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EMPLOYMENT FLEXIBILITY IN TIMES OF CRISIS

Abstract

This article addresses the issue of legitimacy and legal consequences of the introduction of various forms of flexible employment in times of crisis, above all focusing on issues related to the flexibility of the workplace (telework, remote work), as well as those of flexible working time (part-time work, modifications of working time systems and schedules). Bearing in mind the specifics of the crisis, the following legal constructions will also be analyzed: term employment contracts, non-employee civil law work, work in cottage industry, self-employment, temporary work, casual work, on-call work, job sharing, and employee outsourcing. Each flexibilisation of employment introduced into the legal order due to the crisis, although temporary, each time leaves its mark on the regulations in force also in times free from a crisis (specific legal constructions remain, permanently modifying a given legal order). This article is also devoted to this issue.

KEYWORDS

flexibility, employment relationship, workplace, working time, non-employee work, COVID crisis, anti-crisis legislation

SŁOWA KLUCZOWE

elastyczność, stosunek pracy, miejsce pracy, czas pracy, zatrudnienie niepracownicze, kryzys covidowy, regulacje antykryzysowe

1. INTRODUCTORY REMARKS

Employment flexibility is usually understood as “the ability to adapt the structure, size, and skills of the workforce in accordance with changing external circumstances and conditions and the needs and capabilities of the employer”¹. In times of economic crises, legislators take various measures to make the labour market more flexible, generally by liberalizing labour laws and popularizing flexible forms of employment and organization of working time. Typically, this is primarily aimed at maintaining current employment levels and retaining skilled and trained employees.

The 2007–2009 global economic crisis in the financial and banking markets, initiated by the collapse of the high-risk mortgage market in the United States of America, was the first crisis in the global world economy². This meant no models of counteracting the crisis using the instruments previously known to labour law. At that time, many national regulations were created to limit the negative effects of the crisis. For example, in Poland the global economic crisis and the ensuing economic slowdown have led to a search for extraordinary legal solutions to counteract or mitigate the effects of the crisis, particularly those that allow for the reduction of labour costs and prevent job losses during the downturn³.

Also today, in very many countries there are several anti-crisis regulations related to preventing, counteracting and combating COVID-19, which directly affect the situation of employees. Many of these solutions use known instruments of employment flexibility. Although all crises have standard features, each one is different. While some developed models from the previous crisis could be used, the nature of the crisis triggered by COVID-19 necessitated an entirely new

¹ A. Dubowik, *Funkcjonalna elastyczność zatrudnienia a ustalanie rodzaju pracy w umowie o pracę*, (in:) L. Florek, Ł. Pisarczyk (eds.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, Warszawa 2011, p. 200.

² K. Walczak, *Wpływ globalizacji i ogólnoświatowego kryzysu na podstawy i warunki zatrudniania. Wyzwania dla polskiego prawa pracy*, (in:) L. Florek, Ł. Pisarczyk (eds.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, Warszawa 2011, p. 81.

³ Poland had in force the Act of 1 July 2009 on mitigating the effects of the economic crisis on employees and entrepreneurs (“Journal of Laws” 2009, No. 125, item 1035, as amended). The act entered into force on 22 August 2009. However, its provisions did not introduce any permanent changes in Polish labour law. The act was transitional and was in force until 31 December 2011.

approach to specific issues closely related to labour law. On many occasions, specific legislative solutions arouse great controversy (which was inevitable given the scale of the legislature's intervention and the pace of the proceedings). Above all, however, there are opinions about the need to use various forms of employment flexibility in the post-crisis era. This leads to an intensified discussion on the future of labour law and the role that the various forms of employment flexibility analysed here will play in this context.

2. THE CHANGING ROLE OF THE *FLEXICURITY* CONCEPT DEPENDING ON THE TYPE OF CRISIS (COMBATING UNEMPLOYMENT, PROTECTING HUMAN LIFE AND HEALTH)

The economic and social policy model known as *flexicurity*⁴, introduced in many European countries before the economic crisis of 2007–2009, despite its many advantages, was not always an antidote to the problem of high unemployment during that crisis. The economic literature even indicates that “solutions introducing more flexible labour markets do not work as an antidote to the problem of high unemployment during the crisis. In Denmark and other countries with low labour market restrictions, such as the United Kingdom or the United States, the changes in unemployment levels during the crisis were faster and deeper than in countries with more regulated labour markets, especially if the latter applied various shock absorbing solutions, e.g. shortening working time to reduce the decline in economic activity of the population. Examples of such measures include Germany or the Netherlands, where unemployment levels changed little despite the crisis and slowdown”⁵. This weakened the arguments of those who at that time called for the introduction of *flexicurity* solutions into the European Union's recovery programmes.

In the crisis caused by the COVID-19 pandemic, besides, if not primarily, the aim of the *flexicurity* mentioned above is also to protect human health and life, which significantly alters the perception of the role played by the *flexicurity* concept in the crisis. As Rycak notes, “flexicurity rejects the perception of employment flexibility solely as an element beneficial to employers, and security

⁴ *Flexicurity* can be defined as “an integrated strategy to enhance, at the same time, flexibility and security in the labour market”. See also Communication of 27 June 2007 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards Common Principles of Flexicurity”, COM(2007) 359, Brussels 2007.

⁵ A. Gładzicka-Jankowska, *Flexicurity – koncepcja i jej weryfikacja w okresie kryzysu i spowolnienia po 2007 roku*, “Optimum. Studia Ekonomiczne” 2013, No. 3 (63), p. 214.

as an element that is important only for employees”⁶. Indeed, the introduction of various flexible forms of employment during the COVID-19 crisis, designed to limit interpersonal contact and prevent infection, protected employees and employers. For example, remote work has begun to be used as a strategy to minimize health risks while maintaining production and business operations⁷.

