

Rozdział 8

Semi-dependent self-employment under conditions characteristic of the employment relationship

Samozatrudnienie częściowo zależne w warunkach charakterystycznych dla stosunku pracy

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Abstract

The expansion of non-standard forms of work-self-employment or work through online platforms has created competition between the traditional contract labor model and the non-standard form, which also creates an employee-employer relationship. This article aims to suggest a different, complementary rather than antagonistic relationship between employment and labor law. However, I state that it is only a prelude to the polemic that is about to begin. In this article, I examine the legal construction of the relationship between traditional contract employment and semi-independent self-employment, which is based on the conceptualization of these two forms of labor as separate and at the same time having in common the labor entitlements derived from the principle of decent work.

Keywords: concept of worker, economically dependent workers, dependent employment self-employee, self-employed worker, “ABC test”

Streszczenie

Rozpowszechnienie się niestandardowych form pracy samozatrudnienia czy pracy za pośrednictwem platform internetowych spowodowało wystąpienie konkurencji pomiędzy tradycyjnym modelem pracy na podstawie umowy o pracę a niestandardową formą, która również tworzy relację na linii pracownik – pracodawca. Niniejszy rozdział ma na celu zasugerowanie odmiennej, komplementarnej, a nie antagonistycznej relacji między prawem zatrudnienia a prawem pracy. Jest on jednak jedynie wstępem do polemiki, która niebawem się rozpocznie. W opracowaniu autorka bada

konstrukcję prawną relacji między tradycyjnym zatrudnieniem na podstawie umowy o pracę a samozatrudnieniem półzależnym, która opiera się na konceptualizacji tych dwóch form pracy jako odrębnych, a równocześnie mających cechy wspólne, którymi są uprawnienia pracownicze wywodzące się z zasady godnej pracy.

Słowa kluczowe: pracownik, pracownicy ekonomicznie zależni, samozatrudniony pracownik zależny, samozatrudniony, „standard ABC”

Introductory remarks

The latest OECD Employment report is rich in policy guidance to combat so-called “false self-employment”.¹ For example, the report calls on countries to clarify existing regulations to reduce the so-called “gray zone” between self-employment and employment and, if necessary, consider strengthening the rights and benefits of those self-employed workers who remain in the “gray zone” despite these efforts. Stresses the importance of providing workers with adequate labor law protections, regardless of their employment status. It calls on governments to address the bogus self-employment that employers sometimes use to avoid taxes and regulations, minimize the “gray zone” between salaried work and self-employment, and extend rights to workers left in this zone. According to the report, adjusting and extending social protection is essential to ensure better coverage for workers in non-standard forms of employment. In some countries, non-standard workers are 40–50% less likely to receive any form of income support while away from work than regular workers. Eligibility for benefits should be transferred between jobs, and targeted social protection measures should be complemented by more universal and unconditional support. Also, the European Trade Union Confederation’s (also as: ETUC)² latest 2019 report³ examines a number of regulatory, normative and conceptual dimensions relating to self-employment, with a particular focus on the economically dependent self-employed. Already the second report is a response to the first commissioned by the ETUC Confederation in 2017 following a call for legal expertise on “New trade union strategies for new forms of employment.” Both reports indicate the need to seek a new legal conceptual framework for analyzing the normative and

1 *Rapid action needed for people to meet challenges of changing world of work*, n.d., <https://www.oecd.org/newsroom/rapid-action-needed-for-people-to-meet-challenges-of-changing-world-of-work.htm> (accessed: 12.07.2023).

2 European Trade Union Confederation.

3 *New Trade Union Strategies for new forms from employment 2019*, n.d., <https://www.etuc.pdf> (accessed: 12.07.2023).

regulatory challenges arising from the proliferation of “new forms of employment” and, in particular, the development of forms of work that, because they are classified as autonomous or quasi-autonomous, fall outside the protective scope – typical of the traditional understanding of labor law i.e. the protective function of labor law.⁴ The main context of the report is a new challenge or set of challenges for the world of labor arising from the so-called “digital economy” on the one hand, and on the other hand from the opportunities arising from the initiative of inclusion of labor protection on the self-employed partially dependent (or for the purpose of this study, the name of partially dependent workers can be used).

