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Michał Barański
University of Silesia in Katowice
e-mail: michal.baranski@us.edu.pl
ORCID: 0000-0001-6797-8124

EMPLOYMENT FLEXIBILITY IN TIMES OF CRISIS

Abstract

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

KEYWORDS

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

SŁOWA KLUCZOWE

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

1. INTRODUCTORY REMARKS

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

The 2007–2009 global economic crisis in the financial and banking markets, initiated by the collapse of the high-risk mortgage market in the United States of America, was the first crisis in the global world economy[2]. This meant no models of counteracting the crisis using the instruments previously known to labour law. At that time, many national regulations were created to limit the negative effects of the crisis. For example, in Poland the global economic crisis and the ensuing economic slowdown have led to a search for extraordinary legal solutions to counteract or mitigate the effects of the crisis, particularly those that allow for the reduction of labour costs and prevent job losses during the downturn[3].

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

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

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

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

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

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

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

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

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

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

as an element that is important only for employees"[6]. Indeed, the introduction of various flexible forms of employment during the COVID-19 crisis, designed to limit interpersonal contact and prevent infection, protected employees and employers. For example, remote work has begun to be used as a strategy to minimize health risks while maintaining production and business operations[7].

It is, therefore, possible to note a specific evolution of *flexicurity*. *Flexicurity* is a concept that has to be defined as part of an ongoing process[8]. It should not be a standardised model that can be applied in the same way, for example, across all European Union Member States. Moreover, even during the previous 2007–2009 crisis, the Committee of the Regions, while stressing the importance of combating unemployment, made it clear in the opinion mentioned above that there should be fair and just labour laws in the Member States – these laws should not only include, but also ensure, among others, health and safety protection. Thus, although in the COVID-19 crisis, the various forms of employment flexibilities analysed later in this paper continue to be used by the legislator to protect workplaces (to counter unemployment) and to ensure the continuity of the employer's operations, in some cases an equal aim, if not the most important one, is to protect the lives and health of both parties to the employment relationship.

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

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

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

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

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

[8] Opinion of the Committee of the Regions on 'Flexicurity', 2008/C 105/04.

[9] *Ibidem*.

In the EU Member States, the introduction of regulations on telework was primarily aimed at creating a legal basis for telework, in accordance with the European Framework Agreement on Telework of 16 July 2002[10]. The agreement defines telework as a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. The parties to the agreement are the social partners that are representative at the European level, in this case: European Trade Union Confederation (ETUC), the EUROGADRES/CEC Liaison Committee, the Union of Industrial and Employers' Confederations in Europe (UNICE), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), and the European Centre for Enterprises of State and Public Benefit (CEEP). The European Framework Agreement on Telework was given the form of a "voluntary" agreement, which was to be implemented by the social partners themselves, signatories to the agreement. The adopted in this way, a kind of Community legal regulation, from the point of view of European law theory, can be classified as soft-law. The agreement and the teleworking rules were to be implemented within three years from the moment of signing, i.e. by 16 July 2005.

In Poland, the benefits of working away from one's office thanks to information and tele-communication technologies were first appreciated by people with disabilities. The development of new technologies has created employment opportunities for employees with limited spatial mobility[11]. For the disabled community, telecommuting and teleeducation are sometimes the only way to get an education and lead an active professional and social life. A comprehensive regulation of teleworking was introduced through the amendment of the Polish Labour Code on 24 August 2007[12].

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

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

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

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