It is, therefore, possible to note a specific evolution of *flexicurity*. *Flexicurity* is a concept that has to be defined as part of an ongoing process⁸. It should not be a standardised model that can be applied in the same way, for example, across all European Union Member States. Moreover, even during the previous 2007–2009 crisis, the Committee of the Regions, while stressing the importance of combating unemployment, made it clear in the opinion mentioned above that there should be fair and just labour laws in the Member States – these laws should not only include, but also ensure, among others, health and safety protection. Thus, although in the COVID-19 crisis, the various forms of employment flexibilities analysed later in this paper continue to be used by the legislator to protect workplaces (to counter unemployment) and to ensure the continuity of the employer’s operations, in some cases an equal aim, if not the most important one, is to protect the lives and health of both parties to the employment relationship.

3. THE ISSUE OF LEGITIMACY AND LEGAL EFFECTS OF INTRODUCING VARIOUS FORMS OF FLEXIBILIZATION OF PRECRISIS EMPLOYMENT RELATIONS IN TIMES OF CRISIS

3.1. THE FLEXIBILITY OF THE WORKPLACE (TELEWORK, REMOTE WORK)

The *flexicurity* model supposes “the creation of an accessible, inclusive and flexible labour market, recognising and encouraging ICT, and enabling varied work patterns (i.e. homeworking and teleworking)”⁹. However, it should be borne in mind that flexibility of employment in terms of the workplace was known in the legislations of many countries, even before the economic crisis of 2007–2009 and before the concept of *flexicurity* was formalised at the EU level.

⁶ M. Rycak, *Wpływ koncepcji flexicurity na przemiany stosunku pracy*, (in:) L. Florek, Ł. Pi-sarczyk (eds.), *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, Warszawa 2011, p. 211.

⁷ M. Fana, S. Torrejon Perez, E. Fernandez Macias, *Employment impact of Covid-19 crisis: From short term effects to long terms prospects*, “Economia e Politica Industriale – Journal of Industrial and Business Economics” 2020, Vol. 47, No. 3, p. 402.

⁸ Opinion of the Committee of the Regions on ‘Flexicurity’, 2008/C 105/04.

⁹ *Ibidem*.

In the EU Member States, the introduction of regulations on telework was primarily aimed at creating a legal basis for telework, in accordance with the European Framework Agreement on Telework of 16 July 2002¹⁰. The agreement defines telework as a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. The parties to the agreement are the social partners that are representative at the European level, in this case: European Trade Union Confederation (ETUC), the EUROGADRES/CEC Liaison Committee, the Union of Industrial and Employers' Confederations in Europe (UNICE), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), and the European Centre for Enterprises of State and Public Benefit (CEEP). The European Framework Agreement on Telework was given the form of a "voluntary" agreement, which was to be implemented by the social partners themselves, signatories to the agreement. The adopted in this way, a kind of Community legal regulation, from the point of view of European law theory, can be classified as soft-law. The agreement and the teleworking rules were to be implemented within three years from the moment of signing, i.e. by 16 July 2005.

In Poland, the benefits of working away from one's office thanks to information and tele-communication technologies were first appreciated by people with disabilities. The development of new technologies has created employment opportunities for employees with limited spatial mobility¹¹. For the disabled community, telecommuting and teleeducation are sometimes the only way to get an education and lead an active professional and social life. A comprehensive regulation of teleworking was introduced through the amendment of the Polish Labour Code on 24 August 2007¹².

The reasons for introducing into Polish legislation a regulation on remote work (not regulated at all before the COVID-19 crisis) were quite different.

¹⁰ See also https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002_Framework%20Agreement%20-%20EN.pdf (accessed 29.12.2021). This agreement directly supports the strategy defined at the Lisbon European Council and the transition to a knowledgebased economy and society, in line with the Lisbon objectives. In July 1997, the European Commission adopted a raft of policy recommendations on the labour market and the social dimension of the information society. The recommendations included commitments to promote teleworking in Europe and to study teleworking within the Commission. In 1998 a pilot project was launched by the Directorate General for Employment, Social Affairs and Equal Opportunities and the Directorate General for the Information Society. It includes three telework types of a part-time nature: working both from home and in the office, working whilst on the move during official missions, and occasional work in another Commission building.

¹¹ See also Opinion of the Parliamentary Analyses Bureau – a substantive opinion to the government project of the bill amending the Labour Code Act and some other acts in particular in the scope of: social effects of proposed legal regulations, impact on the labour market (Parliamentary Paper No. 1684).

¹² "Journal of Laws" 2007, No. 181, item 1288.

The COVID-19 pandemic, enforcing reduced social contact, isolation, and new forms of security, must have caused significant changes in work arrangements¹³. According to Art. 3(1) of the Polish Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them¹⁴, in the period of validity of an epidemic emergency or a state of epidemics, declared due to COVID-19, and in 3 months after their cancellation, to counteract COVID-19, an employer may order an employee to perform, for a specified period, work specified in the employment contract, outside the place of its regular performance (remote work)¹⁵. It is unnecessary to enter into a separate agreement between the parties to the employment relationship regarding the temporary performance of remote work by the employee (although the parties to the employment relationship may establish this form of work provision by way of an amending agreement)¹⁶.

