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ECONOMICALLY DEPENDENT STANDARD AS A CRITERION OF EMPLOYMENT RIGHTS FOR SEMI-EMPLOYED WORKERS IN POLAND

Abstract. The current legal status protects only employees within the meaning of Art. 2 of the Labor Code, and in a small part of contractors, it contributes to the deterioration of the situation of semi-dependent/self-employed workers, resulting in effects that are entirely opposite to the intended ones, i.e., the inclusion of the axiology of the protective function into non-employee forms of work. Poland does not have its own scope of protective provisions similar to the labor code provisions that would apply to economically semi-dependent/self-employed workers. In this article, is analyzed the concept of the economically semi-dependent/self-employed as a starting point for granting them certain employment rights. Two main conclusions can be drawn: first, the economically semi-dependent self-employed is not an intermediate category between workers and the self-employed but a subcategory of the self-employed. Secondly, failure to grant them protection by Polish labor law will have a negative impact on the extension of collective rights of the self-employed.

Keywords: concept of worker, scope of application of labour law, personal work, economically dependent workers, self-employed worker

KRYTERIUM ZALEŻNOŚCI EKONOMICZNEJ, JAKO PRZESŁANKA PRZYZNANIA NIEKTÓRYCH PRAW PRACOWNICZYCH SAMOZATRUDNIONYM W POLSCE

Streszczenie. Obecny stan prawny chroniący tylko pracowników w rozumieniu art. 2 Kodeksu pracy oraz w nieznacznej części zleceniobiorców przyczynia się do pogorszenia sytuacji samozatrudnionych półzależnych, wywołując w rezultacie skutki wręcz odwrotne do zamierzonych tj. inkluzji aksjologii funkcji ochronnej na niepracownicze formy świadczenia pracy. Polska nie ma własnego zakresu przepisów ochronnych na wzór przepisów Kodeksu pracy, który miałby zastosowanie do ekonomicznie półzależnych samozatrudnionych. W niniejszym artykule analizowane jest pojęcie typu ekonomicznie półzależnych samozatrudnionych jako przesłanki wyjściowej do przyznania im niektórych praw pracowniczych. Można wyciągnąć dwa główne wnioski: po pierwsze, ekonomicznie półzależni samozatrudnieni nie są kategorią pośrednią między pracownikami a osobami samozatrudnionymi, ale podkategorią osób samozatrudnionych. Po

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drugie, brak przyznania im ochrony przez polskie prawo pracy będzie mieć negatywny wpływ na rozszerzenie praw zbiorowych samozatrudnionych.

Słowa kluczowe: pojęcie pracownika, zakres stosowania prawa pracy, praca indywidualna, pracownicy ekonomicznie zależni, osoba prowadząca działalność na własny rachunek

1. INTRODUCTION

The concept of granting the self-employed a specific scope of protection, particularly certain labor rights, which employees are entitled to under traditional labor law, is based on the idea of "personal relationship at work" a concept developed by M. Freedland (Freedland 2010). The concept of personal relationships implies that work can be provided in various ways and through a range of conditions and patterns in modern employment markets. These can range from classic subordinate, bilateral and continuous forms of employment to more varied and complex forms of work involving multiple parties and economic actors, and ultimately developing in terms of autonomy regarding their legal characteristics and independence in performing work (Freedland 2010). Currently, no one denies that the definition of employee should read as follows: employees are those who voluntarily provide their paid services to others, under a chosen institution (private or public sector) and under the direction of another natural or legal person, called the employer. This definition does not make any factual distinction between a worker and a self-employed person. A significant factor is the conditions under which the employee is contractually obliged to perform his duties (Gramano, Gaudio 2019, 240–253). To qualify as such, it requires the employee to be required to follow orders and instructions received by the employer. These orders can be specific or simply programmatic; they can be repeated daily or randomly, depending on the type of activity being performed. Notably, the employee cannot organize his work on his own and is legally obliged to follow the instructions received to the extent that he may be disciplined or threatened with dismissal if he does not do so. However, in terms of employee rights, a self-employed person, in particular, who is constantly financially dependent on one or more contractors, does not benefit from the privileges offered by the Polish Labor Code, e.g., parental protection, protection against dismissal, restrictions on working time, etc. (The Act of June 26, 1974, the Labor Code[1]). Here, the dependency criterion can put forward a justified thesis – it is a financial criterion as a factor connecting the employee and the employer in the traditional understanding of the employment relationship.

