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IS THE EXISTING MODEL OF PREVENTING THE ABUSE OF FIXED-TERM EMPLOYMENT CONTRACTS IN POLAND AND GERMANY SUFFICIENT IN THE FACE OF THE COVID-19 PANDEMIC?

Abstract

The need to prevent the abuse of fixed-term employment contracts, having its legal basis in the framework agreement on fixed-term work, implemented by Council Directive 99/70/EC, may have been weakened by the tendency to become more flexible in the face of the socio-economic conditions related to the coronavirus pandemic. From the point of view of an employee, it is important to be employed under an employment contract, ultimately for an indefinite period. Long-term employment on a temporary contract is associated with the phenomenon of precarization of employment and leads to segmentation in the labour market. The purpose of this paper is to answer the questions of whether the state of pandemic affects in some way the possibility of concluding fixed-term employment contracts, in particular whether it can constitute an objective reason justifying the conclusion of such an employment contract.

Słowa kluczowe: umowa o pracę na czas określony, COVID-19, obiektywne powody

Keywords: fixed-term employment contract, COVID-19, objective reasons

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Introduction

The COVID-19 pandemic had a large impact on the global economic and employment. It did not only imply changes/reductions in working hours and the wide application of remote work but also in the structure of employment. Generally speaking, response to COVID-19 has led to the increase in the unemployment rate, volatility in employment markets expressed mainly by sharp falls in labour demand in many sectors, but also its growth in others, as well as caused a shift in the structure of economic activities (Costa Dias *et al.* 2020, p. 372;

Fana *et al.* 2020, p. 392). It should be emphasized that in the forcefully closed sectors, the share of temporary employment was the highest (Fana *et al.* 2020, p. 400). The ongoing state of uncertainty had an impact on employers' behaviour also in sectors less affected, or even more prosperous during the pandemic time. The unpredictability that existed at that time about the duration of the pandemic may have caused a reluctance to long-term planning, also regarding employment. The most noticeable response to the economic situation was stagnation in the area of employment. However, it was obvious that such a state of affairs will not last forever, and a slow recovery may lead to employers' cautious approach and concluding fixed-term employment contracts (Bauer, Romero 2021, p. 690).

The aim of this article is to analyse the regulation of fixed-term employment contracts in Poland and Germany in relation to the risk of increased labour demand related to the recovery from the economic crisis. The article focuses on regulations constituting *lex generalis* and does not refer to specific acts.

The need to prevent the abuse

Prior to examining the regulation adopted in Polish and German law concerning fixed-term employment contracts which constitutes the subject matter of this article, it seems necessary to present the justification for counteracting the abuse of fixed-term employment contracts. It should be obvious that it is necessary to prevent the misuse of any legal institution. The existence of the possibility of abuse of a fixed-term employment contract in itself already leads to the conclusion that this contract cannot be concluded under certain conditions and that a contract of indefinite duration is then necessary. The crucial question, however, is to determine when we are dealing with the abuse.

One should note that employment under a contract of an indefinite duration is the most desirable from the point of view of an employee, as it ensures stability and, subject to the regulations in a given country, protection against termination of an employment contract by notice. Performing work based on a fixed-term contract is less favourable (Rylski 2014, p. 2) and involves uncertainty as to the continuation of employment (Dral 2016, p. 22), as well as the possibility of terminating the contract at the end of the deadline, also at a time extremely inconvenient for the employee, because practically no protective regulations shall apply in this regard (Święcicki 1969, p. 221; Boecken 2012, p. 526; Maschmann 2012, p. 518; see also Dral 2009, pp. 23 ff). At the same time, this employment ground is used as a tool to make the labour market more flexible, constituting a form of external numerical flexibility (Giesecke 2006, p. 42; Majewska, Samol 2016, p. 22).¹ It is pointed out that flexible forms of employment, allowing the enterprise to adapt to market changes, are desirable not only from an economic but also social point of view, as they increase the possibilities of employees

¹ External numerical flexibility consists in the entrepreneur's ability to adapt by changing the size and structure of employment to changes in the environment, i.e. changes in the volume of demand for specific goods and services. The internal one is associated with changes in the organization of work in the enterprise.