In most countries, as in Poland, one of the ways to deal with the crisis caused by COVID-19 (*inter alia*, to protect health) was to “facilitate” remote working arrangements¹⁷. It is rightly noted by Menegatti that “obviously, work from home has the ability both to grant social distancing, by avoiding the need for workers’ commuting and personal contacts in the workplaces, and to keep at the same time workers active and companies alive”¹⁸. However, it is essential that some countries, unlike Poland, already have complex regulations not only on teleworking but also homeworking (work can be performed without technological tools for carrying out the work). These regulations often took effect long before the crisis caused by COVID-19. It was a significant facilitator in introducing remote work as an instrument to combat COVID-19. For example, in Italy in 2017, “the legislature decided to regulate ‘agile’ work, following on the elaboration of collective bargaining, as a peculiar execution mode of the employment relationship agreed by the parties, organised by stages, cycles and objectives, without strict time and place constraints, and possibly involving the use of technological tools for car-

¹³ Ł. Pisarczyk, A. Boguska, *Sfera zatrudnienia w działaniach antykryzysowych. Wybrane zagadnienia*, “Monitor Prawa Pracy” 2020, No. 5, p. 12.

¹⁴ “Journal of Laws” 2020, item 1842, as amended, hereinafter referred to as the Anti-Crisis Act.

¹⁵ Under Art. 2(2) of the Anti-Crisis Act, whenever the Act refers to “counteracting COVID-19”, it is understood to mean all activities related to eradicating infection and preventing the spread, prophylaxis and combating the effects of the disease. As long as the employee is not absent from work on an excused basis (e.g. due to illness), in the event of the need to take measures to counteract COVID-19, the employer should, therefore, first of all, give the employee an order to work remotely.

¹⁶ M. Barański, *Remote work in the COVID-19 era*, (in:) M. Jankowska, M. Pawelczyk (eds.), *Fashion industry copes with Covid-19: A legal, technological and sociological reflection*, Katowice 2021, p. 274.

¹⁷ E. Menegatti, *The impact of COVID-19 crisis on Italian labour law*, “Z Problematyki Prawa Pracy i Polityki Socjalnej” 2021, No. 2 (19), p. 3.

¹⁸ *Ibidem*, pp. 3–4.

rying out the work activity, partly outside the business premises, without a fixed location”¹⁹.

However, it is noticeable that COVID-19 remote work is much more similar to traditional teleworking than homeworking, having a different rationale: first of all public health protection, rather than enhancing work-life balance and companies’ competitiveness²⁰. This, in turn, sometimes raises questions when distinguishing one legal construct from another. Moreover, it should also be stressed that the Polish legislator in the above-mentioned Art. 3 of the Anti-Crisis Act uses such terms as “employee”, “employer”, “employment contract”, which clearly indicates the limited subject scope of this provision. It covers only employment cases of an employee (within the employment relationship framework)²¹. Therefore, it does not cover cases of work performed under civil law contracts (which is a specific feature of the Polish legal system).

3.2. THE FLEXIBILITY OF WORKING TIME (PART-TIME WORK, MODIFICATIONS OF WORKING TIME SYSTEMS AND SCHEDULES)

Reorganization of work forced by the crisis causes changes or flexibility of working time. Relatively rigid previous labour law regulations have not always allowed employers to introduce organizational solutions quickly. Previous legislation has also been used to change working time (while changing working hours by mutual agreement, terminating working conditions, specifying in the working time pattern different hours for the commencement of work on days designated as the employee’s working days according to that working time pattern, specifying in the working time pattern the time during which an employee may decide when to commence work on a given day designated as the employee’s working day according to that working time pattern, defining an individual working time pattern within the working time system covering that employee etc.), but this has proved insufficient. It became necessary to introduce solutions that would tie interference with working time to state financial aid.

For example, Art. 15g of the Polish Anti-Crisis Act assists employers while protecting workplaces through a complex system of remuneration subsidies for employees affected by economic work stoppage or reduced working hours. Pursuant to Art. 15g(11) of the Anti-Crisis Act, it is possible to conclude an collective agreement specifying the conditions and procedure for performing work during the period of economic work stoppage or reduced working hours. It refers to the status of employees, but its personal scope may also include persons working outside an employment relationship, for example, under civil law contracts and

¹⁹ *Ibidem*, p. 4.

²⁰ M. Barański, *Remote work...*, pp. 278–281; E. Menegatti, *op. cit.*, p. 5.

²¹ M. Barański, *Remote work...*, pp. 274–275.

the self-employed. However, it should be emphasized that the solutions included in the Anti-Crisis Act were already known to the Polish legislation (similar regulations already appeared in the Act of 11 October 2013 on special solutions related to the protection of workplaces²² and the previously mentioned Act of 1 July 2009 on mitigating the effects of the economic crisis on employees and entrepreneurs). However, it should also be mentioned that in Poland employers responsible for critical infrastructure elements have been given further organizational authority. They may significantly reorganize the work process (unilaterally) for a limited period of time, not longer than until the state of epidemic threat or epidemic state is cancelled. This consists, firstly, in the possibility of changing the system and schedule of employees' working time in such a way as is necessary to ensure the continuity of the operation of their enterprise. The Anti-Crisis Act also provides for this specific group of employers the possibility of ordering the employees to perform overtime work to the extent and dimension necessary to ensure the company's operations continuity. There is a possibility to oblige the employee to perform an on-call shift in violation of the right to daily and weekly rest as well as ordering the employee to exercise the right to rest in the place designated by the employer (the only condition is the occurrence of an epidemic or threat of epidemic). The literature emphasizes that "without questioning the need to take care of strategic services, these measures must be evaluated as disproportionate to the purpose they were intended to serve, especially in the context of the employees' right to safe and hygienic working conditions (taking into account, among other things, the suspension of the obligation to perform periodic examinations) or their right to privacy"²³.

