t. LXI, nr 2/2020 DOI 10.33226/0032-6186.2020.2.5

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The consequences of exceeding the maximum duration of temporary agency work in the jurisprudence of the Polish Supreme Court

Konsekwencje przekroczenia maksymalnego okresu świadczenia pracy tymczasowej w orzecznictwie Sądu Najwyższego

Abstract
The article deals with the issue of exceeding the maximum duration of temporary agency work. The text analyses the Polish Supreme Court's jurisprudence with regard to the purpose of Article 20 of the Act of 9 July 2003 on the Employment of Temporary Agency Workers and the implicit establishment of an employment relationship between the user employer and a temporary agency worker in the context of the model of temporary agency work that is in force in Poland.

Keywords
temporary work, temporary worker, temporary work agency, user employer

JEL: K31

Streszczenie
W artykule została podjęta problematyka przekroczenia maksymalnego okresu świadczenia pracy tymczasowej. Autorka analizuje orzecznictwo Sądu Najwyższego w zakresie celu art. 20 ustawy oraz dorozumianego nawiązania stosunku pracy pomiędzy pracodawcą użytkownikiem a pracownikiem tymczasowym w kontekście modelu pracy tymczasowej obowiązującego w Polsce.

Słowa kluczowe
praca tymczasowa, pracownik tymczasowy, agencja pracy tymczasowej, pracodawca użytkownik

Introductory remarks

Temporary work in Poland may be performed for the period specified in the Act of law. Pursuant to Art. 20 Section 1 of the Act of 9 July 2003 on the Employment of Temporary Agency Workers[1], the temporary agency work may assign a temporary agency worker to perform temporary agency work for the user employer for a period not exceeding a total of 18 months in a period not exceeding 36 consecutive months. On the other hand, the period of temporary agency work may last continuously for a maximum of 36 months only if the temporary agency employee performs the duties of an absent employee of the user employer. Currently, this maximum limit for temporary agency work includes not only employment under a contract of employment, but also a civil law contract to which the Labour Code does not apply.

The provision of Article 20 of the Act has been significantly extended by the amendment of 7 April 2017 amending the Act on the employment of temporary agency workers and certain other acts[2]. The aim of the amendment was to strengthen the protection of temporary agency workers. The provision of Article 20 of the Act was circumvented prior to the amendment by the practice of sending the same temporary agency worker to the same user employer by different temporary work agencies. On the basis of a referral from different temporary work agencies, the temporary agency worker was able to work for the same user undertaking without the statutory time limits[3]. The amendment finally ended the practice of creating new temporary work agencies for

the sole purpose of extending of the duration of temporary agency work.

In the context of the current legal framework, recent rulings of the Supreme Court are important, stating that such practices were not acceptable even before the 2017 amendment. In the judgments of 9 April 2019[4] and 19 March 2019[5] the Supreme Court decided that temporary agency work cannot be permanent, and exceeding the maximum duration of temporary agency work may lead to the recognition that an employment relationship between a temporary agency employee and a user employer has been established *per factia concludentia*.

Temporary agency work model in Polish law

In Poland, temporary agency work is regulated mainly by the Act of 9 July 2003 on the Employment of Temporary Workers, which has been in force since 1 January 2004. The Polish model of temporary agency work consists of the prerequisites for the use of temporary work and the maximum duration of temporary agency work specified by the legislator. Restrictions provided for in the Act were introduced to ensure that temporary agency employment is not permanent and leads to finding permanent employment. Temporary agency work is therefore, by definition, a short-term form of employment that is not permanent.

The Polish regulation does not differ from other European regulations and recognizes temporary work agency as the employer of a temporary agency worker. Pursuant to Article 2 point 2 of the Act, a temporary agency worker is an employee who is employed by the temporary work agency solely for the purpose of performing temporary agency work for and under the direction of the user employer. The Act also defines the concept of temporary work by including three cases in this category in the form of tasks: a) of a seasonal, periodic, ad hoc nature, or b) whose timely performance by employees employed by the user employer would not be possible, or c) whose performance is the responsibility of an absent employee employed by the user employer (Article 2(3) of the Act). The catalogue of tasks is limited to only three cases, and the temporary agency worker is not allowed to perform any kind of work, but only the type of work specified in the Act.

