Biuletyn Stowarzyszenia Absolwentów i Przyjaciół Wydziału Prawa Katolickiego
Uniwersytetu Lubelskiego t. XVII, 19 (1) 2022, s. 117-130

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PROHIBITION OF DISCRIMINATION AND THE PRINCIPLE OF EQUAL TREATMENT IN TEMPORARY EMPLOYMENT – CHOSEN LEGAL ASPECTS

Introduction

The subject of the research is the Polish legislation currently binding, directly or indirectly referring to the violation of the principle of equality and non-discrimination in relation to a temporary employee. This is an extensive matter and rarely touched upon by the doctrine, therefore it requires a careful analysis and an objectivized, interdisciplinary approach. Temporary work is supposed to be a solution towards reducing unemployment.

In Polish legislation temporary work was introduced by the Act of 9 July 2003 on employment of temporary workers.[1] It is not a popular form of employment. The article is an attempt to answer questions, which have arisen in the course of legal interpretation, related to the legal situation of temporary employees, in relation to whom the principle of equal treatment, and the prohibition of discrimination have been violated. It analyses the essence and purpose of those principles not only from the perspective of labor law, but also from the perspective of constitutional law and human rights. The aim of the research is to determine against whom the employee is entitled to claims, as well as to assess the appropriateness of the solutions indicated by the Act. The starting point for a proper understanding of the legal situation of temporary employees is to determine

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[1] Journal of Laws No. 166, item 1608 as amended.

ISSN 2719-3128; e-ISSN 2719-7336
https://doi.org/10.32084/bsawp.4401

the constitutional model in terms of rights and civil liberties of these people, the right to claims regulated in the Act on the employment of temporary employees, as well as the provisions of the labour law.

1. The principle of equality and non-discrimination from the perspective of international and constitutional law

In the international law the principle of equality and non-discrimination is expressed in many legal acts. The first act defining the concept of discrimination was the Treaty of Rome, established on 25 March 1957, which created the European Economic Community [Śledzińska-Simon 2011, 45]. Provisions of this Treaty introduced a ban on discrimination on the grounds of origin, and also guaranteed implementation of provisions regulating the principle of equal pay for men and women for the same work.[2]

The biggest breakthrough came with establishment of European Union laws which became known as the European Union anti-discrimination law [Burek and Klaus 2013, 72]. This law consists of four main directives: the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,[3] the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment

[2] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union), the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed in Athens of 16 April 2003, Journal of Laws of 2004, No. 90, item. 864.

[3] OJ L 180/22.

and occupation,[4] the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services,[5] the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[6] In addition to the "main directives" there are other directives that make up the totality of the said law. The specificity of the anti-discrimination law of the European Union is based on the precise identification of the situation in which discrimination occurs, basing on the grounds listed in the catalogs of protected characteristics [ibid., 74].

The development of the principles of equality and non-discrimination in labour law has also been influenced by the Conventions of the International Labour Organization such as: Convention no. 111 of 25 June 1958 concerning discrimination in respect of employment and occupation,[7] Convention no. 190 of 21 June 2019 concerning the elimination of violence and harassment in the world of work.[8] Very important is also Recommendation No. 206, which came into force on 25 June 2021 and aims at combating sexual violence in the workplace.[9]

An extremely important acquis and guideline that expands the concept of discrimination are the interpretations of the principles made by the European Court of Human Rights (ECtHR) during the analysis of a number of cases. E.g. *Łuczak v. Poland* – the ECtHR found that unjustified refusal of access to the social security system for farmers on the basis of nationality alone constitutes discrimination on grounds of nationality.[10] In *D.H. and Others v. Czech Republic* the placement of Roma children in schools

4 OJ L 303/16.

5 OJ L 373/37.

6 OJ L 304/23.

7 Journal of Laws of 1961, No. 42, item 218.

8 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 [accessed: 01.02.2022].