Over the years, labor law has traditionally focused on regulating the model employment relationship embodied in a typical employment contract, although in recent decades the scope of its interest has partially expanded to include some emerging forms of so-called atypical employment relationships, such as self-employment, part-time, fixed-term or temporary work.⁵ The conceptualization of semi-independent self-employment based on dependence on one or two contractors is problematic because it leads to the risk of conflict between self-employment and the traditional employment relationship and the associated labor privileges and uncertainty about their scope, with the result that the level of protection of the employees themselves may suffer. This requires breaking down the dichotomy and providing a continuum of protection for different forms of work, both under labor and employment law.⁶ In this regard, the basic principles and standards of international law, which are universal in nature and thus go beyond the basic labor pattern based on the traditional employment relationship, can be helpful.

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- 4 A. Sobczyk, *Różnicowanie praw (ochrony) zatrudnionych – wybrane kryteria i ich ocena*, [in:] M. Bosak (ed.), *Funkcja ochronna prawa pracy a wyzwania współczesności*, Warszawa 2014, p. 1; T. Liszcz, *Ogólna charakterystyka prawa pracy*, [in:] R. Borek-Buchajczuk, A. Kosut, J. Ligaj, T. Liszcz, M.R. Łysiak, W. Perdeus (eds.), *Zarys prawa pracy*, Lublin 2005, p. 22.
 - 5 European Parliament, *Study on economically dependent work/ parasubordinate (quasi-subordinate) work by Professor Adalberto Perulli*, 2003, http://europa.eu.int/comm/employment_social/labour_law/docs/parasubordination_report_en.pdf (accessed: 12.07.2023); A. Perulli, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, [in:] G. Casale (ed.), *The Employment Relationship: A Comparative Overview*, Geneva 2011.
 - 6 V. De Stefano, *Labour is not a Technology – Reasserting the Declaration of Philadelphia in times of platform-work and gig-economy*, “IUSLabor” 2017, vol. 1, pp. 11–12; M.A. Cherry, A. Aloisi, “Dependent Contractors” in the Gig Economy: A Comparative Approach, “American University Law Review” 2017, vol. 66, issue 3, article 1, <http://digitalcommons.wcl.american.edu/aulr/vol66/iss3/1> (accessed: 12.07.2023).

Implication of fundamental labor principles in international law for semi-independent self-employment

The International Labor Organization recognizes four fundamental principles of labor law, namely freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in employment and choice of occupation. These principles are considered universal and applicable to all employed workers and are enshrined in the Organization's eight fundamental conventions.⁷ The 1998 ILO Declaration on Fundamental Principles and Rights at Work calls on all ILO member states to respect and promote these principles and rights, whether or not they have ratified the relevant conventions.⁸ The problem arises when an employee (worker) wants to exercise these rights, which are, as it were, divided between workers under traditional labor law and other workers providing work in non-standard forms of employment.⁹ When it comes to freedom of association, for example, the practical possibility of association: either it does not exist but is illusory, especially due to the unpreparedness of trade unions for this task.¹⁰ The protection of semi-independent self-employed workers under ILO standards suffers a weakening when confronted with actual working conditions and rules, which should be taken into account when assessing the scope of protection for semi-independent self-employed workers. Not all semi-independent self-employed will represent common goals or even needs. Admittedly, the UN Committee on Economic, Social and Cultural Rights and the Human Rights

7 Forced Labor Convention (No. 29), Forced Labor Abolition Convention (No. 105), Equal Remuneration Convention (No. 100), Discrimination (Occupation) Convention (No. 111), Minimum Age Convention (No. 138), Worst Forms of Child Labor Convention (No. 182), Freedom of Association and Protection of the Right to Organized Convention (No. 87), Right to Organize and Collective Bargaining Convention (No. 98).

8 *ILO Declaration on Fundamental Principles and Rights at Work*, adopted in 1998 and revised in 2022, <https://www.ilo.org/declaration/lang--en/index.htm> (accessed: 12.07.2023).

9 The ILO has affirmed a broad understanding of the concept of a worker, the June 2, 2015 Constitutional Court ruling and the 2018 amendments to the Law on Trade Unions have expanded the subjective scope of trade union association. In addition, Poland has a minimum wage law that sets a minimum monthly wage and a minimum hourly rate, rozporządzenie Rady Ministrów z dnia 15 września 2020 r. w sprawie wysokości minimalnego wynagrodzenia za pracę oraz wysokości minimalnej stawki godzinowej w 2021, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200001596/O/D20201596.pdf> (accessed: 12.07.2023).