Apart from the so-called positive prerequisites for temporary agency work, the legislator indicates the so-called negative prerequisites for temporary agency work. The temporary agency worker may not perform for the user employer the work that is: 1) particularly dangerous within the meaning of the regulations issued pursuant to Article 237[15] of the Labour Code; 2) on a position occupied by the user employer's worker during their participation in a strike; 3) of the same type as the work performed by an employee of the user employer with whom the employment relationship has been terminated for reasons not related to employees in the last 3 months preceding the expected date of commencement of temporary work by the temporary worker, if such work were to be performed in any organisational unit of the user employer located in the municipality where the dismissed employee is or was employed; 4) requiring a security guard to be armed with firearms or objects intended to incapacitate persons by means of electricity, the possession of which requires a permit referred to in the Act of 21 May 1999 on Firearms and Ammunition[6].

Temporary agency worker may be employed on the basis of a fixed-term employment contract. The limitation resulting from Article 25[1] of the Labour Code does not apply to the employment contract concluded with a temporary agency worker, which means that fix-term contracts may be applied repeatedly within the time limit. The employment contract shall be concluded in writing. If the employment contract is not concluded in writing, the temporary employment agency shall confirm the terms of the employment contract in writing no later than on the second day of the agency work employment.

The use of an open-ended employment contract as a basis for the employment of a temporary agency worker is not permissible in Poland. However, the issue of temporary employment under an open-ended contract should be treated with caution, as the introduction of such a basis could open the way to derogating from the principle of equal treatment, as allowed by the EU directive[7].

The temporary work agency may also employ on the basis of a civil law contract. The 2017 amendment extended the protection provided for in the law to persons employed under civil law contracts through temporary work agencies (see more Reda-Ciszewska & Rycak, 2017). Among others, Article 20 of the Act on limiting the time of temporary agency work applies to persons employed on the basis of civil law contracts.

Maximum duration of temporary agency work

Article 20 of the Act has been questionable since its entry into force (see Sobczyk, 2004, p. 36; 2005; 2011, p. 157; Makowski, 2006, p. 100; Paluszkiewicz, 2011). Temporary agency work has been limited in time from the entry into force of the Act on the Employment of Temporary Agency Workers[8]. Initially, the time limit covered a period of 12 months[9], and then it was extended by the Act of 23 October 2009 to 18 months over a period of 36 consecutive months[10]. In the case of the continuous performance of tasks which are the responsibility of an absent worker employed by the user employer, the temporary work may not exceed 36 months.

The justification to the draft Act of 9 July 2003 on the Employment of Temporary Agency Workers[11] stated that the Act provides for the "limitation to 12 months (within 36 consecutive calendar months) of the duration of temporary agency work performed by a temporary agency worker for the benefit of single user employer in order to increase the chances of employment of this worker, after the end of temporary agency work, as an

employee of this user undertaking". Therefore, the legislator aimed at limiting the duration of temporary agency employment in order to promote permanent employment. One could also find views that temporary agency work would be an instrument in the fight unemployment[12].

Then, with the amendment of 2010,[13] Article 20 of the Act was liberalised by extending the period of temporary agency work from 12 to 18 months. However, the explanatory memorandum to the draft did not mention the elimination of the practice of sending the same worker to the same user employer by different agencies[14]. The direction of the amendment could therefore suggest that the legislator accepts the view that the limitation of temporary work only applies to temporary work agencies and temporary agency workers. This solution, although considered restrictive, could also be considered ineffective in practice. Despite the 2010 amendment, the Act still did not exclude the possibility to post the same temporary agency worker to the same user employer through different agencies. There were no consequences of assigning a temporary agency employee to work for a period longer than provided for in the Act.