9 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206 [accessed: 01.02.2022].

10 Judgment of the European Court of Human Rights of 27 November 2007, no. 77782/01.

for children with intellectual disabilities was found to be discriminatory.[11] In *Constantin Stoica v. Romania* the ECtHR found that racist violence is a particular affront to human dignity.[12] In the case of *Opuz v. Turkey* the ECtHR stated that violence against women is a form of gender discrimination.[13]

In the Polish Law, the essence of the principle of equality was expressed in Articles 32 and 33 of the Constitution of the Republic of Poland of 2 April 1997[14]. Article 32 indicates that everyone is equal before the law and should be treated equally by public authorities. Furthermore, para. 2 of the said article express the prohibition of discrimination in social, economic or political life. Article 33 introduces the principle of equality between men and women. Apart from the mentioned articles, the principle of equality is repeatedly expressed in connection with relevant areas of life in the Polish Constitution, such as equality in the Right to Vote (Article 96, para. 2; Article 127, para. 1), Equal Protection of Property Rights (Article 64, para. 2), Equal Access of Citizens to Public Service (Article 60).

The principle of equality bases on equal treatment of entities belonging to the same category or being in the same situation [Brzozowski, Krzywoń, and Wiącek 2019, 267]. It should be noted at this point that it does not lead to equal treatment of all through the application of exactly the same legal norms. The doctrine, in connection with the principle of equality has developed the concept of "relevant feature," i.e. a significant feature on the basis of which entities are categorized [ibid.]. The Constitutional Court has also considered the principle of equality in the same way, by indicating that entities which are in a similar situation should be treated in a similar way, i.e. without any favouritism or discrimination, and according to the same measure.[15] It should be emphasized however, that the principle of equality does not determine the order of unequal treatment of unequal persons, by its analogous content.[16]

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[11] Judgment of the European Court of Human Rights of 19 September 2017, no. 57325/00.

[12] Judgment of the European Court of Human Rights of 4 March 2008, no. 42722/02.

[13] Judgment of the European Court of Human Rights of 9 June 2009, no. 33401/02.

[14] Journal of Laws No. 78, item 483 as amended [hereinafter: the Polish Constitution].

[15] Judgment of the Polish Constitutional Tribunal of 10 October 1989, ref. no. K 4/89, unreported.

[16] Judgment of the Polish Constitutional Tribunal of 19 April 2011, ref. no. P 41/09, Journal

Discrimination is not explicitly defined in Polish legislation. Depending on a source, the term is used in a slightly different wording but fits within the criteria developed in the doctrine. According to it, a discrimination is any differentiation, a different treatment of individuals because of their individual (personal) characteristics [ibid., 279]. Discrimination is repeatedly defined as a qualified form of unequal treatment which arises when there is a differentiation based on a personal characteristic. The prohibition of violation of this principle has been expressed in Article 32(2) of the Polish Constitution covering such areas as social, economic and political life. This article applies the broadest scope of the prohibition of discrimination – "on any ground." Usually, this prohibition is combined with an open catalog containing the most common manifestations. These catalogs are open and are extended by the acquis of case law [ibid., 282].

The principle of equality is repeatedly complemented by the prohibition of discrimination, which results from the fact that they are complementary. It is present not only in the Polish Constitution but also in other legal acts. This link can be seen also in the way that they are included together, or one after the other in legal acts.

2. The principle of equal treatment and non-discrimination under the Labour Code

A basic legal act regulating labor law relations is the Labour Code.[17] The principle of equality of employees, also known as the principle of equal treatment of employees, together with the prohibition of discrimination, are expressed in the Chapter II titled "Fundamental Principles of Labor Law." The legislator derives these principles from provisions of the Polish Constitution by transforming their content, so that they apply to relationships arising from the employment relationship. It is known that principles of the labour law are, *de facto* derived from a content of all provisions regulated by them in the Labour Code. Non-discrimination and equality have been elevated to the rank of "fundamental," i.e. those of particular impor-

of Laws No. 130, item 762.