10 In Poland, the first trade union of the self-employed was registered on September 10, 2021 (Nationwide Trade Union of the Self-Employed "wBREw"); see more: <https://wbrew.org> (accessed: 12.07.2023).

Committee issued a joint statement in 2019 on “Freedom of Association, including the right to associate and join trade unions,” in which the right to strike was also explicitly stated.¹¹ As T. Novitz points out, the declarations of the ILO and other international organizations, indicate that all “employed persons” are entitled to labor rights guaranteed by international conventions and agreements and thus go beyond what was formally listed as “core labor standards” to include other forms of decent work.¹² As already indicated this form of work, is not conducive to the desire to unionize, some workers will feel resentment toward unions and some may not want to exercise any collective rights.¹³ Permanent ties with one or two contractors enable them to monitor and discourage semi-independent self-employed workers from forms of activism including the freedom to associate non-unionized.¹⁴

In addition to these specific disadvantages of using this form of work, as mentioned above, workers in the semi-independent self-employed economy may also face some problems with regard to the basic principles and rights at work that affect non-standard workers. The international literature indicates that difficulties related to the protection of non-standard forms of labor are plentiful, but in this article I will limit myself to one,¹⁵ namely the one related to the misclassification of the employment status of semi-dependent self-employed workers, for status will set the standards of protection. ILO supervisory bodies have expressed their concerns on various issues, though particularly on the aspect of the exclusion of the

- 11 *Freedom of association, including the right to form and join trade unions, Joint statement by the Committee on Economic, Social and Cultural Rights and the Committee on Human Rights*, October 23, 2019, E/C.12/2019/3-CCPR/C/2019/1, https://www.ohchr.org/Documents/HR-Bodies/CESCR_CCPR_Joint_STM.pdf (accessed: 12.07.2023).
- 12 T. Novitz, *The Potential for International Regulation of Gig Economy Issues*, “King’s Law Journal” 2020, p. 7.
- 13 V. De Stefano, *Non-standard work and limits on freedom of association: A human-rights based approach*, “Industrial Law Journal” 2017, no. 46(2), p. 185.
- 14 T. Kerikmäe, A. Kajander, *Gig economy workers in the European Union: towards changing their legal classification*, “Revista CIDOB d’Afers Internacionals” 2022, issue 131, pp. 117–139.
- 15 International Labour Office, *Global Employment Trends for Youth 2012*, 2012, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_180976.pdf (accessed: 12.07.2023); International Labour Office, *World Employment and Social Outlook 2015: The Changing Nature of Jobs*, 2015, https://www.ilo.org/global/research/global-reports/weso/2015-changing-nature-of-jobs/WCMS_368626/lang--en/index.htm (accessed: 12.07.2023); International Labour Office, *Non-standard Employment around the World: Understanding challenges, shaping prospects*, 2016, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf (accessed: 12.07.2023); International Labour Office, *Women in Non-standard Employment*, INWORK Issue Brief 9, 2016, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_556160.pdf (accessed: 12.07.2023); International Labour Office, *Statistics on Work Relationships. 20th International Conference of Labour Statisticians*, 2018, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_644596.pdf (accessed: 12.07.2023).

self-employed from protection by labor law. As a result, self-employed workers or misclassified semi-independent self-employed workers may be excluded or effectively restricted from basic rights afforded to standard workers.¹⁶ The issue of employment status is all the more important from the point of view of worker protection, since not only minimum wage issues are at stake, but also access to basic labor rights and thus human rights.

Labor law and the distinction between employees and the self-employed

The legislations of many European Union countries are beginning to introduce into their legal orders a distinction between semi-dependent self-employed and autonomous self-employed, e.g. Spain, Italy, Germany, Austria have introduced an additional intermediate category of semi-dependent workers.¹⁷

Eurofund's latest 2021 report¹⁸ points out the current risks faced by semi-independent self-employed workers. Some are characterized by low income and high financial insecurity. For these groups, an adequate safety net is needed to mitigate the risks associated with self-employment. An important step forward would be access to benefits in the event of unemployment, work injury and illness.