When considering working time flexibility, it is also essential to mention the new phenomenon of on-call work – increasingly gaining popularity in the COVID-19 crisis. The ILO Part-Time Work Convention, 1994 (No. 175) defines the term "part-time worker" as "an employed person whose normal hours of work are fewer than those of comparable fulltime workers". As ILO points out "part-time work is one of the traditional forms of non-standard employment. However, over the past decades, not only has it grown in importance, but it has also witnessed a diversification of its forms, which include: 'substantial part-time' (21–34 hours per week), 'short part time' (20 hours or less), and 'marginal' part-time (fewer than 15 hours per week). In some instances, working arrangements may involve very short hours or no predictable fixed hours, and the employer has no obligation to provide a set number of hours of work. These arrangements, known as 'on-call work', come under different contractual forms depending on the coun-

²² "Journal of Laws" 2019, item 669, as amended.

²³ Ł. Pisarczyk, A. Boguska, *op. cit.*, p. 14.

try and include so-called ‘zero-hours contracts’²⁴. In its judgment of 19 March 2013²⁵, the Polish Supreme Court emphasised that on-call work with fully paid waiting time does not constitute employment as defined in Art. 22 para 1 of the Polish Labour Code²⁶.

3.3. THE FLEXIBILITY IN THE TYPE OF WORK

The economic crisis often forces employers to take actions that come down to a temporary change in the type of work. Such a change may be justified, for example, when an employee cannot work remotely, but at the same time, it is possible to assign him other duties to economic work stoppage.

As Gundt points out, from the perspective of Dutch labour law, there is a noticeable tendency, not only of the legislator but also of the jurisprudence, to look for a balance between the interests of the employer and the employee within the framework of anti-crisis solutions. On the one hand, the payment of remuneration for work is guaranteed to the employee, on the other hand, high flexibility in performing by the employee other work, when the current one cannot be performed²⁷. According to Gundt “this general idea of a certain flexibility of the employment contract also explains the idea of being able to change the employment contract in good faith on the basis of reasonableness (...) the response to the crisis is not a weakening of the position of the weaker of two parties in the contract, but rather a continued protection”²⁸.

In Poland, during the COVID-19 crisis, no specific arrangements were put in place to temporarily interfere with the type of work (change in the type of work). Therefore, the existing regulations in this regard, primarily Art. 42 para 4 KP, were applicable. According to this provision, notice of termination of the current terms and conditions of work and pay is not required in cases when an employee is assigned work other than that specified in the contract of employment for a period not longer than 3 months in a calendar year, if justified by the employer’s needs, unless this reduces the employee’s remuneration and is inappropriate to the employee’s qualifications. The parties to an employment relationship also always can change the type of work by mutual agreement.

²⁴ International Labour Organization, *What are part-time and on-call work?*, https://www.ilo.org/global/topics/non-standard-employment/WCMS_534825/lang-en/index.htm (accessed 29.12.2021).

²⁵ Judgment of the Supreme Court of 19 March 2013, I PK 223/12, LEX No. 1415490.

²⁶ “Journal of Laws” 2020, item 1320, as amended, hereinafter referred to as KP.

²⁷ N. Gundt, *The COVID-specific measures in the Netherlands: Do they fit into the general picture?*, “Z Problematyki Prawa Pracy i Polityki Socjalnej” 2021, No. 2 (19), p. 14.

²⁸ *Ibidem*.

4. DIFFERENT FORMS OF WORK IN TIMES OF CRISIS

4.1. FIXED-TERM EMPLOYMENT CONTRACTS

In Poland, according to Art. 25 para 1 KP an employment contract is concluded for a trial period, for an indefinite period of time or for a definite period of time. The employment contract for a trial period not exceeding 3 months is concluded in order to check the qualifications of the employee and the possibility of his employment for the purpose of performing a specified type of work (Art. 25 para 2 KP)²⁹. In turn, under Art. 25¹ para 1 KP, the employment period based on an employment contract for a definite period time, as well as the total employment period based on employment contracts for a definite period of time concluded between the same parties to the employment relationship, may not exceed 33 months, and the total number of these contracts may not exceed 3 (the legislator provides for several exceptions in this respect).

However, it is the employment contract for an indefinite period of time that fulfils the protective function of labour law. This is because this contract realises the rights and obligations of employees and employers in the most accurate way and is characterised by the strongest bond between the parties to the employment relationship. This means that “an employment contract for a definite period time should be an exception to the principle of employment of indefinite duration, to be used when objective circumstances are justifying the temporary employment”³⁰.

It should not be forgotten that although both parties to the employment relationship may terminate the employment contract by notice, their legal situation is significantly different (given the significant restriction on the employer's ability to terminate the employment contract due to general and special employment protection)³¹. At the same time, the literature on the subject stresses that currently, the Polish Labour Code, due to the resignation by the legislator of the previous principle of non-termination of term contracts, does not guarantee employees employed for a specified time any stability of employment³². Despite the significant change in the regulation on limiting the length of term contracts that came into force due

²⁹ According to Art. 25 para 3 KP it is possible to re-sign an employment contract for a trial period with the same employee: 1. if the employee is to be employed for the purpose of performing another type of work; 2. after a lapse of at least 3 years from the date of termination or expiry of the previous employment contract if the employee is to be employed for the purpose of performing the same type of work; in this case it is permissible to re-assign an employment contract for a trial period.

³⁰ Judgment of the Supreme Court of 22 August 2018, III PK 66/17, LEX No. 2549369.