[17] Act of 26 June 1974, the Labour Code, Journal of Laws No. 24, item 141 as amended [hereinafter: the Labour Code].

tance, and will be a kind of guideline for a construction of further labour law regulations.

The principle of equality of employees is expressed in Article 11(2) of the Labour Code. According to this provision, all employees who perform the same duties have equal rights [ibid., 282]. Differentiation on a workplace is a natural phenomenon. Organization of work is based on positions which are often associated with greater or lesser responsibility. Employees must have appropriate qualifications which vary depending on activities they are to perform. Hence, equal treatment of employees in line with the principle of equality expressed in the Polish Constitution is based on relevant features, i.e. performance of the same duties. The concept of "equal rights" is understood as equal pay quite often. The most common factor that influences differences in pay is seniority or overtime allowance. This does not constitute a violation of the principle.

There are groups that have special rights in order to provide equal opportunities in the labour law: handicapped, juveniles and employees who raise children [Liszcz 2019, 99]. Equal opportunities do not contradict the principle of equal treatment. Article 11(2) establishes the principle of equality of men and women in employment also. This issue is extremely difficult not only from the perspective of labour law, but in all areas of law. In international legislation, the first step was to establish the principle of equal treatment of women and men as a reaction to unequal competition which arose in reducing production costs. This phenomenon involved employing women in greater numbers because they were paid less than men. However, later on there was a shift towards a total equality in employment between the two sexes [Szymanik 2014, 85].

Although the Polish law as well as the international law seeks to build appropriate legal solutions to bring about total equality, according to the European Institute for Gender Equality's 2020 Index, which was based on data collected in 2018, this is still at least 60 years ahead.[18]

The prohibition of discrimination is expressed in Article 11(3) of the Labour Code. The catalog of listed discriminatory grounds has been

[18] European Institute for Gender Equality, *Gender Equality Index 2020: Digitalisation and the future of work*, https://eige.europa.eu/publications/gender-equality-index-2020-digitalisation-and-future-work [accessed: 10.07.2021].

expanded in 2019. Although the content of the principle itself can be found in the mentioned article, the Legislator has placed the most legal norms in the content of Article 18(3a)-18(3e). Article 18(3a) of the Labour Code expresses a prohibition to violate the principle of equality, especially on discriminatory grounds. Moreover, this article presents existing manifestations of discrimination, dividing them into direct discrimination, indirect discrimination, harassment, as well as sexual harassment. Direct discrimination exists when an employee on one or more of the following grounds: sex, age, disability, race, religion, nationality, political opinion, union membership, ethnic origin, religion, sexual orientation, employment for a definite or indefinite period of time, full-time or part-time employment, was, is or could be treated less favourably than other employees in a comparable situation. Indirect discrimination exists where an apparently neutral provision, criterion or measure, results in or would result in an unfavourable disparity or a particular disadvantage in employment at any stage, unless the measure is justified by the legitimate aim pursued, and the means of achieving that aim are appropriate and necessary. The Labour Code lists also phenomena that are treated as manifestations of discrimination: encouraging another person to violate the principles indicated, harassment, sexual harassment.

The first step is a proper identification of a discriminatory phenomenon and the second one is protection of a subject. It follows from the wording of Article 18(3b) that in discrimination cases there is a presumption of violation, so the onus is on an employer to provide evidence to the contrary, i.e. objective reasons [Liszcz 2019, 101]. The Labour Code provides various sanctions for violation of the principle of equal treatment. The first of these results in non-applicability of provisions. According to Article 18, para. 3, provisions of employment contracts and other acts on the basis of which that employment relationship is established, and which violate the principle of equal treatment in employment are invalid [ibid.]. The second sanction expressed in Article 18(3e) gives the victim the possibility to obtain compensation from an employer in an amount not lower than the minimum wage. The Labour Code also establishes special protection for victims of discrimination under which they cannot suffer any negative consequences for the actions taken to assert their rights.