This article is a work that opens a discussion in labor law on the identification of the fundamental premise, i.e., the criterion of economic dependence. This introductory paper will address the challenge of analyzing the above standard,

[1] Journal of Laws 1974 No. 24, item 141.

qualifying the self-employed person's contractual relationship as an employment relationship, to open up the possibility of granting semi-dependent employees certain employment rights (see more: Adserà, Boix, Payne 2003).

2. THE IDEA OF A PERSONAL WORK RELATIONSHIP

A. Świątkowski points out that the redefinition of the employment relationship is a consequence of forcing employers and state authorities to guarantee legal and social security to employees and persons with different legal statuses, i.e., persons employed under employment contracts and others – performing work under civil law contracts (Świątkowski 2015, 175; Florek 2015, 30 et seq.; Latos-Miłkowska 2013). The year 1989 was a breakthrough because the changes mentioned above and transformations in the scope of the definition of work performance were the reaction of the state authorities to new trends in employment policy and labor relations, so far predominantly subject to legal regulations of the labor code and other acts based on which work was performed under an employment relationship. Only in 2019, M. Freedland, in his publication on trade union strategies in protecting employees who work in new forms of employment, emphasized that, first of all, it is crucial to understand the methodology of performing work outside the employment relationship. The author pointed out that what is currently being done is to shape and present contractual obligations in the field of employment so that they do not take the form – or at least do not seem to take the state – of permanent and bilateral employment contracts, creating the classic paradigm of the traditional definition of an employment relationship (Freedland 2019, 179–182). This conversion of commitments places the working person on the other side of the line between "employees" and "independent contractors" or "self-employed," thereby shifting the traditional division of the world of work. This particular kind of transformation or conceptual relocation of work-related tasks gives rise to "new forms of work" which were, inter alia, are the subject of the Report of the International Labor Organization in 2020.[2] Significant in this respect were the amendments to Art. 22 of the Labor Code the laws passed on 2 February 1996 (On the amendment to the Act – Labor Code and on the amendment of certain other acts[3]) and on 26 July 2002. The idea of freedom of contracts was partially negated, because gradually, work began to be abandoned only based on an employment contract, which was the beginning of fundamentally different legal relationships: employee or non-employee employment. After the above-mentioned, the amendments opened a discussion not only in the categorization of employment

[2] See full report: MOP: Ensuring better social protection for self-employed workers 2020, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ddg_p/documents/publication/wcms_742290.pdf (accessed: 15.07.2022).

[3] Journal of Laws 1996 No. 24, item 110.

law, but also employment law, i.e., all others who do not perform subordinate work within the meaning of Art. 22 of the Labor Code (Świątkowski 2015, 175). The doctrine of the Polish labor law showed the characteristic features of both employee and non-employee employment. After the amendment to Art. 22 of the Labor Code in 1996, great emphasis was placed on increasing the protection of remuneration, the durability of the employment relationship, employment conditions (in particular working time) and working and pay conditions, and the rights of employee representation to negotiate employment conditions in collective agreements, as well as state aid in the event of job loss or loss of ability to perform work due to health impairment caused by accidents at work (Świątkowski 2015).

The concept of a "personal relationship at work" is a concept developed by M. Freedland and is undoubtedly a critical attempt not only to re-conceptualize the contractual relationship between a self-employed person and their contractor but may prove helpful in distinguishing the legal subcategory of the self-employed that in today's work in the labor markets there are different ways and on other employment bases. These can range from classic subordinate, bilateral, and permanent employment relationships to more varied and complex forms of work, involving many parties and economic entities and ultimately developing in terms of autonomy and their legal characteristics, independence-employment.

3. WHO IS THE WORKER IN POLISH LABOR LAW?

Traditionally, we assume that one of the main goals of labor law is to protect the economically weaker party (Sobczyk 2014, 1). In Polish labor law, protection of the weaker party of an employment relationship is treated as the most crucial feature of an employment relationship, resulting in both from the labor law norms encoded in the provisions of normative acts and from the specific mechanism of their impact (Jarota 2015). The traditional approach in European legal systems distinguishing between employment and self-employment does not preclude granting basic employment and social rights to self-employed persons in all cases. In addition to extending some protection to employees and contractors, for example, different legal systems provide minimal protection to self-employed workers, irrespective of their economic dependence on contractors (e.g., Austria, Germany, Spain).