³¹ L. Mitrus, (in:) A. Sobczyk (ed.), *Kodeks pracy. Komentarz*, Warszawa 2020, p. 201.

³² *Ibidem*; Z. Góral, (in:) K.W. Baran (ed.), *Kodeks pracy. Komentarz*. Vol. 1. Art. 1–113, Warszawa 2020, pp. 343–344.

to the amendment of 25 June 2015³³, the general protection against termination continues to cover only employees employed under a permanent contract.

In many countries, in order to ensure the proper organization of work during the COVID-19 pandemic, labour law authorizes the conclusion of successive fixed-term employment contracts in specific sectors and under certain conditions³⁴. This is a solution already known to the anti-crisis legislation from the crisis of 2007–2009, when, for example, in Poland the limits on the conclusion of successive fixed-term employment contracts were modified³⁵. At the same time, however, during the COVID-19 crisis in Poland, the legislator did not decide to introduce such solutions used during the earlier crisis.

The introduction, during crises, of legal modifications to already existing employment relationships in terms of the length or number of fixed-term employment contracts and the widespread conclusion of short-term employment contracts undoubtedly weakens the protective function of labour law. This results in far less employment stability.

4.2. NON-EMPLOYMENT WORK (CIVIL LAW TYPE) AND WORK IN THE COTTAGE INDUSTRY

In Poland, according to Art. 22 para 1 KP “by establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration”. It is accepted in the literature that labour law is a set of legal norms governing subordinate employment relationships and other legal relationships inherent in them³⁶. This specific obligatory relationship, which is the employment relationship, is a central concept in Polish labour law. It is, precisely, the criterion of the subject of regulation that makes it possible to distinguish labour law as a separate branch of law. It is common in both jurisprudence and literature to contrast employment relationships with other workers’ work.

³³ “Journal of Laws” 2015, item 1220.

³⁴ C. Mairy, *COVID-19: Possibility of successive fixed-term contracts in certain sectors*, <https://www.partena-professional.be/en/knowledge-center/infoflashes/covid-19-possibility-successive-fixed-term-contracts-certain-sectors> (accessed 2.01.2022). See, e.g. Act of 20 December 2020 on temporary support measures due to the COVID–19 pandemic, “Belgian Official Gazette”, 30 December 2020.

³⁵ According to Art. 13(1) Act of 1 July 2009 on mitigating the effects of the economic crisis on employees and entrepreneurs, the period of employment under a fixed-term employment contract, as well as the total period of employment under subsequent fixed-term employment contracts between the same parties to the employment relationship, may not exceed 24 months.

³⁶ T. Wyka, *Miejsce prawa pracy w systemie prawa*, (in:) K.W. Baran (ed.) *System prawa pracy*. Vol. 1. *Część ogólna*, Warszawa 2017, p. 171.

The employment relationship, as a legal relationship governed by labour law, has a specific legal character which distinguishes it, for example, from civil law relationships. In the Supreme Court's view, the work does not have to be of an employee nature³⁷. According to K.W. Baran, "non-employment work includes all non-incidental provision of work except for classically conceived employment of a legal-employee nature"³⁸.

The structural features of an employment relationship are voluntary commitment, the need to perform work personally, the aforementioned employee subordination, the employer's risk, the remuneration of work, and continuity of work.

The widespread use of civil law contracts in Poland became all the more critical at the beginning of the COVID-19 crisis, when employers, looking for illusory savings, not infrequently violating labour laws, led to the termination of employment contracts with employees and hired workers in their place. Often such contracts are disguised employment contracts (civil law contracts are sham and, in that sense, invalid).

Another issue is the provision of work in the cottage industry during the crisis and the juxtaposition of this legal construction to the new instruments introduced to counteract the crisis. Pursuant to the statutory delegation under Art. 303 para 1 KP, the Polish Council of Ministers determined, by way of a Regulation of 31 December 1975, the scope of application of the labour law to persons performing work in the cottage industry, with amendments resulting from different conditions for performing such work³⁹. The legal nature of the work in the cottage industry has raised serious doubts for many years, and it certainly does not constitute the basis for establishing an employment relationship (a closed catalogue of such bases is set out in Art. 2 KP; this fact is also confirmed by Art. 303 para 2 KP). Work in the cottage industry is usually defined as "gainful and professional work of natural persons, usually performed in their own home, to the order and account of the contractor, with materials and raw materials entrusted by him, alone or with the help of other persons"⁴⁰. The contract of work in the cottage industry is a contract of result, and the features of the legal relationship based on this contract are not the subordination of the contractor to the outlay worker and the personal nature of the service (the contractor may, for example, use the help of household members).

The introduction of the regulation of remote work to the Polish legal system has caused, in specific factual situations, difficulties in distinguishing this legal

³⁷ Judgment of the Supreme Court of 7 October 2004, II PK 29/04, LEX No. 145435.

³⁸ K.W. Baran (ed.), *System prawa pracy*. Vol. 7. *Zatrudnienie niepracownicze*, Warszawa 2015, p. 22.

³⁹ "Journal of Laws" 1976, No. 3, item 19, as amended.