The provisions of the Labour Code determine a number of obligations incumbent on an employer in order to prevent discrimination. An employer is also obliged to make the content of provisions on the principle of equal treatment available to employees. Undoubtedly, establishment of numerous duties and rights is aimed at protecting employees, as well as realizing the principle of employee preference, which is one of the most important norms of labor law.

3. Prohibition of discrimination, the principle of equal treatment and temporary work

Temporary employment is governed by the Act of 9 July 2003 on the employment of temporary workers[19] and in cases not regulated by it, provisions of the labour law apply. It is a type of employment of atypical nature. Atypical employment is based on temporary work, usually outside of employer's headquarter [Florek and Pisarczyk 2019, 342]. Atypical employment aims for greater flexibility of work, thus reducing phenomenon of unemployment [ibid.].

Temporary work is a so-called tripartite employment relationship. It results from the fact that there are three entities in an employment relationship: a temporary employee, a user employer, and a temporary employment agency. In this case, a temporary employment agency is an employer in the meaning of Article 3 of the Labour Code, so it can be a natural or a legal person, as well as an organizational unit. The aim of such agency is to employ workers so they can be directed to work for a user employer. That user employer, although having the status of an employer, has no direct legal relationship with such temporary employee [Liszcz 2019, 175].

A user employer concludes an agreement with a temporary employment agency by agreeing in advance in writing on conditions necessary to qualify a suitable temporary employee, such as: type of work, qualifications, working time, place of performing work. On the other hand, a temporary employment agency concludes an agreement with a temporary employee, which is created on the basis of an employment contract, but completed

[19] Journal of Laws No. 166, item 1608 as amended [hereinafter: ETW].

with necessary data, such as: indication of a user employer, work conditions, work performance period [Florek and Pisarczyk 2019, 343].

Due to division of contracts, as well as an actual provision of work for user a employer under his direction, there is a phenomenon of "divided employer" in a practical sense [Liszcz 2019, 178]. This follows from the provision of Article 5 ETW "to the extent not regulated otherwise by the provisions of the Act and separate provisions, the provisions of labor law pertaining to the employer and employee, respectively, shall apply to the temporary work agency, temporary employee and user employer, taking into account the Article 6." A user employer pursuant to Article 14 ETW on hiring temporary employees "shall perform the duties and exercise rights vested on an employer, to the extent necessary to organize work with the participation of a temporary employee." A user employer is obliged to perform health and safety duties and keep records of temporary employee's working time. By applying an extended interpretation it should be deduced that all other obligations rest with an employer, i.e. an agency.

At this point, there should be raised a particular question, namely who is liable for violating the principle of equal treatment and the prohibition of discrimination with respect to a temporary employee? Pursuant to Article 15 ETW, "a temporary employee during the period of performing work for the user employer may not be treated less favourably with respect to working conditions and other terms and conditions of employment than employees employed by that user employer in the same or a similar position" [ibid.]. In case of a violation of the principle set forth in Article 15, a temporary employee shall be entitled to claim compensation from a temporary employment agency in an amount not less than the minimum wage. A temporary employment agency, is liable for user employer's violations only to the extent indicated in Article 15, i.e. resulting from the fact of having a status of temporary employee [Szabłowska-Juckiewicz 2019, 169].

In the event of refusal to establish an employment relationship with a temporary agency worker, in the case of refusal to establish an employment relationship with a temporary employee and referring such a temporary employee to another user employer, the responsibility for equal

treatment will be borne by a temporary employment agency as an employer of temporary employee [Reda-Ciszewska 2017, 142].

In the case of resignation by a temporary agency worker before the end of agreed period of performing temporary work pursuant to Article 18, para. 2 ETW, if the reason for resignation is connected with a violation of the principle of equal treatment, a temporary employment agency will also be held liable for the violation of the principle.

