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THE PROBLEMS OF REMOTE WORK IN POLISH LABOUR CODE

Abstract

Section IIC of the Labour Code that was adopted by the Parliament in December 2022 introduces new regulations concerning remote work to Polish labour legislation. Thus, the binding legal provisions included in the anti-Covid legislation were repealed. The legislation authority established a new model of remote work. The aim of this study is to provide a general characteristic of this model. For the purposes of this article, I will focus mainly on the subjective and objective issues. The essence of remote work consists in performing this work at a location specified by the employee and agreed with the employer. The results of remote work are submitted with the use of means of remote communication. *De lege lata*, two types may be distinguished: contractual remote work and remote work that is designated unilaterally. This allows the parties to the employment relationship to adapt it in a flexible way to the diverse conditions of the work environment at the dawn of the post-industrial era.

Słowa kluczowe: praca zdalna, rodzaje pracy zdalnej, zakres przedmiotowy pracy zdalnej, nowelizacja Kodeksu pracy

Keywords: remote work, types of remote work, scope of remote work, amendment to the Labour Code

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Section IIC of the Labour Code that was adopted by the Parliament in December 2022 introduces new regulations concerning remote work to Polish labour legislation. Thus, the binding legal provisions included in the anti-Covid legislation were repealed (Baran, Książek, Witoszko 2020, pp. 44 ff; Makowski 2020, pp. 14 ff). The legislation authority established a new model of remote work. The aim of this study is to provide a general characteristic of this model. For the purposes of this article, I will focus mainly on the subjective and objective issues. For editorial purposes, I will omit all issues related to the rights of employees who perform such remote work.

In the light of Art. 67(18) of the Labour Code (Sierocka 2022, pp. 837 ff; Gładoch 2023, pp. 53 ff; Tomaszewska 2023), the essence of remote work consists in performing this work at a location specified by the employee and agreed with the employer. The results of remote work are submitted with the use of means of remote communication. This mechanism is described in detail in Art. 67(27) of the Labour Code (Sierocka 2022, pp. 855 ff), which states that the subjects of remote work shall transfer the information necessary for bilateral communication through direct remote communication means or in another, mutually agreed way. In practice, this mechanism refers first of all to the Internet. However, the wording of the provision allows *implicite* also for other means of communication. In my opinion, such flexible formula deserves approval, as it enables to adapt the performance of work to the specific conditions of the given work environment.

The place of performing remote work is also important. *Natura rerum*, this type of work is performed outside the regular workplace (e.g. the premises of the employer). The parties agree on the location where the work will be performed. However, it does not have to be performed at the place of residence of the employee. In literal wording, the analysed provision of the Labour Code suggests only one location where remote work is performed. However, I would also accept a broadening interpretation, based on the contractual freedom in employment relationships. As a result, I believe that it is acceptable to agree on multiple locations for performing work in the model of "nomadic" remote work, provided that the employer is able to exercise its rights towards the employee, in particular the rights to control.

Analysing the issues related to remote work, it is worth considering its subjective aspects. I will start the deliberations from analysing the issue whether the regulation of the Labour Code is applicable to all employers. The provisions do not regulate this issue directly. Therefore, considering the literal wording of Art. 67(18) and the *lege non distinguente* argument, I would like to conclude that it is applicable to all employers as defined in Art. 3 of the Labour Code (Baran 2022b, pp. 55 ff; Hajn 2017, pp. 144 ff). This interpretational option is also justified by the argumentation *a completudine* and *a cohaerentia*. This means that remote work may be introduced both by organisational units and natural persons. This conclusion is also based on the *lege non distinguente* argument. This refers both to employers who operate in the industrial sector and to those in the public sphere (e.g. public administration offices, local territorial self-government offices, courts, and prosecutor's offices) as well as in other sectors (e.g. in education or higher education). In the subjective aspect, the analysed provision does not eliminate *ex lege* any category of employers, obviously provided that the specific statutory objective factors of remote work are considered. In practice, it is the type and nature of the performed work and the qualifications, the premises, and the technological possibilities of the employer decide about the possibility to use remote work.

Remote work as defined in Art. 67(18) of the Labour Code may be performed by every employee as defined in Art. 2 thereof (Baran 2022b, pp. 34 ff). This interpretational option is justified in the Polish legal system in the *lege non distinguente* argumentation. This means that, *in abstracto,* in the Polish labour law system, remote work may be applied to all categories of employees, regardless of the type of act that regulates the employment relationship, both contractual and non-contractual (Góral 2017, *passim*), employed based on an appointment,

nomination, or election. As far as employees who perform work based on an employment contract are concerned, it is applicable to all contracts for an indefinite period, as well as to temporary contracts (e.g. for a definite period or for a trial period). As a result, remote work may also be performed by temporary employees, obviously provided that the nature of such work allows it. It is also applicable to those who are employed based on a cooperative contract of employment, to minor employees and temporary workers.