⁴⁰ P. Prusinowski, (in:) K. Baran (ed.), *Kodeks pracy. Komentarz*. Vol. 2. *Art. 114–304(5)*, Warszawa 2020, LEX/el.

construction not only from telework but also from work in the cottage industry⁴¹. In the circumstances of a given case, it can be far more problematic to confirm that remote or telework is indeed performed under conditions of subordination and in person – within the scope of the employment relationship⁴². Meanwhile, in the Polish labour law system, the criterion of employee subordination is supposed to prevent the conclusion of such civil law contracts, which de facto conceal the employment relationship. In the context of telework, Polish literature directly emphasizes that “in practice, there may be doubts as to whether the contractual relationship established by the parties, in which one party is to perform for the benefit of the other party certain activities in the telework system, is a legal employment relationship, or a civil law relationship of providing services. Resolving this doubt will be possible after analyzing the content of the agreement concluded by the parties and determining whether the party who has committed to performing certain activities for the other party is subordinated to the other party in performing those activities or not”⁴³. With remote work, as in the case of telework, however, the employee’s subordination is significantly weakened, even marginalized, often involving only the control of work results⁴⁴.

According to Sanetra, “telework has some important similarities to the work in the cottage industry, in which, as a rule, work is regularly performed outside the workplace. The main differences, however, lie in the fact that work in the cottage industry is not associated with technological progress – or rather, in practice, is its contradiction – and its results are not communicated to the employer by electronic means, and in the fact that the worker organizes his workshop and his work, having the possibility to replace himself in its execution by other people”⁴⁵. From the perspective of the subject of the obligation, therefore, while comparing telework to remote work (remote work has a much broader conceptual scope than telework)⁴⁶, the common point is the performance of work with the use of means of electronic communication, remote work, which concerns the performance of manufacturing parts or material services, is to some extent similar to work in

⁴¹ M. Barański, *Praca zdalna w czasach COVID-19*, (in:) M. Jankowska, M. Pawełczyk (eds.), *Moda i design w świecie COVID-19*, Katowice 2020, p. 467; M. Barański, *Praca zdalna a umowy cywilnoprawne*, (in:) M. Mędrala (ed.), *Praca zdalna w polskim systemie prawa pracy*, Warszawa 2021, p. 234.

⁴² M. Barański, *Praca zdalna w czasach...*, p. 467; M. Barański, *Praca zdalna a umowy...*, p. 234.

⁴³ D. Dzienisiuk, J. Skoczyński, T. Zieliński, (in:) L. Florek (ed.), *Kodeks pracy. Komentarz*, Warszawa 2017, LEX/el.

⁴⁴ *Ibidem*.

⁴⁵ W. Sanetra, (in:) J. Iwulski, W. Sanetra, *Kodeks pracy. Komentarz*, Warszawa 2013, LEX/el.

⁴⁶ The literature emphasizes that “as the law currently stands, it appears that the only criteria for differentiation are that remote work is currently only possible to combat COVID-19, remote work does not have to be performed using electronic communication in every instance, and remote work itself is by definition temporary (fixed-term)”. See M. Barański, *Praca zdalna a umowy...*, p. 235.

the cottage industry⁴⁷. Indeed, for both of these constructs, the critical issue is whether the physical activities in question can be performed at all, primarily in a home environment⁴⁸. Ultimately, however, when juxtaposing remote work and work in the cottage industry, there is a need to conclude that it is the interested parties who choose the basis of employment “guided in this respect by the directive of the manner of performing the given activity, and not its subject”⁴⁹.

4.3. SELF-EMPLOYMENT AND WORK THROUGH DIGITAL LABOUR PLATFORMS

“Self-employment” has not been defined so far on normative grounds (there is no legal definition). The “self-employed” in Polish labour law is often identified in general with an entrepreneur who is a natural person, or with an entrepreneur who is a natural person, but who performs as part of his activities, as a rule personally, activities for the benefit of one entity (or more), but each time in conditions of economic dependence⁵⁰. In Polish jurisprudence, one may also encounter the view that “self-employment” consists in the performance of services for the employer by employees who simultaneously carry out business activities or perform a liberal profession⁵¹. Irrespective of adopting any of the above definitions, self-employment is inextricably linked to the running of a business by a natural person. In Poland a self-employed person is not an employee within the meaning of Art. 2 KP.

When considering the issue of self-employment from the perspective of making employment more flexible during the crisis, special attention should be paid to the rapidly growing work through digital labour platforms. Digital labour platform work is typically understood as performing a series of tasks through platforms that allow individuals and organizations to access an unspecified and unknown group to solve a specific type of problem, perform a particular service, or provide goods for a fee⁵². As noted by Bakalarz, “in the case of work on a digital labour platform, there are ‘micro-tasks’, i.e. only a part of the activities neces-

⁴⁷ *Ibidem*.

⁴⁸ *Ibidem*.

⁴⁹ Judgment of the Supreme Court of 13 April 2000, I PKN 594/99, LEX No. 43751.

⁵⁰ K. Walczak, *Zatrudnienie niepracownicze w ramach pozarolniczej działalności gospodarczej*, (in:) K.W. Baran (ed.), *System prawa pracy*. Tom VII. *Zatrudnienie niepracownicze*, Warszawa 2015, pp. 298–316.

⁵¹ Judgment of the Supreme Court of 10 January 2003, I PK 87/02, LEX No. 78671.

⁵² V. de Stefano, *The rise of the “just-in-time workforce”: On-demand work, crowdwork and labour protection in the “gig-economy”*, Geneva 2016, p. 1. Digital platform work is an example of crowdfemployment. This new form of employment involves networked exchanges that allow users (organizational units and individuals) to access other users via the Internet to solve specific problems or achieve particular goals. See Eurofound, *New forms of employment*, Luxembourg 2015, pp. 1–2. See also T. Bakalarz, *Zatrudnienie za pośrednictwem platformy internetowej jako przejaw “uberyzacji” pracy*, *Przegląd Prawa i Administracji* 2019, Vol. 117, p. 11.

sary for the implementation of a given project, monotonous work of a low degree of complexity, but which require participation and evaluation by humans, which are beyond the reach of devices using artificial intelligence (for example, coding, tagging photos, assessing emotions, conducting surveys). Platform work may also involve specialized, complex activities specific to creative professionals”⁵³.