If rules are violated for other reasons, then a user company is liable. It is therefore clear, that a private employment agency is not liable for harassment, i.e. unwanted conduct, aim or effect of which is to violate the dignity of an employee and to create an intimidating, hostile, degrading or offensive atmosphere towards him (Article 18(3a) of the Labour Code). It is also not liable for sexual harassment, which is unwelcome physical, verbal or non-verbal conduct of a sexual nature or relating to a sex of an employee that has the purpose or effect of violating the employee's dignity, in particular by creating an intimidating or humiliating environment (Article 18(3a) of the Labour Code). These are behaviors that are intended to violate the employee's dignity, which does not exhaust prerequisites included in the catalog in Article 15 ETW [Szabłowska-Juckiewicz 2019, 169].

In view of Article 5 ETW, there is no doubt that provisions of the Labour Code apply to user employer. Analysis of the above leads to the conclusion that for violation of the principle of equality and prohibition of discrimination, a user employer is liable on the basis of Article 18(3e) of the Labour Code. Indeed, an employer is liable for acts of which he himself is the perpetrator [ibid.].

Violation of rules may result from the conduct of an employer itself but also own employees. In the case of a violation of rules of equal treatment or prohibition of discrimination by a third party, the doctrine narrows to two possibilities of interpretation. Some authors are in favour of a broad interpretation of Article 18(3e) of the Labour Code, attributing liability to the employer in any situation on the basis of liability in the case of mobbing. Other authors, on the other hand argue that in this situation such employer can only be charged with failure to perform improper performance of the obligation under Article 94, sect. 2b of the Labour Code.

Abovementioned conclusions can be derived from interpretation of discussed provisions, however the issue of liability was dealt with by the Supreme Court, which it indicated that in cases where an employee claims compensation for damage caused by a breach of duties incumbent on the employer, even if the source of the breach was an act or omission of a user employer, compensation will be due from a temporary employment agency. The agency may possibly be entitled to recourse claims against the user employer.[20]

Conclusions

When analyzing the above considerations based on *de lege lata* situation, there can be noticed many inconsistencies which raise doubts as to liability for breach of the principle of equality, as well as prohibition of discrimination with regard to a temporary employee. It is particularly difficult to formulate conclusions in the absence of uniformity in the doctrine.

At this point, it is reasonable to propose *de lege ferenda* changes, through which it will be possible to apply the principle of *clara non sunt interpretanda*. First of all, as can be seen, the doctrine discusses situations in which liability for breach of the rules is borne by a temporary work agency, as well as an user employer. For the sake of clarity and transparency of regulations, it would be advisable to visibly divide the factors of bearing responsibility, by dividing them into those affected by the temporary work agency, such as: setting the conditions of employment, selection of an appropriate user employer and others lying on the side of an user employer. The second group, therefore should include situations influenced only by the user employer as organizer of work, as well as a supervisor – such as harassment, sexual harassment, discrimination for other reasons than those listed in Article 15 ETW.

Although judicature supports broad liability of temporary work agencies, thus equipping them with recourse claims, such solution raises doubts. It may prove dysfunctional and lead to protracted proceedings. First and foremost, although it is a temporary work agency that holds a title of employer, the very nature of temporary work implies a "divided

[20] Judgment of the Polish Supreme Court of 10 April 2014, ref. no. I PK/ 243/14, unreported.

employer" relationship, so the agency cannot be held responsible for situations over which it has no control. Moreover, in the course of proceedings before the court, such agency is not in a position to rely on sound argumentation since, in principle apart from the testimony of the employees, it has no knowledge of the detailed situation of a relevant workplace. The agency merely acts more as an intermediary in effect. Consequently, by providing it with a recourse claim, there will be a further proceeding to recover funds from the user employer, which undoubtedly prolongs the time for pursuing the relevant claims.

