

Dr Jagoda Jaskulska

Uniwersytet Mikołaja Kopernika w Toruniu

ORCID: 0000-0002-0904-0207

e-mail: jagoda_jaskulska@umk.pl

Dr Beata Rutkowska

Uniwersytet Mikołaja Kopernika w Toruniu

ORCID: 0000-0002-1920-8261

e-mail: beatarut@umk.pl

Remote working in Poland. Legal and social perspective (opportunities and threats)

Praca zdalna w Polsce. Perspektywa prawna i społeczna (szanse i zagrożenia)

Abstract

The outbreak of the COVID-19 pandemic has led to increased interest in remote working. In Poland, the legislative body chose to legally standardize remote working, placing it among the tools used to counteract the pandemic and its effects. For some time now, there have been works on including remote work in the Polish Labour Code on a permanent basis. However, owing to the specific way of organizing work accompanying the remote form of its performance, in the course of creating a new legal framework for this institution, the social dimension of its functioning in practice should also be taken into account. To this end, the article analyzes remote working from the perspective of the employee and the employer, based on research conducted in this area both in Poland and in other countries.

Keywords

remote work, COVID-19 pandemic, employee, employer, telework

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Introduction

Remote working is one of the forms of performing work at a distance. Before the COVID-19 pandemic it functioned in Poland only in practice, without being reflected in labour legislation (it was called home office or homeworking). It was based on an agreement between

Streszczenie

Wybuch pandemii COVID-19 doprowadził do wzrostu zainteresowania pracą zdalną. W Polsce ustawodawca zdecydował się nawet na jej prawne unormowanie, sytuując ją wśród narzędzi służących przeciwdziałaniu pandemii oraz jej skutkom. Od pewnego czasu trwają prace nad włączeniem pracy zdalnej do polskiego kodeksu pracy na stałe, jako rozwiązania, z którego strony stosunku pracy mogłyby korzystać zarówno w normalnych warunkach, jak i w szczególnych okolicznościach, takich jak np. stan epidemii. Jednak ze względu na specyficzny sposób organizacji pracy towarzyszący zdalnej formule jej wykonywania, w toku tworzenia nowych ram prawnych tej instytucji należy uwzględnić także społeczny wymiar jej funkcjonowania w praktyce. W tym celu w artykule dokonano analizy pracy zdalnej z perspektywy pracownika i pracodawcy, opierając się na badaniach przeprowadzonych w tym obszarze zarówno w Polsce, jak i w innych państwach.

Słowa kluczowe

praca zdalna, pandemia COVID-19, pracownik, pracodawca, telepraca

the employee and the employer under the principle of freedom of contract. The essence of remote work at the time consisted of the occasional provision of work outside the employer's premises (usually at the employee's home) with the use of modern technologies.

The situation changed dramatically with the outbreak of the COVID-19 pandemic. It was then that remote

working was introduced into the Polish legal system. This was effected by the Act of 2 March 2020 on specific solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases, and crisis situations caused by them (consolidated text: Journal of Laws of 2021, item 2095, as amended), which closely linked remote working with COVID-19, giving this institution a unique character, significantly different from the previous home office practice. Thus, remote working has ceased to be a benefit for employees and has become a necessity and an opportunity to reduce the risk of infection (Dolot, 2020).

The essence of remote work boils down to the performance of work specified in the employment contract, outside the place of its permanent provision. The place of work constitutes an obligatory element of the employment contract. By the same token, the provision of work outside the place of its regular performance implies a change in the content of the contract. However, the type of work may not be modified.

There is no requirement that remote work be carried out using modern means of communication. The Act indicates that, in particular, remote work may be performed using means of direct remote communication or may concern the performance of productive parts or material services. Against the background of this regulation, one may have doubts whether the analyzed work is in fact "remote" (Makowski, 2020).

Remote working regulated for the period of the pandemic is also characterized by the unilateral mode of its implementation and its temporary nature. Remote working is commissioned by the employer by means of an order. However, the performance of remote work may be commissioned only if the employee has the skills and technical and on-site capabilities to perform such work and the type of work permits it. It is understood in the literature that while it is the employer who decides whether the type of work and the employee's skills are adequate to provide remote work, the technical conditions and space are assessed by the employee. His/her subjective assessment "determines the admissibility of an order to provide remote work" (Baran, Książek & Witoszko, 2020). This means that if the employee determines that he or she lacks the necessary technical and accommodation capacity to perform the remote work, the employer may not commission this work. What is important here is that no entity exists that would be entitled to check the assessment made by the employer and the employee. Only in the case of a potential dispute (arising, for example, from a refusal to comply with an order to perform remote work and the termination of the employment relationship for that reason) is that assessment subject to review by the labour court.