A contractor performing work via a digital labour platform is not economically dependent on a particular contracting party, but it should be borne in mind that his activity determines the extent of his remunerative activity on the platform. It is therefore possible for such a contractor and the platform operator to develop a bond of dependence – organizational (without using the platform, the contractor will not establish contact with the contracting authority and will not perform the service) and economic (the platform operator moderates the flow of remuneration between the contracting authority and the contractor, decides to exclude the contractor from the “crowd of contractors”)⁵⁴. Therefore, although currently, the work through the digital labour platform cannot be interpreted as a relationship of legal subordination inherent to an employee, the constant activity of the contractor on the platform has the characteristics of work (non-employment civil law type)⁵⁵. The literature primarily seeks a model for digital labour platform work in self-employment, although performing this work also shares many characteristics with work in the cottage industry⁵⁶.

Digital labour platforms have been widely promoted to solve the unemployment crisis sparked by the COVID-19 pandemic⁵⁷. Among other reasons, in late 2021, the European Commission proposed a set of measures to improve the working conditions in platform work and to support the sustainable growth of digital labour platforms in the EU⁵⁸. The new rules probably will ensure that people working through digital labour platforms can enjoy the labour rights and social benefits they are entitled to. They will also receive additional protection as regards the use of algorithmic management (i.e. automated systems that support or replace managerial functions at work). According to the European Commission, a common set of EU rules will provide increased legal certainty, therefore enabling digital labour platforms to benefit fully from the economic potential of the Single Market and a level playing field⁵⁹.

⁵³ T. Bakalarz, *op. cit.*, p. 11.

⁵⁴ *Ibidem*, p. 17.

⁵⁵ *Ibidem*.

⁵⁶ *Ibidem*.

⁵⁷ K. Howson *et al.*, *Stripping back the mask: Working conditions on digital labour platforms during the COVID-19 pandemic*, “International Labour Review” 2021, <https://doi.org/10.1111/ilr.12222>, p. 1 (accessed 29.12.2021).

⁵⁸ European Commission, *Commission proposals to improve the working conditions of people working through digital labour platforms*, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 (accessed 28.12. 2021).

⁵⁹ *Ibidem*.

5. THE TEMPORARY NATURE OF EMPLOYMENT FLEXIBILITY DUE TO THE CRISIS (THE IMPACT OF ANTI-CRISIS REGULATIONS ON THE LEGAL ORDER IN TIMES FREE FROM CRISIS)

Each flexibilisation of employment introduced into the legal order due to the crisis, although temporary, each time leaves its mark on the regulations in force also in times free from a crisis (specific legal constructions remain, permanently modifying a given legal order). All global crises naturally not only intensify but even force reflection on the future of labour law⁶⁰. The literature emphasizes that “the COVID crisis is so deep that it will not only radically affect labour markets in the short and medium run, but it can also change substantially the way the work is organised”⁶¹. This is a significant difference from the effects of the 2007–2009 crisis, which had only a short-term impact on labour law.

Legislative proceedings are currently underway in Poland to permanently introduce the concept of remote work into the Labour Code (to replace the regulation on telework). Thus, remote work will probably be permanently incorporated into Polish labour law, just as is already the case, for example, in Italy. It turned out that this form of employment in the era of the COVID-19 pandemic is essential for employees not only because of the reduction of the risk of contracting the COVID-19 but also for family reasons (e.g. enabling the reconciliation of work and family responsibilities in a situation where children and adolescents carry out classes using distance learning methods and techniques, i.e. remotely, at their place of residence)⁶². For employers, remote work is now associated with reducing the risk of absence from work of an employee using sick leave and absence from work due to quarantine, thus enabling the continuation of the business (without disruption or minimizing possible disruption). The proliferation of remote work and the recognition of the advantages of such work by both sides of the employment relationship have also resulted in signals and calls from both employees and employers’ organizations for the introduction of remote work regulations as a permanent solution⁶³.

In the era of the COVID-19 epidemic, strong correlations between the dynamic development of new technologies and flexible forms of employment are also noticeable. Currently, there is an irreversible process of change in socio-economic

⁶⁰ K. Walczak, *Wpływ globalizacji...*, pp. 80–81.

⁶¹ M. Fana, S. Torrejon Perez, E. Fernandez Macias, *op. cit.*, p. 402.

⁶² See also Projekt ustawy o zmianie ustawy – Kodeks pracy, ustawy o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych oraz ustawy o promocji zatrudnienia i instytucjach rynku pracy, <https://legislacja.rcl.gov.pl/projekt/12346911/katalog/12789138#12789138> (accessed 11.03.2023).

⁶³ *Ibidem*.

conditions, progressive technological development and large-scale use of innovative technical solutions, which undoubtedly also affects labour law⁶⁴. Indeed, the competing interests of the employee and the employer may be given a different meaning, for example, given the extent to which interference in the employee's private life is made possible by new and increasingly sophisticated technologies⁶⁵. This is particularly evident during the COVID-19 crisis and the associated need to make indirect (via electronic communication) human contact more common in many work environments. Stefański rightly notes that a decrease in the amount of work ("technological development may result in a decrease in demand for human labour") with an increasing supply of work must mean the necessity to redistribute the good, which is work⁶⁶. Flexible working time arrangements can be an excellent instrument here. In this context, special attention should be paid to such flexible forms of work as: part-time work, on-call work, job sharing.