to act. At the same time, it is noted that such forms of employment facilitate the transition from unemployment to employment, which reduces social inequalities (Giesecke 2006, p. 18). On the other hand, it is indicated that fixed-term employment leads to a deterioration of the employee's situation from the economic (remuneration and social security) and social point of view (uncertainty of further employment), and the transfer of the economic risk of the enterprise onto employees (Giesecke 2006, p. 19). Furthermore, it is noted that changes in the labour law related to making employment more flexible mainly meet the needs of entrepreneurs, increasing their adaptability (Włodarczyk 2017, p. 99). Fixed-term employment is one of the dimensions of the underemployment phenomenon (Bednarski 2012, p. 36)² and leads to precarization of employment (Horstmeier 2009, p. 6; Standing 2009, p. 98; Standing 2011, p. 1; Cymbranowicz 2016, p. 17)³ and segmentation in the labour market (Kukulak-Dolata 2018, p. 113). Therefore, it seems obvious that employment on this basis should not be a target for the employee and it is necessary to introduce mechanisms limiting such use of fixed-term employment contracts, which leads to depriving the employee of the benefits related to employment for an indefinite period.

However, it should be emphasized that a fixed-term employment contract is one of the types of employment contract permitted by law, which should be concluded only if there is a temporary demand for work, for a period corresponding to existing need. At the same time, employers are concluding this type of contract instead of contracts for an indefinite period of time also when the need for work is permanent, which is against the essence of this contract (Moras-Olaś 2021, pp. 523 ff). This type of contract shall allow the employer to satisfy its needs during periods of heavy demand for work, without making a permanent bond with the employee (Bury 2017, p. 76), and cannot be concluded for any other purpose than to cover the temporary needs of the employer.

The need to prevent discussed phenomenon of abuse was recognized by the European Union. General interbranch organizations operating in the industry, the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC), concluded a framework agreement on fixed-term work, which was implemented by a Council Directive 1999/70/EC of 28 June 1999 (OJ L 1999/175, pp. 43–48) which the Member States were obliged to implement into their legal systems. A directive, as an act of EU secondary law, binds the Member States only as to the result to be achieved. Thus, it leaves the freedom to choose the form and methods of implementing the regulation into national law. The regulations of this act establish an absolute minimum level of protection. As it is noted in the preamble of framework agreement:

The parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also

² The others are part-time, low-paid and underqualified employment.

³ The concept of precarization is derived from the combination of the words precarious (uncertain) and proletariat (poor working class).

recognise that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers.

The agreement in question does not define the concept of abuse of a fixed-term employment contract, which constitutes its significant shortcoming. In particular, this is problematic as it is an act that requires implementation in many national jurisdictions, and failure to specify this term may lead to significant discrepancies between the adopted regulations. The interpretation of this act leads however to the conclusion that the concept of abuse should be understood as a sequence of contracts that deprives the employee of the benefits of employment for an indefinite period. Andrzej M. Świątkowski states that it consists in the successive conclusion of contracts in order to establish a permanent employment relationship (Świątkowski 2015, p. 206; judgment of the CJEU of 13 March 2014, C 190/13, Antonio Márquez Samohano v. Universitat Pompeu Fabra, ECLI:EU:C:2014:146). It should be noted, however, that the aforementioned European act does not apply to single and first contracts, whereas also in such cases an abuse is possible.

Neither Polish nor German regulations use explicitly the concept of abuse of a fixed-term employment contract, although this notion is used in jurisprudence and doctrine. Unlike in the framework agreement, where the concept in question has an abstract dimension, in domestic law, it refers to specific situations. Under Polish law, Maciej Świącicki questioned the admissibility of successive—concluded one after another—fixed-term employment contracts with a short timeframe (Świącicki 1969, p. 221; Szubert 1976, p. 114). Tadeusz Zieliński (1986, pp. 18–19) believed that long-term contracts are contrary to the socio-economic aim of the regulation of the Labour Code and questioned those that led to the circumvention of the provisions on the termination of employment contracts for an indefinite period. In German law, the judiciary initially questioned the possibility of concluding a series of fixed-term contracts (*Kettenarbeitsverträgen*) if the employer's intention was to circumvent the protection against the termination of an employment contract for an indefinite period. Ultimately, the existence of an objective reason was required for the conclusion of such an agreement, which shall protect against abuse (Dörner 2011, p. 3; Hesse 2016, § 14 TzBfG, nb. 1–2; Müller-Glöge 2019, § 14 TzBfG, nb. 1–2; Rudnik 2019, p. 168).