The question "who is an employee?," offers an assessment of the current legal status in terms of the subjective scope of application of standard provisions on employment protection in many European countries and concerning some relevant systems of supranational regulations (mainly the EU, the Council of Europe and the ILO). The current taxonomy of the typology of labor relations among the Member States is needed because it allows for the evolution beyond

the narrow protective scope of most employment protection provisions (Davidov 2005, 57–71).

The traditional doctrine of Polish labor law offers us the concept of an employee following the law and developed jurisprudence of the employment relationship, offering an assessment of the conventional legal status in terms of the subjective scope of application of standard provisions on employment protection (Liszcz 2017, 26–27; Gersdorf 1993, 53; Świątkowski 2011, 54). It should rightly be noted the need to indicate the category of autonomous work, according to which labor law now applies also to those employees who constantly cooperate, providing only personal work for the principal, who organizes the way of performing activities also in terms of time and place of work, but also to the self-employed, who are providers of personal work and, at the same time as in a traditional employment relationship, are economically dependent on one or more contractors to try to understand the future legal framework and legal strategies to better face the above-mentioned challenges.

Terms such as "employee," "employment contract," or "employment relationship" are indeed mentioned in both primary and secondary instruments of EU law, but there is still no single consistent definition of a worker. The CJEU has specified the number of criteria allowing the identification of employment contracts or subordinated relationships in the case of civil law employment. The essential features of the employment relationship include economic risk, working time, integration with the workplace, or subordination, which are part of the common core of criteria for identifying subordinate employment (Davies 2012, 174).

For the first time in the *Lawrie-Blum* case (C-66/85) the CJEU defined the definition of an employee, which began to redefine most or all EU labor law instruments, anchoring them in the concept of subordination. In similar cases, the Tribunal identified three criteria that can be used to determine whether a given obligation relationship is an employment relationship. First, he pointed out that an essential feature of an employment relationship is the performance of a service for and under the direction of another person. The second criterion is the remuneration component, with the Tribunal requiring that the work be performed under the supervision of another person for whom the remuneration is received. The Court has interpreted this requirement broadly in the context of free movement, assuming, for example, that "the mere fact that a person receives a share of the remuneration and his remuneration is calculated collectively cannot deprive that person of the status of an employee." The third requirement is that the employee is involved in "an effective and genuine activity, excluding an activity so slight that it can be considered purely marginal and auxiliary" (see also: case 53/81, Levin and case C-337/97, Meeusen).

In this respect, it seems essential to indicate that the essence of the obligation relationship, ie, its basic elements, may prove helpful in distinguishing between an employee and a self-employed person. One may be tempted to say that the aspects

of the obligation relationship may be used to indicate an autonomous employment relationship. They are: 1) voluntary work, 2) personal work, 3) dependence, 4) work on someone else's behalf, 5) remuneration. In theory, these five elements must be present in a relationship for a service contract to qualify as an employment contract. However, some of them are more important than others and may be nuanced by case law in some cases.

4. "AUTONOMOUS WORK RELATIONSHIP"

When assessing the employment relationship in Poland, the contractual relationship must first be analyzed. Considering the differences between employees, partially dependent employees (with a subcategory of employees similar to employees), and self-employed employees, the provisions of the Labor Code regarding the rights of employees within the meaning of Art. 2 of the Labor Code (e.g., regulations on working hours, the law on holidays, etc.). The features of a traditional employment relationship can be contrasted with the autonomous parts of the obligatory employment relationship indicated by me: 1) voluntary work, 2) personal work, 3) dependence, 4) work on someone else's behalf, 5) remuneration.