In particular, the problem of blurring the line between self-employment and gainful employment based on the traditional labor model was pointed out. Many self-employed people, especially those who depend on a single client, find themselves in a situation that resembles that of employees in terms of economic dependence and autonomy. This raises the question of whether the criteria for determining employment status should be clarified, or whether a hybrid status of economically dependent self-employment is needed. Different approaches have been adopted by member states, and the jury is out on which one yields the best results. What is clear is that ambiguity must be reduced in classifying workers and opportunities for abuse of self-employment status must be removed. These issues underscore the importance of distinguishing between different types of self-employment when developing policies, whether to encourage self-employment or to better protect the self-employed.

¹⁶ Ibidem.

¹⁷ G. Casale, *The employment relationship: a comparative Overview*, Geneva 2011, p. 19.

¹⁸ Eurofound, *Exploring self-employment in the European Union*, 2017, <https://www.eurofound.europa.eu/pl/publications/report/2017/exploring-self-employment-in-the-european-union> (accessed: 12.07.2023).

This traditional division of tasks between labor law and employment law may not be adequate in an era of dynamic development of different work patterns. In this regard, I share the view of E. Torpey and A. Hogan (although in the context of “gig” workers) that perhaps the semi-independent self-employed do not fit into any of the traditional forms of labor provision. And just as the economy’s new work patterns have modernized the labor market, so too should the systems that protect that work, and thus the rights of their workers, evolve. In the union, an emerging new category of workers will fill the gap created by the aforementioned new work patterns, the so-called “dependent workers,” which will also include the semi-independent self-employed.¹⁹

In Poland, for example, self-employment is not defined in detail in the country’s labor laws. The concept of employee is based on the traditional division into employees in the reasoning of Article 2 of the Labor Code:²⁰ if a person meets the specific criteria and indicators used to determine who is an “employee” or “worker,” labor law assumes almost by default that this person is not an employee.²¹ The concept of self-employment covers a very broad and heterogeneous group of self-employed. It can include both self-employed individuals who sell only their personal work (often to a single client or a limited number of clients or customers), but also self-employed individuals who offer highly capitalized services. The former group is not characterized in any way in international law in this EU law.

The concept of “worker” in EU labor law derives from CJEU jurisprudence in the area of free movement. Terms such as “worker,” or “employment contract” or “employment relationship,” are indeed mentioned in both primary and secondary instruments of EU law, but there is still no single consistent definition of worker. The CJEU has identified a number of criteria for identifying employment contracts or subordinate relationships in civilian employment.²² Among the relevant features of an employment relationship are economic risk, working time, integration into the workplace or subordination, which are part of the common core of criteria for identifying subordinate employment.²³

19 E. Torpey, A. Hogan, *Working in a gig economy*, Washington 2016, <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm/> (accessed: 12.07.2023).

20 Act of June 26, 1974, Labor Code, Journal of Laws 1974 No. 24 item 141.

21 Art. 2: “An employee is a person employed under an employment contract, appointment, election, nomination or cooperative employment contract”.

22 E.g., the concept of “worker” mentioned in the treaties in only two provisions of the TFEU – Article 45(1) guaranteeing the freedom of movement of persons and Article 157(1) of the normation committing to the principle of equal treatment – regardless of gender – in matters relating to the payment of wages of employed persons.

23 A.C.L. Davies, *EU Labour Law*, Cheltenham 2012, p. 174.

“ABC Standard”

The CJEU first reconceptualized the concept of employee in the *Lawrie-Blum* case,²⁴ which took the lead in developing a pan-European concept of employee applicable to most or all EU labor law instruments, anchoring it in the concept of subordination. The Court, over the course of similar cases, has identified three criteria by which to determine whether a contractual relationship is an employment relationship. First, it pointed out that an essential feature of an employment relationship is the performance of a service for and under the direction of another person. The second criterion is the element of remuneration, with the Court requiring that the work be performed under the direction of another person for which remuneration is received. The Court has interpreted this requirement broadly in the context of free movement, accepting, for example, that “the mere fact that a person receives a share of the remuneration, and that his remuneration is calculated collectively, cannot deprive that person of the status of a worker”. The third requirement is that the employee engage in “effective and real activity, excluding activity on such a small scale that it can be considered purely marginal and ancillary”.²⁵ These criteria seem insufficient given the dynamic development of new work patterns.