Summing up this part of the considerations, it should be emphasized that the need to prevent abuse of a fixed-term employment contract results from the need to protect the employee. The key is to find legal solutions to avoid the effect of abuse while maintaining the possibility of achieving the benefits of this type of employment.

Current regulations in Polish and German law in the light of the European Union law

The need to prevent the abuse of fixed-term employment contracts may have been or may even now be weakened by the tendency to become more flexible in the face of the socio-economic

conditions related to the coronavirus pandemic. Attempts to mitigate a steep increase in unemployment triggered by the economic crisis caused by the pandemic are inevitably connected with the promotion of employment flexibility which may be perceived as a risk to the welfare and occupational security of employees.

The protection against abuse established in the framework agreement is based on three mechanisms: objective reasons justifying the renewal of contracts, the maximum total length of successive contracts, and the number of their renewals. These mechanisms are not specified in any way, including the determination of a maximum period of time, maximum number or examples of objective reasons. Requirements are formulated broadly, leaving a wide margin for national regulations (Kamanabrou 2017, p. 221). Thus the framework agreement leaves Member States wide freedom as regards their choice which measure should be introduced and specific methods of their formation. Member States can also determine the condition under which fixed-term contracts are deemed as successive. Proper implementation, apart from the necessity to achieve *effet utile*, requires finding a proper balance between employee protection and flexibility of solutions. As Sudabeh Kamanabrou (2017, p. 226) notes, cumulative combinations of measures enhance the level of protection compared to regulations based on only one mechanism and alternative combinations of them.

Polish and German regulations introduce the same model of preventing the abuse of fixed-term employment contracts. It is based on the cumulative use of measures of maximum duration and number and renewal of such contracts, and alternative use of the mechanism of objective reasons (Kamanabrou 2017, p. 231). However, a detailed analysis allows for identifying the far-reaching differences in both national regulations. In Polish law, the rule is to conclude contracts limited by the time and number of extensions, while in Germany just to the opposite - contracts limited by the time and number of extensions constitute an exception and the general rule is to conclude contracts justified by objective reason.

According to Art. 25¹ of the Labour Code Act of 26 June 1974 (Dz.U. 2020, item 1320 consolidated text, as amended, hereinafter referred to as: “the Labour Code,” “l.c.”) the maximum duration of fixed-term employment contracts between the same parties may not exceed 33 months and a maximum number of consecutive contracts is three. However, these limits do not apply when one of the objective reasons justifying the conclusion of a fixed-term employment contract is involved. The legislator introduced four reasons. The conclusion of a contract in such conditions is allowed if the general premise is met, according to which the conclusion of fixed-term employment contract in a given case addresses a real and temporary need and is necessary for that respect in the light of all the circumstances surrounding the conclusion of the contract. An exhaustive list of objective reasons included in Labour Code contains following grounds: substituting an employee during his/her excused absence at work; performing any work of casual or seasonal nature; performing work during the term of office; the existence of objective reasons attributable to the employer.

In Germany § 14 of the Act of 21 December 2000—Part-time job and fixed-term employment contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge; the Journal of Laws of 2000, p. 1966, as amended, hereinafter referred to as the: “TzBfG”), includes a non-exhaustive list of objective grounds which are:

1) the temporary nature of operational need for the work involved, 2) the term is fixed following training or study in order to facilitate the employee's transition to a subsequent job, 3) substituting an employee during his/her excused absence at work, 4) the type of work involved justifies a fixed term, 5) the fixed term is intended to try the employee out, 6) there are personal reasons residing with the employee which justify the fixed term, 7) the employee is remunerated from public funds which are earmarked for fixed-term employment and he has been hired on that basis, or 8) the fixed term is based on a court settlement.

As Bernd Wass (2010, p. 28) notes, despite the open-ended statutory catalogue it is difficult to figure out additional grounds which could also justify the fixing of a term of an employment contract.

Additionally, it is permitted to conclude an employment agreement when no objective grounds exist for up to two years, and during this time, it is possible to extend the contract up to three times. The significant differences to Polish regulations regarding fixed-term employment contracts with no objective reasons concern the possibility of concluding this agreement only if it is the first employment contract between parties and renewal of a contract is permitted only when there is no break between contracts (it must be concluded as the extension and not as a new contract).