The fundamental issue are the sources of law that define the standards of remote work. On the one hand, these are statutory code provisions, and on the other – collective agreements concluded between the employer and the trade unions (Baran 2022a, pp. 22 ff) or by-laws. By their nature, the latter are subsidiary and they may shape the conditions of remote work only in a way that is more beneficial for the employees than the standards of the Labour Code.

As far as collective agreements are concerned, their content refers to four main aspects of remote work, i.e.: 1) the subjective aspect, i.e. groups of employees who will be covered by the remote work model; 2) the financial aspect, i.e. the principles of covering the costs of remote work and calculating the financial equivalent; 3) the control aspect, i.e. the principles of supervision over the performance of work, occupational health and safety control, and protection of information, including personal data; 4) the organisational aspect, i.e. the principles of communicating with the employer, confirming attendance, and the principles of installation, stocktaking, maintenance, and service of the tools entrusted to the employee. These aspects were specified in Art. 67(20) of the Labour Code (Gładoch 2023, pp. 75 ff; Tomaszewska 2023).

The enumeration presented above is only of an exemplary nature, which means that some issues may, but do not have to, be included in the agreement. This interpretation option is supported by the use of the term “in particular” in item 6 of the analysed draft. If the agreement does not specify specific elements thereof, statutory standards will apply to employees on a subsidiary basis, if such standards were defined. Subject to constitutional freedom of contracts, the parties to the agreement may also include other provisions, both of a normative and obligatory nature, referring only to the rights and obligations of the parties thereto. Due to the semi-imperative nature of the standards of the Labour Code in this matter, the provisions adopted in this way may differ from statutory ones, but only to the benefit of the employee.

In my opinion it is acceptable, for example, to establish a hybrid model of work, which involves partly remote work and partly on-site work. For example, it is possible to adopt a heterogeneous formula of performing work, either in an hour-based variant (e.g. 4/4 per day), or a week-based (e.g. 2/3 days), or monthly version (2/2 weeks), or even based on longer periods (e.g. quarterly), depending on the conditions of the business activity conducted by the employer.

Remote work may also be regulated in by-laws issued by the employer, if the parties fail to reach consensus during negotiations with trade unions or if there are no active trade unions at the employer’s work establishment. In such situation, the employer should consult the content of the planned by-laws with representatives of employees who are designated in the manner that is adopted by the given employer. For example, workers’ councils may be an example of a party to the consultations.

Analysing the problems of remote work in the Labour Code, it is worth discussing the types of such work (Gładoch 2023, pp. 70 ff; Tomaszewska 2023). In my opinion, *de lege lata*, two types may be distinguished: contractual remote work and remote work that is designated unilaterally. In the first category, the arrangement may be established in two variants, either based on the agreement between the future employer and the applicant during negotiations (Baran 2022b, pp. 40 ff) on the employment contract or during an existing employment relationship. Each of the parties to the employment relationship may take the initiative. The employee should submit the relevant motion in printed or electronic format. A similar mechanism applies to the cessation of remote work. Each of the parties may file a binding motion to restore on-site work. In an agreement, the parties specify the time of restoring previous conditions of work, provided that the period cannot exceed 30 days from the date of receipt of the motion. If the parties fail to reach consensus, previous working conditions are restored on the day following the expiry of the 30-day period after the receipt of the motion. Violation of this regulation may, depending on the given circumstances, lead to the termination of the employment relationship pursuant to the provisions of Art. 52 item 1(1) or Art. 5 item 1(1) of the Labour Code.

On the other hand, in the case of unilaterally designated remote work, both the employer and the employee have the right to certain competences in this matter. However, in both cases the other party to the employment relationship must grant at least coincidental consent. In this sense, unilaterally designated remote work is of a relative nature and can be applied arbitrarily neither by the employee nor by the employer.

Remote work upon the order by the employer may be performed only in the circumstances foreseen in Art. 67(20) of the Labour Code, namely: 1) during the state of emergency, a state of epidemiological emergency or a state of epidemic emergency and for a period of three months after their revocation; 2) during the period when it is impossible for the employer to ensure safe and hygienic working conditions at the existing workplace as a result of the circumstances of force majeure.