The definition of "employee" is included in Art. 2 and 22 of the Labor Code. An employee is a person who uses the entire scope of labor law, i.e., protection and catalog of employee rights. According to Art. 22 of the Labor Code (employment contract) is a contract in which the two parties agree that one (the employee) provides his services voluntarily to the other (the employer) for a specified period, under the direction of the employer and for remuneration. During compilation the terms "employment contract" with the concept of "service contract or cooperation contract," it should be noted that in the case of the other parties agree that one of them (self-employed) will ensure the performance (delivering a specific result/completing the assigned task) services in person, with the difference that a self-employed person may use the help of "substitutes." However, it should be noted that the contractual relationship does not have to meet all the criteria set out in Art. 22 of the Labor Code to be considered a contract of employment, but in the overall assessment, these criteria must take precedence over others that favor an employment contract or any other contractual relationship.

Once the requirements are set out in Art. 22 of the Labor Code, personal dependence arises, which leads to the classification of the contractual relationship as an employment contract. The main criterion is personal subordination, which means that a person works under the direction of an employer who has the right to decide where, when, and under what circumstances he is to perform work (i.e., the employer controls the employee's work). Any "employee success" that

results from the time and work they provide is the employer's success, not the employee's. At the same time, the employer bears the risk of success/failure, not the employee. In turn, the employee is obliged to perform work diligently, using the tools provided by the employer. More generally, the employee is integrated into the employer's organization. In contrast to the self-employed, whose subordination is expressed in the multifaceted concept of "dependency." The Civil Code does not provide a legal definition of working persons, i.e., semi-dependent self-employed workers. It is worth pointing out that over the years, in their jurisprudence, labor courts have developed criteria that determine the existence of an employment relationship in place of, for example, a civil law relationship, based on lawsuits establishing the presence of an employment relationship (Civil Procedure Code Art. 189, Act of November 17, 1964 – Code of Civil Procedure[4]). Any voluntary employment, paid employment, performed under the employer's direction, is treated by law as employment under the employment relationship, regardless of the name of the contract concluded by the parties. Establishing that work of a specific type is performed for the employer's benefit, under his direction, at a place and time designated by him is sufficient to establish an employment relationship. Subordinating the employee to the employer's management in performing work is a kind of demarcation line, allowing for the distinction of the structural element of employment within the employment relationship. Subordinating an employee to an employer consists of the management of the employing entity and designating the time and place of work by him. On the other hand, in the relationship between a contractor and a semi-dependent/self-employed person, the contractor's ability to issue orders is limited (the judgment of the Supreme Court of 22 April 2015, II PK 153/14, OSP 2016, No. 6, item 6 with the commentary by A. Musiała). On the other hand, in the relationship between a contractor and a semi-dependent/self-employed person, the contractor's ability to issue orders is limited. Moreover, the semi-dependent/self-employed person is only or barely integrated with the contractor's organization. In summary, the personal dependence of the self-employed on the contractor is reduced to a minimum, but it is also multidimensional.

The feature of semi-independent self-employed workers is that not being employees; they provide services on behalf and at the expense of another person/entity and follow their instructions. Regarding the application of labor law or certain specific provisions of labor law to them, they are to be treated as similar to employees due to their economic dependence. Thus, from the perspective of freedom of contract, the categorization of contracts is irrelevant because from qualifying self-employed workers to the category of semi-dependent "workers" the concept of "employee probability" may be meaningful (Muehlberger, Pasqua 2009). The main criterion, also referred to by some labor law systems of the EU

[4] Journal of Laws 1964 No. 43, item 296.

Member States (e.g., Austria), extending the scope of applying certain labor rights to semi-dependent self-employed workers, is the premise of economic dependence (Brameshuber 2019, 187). The meaning given to it by this study refers not only to economic dependence in the strict sense, which means that a given person is dependent on the earnings he receives from working for one or several people. Economic dependence broadly consists of the assumption that a self-employed person does not offer his services on the market to other entities but regularly works only for one or several persons/entities. In the jurisprudence of Austrian courts, the qualification of a self-employed person as a semi-dependent entity (semi-dependent employee) is determined by the assessment of who is responsible for the economic success in the relationship between the self-employed and the contractor. If the financial success of the work performed belongs to the contractor, and the working person is only economically subordinated, it is assumed that he works for the contractor's economic purposes (i.e., that he is an enterprise).