The German regulation of fixed-term employment contracts allows concluding contracts also in some specific situations such as: employment in a newly established enterprise, employing an employee who has reached 52 years of age and receives certain benefits. These specific regulations however will not be discussed further as they do not concern the issue in question.

The legal basis for concluding a fixed-term employment contract in the face of the needs caused by the pandemic

In the post-pandemic world, one of the key tasks is and still will be to rebuild economies and the labour market. This may be associated with the temptation to make employment excessively flexible, which will not have a positive effect on the situation of employees. As it was mentioned before, employment on the basis of fixed-term employment contracts induced by the crisis connected with the COVID-19 pandemic may be mostly motivated by uncertainty and volatility. A pandemic in itself cannot, however, be a sufficient objective reason to justify a fixed-term contract, so is the uncertainty about the economic situation of the employer and the volatile situation on the labour market, as this would lead to a shift to the employee the economic risk of an employer, which should never be the case.

Undoubtedly, the current Polish and German regulations without requiring an objective reason for each contract, make it possible to conclude such contracts in the discussed situation, limited by the duration and number of contracts. One should note that it constitutes the most favourable basis for employers (Bauer, Romero 2021, p. 690), mainly due to the fact that it excludes the need to justify the agreement and *legis latae* it is not subject to control as to the existence of a reason. Additionally, currently both in Poland and Germany conclusion

of a contract limited as to duration and the number of renewals may not cause the abuse. However, it has to be emphasised again that, in my opinion, concluding such a contract should take place only when the temporary need of employer exists.

It is also conceivable to conclude a fixed-term employment contract in the context in question due to the presence of an objective reason. It pertains to situations that were triggered by the pandemic and allowed the creation of new workplaces for the employer. The conclusion of an employment contract for a definite period in the case discussed herein may be justified in the case of Polish law by objective reasons attributable to the employer, and in the case of German law when the operational need for the work involved is only temporary. One should pay attention also to other reasons, the occurrence of which is not related to the pandemic but may be used in a specific way in the discussed situation, such as performing any work of casual or seasonal nature and (under Polish law) and (in both countries) substituting an employee during his/her excused absence at work.

When analysing the above-mentioned justification for the conclusion of the contract, it should be noted that the wording of the one included in Art. 25¹ § 4 point 4 l.c., which is objective reasons attributable to the employer, raises numerous concerns due to the overly general wording, which may lead to some problems with its interpretation. Although on the other hand, the adopted solution is also very flexible (Dral 2016, p. 32). The *ratio legis* of the regulation in question is such that the reason is related to the employer in the economic sense (the issue of, for example, increased demand for work), including the functioning of his enterprise (Mitrus 2015, p. 288). As noted by Mikołaj Rylski, the actual temporary demand will often constitute an objective reason justifying the form of employment in question, but it is also necessary to indicate specific circumstances and it is not sufficient for the employer to use the general, statutory wording. However, it relates to situations other than resulted from the employer's (wrong) actions (Pisarczyk 2016, p. 179; 2017, p. 343; Rylski 2016, p. 25). It should also be remembered that employment upon fixed-term employment contract based on discussed reason is allowed only in the event when the above-mentioned general premise, relating to the periodicity of employment and its necessity, is met.

An objective reason of the temporary character of operational need for the work involved which is included in § 14 TzBfG basically covers two cases: a temporary demand for labour and a temporary increase in labour demand (Boecken 2012, p. 292; Müller-Glöge 2019, § 14 TzBfG, nb. 23). The first of them concerns tasks which are not permanently performed by the employer and after the end of the contract, there will be no further need to perform them (Bayreuther 2019, § 14 TzBfG, nb. 28). As Bundesarbeitsgericht (The Federal Labour Court) indicates in its judgment of 25 August 2004 (case no. 7 AZR 7/04, NZA⁴ 2005, p. 357), when assessing whether the demand is temporary, the employer must state (*Prognoseentscheidung*) with sufficient certainty that there will be no need to hire an employee after the period for which the contract has been concluded. The second one concerns an increase in the number of tasks. Even a temporary increase in the number of permanent tasks, or the adoption of some new project or additional task for which the permanent staff of the workplace is not sufficient

⁴ Neue Zeitschrift für Arbeitsrecht.

to perform, will constitute a temporary increase for in demand for work within the meaning of § 14 TzBfG (judgment of Bundesarbeitsgericht of 27 July 2016, case no. 7, AZR 545/14, NZA 2016, p. 1531), however, it is permissible to employ only as many employees under a fixed-term employment contract as necessary to cover the increased demand (judgment of Bundesarbeitsgericht of 14 December 2016, case no. 7 AZR 688/14, BeckRS⁵ 2016, no. 119687). The basis for the conclusion of the contract in discussed circumstances may be the second of the indicated cases.