Considering the issue of employer's liability for the acts of others, I agree with the position that an employer should be held liable for infringement of the principles of equality and non-discrimination on a workplace, even when the perpetrators are employees because it is the employer who is responsible for appropriate selection of staff, as well as for managing workplace and familiarizing employees with discriminatory regulations.

Temporary work often opens up the possibility of working for many groups, including pregnant women or single parents. Considering the fact that these groups are particularly susceptible to violation of the aforementioned principles both during the recruitment process as well as in the performance of work, and also bearing in mind the importance of temporary work, especially in terms of reducing the phenomenon of temporary work, the introduction of the aforementioned changes is justified.

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Prohibition of Discrimination and the Principle of Equal Treatment in Temporary Employment – Chosen Legal Aspects

Abstract

Temporary work is an extremely important phenomenon. As an atypical employment, this solution makes it possible for single parents to work, and for the state authorities to reduce unemployment. However, it should be remembered that due to the presence of three entities in this employment relationship, there are many doubts and inaccuracies. With the protection of temporary workers in mind, it is necessary to create legal constructions that protect workers primarily against discrimination, violation of equality, and alienation in the workplace in relation to other employees. Violation of these principles has been a common phenomenon for years; hence these principles are standardized in the most important legal acts on national and international level.

The notion of employer in the case of temporary work is constantly overlapping with the notion of user employer, and temporary work agency. Due to that, is not easy to assess which provisions applies to a particular situation. This article aims to discuss the indicated terms, as well as to present them using the applicable regulations.

The legislator had a difficult task – to create appropriate provisions that not only make work possible, but at the same time adequately protect temporary employees from inequality. The purpose of this article is to present advantages and disadvantages of the current legal constructions based on the analysis of the legislation, and the doctrine and line of jurisprudence, as well as to propose the necessary solutions.

Keywords: temporary work, temporary employee, user employer, temporary employment agency

Zakaz dyskryminacji i zasada równego traktowania w pracy tymczasowej – wybrane aspekty prawne

Abstrakt

Praca tymczasowa jest zjawiskiem niezwykle ważnym, choć doktryna nieczęsto je omawia. Jako zatrudnienie atypowe rozwiązanie to umożliwia m.in. samotnie wychowującym dzieci rodzicom wykonywanie pracy, zaś dla władzy państwowej zmniejszenie zjawiska bezrobocia. Należy jednak pamiętać, że w związku z występowaniem w tym stosunku pracy trzech podmiotów istnieje wiele wątpliwości i nieścisłości. Mając na uwadze ochronę pracowników tymczasowych należy stworzyć konstrukcje prawne, które ochronią pracowników przede wszystkim przed dyskryminacją, naruszeniem równości i alienacją w zakładzie pracy w stosunku do pozostałych pracowników. Zjawisko naruszenia wskazanych zasad jest od lat zjawiskiem powszechnym, stąd też zasady te unormowane są w najważniejszych aktach prawnych tak krajowych, jak i międzynarodowych.

Pojęcie pracodawcy w przypadku pracy tymczasowej przenika się nieustannie z pojęciem pracodawcy użytkownika i agencji pracy tymczasowej i niełatwo jest dokonać oceny, który z przepisów w zakresie podmiotowym dotyczy poszczególnego z nich. Niniejszy artykuł ma na celu omówienie wskazanych terminów, a także zaprezentowanie ich za pomocą przepisów obowiązujących.

Ustawodawca miał trudne zadanie – stworzyć odpowiednie przepisy, które nie tylko umożliwią pracę, ale jednocześnie odpowiednio ochronią pracowników tymczasowych przed nierównościami. Celem niniejszego artykułu jest przedstawienie wad i zalet aktualnych konstrukcji prawnych w oparciu o analizę przepisów i doktryny i linii orzeczniczej, a także zaproponowanie koniecznych rozwiązań.

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

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