This catalogue is of an enumerative nature so it cannot be interpreted in a broadening way, pursuant to the directive *exceptiones non sunt extendendae.* This means that in other cases, it is unacceptable for the employer to order the employee to perform remote work. *Natura rerum,* the order to perform this type of remote work is of a time-limited nature. In this context, the question arises whether an order to perform remote work may be extended. There are no legal obstacles in this matter if the statutory prerequisites are met. As a result, the order may be extended multiple times, but never beyond the periods specified in binding regulations of a statutory rank.

The order to perform remote work in extraordinary situations refers only to the type of work that has been agreed in the employment contract. As a result, the employer cannot order the employee to perform remote work that extends beyond the type of work specified in the contract. However, in some cases the scope of duties may be narrower due to functional or legal limitations.

Each time before issuing the order, the employee shall make a written or electronic statement confirming that he or she has the suitable premises and technological conditions to

perform remote work. Without such statement the order to perform remote work is legally ineffective, and the employee who refuses to perform remote work is not subject to liability. The employee shall notify the employer immediately about any changes in the premises or technological conditions that prevent him or her from performing remote work. In such event, the employer shall withdraw the order to perform remote work immediately. The problem here is the interpretation of the term “immediately”. Due to the fact that this notion is immanently undefined, it is impossible to define a specific period. Based on the functional interpretation, I suggest that it should be assumed that it should happen as soon as possible in the given circumstances in which the work is performed. In situations when the employer prolongs the period of returning the employee to regular on-site work in an unjustified work, the employment contract may be terminated on grounds of gross violation of the fundamental obligations towards the employee, pursuant to Art. 55 item 1(1) of the Labour Code (Baran 2022b, pp. 40 ff).

Another important practical issue is the question who exactly may issue an order to perform remote work. *De lege lata* it is obvious that it may be done by the employer or the person who performs actions related to labour law on behalf of the employer—pursuant to Art. 3(1) of the Labour Code (Baran 2022b, pp. 40 ff).

A different temporal mechanism was adopted in situations when it is the employer who withdraws the order to perform remote work. Art. 67(19) of the Labour Code (Sierocka 2022, pp. 842 ff; Tomaszewska 2023) stipulates that this may happen at any time, but upon a notification at least two days in advance. This is the minimum period that can be shortened neither by the agreement on remote work concluded with the trade union nor by the by-laws. The employee who refuses to return to on-site work after the expiry of the notification period may be subject to various sanctions, including even the termination of employment contract without notice under Art. 52 item 1(1) of the Labour Code.

One of the aspects of remote work ordered unilaterally is the obligation of the employer that is foreseen in Art. 67(19) item 5 of the Labour Code to consider the motion of a parent in a complicated pregnancy, parent of a child with disabilities, an employee who is bringing up a child up to four years of age and an employee who takes care of a closest relative or another person in the same household who have a certificate of disability or severe disability, unless it is impossible due to the organisation of work or to the type of work performed by the employee (Gładoch 2023, pp. 72–73 ff; Tomaszewska 2023). Therefore, also in this case the obligation of the employer is of a relative nature. The employer shall notify the employee about the reason for the refusal to consider the motion in writing or electronically, within seven business days from the date of filing the motion. The employee may appeal against the decision of the employer to the labour court by way of action for determination under Art. 189 of the Code of Civil Procedure. Here it is worth noting that employees who take up remote work in an unauthorised way, without the consent of the employer, may be subject to termination of the employment relationship without notice pursuant to Art. 52 item 1(1) of the Labour Code. On the other hand, unjustified refusal to consider a motion for remote work entitles the employee to terminate the employment contract without notice pursuant to Art. 55 item 1(1) of the Labour Code.

To continue the discussion of remote work in Polish Labour Code, I would like to conclude that the provisions of Section IIC constitute *lex specialis* in reference to other norms provided in the Code. This means derogation from the general norms of the Code in the objective and subjective scope. To the remaining extent, the standards of the Labour Code are fully applicable to remote work. The same refers to other standards of labour law, for example to collective employment law. This is why the new regulations on remote work cannot, in any case, constitute an excuse for employers to limit the trade union rights of remote workers.

To conclude the characteristics of remote work in the Labour Code, I believe that the new statutory model introduces a differentiation of types of remote work to the Polish labour law system. This allows the parties to the employment relationship to adapt it in a flexible way to the diverse conditions of the work environment at the dawn of the post-industrial era.

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