In fact, a detailed interpretation of above mentioned reasons leads to the conclusion that they cover similar situations. They are formulated broadly and may contribute to the repeated conclusion of such contracts which may not be favourable to the employee. The risk of such development of the employee's situation may be even greater in Germany, where in the event of the control of employment relationship only the last contract is examined as to whether there is actually an objective reason for its conclusion and the earlier ones do not affect the assessment (Maschmann 2012, p. 555). Basically, due to the fact that it is one of the mechanisms mentioned in the framework agreement, it should be assumed that the occurrence of an objective reason eliminates the risk of abuse in itself. However, CJEU in the judgment of 26 January 2012 (C-586/10, Bianca Küçük v. Land Nordrhein-Westfalen, ECLI:EU:C:2012:39) indicated that in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.

Conclusions

In the initial phase of the pandemic, according to research conducted in Germany in 2020, no increase was noticed in the number of concluded fixed-term employment contracts. Although usually, the uncertainty was an impulse to conclude such contracts (Seils/Emmler 2021, p. 5; Wolter 2021), a downward trend could even be observed (Eurostat 2021a).⁶ Similarly, in Poland there was a decrease in employment contracts for a definite period of time, which was related to the expiry of their duration (GUS 2021, p. 87). But in fact beginning of the pandemic was associated with the introduction of measures limiting the functioning of many sectors and social distancing. It caused a kind of freezing in the area of employment (Seils/Emmler 2021, p. 5; Wolter 2021). The most noticeable response to the economic situation was stagnation in the area of employment (hiring new employees was kept to a minimum) but over time there has also been an increase in unemployment (Eurostat 2021b; GUS 2021, p. 17). One of the most affected group of people who lost employment were workers on fixed-term

⁵ Beck-Rechtsprechung.

⁶ The statistics also include fixed-term employment contracts concluded with a temporary employment agency, contract for a probationary period.

contracts, due to the end of the duration of the contract and not concluding a renewed one (ILO-OECD 2020, p. 17). This type of contract is often concluded in sectors such as entertainment, hospitality and tourism, which were exactly ones facing the hardest impact in the COVID-19 crisis. Additionally, employers on fixed-term contracts were often not eligible for any employment protection schemes introduced in European countries (Eurofound 2021, *passim*). But subsequent studies (Eurostat 2021a) already show a slight, Europe-wide, increase in employment for a definite period of time, and this type of employment is still expected to increase. Such growth is likely to occur especially because re-opening economies results in an increase in labour demand. However, employers may be reluctant to plan for the long term, which naturally leads to a cautious approach resulting in fixed-term rather than indefinite contracts. (ILO-OECD 2020, p. 27). It is therefore important that the contract in question should be concluded when there is only a periodic demand for work and not as a replacement for an indefinite contract for uncertain times.

The undertaken considerations focus on answering the question of whether the existing regulations are sufficient in this respect as neither in Poland nor in Germany the pandemic resulted in the enactment of special legislation regarding the possibility of concluding employment contracts for a fixed period. The point is whether the regulations, on the one hand, meet the needs of employers related to the pandemic, and on the other hand, whether they adequately protect employees. It seems that the discussed-above bases for concluding fixed-term employment contracts may prove sufficient for the specific time and problems connected with the pandemic and there is no need to introduce some specific regulations in this area. Especially one should appreciate the flexibility and utility of regulations related to the objective justification. It should be noted, however, that although they may currently prove to be a very helpful solution, they seem to mitigate the problem of the abuse of fixed-term employment rather than fully eliminate it. Nevertheless, both in Poland and in Germany, the regulations introducing mechanisms to prevent abuse cannot be considered mild.

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