employees are determined, as in other categories of employees and persons insured under the general social insurance system, by the same provisions. They have in mind art. 4 of the Act, it should be pointed out that the periods of this insurance include the previous periods of sickness insurance, if the break between them did not exceed 30 days, or was caused by parental leave, unpaid leave or active military service by a lay soldier (Koczur 2011, 219). Notwithstanding, this applies to temporary agency workers who work under a fixed-term employment contract which is entered into and terminated on the same day.

Conclusions

Employment-based on fixed-term employment contracts has long occupied an essential place in the scientific discussion and doctrine of labor law. Statistical data show that for several years Poland has been a European Union country with the largest share of fixed-term contracts in total employment, although the COVID-19 pandemic slowed down this process (https://polskieforumhr.pl/wp-content/uploads/2020/04/RYNEK-AGENCJI-EMPLOYMENT-2019.pdf). Fixed-term contracts play a significant role in making the Polish labor market more flexible (Bednarski 2012, 36). As Z. Hajn points out, the use of fixed-term contracts is considered to be one of the four essential elements of labor market flexibility, next to the flexibility of working time, wages and labor supply. Such activities are conducive to lowering enterprises' operating costs and increasing their competitiveness (Hajn 2004, 8). Making the labor market more flexible results in replacing employment contracts with civil law contracts or with the use of e.g. digital platforms. Fixed-term contracts are also such a method, which can generally be used as tools for abuses on the labor market, in particular by temporary employment agencies (Wrocławska 2017, 31 and the jurisprudence cited therein: justification of the judgment of the Supreme Court of 25.10.2007, II PK 49/07, OSNAPiUS 2008/21–22, item 317. Cf. e.g. the justification of the judgment of the Supreme Court of September 7, 2005, II PK 294/04, LEX No. 188092, or the judgment of the Supreme Court of February 25, 2009, II PK 186/08, OSNP 2010/19–20, item 230. The judgment of the Supreme Court of 5 October 2012, I PK 79/12, OSNP 2013/15–16, item 180. The judgment of the Supreme Court of February 25, 2009, II PK 186/08, OSNP 2010/19–20, item 230). The labor law

literature writes about aspects of work, about the protective function of labor law, but forgets about the reduced protection standards for temporary workers' social insurance in temporary work. It should be accepted that a poorly functioning social security system is a prerequisite for a low degree of employment protection, leading to increased job insecurity.

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