Finally, the provision of Artticle 20 of the Act was amended by the Act of 7 April 2017 amending the Act on the Employment of Temporary Workers and certain other Acts[15]. The explanatory memorandum to the Act already explicitly mentions the practice of different temporary work agencies directing temporary agency workers to the same user employer in order to circumvent the time limits set out in the Act. The explanatory memorandum also states that legislators are familiar with practices whereby one founding entity creates several temporary work agencies for the sole purpose of directing the same temporary agency worker, by different temporary work agencies, to the same user employer. Therefore, the legislator sees violations of Article 20 of the Act, which took place in practice, and intends to eliminate them through the amendment of the Act on the Employment of Temporary Agency Workers. It is worth noting, by the way, that the amendment that has been in force since 1 June 2017 concerns both employment contracts and civil law contracts concluded by a temporary work agency with a person posted to perform temporary agency work for the user employer.

Supreme Court jurisprudence on exceeding the maximum duration of temporary work

The Supreme Court has dealt with the consequences of violation of Article 20 of the Act several times. The position of the Supreme Court in its rulings of 1 April 2015[16], of 19 March 2019[17] and of 9 April 2019[18] should therefore be followed.

In 2015 The Supreme Court held that exceeding the maximum duration of employment of a temporary agency worker with a user employer does not lead to the establishment of an employment relationship between that worker and a temporary work agency. In the facts of the case which gave rise to the 2015 judgment, the worker was employed by a temporary work agency under a fixed-term contract of employment. Before the end of her employment relationship, the worker presented a certificate of incapacity for work due to pregnancy-related ailments. The temporary work agency did not offer her a job for a further period. The control of the State Labour Inspection revealed that the respondent company employed temporary agency workers for a period exceeding 18 months, including the worker who applied to the court for a claim to establish employment for a definite period of time, maternity leave and holiday leave allowance. It was not disputed in this case that the maximum period of employment of the worker with one user employer was exceeded.

In the Statement of reasons for the 2015 judgment The Supreme Court also states that it would be questionable to establish the existence of an employment relationship with a user employer, since the nature and substance of temporary agency work are in opposition to this. The Supreme Court emphasised then that the temporary work agency is a special employer, because it employs temporary agency workers only for the needs of another entity — the user employer (Article 2 point 2 of the Act). However, two entities — the temporary work agency and the user employer — become involved in the performance of this employment relationship on the employer's side. The specific nature of temporary agency work means that the agency is not the direct addressee of the worker's activity. The user employer, on the other hand, only uses the temporary agency worker's work (see Article 14 of the Act).

With respect to the establishment of the employment relationship between the user employer and the temporary agency worker, the Supreme Court clearly emphasized that the continuation of the provision of temporary agency work beyond the limits provided for in the Act could be classified as the provision of work within the employment relationship, which was established by implication between the current user employer and the current temporary worker, only if it could be stated that both parties made unanimous declarations of intent in this respect. Therefore, the Supreme Court in the Statement of reasons for the 2015 judgment is sceptical about the consequences of exceeding the limits of temporary work, because it will be difficult to determine the existence of an employment relationship with the user employer who used temporary agency work because he did not want to become an employer directly.

If, in the Statement of reasons to the 2015 judgment the Supreme Court stated that exceeding the maximum duration of employment of a temporary worker with a user employer does not lead to the establishment of the employment relationship between this worker and the temporary work agency or the user employer, and the provision of Article 20 of the Act is only of a technical nature, then in the case of 2019 rulings, the facts clearly indicate the possibility of establishing an employment

relationship between the user employer and the temporary agency worker, even indicating that it could be a fixed-term employment contract between the former temporary agency worker and the former user employer.

The two facts underlying the Supreme Court's 2019 decisions are similar. In both cases, the persons employed as temporary agency workers were posted to the same user employer by different but capital related temporary work agencies. Subsequent contracts were concluded with the same proxy representing the subsequent temporary work agencies. This resulted in temporary agency work exceeding the maximum period of temporary agency work provided for in Article 20 of the Act and contrary to the definition of temporary agency work specified in Article 2(3) of the Act. This practice was challenged by the Social Insurance Institution (ZUS).