It is worth noting the introduction of an additional criterion for determining the "existence of all or the predominantly characteristic features of the employment relationship," i.e., the designation of "means of production" (work tools). Such a criterion appeared among others in Austrian, German, and Spanish labor law.[5] So, since the working person performs work/services under the direction and supervision of another person and the other person can designate the working time and place of work (and how the work should be performed), the question arises whether the criterion of the means of production/tools of work will not determine the existence or non-existence of an employment relationship. In addition, it should be taken into account that even an employee within the meaning of the labor code may have specific "means of production" (e.g., a mobile phone, a car) that are his property. Are there "essential" means of production then? For example, computer hardware owned by the developer or a bicycle owned by a courier or supplier. For example, the Spanish courts indicate an additional criterion that excludes a self-employed person from the business structure to establish the existence of an employment contract. The decisive factor seems to be the lack of elements allowing to conclude that it is a real company – no significant areas of activity, no relevant assets (tangible or intangible). In fact, it is necessary to have a "means of production" in this case. Thus, when the services provided require an economically appropriate amount of capital, these elements belong to the supplier, and manage the areas of activity needed to run the business, it can be considered an actual enterprise (Spanish Supreme Court Judgment of 19 February 2014 (rec. 3205/2012)).

[5] Mutual Learning Programme, DG Employment, Social Affairs and Inclusion 2020, p. 5, https://ec.europa.eu/social/main.jsp?catId=1047 (accessed: 15.07.2022).

5. INDIVIDUAL AND COLLECTIVE RIGHTS OF SELF-EMPLOYED WORKERS

Protection against discrimination. The constitutional right to non-discrimination (Art. 32 of the Polish Constitution) applies directly to citizens, including all relationships or contracts (civil, commercial, administrative, and employment).

Right to privacy. The fundamental right to privacy also applies in the case of a self-employed person. If you are a self-employed worker, you have the right to privacy and dignity and be adequately protected against sexual and gender harassment or any other type of harassment. This means that the contractor must respect these limitations and autonomy if the parties are restricted by these rights. The above limitations result directly from the Polish Constitution (Art. 47), and therefore it is justified to repeat only what has already been established in the provisions of the Constitution.

6. WORKING AND PAY CONDITIONS OF A SELF-EMPLOYED PERSON

Working hours. The nature of independent contractors seems only seemingly incompatible with any regulations or restrictions on working hours. In fact, there are no specific rules on the working hours or hours of self-employed workers; this means that there are no regulations on the minimum number of hours of rest, paid holidays, or any other type of leave (Art. 154 of the Labor Code), which is contrary to Art. 66 sec. 2 of the Constitution of the Republic of Poland, according to which the employee has the right to statutory holidays and annual paid holidays, and the maximum working time standards are specified in the act.

Remuneration. The remuneration of the self-employed person will be paid in the same way as agreed with his contractor. There is no minimum wage for the self-employed. In the light of Art. 24 of the Constitution, work is under the protection of the Republic of Poland, and the state supervises the conditions of work performance. An extension of these provisions is determining the minimum amount of remuneration for work (Art. 65 (4)). A constitutive element of the employment relationship is remuneration, and the generally applicable standard is the guarantee of the employee's right to "fair" wage (Nowak 2007, 19–55; Maciejewski 2017, 294–296; Prusinowski 2019).

Working time. Currently, there is no legal provision that would establish a regime of work schedules and hours, the weekly rest time, non-working days and the maximum amount of activity per day, or even its weekly schedule when days are counted in months or years. Therefore, the working hours of economically dependent employees will be agreed by the parties to the contract. Therefore, it can be seen that, unlike a self-employed person, it should be possible to fix

a maximum number of working hours in the case of an economically dependent worker. However, the parties can decide on this maximum contractual deadline without the maximum legal annual reference, as with employees. It seems that in the case of an economically dependent employee, it can be argued that, since most of the work comes from the same customer, that customer can approximately calculate the days on which the economically dependent employee is needed and therefore include it in the contract. On the other hand, it does not seem possible to calculate the working day with each of their clients for the self-employed without the primary client (see more: Todolí-Signes 2019, 254–270).