The limitation on the duration of remote working consists, on the one hand, in the exclusion of remote working for an indefinite period and, on the other hand, in the abovementioned link between remote working and the duration of an epidemic emergency or a state of

epidemic declared on account of COVID-19 and the 3-month period following their revocation.

The introduction of remote work into the Polish legal order was not accompanied by the elimination of the previous institution of telework. This means that currently in labour law two separate legal categories exist — remote working and telework, which is permanently envisaged institution regulated in the Labour Code, aimed at streamlining the management process or helping the employee to combine private and professional life (Gładoch, 2020). Meanwhile, remote working serves primarily to protect the life and health of employees and their families (Makowski, 2020) and has a temporary and exceptional (extraordinary) character, as evidenced by its association with COVID-19, the unilateral mode of introduction, and the determination of the timeframe of its application.

The need to ensure social distancing in order to protect the lives and health of employees and their families, combined with the need for employers to continue their business, has contributed to the growing popularity of remote working in some sectors in Poland, which is in line with the global trend towards the greater use of this form of work provision during pandemics (Brynjolfsson et al., 2020). According to the data of the Statistics Poland, obtained from the survey "Demand for labour", concerning the impact of the COVID-19 epidemic on selected elements of the labour market in Poland in the individual quarters of 2020 (Statistics Poland, 2020), the proportion of people who worked remotely owing to the epidemic situation in the total number of the employed was the highest at the beginning of the pandemic and on 31 March amounted to 11%. In the following two quarters, this share gradually decreased to 10.2% in the second quarter and 5.8% in the third quarter, to reach again at the end of the year a level very close to that at the beginning of the pandemic — 10.8%. An important factor determining the scale of the transition to remote working was the type of activity. It is worth noting, for example, that while in industry only a few employees worked remotely, in services the number was several times higher, although the specificity of services was important here — e.g. in the "Information and communications" section from the beginning of the pandemic a significant number of employees worked remotely (ca 40% on March 31), while in the "Trade, repair of motor vehicles" section this number remained below 10%.

For some time now, efforts have been underway to reshape remote working in such a way as to make this form of work organization a permanent institution under general labour law. At the same time, plans are being made to give remote working a broader meaning, including the current telework. It is all the more justified because the introduction of remote work under normal conditions would be conducted on principles similar to those currently in force on the grounds of telework. However, it is envisaged that in certain circumstances, an employer may order an employee to work remotely using his/her managerial powers.

It is extremely important in the process of preparing a new legal regulation to take into account the diagnosed social context within which remote working is used in practice. Both from the perspective of employees and employers, the benefits and risks of including remote working permanently in labour legislation can be identified. Their early identification and the anticipation of their subsequent impact on the practical dimension of work should be of key significance in defining the legal framework for this institution. This is even more important when one considers that in the publication of the European Parliament and the Committee on Employment and Social Affairs, entitled "The right to disconnect", Poland was identified as one of the countries where telework, while legally regulated and promoted, does not take into consideration its potential disadvantages (European Parliament and Committee on Employment and Social Affairs, 2020). This prompts a closer look at remote working in terms of both its advantages and disadvantages, as reported by the parties to the employment relationship themselves.

Remote working from the employee's point of view

Regardless of the pandemic, the advantage of remote working from the point of view of employees is that there are no restrictions related to the location of the employer. Employees can work from home or from another location, even at a considerable distance from the employer's premises. This broadens job seekers' perspectives with offers from employers outside the local labour market who offer the possibility of remote working. Therefore, the benefits of remote working include time savings and reduced costs related to commuting (Lorenz, 2011). Attention is also drawn to the flexibility of remote working and the possibility of adapting working hours to the employee's activity (Sęczkowska, 2019). However, the last highlighted element is not applicable in all cases of remote working. This is because some employers may require employees working remotely to be active at strictly defined hours (e.g. by allowing them to log into the system only at specific times). The benefits of remote working in terms of work-life balance, i.e. reconciliation of private and professional life, are also recognized (Sęczkowska, 2019).