According to the Supreme Court, the interpretation of Article 20 of the Act according to which the user employer may use temporary agency work without any time limits if a worker is posted to him by various temporary work agencies has not been accurate, even before the amendment of 2017. The adoption of such an interpretation of this provision would be contrary to both the definition of temporary agency work and the *ratio legis* of the entire Act, it would completely distort the sense of normative regulation of temporary agency work.

In both cases, the Supreme Court pointed to the definition of temporary agency work referred to in Article 2(3) of the Act. In the opinion of the Supreme Court, the intention of the legislator and the purpose of the Act on the Employment of Temporary Agency Workers is to limit temporary employment and promote permanent employment. This is what the maximum duration of one temporary agency worker's employment by one user employer is intended to do.

In the Statement of reasons of the April 2019 judgment the Supreme Court clearly states that we are dealing with a circumvention of the law. The conclusion of sequential temporary agency employment contracts with the same worker by successive temporary work agencies directing that worker to perform the same tasks with the same user employer does not formally (apparently) oppose the provisions of the Act on the Employment of Temporary Workers, but in fact it aims at achieving an objective which is contrary to the objective of introducing legal regulations restricting the employment of temporary agency workers and the duration of their performance of work in that form of employment.

The Supreme Court emphasizes that the Act on the Employment of Temporary Agency Workers does not contain a specific "sanction" in the form of transforming temporary agency employment into employment on the basis of a fixed-term contract (Statement of reasons of the April 2019 judgment). The fact that the Act on the Employment of Temporary Agency Workers does not specify the consequences of exceeding the periods referred to in Article 20 point 1 of the Act does not exclude the possibility that the legal relationship between the user employer and the temporary agency worker has transformed into an employment relationship based on the principles of the Labour Code.

In the case of the facts of 2019, The Supreme Court stated that in such a situation, an employment relationship between a temporary agency worker and a user employer may be established through actual actions. At the same time, it pointed out that it is required, however, to determine the existence of unanimous declarations of will of the parties in this respect (also expressed by implication). The Supreme Court stressed that the employee was working for the same user employer in the same position, and that in addition, successive contracts were concluded 'automatically', without any recruitment procedure, and that subsequent temporary work agencies with whom the contracts were concluded were represented by the same person, who was also an employee of the user employer. It can therefore be concluded that there was, as it were, one entity on the part of the employer, because the employee of the user employer was at the same time the agent of the successive agencies employing the temporary agency worker.

Comments *de lege ferenda*

There is no doubt that the provision of Article 20 of the Act does not introduce the consequences of exceeding the maximum duration of temporary work in the form of establishing an employment relationship between the user employer and the temporary agency worker. However, the provisions of the Act introduce criminal liability (Article 27a(5) and (6) of the Act). However, the court rulings show that in the case of a gross violation of the provisions of the Act, it will be possible to determine that the employment relationship was entered into by implication. However, demonstrating the willingness of the user employer to enter into an employment relationship directly with the temporary agency worker can be a difficult task. As a rule, the user employer, i.e. the entity assuming that it does not employ the worker directly, will not be willing to enter into an employment relationship.

As for the declaration of intent of the user employer, it should be noted that the user employer makes a declaration of intent to use temporary agency work under the terms of the Act. The law also provides the user employer with suitable instruments to determine the duration of the temporary agency worker's employment. The user employer is obliged to keep records of the temporary agency worker's working time pursuant to Article 14 § 2 point 2 of the Act. He is therefore aware of and has knowledge of the fact that the temporary agency work period has been exceeded (different from G. Spytek-Bandurska. The author acknowledges that it is doubtful whether the work for another entity, without a clear legal basis, is performed in an implied manner. See

Spytek-Bandurska, 2018, Legalis). As of June 1, 2017, the temporary work agency shall determine the total duration of the work performed by the person concerned for the user employer on the basis of an employment contract or a civil law contract, pursuant to Article 11a. The view that is dominant in the literature allows for the possibility of determining the existence of an employment relationship between a former temporary agency worker and a former user employer (Raczkowski, 2012; Paluszkiewicz, 2015, p. 574; Reda-Ciszewska, 2016, p. 8).