After the crisis of 2007–2009, Polish labour law scholars postulated a greater unification of employment law, bridging the gap between employment relationships (for employees) and employment-based on civil law contracts (for workers), taking into account the interests of the unemployed⁶⁷. According to Walczak, "all this requires a considered decision and the introduction of new regulations, which would take into account the *flexicurity* model as far as possible"⁶⁸. This view remains entirely relevant even during and probably after the COVID-19 crisis. However, "the convergence of different forms of providing work is not yet a phenomenon advanced enough to assume that it is possible to create a single formula of employment that would cover both today's employment relations and cases of providing services or so-called self-employment"⁶⁹. It is necessary to create a coherent model of non-employment work, particularly the civil law type⁷⁰.

⁶⁴ T. Duraj, *Koncepcja "autonomicznego podporządkowania" – konflikt pomiędzy autonomią pracownika a jego podporządkowaniem pracodawcy*, (in:) M. Skąpski, K. Ślebzak (eds.), *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych*, Poznań 2014, p. 102.

⁶⁵ ECtHR decision of 5 October 2010, Köpke v. Germany, application No. 420/07, ECHR 1725.

⁶⁶ K. Stefański, *Elastyczny czas pracy*, Warszawa 2016, pp. 28–32.

⁶⁷ K. Walczak, *Wpływ globalizacji...*, p. 90.

⁶⁸ *Ibidem*.

⁶⁹ Ł. Pisarczyk, *Wstęp do Konsytucji Rzeczypospolitej Polskiej – poszukując aksjologii prawa pracy*, (in:) M. Skąpski, K. Ślebzak (eds.), *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych*, Poznań 2014, p. 151.

⁷⁰ Ł. Pisarczyk, *W stronę ochrony zatrudnionych*, (in:) R. Babińska-Górecka et al., *Tendencje rozwojowe indywidualnego i zbiorowego prawa pracy. Księga Jubileuszowa Profesora Grzegorza Goździewiczza*, Toruń 2017, p. 119.

6. SUMMARY

The crisis caused by the COVID-19 epidemic has forced a new look at various flexible forms of employment. To combat the negative effects caused by this epidemic, above all to protect life and health, familiar labour law constructs have been used, some of them substantially modified. The use of labour law as an anti-crisis instrument may raise “doubts of both axiological (weakening of the protective function) and pragmatic nature (it is difficult to determine the actual benefits related to the use of anti-crisis solutions) nature; however, the hope prevails that thanks to the use of certain legal and labour mechanisms it will be possible to limit the negative effects of the economic downturn”⁷¹. In the case of the COVID-19 crisis, however, the effects of such interference on labour law are likely to be much more far-reaching. In many countries, hitherto unknown constructions have been introduced (e.g. remote work in Poland), which are likely to stay with us for longer, permanently changing labour law (in Poland replacing the regulation on telework and weakening employee subordination). With the COVID-19 outbreak, suddenly the modality of work had an unexpected success⁷². Some flexible forms of employment have become so crucial that legislative intervention at the level of EU law is necessary (work within digital labour platforms). At the same time, other instruments known from the crisis of 2007–2009 have not been used as much today as they were then (e.g. fixed-term contracts).

There is a growing tendency to bring two legal regimes – labour law and civil law – closer together. The difference between an employee and a self-employed person (who is economically dependent on his/her contractor, which is particularly visible when working on digital labour platforms) is slowly blurring. In Poland, there is also a tendency to increasingly include persons employed under civil law contracts in the protection of labour law. However, there is a lack of a coherent and general concept. Legislative solutions are of an *ad hoc* nature – there is no legal model of work of a new type (civil law), which would consider the need to protect such workers, similar to the protection of employees. At the same time, specific legal constructions, which some time ago seemed to have ceased to have any meaning, are currently experiencing a renaissance. This is the case, for example, with temporary work in the cottage industry. Here, too, there is no single coherent concept, as in specific factual situations, it is challenging to distinguish remote work under an employment relationship from work in the cottage industry. Moreover, as indicated above, work on digital platforms may be treated as a specific example of work in the cottage industry.

⁷¹ Ł. Pisarczyk, *Przestój ekonomiczny i obniżony wymiar czasu pracy – powrót do znanych instrumentów anty kryzysowych*, „Monitor Prawa Pracy” 2013, No. 12, p. 623.

⁷² E. Menegatti, *op. cit.*, p. 5.

In the wake of the COVID-19 crisis, the concept of *flexicurity* has evolved to emphasise the need to ensure safe and healthy working conditions for employees (protection of life and health), which must often be seen concerning the world of new technologies. The dependence of the work process on new technologies certainly increases the requirements for the human dimension of work, which should raise questions about the legitimacy of maintaining, in this regard, previous rigid constructions of labour law that demonstrate the distinctiveness of this branch of law. Foreign literature emphasizes that the work of the future, dependent on modern technologies may go far beyond the classic framework of subordinated work⁷³. This may result in the need for a paradigm shift – the previous justification for separating labour law due to the existence of subordinated work will give way primarily to the need to regulate employee autonomy in the world of new technologies⁷⁴.

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⁷³ F. Hendrickx, *Privacy 4.0 at work: Regulating employment, technology and automation*, "Regulating for Globalization. Trade, Labor and EU Law Perspectives" 2019, p. 4, <http://regulatingforglobalization.com/2019/09/23/privacy-4-0-at-work-regulating-employment-technology-and-automation/?output=pdf> (accessed 28.12.2021).

⁷⁴ *Ibidem*.

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