However, performing work according to the remote working formula does not always transpire to be beneficial for employees and has certain disadvantages, which became apparent during the pandemic and which should be taken into account at the stage of creating the legal framework for this institution in the labour legislation. First of all, remote working can have a negative impact on the course and development of interpersonal relations at work. This was pointed out even before the pandemic, emphasizing the low number and low quality of contacts between employees working remotely (Jeran, 2016). The results of research conducted in Poland during the COVID-19 pandemic

also showed that the biggest disadvantage of remote working declared by the respondents was the lack of social contacts, followed by the lack of direct communication and cooperation, the blurring of the boundaries between work and private life, distraction by the home environment, and a decrease in motivation, while people working on-site demonstrated a higher level of vigour, dedication, and commitment (Mierzejewska & Chomicki, 2020). The lack of contact with co-workers, the absence of social contact, and isolation ranked first among the negative consequences of remote working and the greatest difficulties associated with it also in other studies conducted in Poland (Dolot, 2020). Moreover, the negative impact of such isolation on the innovation and creativity of employees working remotely is reported (Allen et al., 2015). Limited contact between colleagues can be particularly disruptive when working remotely on a full-time basis rather than on a limited basis. Loneliness or ineffective communication were also prominent among the challenges associated with remote working (along with work-from-home disruptions and procrastination) identified in an early pandemic survey among Chinese remote workers (Wang et al., 2021).

Working remotely during the pandemic and lockdown period proved burdensome especially for working mothers. As the results of the study show, as many as 1/3 of women raising children under the age of 11 declared difficulties in concentrating on work performed from home and 24% of women said that family obligations prevented them from focusing on work to which they would like to devote themselves (compared to 13% among men). Equally high was the proportion of women (32%) who felt that work prevented them from focusing on their family (Mascherini & Bisello, 2020).

In the long term, remote working can also blur the boundaries between working and non-working time. Continuous contact with the work environment is not conducive to effective rest, with significant impacts on workers' physical and mental health. It is also noted that some workers may be interested in reclaiming home as a private space and not treating it solely as a place of work, even for a few days a week (Anderson & Kelliher, 2020). Moreover, prolonged working hours may generate stress and health problems for employees and, in the long-term perspective, lead to a growth in sickness absenteeism, reduced work efficiency, lower quality of life and satisfaction with work, and also increase the risk of accidents at work (Chirkowska & Smolak, 2008). Therefore, the benefits resulting from the reduction of working hours are being increasingly emphasized, including *inter alia* the positive impact of such a solution on the effectiveness of the work, creativity, and health of employees (De Spiegelaere & Piasna, 2020).

The scale of the risks associated with the blurring of the boundaries between work and private life is so serious that the European Parliament and the Committee on Employment and Social Affairs have even decided to take the initiative in amending the EU Working Time Directive (2003/88/EC) by adding to it the so-called "right

of workers to disconnect, or, in other words, to remain offline". The European Parliament and the Committee on Employment and Social Affairs have drawn attention in particular to the long-term effects of remote working on the health of people working in such arrangements (European Parliament and Committee on Employment and Social Affairs, 2020; Naumowicz, 2021).

Employees working remotely may also feel uncomfortable when faced with having to cope with the increased use of technology for work purposes (e.g. instant messaging, video conferencing tools). This type of strain is known as technostress, and research in this area shows its link to remote working in times of pandemic (Molino et al., 2020). Research conducted in this area also indicates the existence of a relationship between technostress, workaholism, and employee management style. Authoritarian leadership shows in this respect a reinforcing effect on the relationship between workaholism and technostress (Spagnoli et al., 2020).

Moreover, remote working may entail the delegation of some of the responsibilities for the organization of the work process to the employee. This is visible, for example, among employees who handle documentation containing personal data at work. The responsibility for their safety in the workplace lies primarily with the employer, who is obliged to ensure their proper protection. The President of the Polish Personal Data Protection Office issued a recommendation that allows remote work also when it involves the processing of personal data outside the workplace, e.g. at the employee's home. However, in such a case the employee bears additional obligations related to, *inter alia*, the necessity to separate the work area in a manner preventing unauthorized access to the data (Personal Data Protection Office, 2020; Kuba, 2021).

Remote working from the employer's perspective

A similar account of the benefits and drawbacks of remote working can be made from the employer's perspective. The unquestionable advantage of remote working these days is the ability to continue to operate in pandemic conditions. This, of course, applies to entities whose nature of business makes it possible to perform work in this form.