7. PERMISSIONS RELATED TO THE PERFORMANCE OF WORK

The semi-dependent/self-employed worker should be entitled to a reasonable interruption in the provision of services. It is true that Art. 69 sec. 2 of the Constitution provides that only employees within the meaning of Art. 2 of the Labor Code: statutory reduction of working time by implementing an eight-hour working day and shorter working time in cases provided for by law, statutory holidays, annual paid holidays, it is necessary, however, to refer to sec. 1 of the same provision guarantees citizens the right to rest. The self-employed person should, for justified reasons, have the right to discontinue the activity by mutual agreement of the parties, the need to deal with urgent, unexpected, and unforeseeable family responsibilities, an imminent threat to the life or health of the self-employed person, if provided for. Maternity, paternity, risk of pregnancy and breastfeeding, or any other reason for a reasonable interruption in the performance of professional activities. At the same time, I believe that the interruption in the provision of services cannot constitute a basis for terminating the contract with a self-employed person and for the discrimination indicated in Art. 18 (3) of the Labor Code. However, I do not exclude situations where a prolonged interruption in the provision of services interferes with the typical performance of his activities. In my opinion, this will be the basis for terminating the contract.

Vacation. Concerning leaves in Art. 69 of the Constitution grants citizens the right to rest, which, in the case of economically semi-dependent workers, states that a financially dependent self-employed person should have the right to interrupt his annual activity for a certain number of working days based on an agreement between the parties or contracts relating to professional interests.

Termination of the contract. The concept adopted in this article assumes that a semi-dependent/self-employed economically works for one or more regular contractors. Therefore, there must be a solid unfair termination regime, as otherwise, a request or requirement for a different right (e.g., a minimum wage) may end the contractual relationship and thus make the requested right non-existent. Similarly, such an absence could result in other employees'

non-application of these rights for fear of such reprisals. Therefore, it is justified to establish conditions for termination of the contract, in particular by establishing that the contractual relationship between the parties will be broken by one of the following circumstances, e.g., based on the parties' agreement, based on the reasons indicated in the contract, death, retirement, discrimination, mobbing etc.

8. COLLECTIVE RIGHTS

According to the judgment of the Constitutional Tribunal of 2 June 2015, the possibility of associating in trade unions was extended, e.g., for contractors and the self-employed (Judgment of the Constitutional Tribunal of June 2, 2015, file ref. No. act K 1/13). The Constitutional Tribunal indicated that the freedom of association in trade unions is guaranteed to all employed entities, irrespective of the basis for performing work, as indicated in Art. 59 of the Constitution, which does not make the admissibility of its use dependent on the basis of employment. Based on Art. 2 of the Act on Trade Unions (Act of 23 May 1991 on trade unions, Journal of Laws 1991 No. 55, item 234 as amended) persons performing paid work are entitled to establish and join trade unions. In particular, it provides that self-employed persons are entitled to:

1) Join a trade union or business association under the conditions set out in the relevant regulations.

2) Join and form professional associations appropriate for the self-employed without prior authorization.

3) Carry out collective activities to defend their professional interests.

In this way, self-employed persons have the right to join already established trade union organizations and associations of entrepreneurs. Therefore, Art. 2 of the Trade Union Act grants self-employed workers the right to join organizations that are not their own but have already been established. It is important to remember that Art. 2 of the quoted act grants the possibility of belonging to self-employed persons who do not employ any employees when it comes to becoming self-employed. Therefore, the right to join a union will depend on whether the self-employed person will not have other employees under his care, but not, for example, apprentices or interns or other associates.

9. CONCLUSIONS

In the Polish labor market, despite the COVID-19 pandemic, the number of self-employed has increased. As indicated by the Polish Economic Institute, in Q4 2020, the number of self-employed increased by 35 thousand people and currently amounts to 1 million 630 thousand people. Such a sharp increase may be the

transition to bogus self-employment of people employed based on an employment contract. We can further divide the group into independent self-employed and partially dependent self-employed workers within this group of economically active people. Economic dependence on the contractor will be significant for awarding economically semi-dependent/self-employed workers, including that one or more contractors will be the primary remuneration providers for the self-employed. It is also essential to demonstrate the lack of a business structure that makes it an honest company – no significant areas of activity, no relevant assets (tangible or intangible). In summary, only when the services provided do not require an economically adequate amount of capital and when a self-employed person does not manage the areas of activity necessary for running a business can he be considered a semi-dependent self-employed person.

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