As M. Wouters rightly points out, the concept of subordination and control in the context of semi-dependent self-employment is not relevant to the rights of free movement enjoyed by EU citizens, since even the self-employed can exercise these freedoms under the freedom of establishment and freedom to provide services. However, transferring the concept of semi-dependent self-employment to the context of EU labor law, control and subordination can have very clear exclusionary consequences, since, as a rule, the self-employed do not receive many rights under labor law.²⁶ The development of new work patterns including through online platforms raises interesting questions, not only in the EU but also in other jurisdictions, about the criteria that would enable courts and public authorities to distinguish between employees and employment test persons as to whether the alleged employer has the right to control the manner and means of achieving the intended result.

Looking beyond the EU legal framework, it is worth looking at the US ABC standard for determining whether a worker is an independent contractor or an employee under the traditional labor standard. In *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018),²⁷ the California Court of Appeal for the

²⁴ C-66/85.

²⁵ See also Case 53/81, *Levin*, and Case C-337/97, *Meeusen*.

²⁶ M. Wouters, *The classification of employment relationships in Belgium*, “European Labour Law Journal” 2019, vol. 10, issue 3, p. 202.

²⁷ *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903, 2018, <https://northerndistrictpracticeprogram.org/wp-content/uploads/2018/09/Dynamex.pdf> (accessed: 12.07.2023).

Fourth Appellate District adopted the “ABC standard” to assist in determining the existence of an employment relationship. The court ruled that the employing entity bears the burden of “establishing that the worker is an independent contractor” and therefore “is not to be included within the scope of the wage order.” The employing entity must meet this burden, and must establish each of the three factors, in what is known as the “ABC test” A) The individual (employee) is not subject to the direction of the service hirer when performing his work; B) The individual performs work that has not been designated by the hiring company; C) The individual is engaged in an independent commercial activity.²⁸ The court indicated that the test should begin by examining factors B and C first, before moving on to the more evidentially challenging A element if necessary. According to this test, unless the employing entity meets each of these three factors, the employee is considered an employee. In other words, if the employing entity does not meet any of these factors, that is enough to show that the worker is an employee. The court noted that it felt that this test would minimize the disadvantages of multi-factor tests and “provide greater transparency and consistency and fewer opportunities for manipulation.”

Going further, the California Supreme Court on January 14, 2021, in *Vazquez v. Jan-Pro Franchising Int’l, Inc.*,²⁹ ruled that the “ABC standard” is retroactive. The court relied on its holding that the classification of independent contractors under California’s wage orders was an unregulated law until 2018. The court determined that considerations of fairness and policy warranted retroactive application of the test because potential application could deprive many workers of the intended protections of wage orders.³⁰

Concluding remarks

In my opinion, the ABC standard is more logical due to the fact that if a service recipient is not subject to the direction of another service provider during the performance of his work, it means that he does all the work himself and is a true

28 M. Knez, *Worker Misclassification: How the Dynamex Operations West, Inc. v. Superior Court Case Can Affect You As An Employer*, n.d., <https://knezlaw.com/worker-misclassification-how-the-dynamex-operations-west-inc-v-superior-court-case-can-affect-you-as-an-employer/> (accessed: 12.07.2023).

29 *Vasquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal. 5th 944.

30 D. McCoy, E. Turcios Yader, *Supreme Court Rules Dynamex ABC Test is Retroactive*, 2021, <https://www.jdsupra.com/legalnews/supreme-court-rules-dynamex-abc-test-is-6826984/> (accessed: 12.07.2023).

entrepreneur. Regarding the existence of economic dependence as a factor relevant to qualifying the distinction between “employees” and “self-employed,” the Dynamex ruling makes this task easier and indicates that the second and third purely economic criteria must be examined, i.e. B) the employee performs work outside the normal scope of the employing entity’s business; and C) the employee is engaged in an independent trade, profession or business of the same nature in the work performed for the employing entity in order to be considered self-employed. To clarify the matter, the California Court of Appeal in the Dynamex case seems to recognize two main characteristics of a true self-employed person that may be central to the test, i.e., having the business structure of a true employer and having employees. Of course, the line between the two is very slight. The ABC test may prove helpful in determining the intermediate category i.e. semi-independent self-employment and granting this category of workers certain labor rights. However, it seems that the test itself does not create an intermediate category, but equally fulfills its purpose.

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