Regardless of the pandemic, the introduction of the remote working formula into the organization may generate certain savings on the part of the employer. This is owing to the possibility of reducing some of the costs of operating the business, such as the maintenance of premises, including, for instance, fees for their rental or energy consumption costs, etc. (Twardowska, 2016). The employer also has the opportunity to attract high quality employees without regard to possible limitations of location. In addition, the introduction of remote working into an organization contributes to improving the management of employees in certain areas. It can be an effective way to increase the level of job satisfaction,

especially when it is accompanied by granting the employee more autonomy over the tasks performed (Schall, 2019; Wang et al., 2021). The absence or reduction of contact between employees, in turn, minimizes the risk of conflicts arising at work, thereby making it unnecessary for the employer to use specific conflict resolution mechanisms (Twardowska, 2016).

Remote working, however, also has certain disadvantages for the employer. The introduction of this form of work means additional obligations for the employer, which generate additional costs, especially in the initial period. In the case of remote working, the general obligation of the employer to provide the conditions for its performance — equipment (usually a laptop), internet, logistical support (installation, service, maintenance), necessary training, tools, and materials needed to perform productive parts or material services, etc. — remains unchanged. In practice, however, it is not uncommon for employees to use their private equipment and internet to work remotely. In this context, it is possible to talk about the transfer of organizational risk to employees, which is not justified by the current legislation (Głądoch, 2020). The employee should not bear the costs associated with remote working. However, if this happens, he or she may demand reimbursement of the expenses incurred (Głądoch, 2020). It would be advisable for this right to derive directly from the legal regulations.

At the beginning of the COVID-19 pandemic, a survey was conducted to assess the preparedness of Polish companies to provide remote working (Chomicki & Mierzejewska, 2020). It showed that, in general, employers were well prepared to introduce this form of work provision. They generally had an adequate communication system at their disposal. However, they experienced some problems with the availability of equipment (e.g. computers, monitors, laptops, VPNs), which meant that employees often had to use their own infrastructure to provide work. The least positive assessment was given to additional actions taken by employers to prepare for remote working (e.g. free transport of equipment or training). It was also concluded that "better prepared were private companies than public ones and those with foreign capital than those with only Polish capital" (Chomicki & Mierzejewska, 2020).

In the course of providing employees with appropriate conditions for remote work, the employer may in practice encounter problems with compliance with the requirements arising from health and safety regulations and rules. There is no doubt that if remote work is to be carried out at the employee's home, which is most often the case, it is necessary to cooperate with the employee in this respect. The European Agency for Safety and Health at Work recommends, among other things, that employees should be given temporary permission to take working equipment home; that they should be given guidance on preparing their work area at home in terms of ergonomics, good posture, and frequent exercise; that

the importance of regular breaks should be stressed; and that effective communication and support from management and colleagues should be provided, not forgetting the opportunity to maintain informal contact with colleagues — e.g. through online chats or "virtual coffee" meetings (Cockburn, European Agency for Safety and Health at Work, 2020).

Even if the employer has taken the recommended measures, the risk of accidents in remote working cannot be completely excluded. In such a case, it may be difficult to establish that the event meets the requirements for recognition as an accident at work, including the premise of work-relatedness. This is mainly because the regulations on accidents at work and the determination of their circumstances and causes do not take into account such a specific situation as the possibility of such an accident occurring at the employee's home. It is worth noting in this context that some European countries have recognized this problem and have introduced into their legislation specific solutions to strengthen the protection of home-based workers in this area — e.g. in Austria the concept of accidents at work also includes accidents at the employee's place of residence (Vargas Llave & Weber, 2020).

In addition to a number of extra responsibilities and costs associated with providing employees with the right conditions for remote working, a disadvantage of this form of work from the perspective of the employer is that it can hinder relationships with employees. Remote working sometimes weakens the sense of relationship between employees and the company, which on the one hand may adversely affect employees' loyalty to the employer understood as refraining from all kinds of activities that harm the employer (Gładoch, 2020). On the other hand, it may reduce the trust of the employer in his employees, which may result in the desire for greater control over them. It is worth noting in this context that, in general, no specific solutions are envisaged for controlling employees providing remote work. The employer may use the existing control methods, which are only partially adequate for the specificity of remote working. This concerns primarily control exercised with the use of electronic communication means, e.g. email monitoring. It should be borne in mind, however, that the excessive use of modern technologies to supervise and monitor employees working remotely may lead to violation of their right to privacy (Vatcha, 2020). From the point of view of this right, it may be particularly problematic to carry out checks at the employee's home as a place of remote work. Moreover, this problem concerns not only control by the employer, but also by the bodies appointed to supervise and control compliance with labour law, in particular with health and safety regulations and principles (e.g. the Polish National Labour Inspectorate). Taking this into account, it seems that the control of employees working remotely should be explicitly regulated in the legislation.