However, one cannot agree with the claim that Article 20 of the Act is only of a technical nature. This should be considered a protective standard and as having a protective function *vis-à-vis* the temporary agency worker. The model of temporary agency work adopted by the Polish legislator shows that temporary agency work is to be short-term, temporary and seasonal. It may not be permanent, which is also indicated by the basis of the temporary agency worker's employment in the form of a fixed-term contract.

It is therefore necessary to call for the introduction of appropriate legislation to guarantee adequate protection for temporary agency workers. This is also the direction in which the amendment of the 2017 law was aimed at. The protection of temporary agency workers is illusory without appropriate consequences for exceeding the maximum duration of temporary agency work. It cannot be accepted that a temporary agency work exceeding the limit laid down in Article 20 still constitutes temporary agency work. Exceeding the maximum limit for temporary agency work necessitates a new qualification of continued employment as a temporary worker for the benefit of the user employer. It should therefore be possible to establish the existence of an employment relationship on the basis of Article 22 of the Labour Code (Makowski, 2017, p. 873).

The provisions of Polish law already contain appropriate protective solutions that could serve as a model. Therefore, there may be used the already functioning mechanisms, e.g. in Article 25^1 para. 3 of the Labour Code, which concerns transformation of a fixed-term employment contract into an open-ended employment contract, or Article 23^1 of the Labour Code, which provides that a new employer shall replace the existing one. Moreover, a solution in this respect was already proposed in the draft Labour Code of the Codification Commission of 2007. The proposed Article 412 para. 2 of the Labour Code was to provide that in the event of exceeding the maximum duration of temporary agency work, it is considered that the worker and the existing user employer concluded an employment contract for an indefinite period of time (Komisja Kodyfikacyjna, 2007). Legal solutions recognising the user employer as the employer directly employing the temporary agency worker are known in some European countries (Paluszkiewicz, 2011, p. 49–51). This would strengthen the protection of the temporary worker.

Przypisy/Notes

[1] Dz. U. (Journal of Laws) of 2019 r. item. 1563 i.e. hereinafter referred to as the Act.

[2] Dz. U. (Journal of Laws) of 2017, item 962. Further amendment of 2017.

[3] See the explanatory memorandum to the Act of 7 April 2017. amending the Act on the Employment of Temporary Workers and certain other acts. Sejm print VIII.1274.

[4] Judgment of the Supreme Court — Chamber of Labour and Social Insurance of 9 April 2019. II UK 583/17, Legalis.

[5] Judgment of the Supreme Court — Chamber of Labour and Social Insurance of 19 March 2019. III UK 84/18, Legalis.

[6] Dz. U. (Journal of Laws) of 2019, items 284 and 1214.

[7] See Art. 5 of Directive 2008/104/EC of the European Parliament and of the Council OJ L 327, 5.12.2008, p. 9–14, hereinafter referred to as the Directive.

[8] i.e. from 1 January 2004.

[9] Dz. U. (Journal of Laws) of 2003, items 166 and1608.

[10] Act amending the Act on the Employment of Temporary Workers, Journal of Laws of 2009. No. 221, item 1737.

[11] Parliamentary print 1349 of the Sejm of the 4th term.

[12] Temporary work agencies were authorised to carry out employment agency services, and thus the number of entities authorised to carry out employment agency services was increased, see the amendment to the Act on Employment and Counteracting Unemployment of 20 December 2002. (Journal of Laws of 2003, No. 6, item 65).

[13] The Act in this version was in force from 24 January to 30 May 2017.

[14] Explanatory memorandum for the draft Act of 23 October 2009 amending the Act on the Employment of Temporary Workers, parliamentary print 1929.

[15] Dz. U. of 2017, item 962. The amendment came into force on 1 June 2017. Parliamentary print VIII.1274.

[16] Judgment of the Supreme Court of 1 April 2015. I PK 203/14, OSNP 2017/2/15.

[17] Judgment of the Supreme Court — Chamber of Labour and Social Insurance of 19 March 2019. III UK 84/18, Legalis.

[187] Judgment of the Supreme Court — Chamber of Labour and Social Insurance of 9 April 2019. II UK 583/17, Legalis.

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