In order to at least partially avoid problems related to the calculation of working time and possible overtime, the task-based working time system, which does not

require the recording of working hours, is often applied to employees working remotely in Poland. This allows employees to adapt the organization of their work to their own needs, and the employer to concentrate not so much on controlling the time and course of work as on its results. On the other hand, some member states of the European Union have introduced specific regulations on accounting for working time and overtime in the case of remote work (Vargas Llave & Weber, 2020). Sometimes a special regulation is adopted with regard to the remote working time itself. An interesting example of this is Slovakia, whose law provides that "while the worker is operating from home, the employment relationship is not subject to the provisions on the schedule of weekly working hours, daily and weekly rest, and idle time. No wage supplements are paid to the employee for overtime and night work, or for working at weekends, unless the employee and the employer agree otherwise" (Vargas Llave & Weber, 2020).

Conclusions

Further intensification of research on remote work may yield a number of benefits, especially in Poland. Work is currently underway to incorporate remote working into the Labour Code as a new institution of general labour law, which in its conceptual scope would also include teleworking. However, in the process of preparing a new legal regulation, it is extremely important to take into account the non-legal aspects of remote working, including above all the psychosocial context in which it is used in practice. Early identification of the advantages and disadvantages of remote working for both parties to the employment relationship, as well as predictions as to how this mode of working will affect the practical dimension of work provision, should be of key importance in defining the legal framework for this institution.

It cannot be ruled out that in the future there will not be other exceptional situations similar to the one currently faced by the whole world. Therefore, the experience gained during the pandemic prompts us to leave the provisions of the labour law with the regulation providing for the possibility of unilateral introduction of remote work by the employer in the event of such special circumstances. However, it is worth considering how to improve the current regulation in this respect, so that it takes greater account of the non-legal, including psychosocial, context of remote working in practice.

Since the possibility of unilateral commissioning of remote work in exceptional situations is to be permanently introduced into the labour legislation, the intention to transfer this solution to the Labour Code deserves a positive assessment. At the same time, however, it should be accepted as a principle in the Code that remote work in cases other than special situations is introduced by mutual agreement between the employee and the employer. Wherever possible, the employee and the employer should also themselves

determine the conditions for remote working. Assigning decisive importance to the consent of the parties to the employment relationship when deciding on the use of remote working and defining detailed conditions for its performance would allow the interests of the employer, the needs of employees, and the nature of the work performed to be taken into consideration in specific cases, and as a result — the limiting of the potential drawbacks of this form of

work. In this context, it should be advocated that the Code regulation of remote work should not be too extensive and too rigid. On the contrary, it seems that it should be as flexible as possible. Moreover, after introducing remote work permanently into the Labour Code it would be advisable to periodically monitor its functioning in practice so as to respond, as necessary, to problems arising in the application of the new regulation.

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Dr Jagoda Jaskulska, PhD; Assistant Professor at the Department of Labour Law of Nicolaus Copernicus University in Toruń; author or co-author of scientific publications on labour law issues. Her research interests focus on employment in medical entities and relations between labour law and civil law. Recently, she has also dealt with the matter of organisation of work during the COVID-19 pandemic, in particular the institution of remote working.

Dr Beata Rutkowska, Assistant Professor at the Department of Labour Law of Nicolaus Copernicus University in Toruń; author or co-author of scientific publications on labour law issues. Her research interests focus on the sources of labour law, institutions of collective labour law, with particular emphasis on employee representation, and recently on the issues of remote work.

Dr Jagoda Jaskulska, doktor nauk prawnych; adiunkt w Katedrze Prawa Pracy Uniwersytetu Mikołaja Kopernika w Toruniu; autorka lub współautorka publikacji naukowych poświęconych problematyce prawa pracy. Swoje zainteresowania badawcze skupia wokół problematyki zatrudniania w podmiotach leczniczych oraz relacji pomiędzy prawem pracy a prawem cywilnym. W ostatnim czasie zajmuje się również materią organizacji pracy w dobie pandemii COVID-19, zwłaszcza instytucją pracy zdalnej.

Dr Beata Rutkowska, doktor nauk prawnych; adiunkt w Katedrze Prawa Pracy Uniwersytetu Mikołaja Kopernika w Toruniu; autorka lub współautorka publikacji naukowych poświęconych problematyce prawa pracy. Zainteresowania badawcze koncentruje wokół zagadnień dotyczących źródeł prawa pracy, instytucji zbiorowego prawa pracy, ze szczególnym uwzględnieniem przedstawicielstwa pracowniczego, a ostatnio problematyki pracy zdalnej.

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