HUNGARIAN LABOUR LAW
E - J O U R N A L

Fixed-term contracts in Poland: protection or flexibility?

Joanna Unterschütz*

Inroduction

The aim of this paper is to present regulations and practice concerning fixed-term contracts in Poland. I am also going to consider if the Polish Labour Code (LC)[1] provides for an effective protection against the widespread practice of conluding fixed-term contracts, which are long-lasting and as such incompatible with the nature of this form of employment.
Next, bearing in mind the practice to substitute employment contracts with civil law ones, often in order to circumvent provisions limiting fixed-term employment, I am going to look at the function of Article 22 § 1(1) of the Labour Code to determine the nature of the legal relationship binding the parties. Finally, given the significant differences in protection between open-ended and fixed-term contracts as well as the number of irregularities related to the application of Article 25.1 LC and 22 § 1(1) LC, I am going to reflect on different solutions proposed at EU and national level.

Developments in Polish labour law towards increased flexibility

Challenges of the global market, such as changing economy and technical development on the one hand, and growing market competition, increasing requirements as to product quality, price of goods and services on the other hand, encourage Polish entrepreneurs to seek more flexible

* University of Business and Administration in Gdynia, joanna.unterschuetz@wp.eu. The paper was written within the framework of Project co-funded by the European Commission (DG Employment, social affairs and inclusion) – VP/2012/001/0067 „Which securities for workers in time of crisis?"
[1] Act of 26 June 1974 on the Labour Code, Journal of Laws 1998 Nr 21, item 94 as amended.

forms of employment and to adapt work organisation.[2] Some atypical labour contracts were present in the Polish legal system for decades, among them: homework, apprenticeship, fixed-term employment contract and atypical forms of work organisation such as part time work, shift work. At the same time one can observe appearance of new labour regulations covering such phenomena as e.g. telework, agency work, and at the same time some efforts to provide core rights (health and safety regulations) for workers employed on the basis of civil contracts and self-employed workers.

Since the mid-nineties de-regulation tendency in the Polish labour maket prevails over labour protection policy. This strongly influences the shape of the Labour Code, which many employers find too rigid and still grounded in the former, socialist labour law principles. It is also obvious that some new forms of labour are prone to precariousness. Workers may suffer form weaker protection against dismissal, a bond between employer and employee is also weakened. There is no coherent flexicurity model in the Polish labour law, as there are few measures, which encourage employment of new workers and guarantee security. The polarisation of the social partners' attitude is another significant obstacle of elaborating a coherent flexicurity model. While trade unions opt for social protection of workers, the employer organisations would rather see further deregulation of the labour market and lower employment costs.[3]

Flexible forms of employment gradually replace the traditional full-time employment contract for an indefinite period, even though the latter is still perceived by the Polish legislator as the standard model. One example of this trend is the increasing number of fixed-term contracts. According to the data published by the Central Statistical Office in the first quarter of 2014, over 26% of employees were employed under fixed-term contracts.[4]

[2] Sewastianowicz, M. (2005): Przewidywane kierunki zmian nietypowych form zatrudnienia w Polsce. In: Rymsza, M. (ed.): *Elastyczny rynek pracy i bezpieczeństwo socjalne. Flexicurity po polsku?* Warszawa, Instytut Spraw Publicznych, p. 109.

[3] Rymsza, M. (2005): W poszukiwaniu miedzy elastycznością rynku pracy i bezpieczeństwem socjalnym. Polska w drodze do Flexicurity? In: Rymsza, M. (ed.): *Elastyczny rynek pracy i bezpieczeństwo socjalne. Flexicurity po polsku?* Warszawa, Instytut Spraw Publicznych, p. 32.

[4] Central Statistical Office, Quarterly information on labour market, May 2014 http://old.stat.gov.pl/cps/rde/xbcr/gus/pw_kwartalna_inf_o_rynku_pracy_1kw_2014.pdf .

Polish regulation on fixed-term employment: easier termination of employment

The Labour Code provides for three types of employment contracts of a definite duration: a contract for a definite period (a fixed-term contract), a contract to complete a specified task,[5] a contract to substitute for an absent employee (a replacement contract).[6] Furthermore, each of these, as well as an open-ended contract, can be preceded by an employment contract for a trial period. Provisions on equal treatment of employees name explicitly employment on the basis of fixed-term contract, working full time or part time (as well as employment by a temporary work agency or in the form of telework) as prohibited grounds for discrimination. An employer is also obliged to inform his/her fixed-term employees about vacancies for an open-ended contract.

From the perspective of the employee, employment under fixed-term contracts may be considered less secure. First of all, the employer is under no obligation to enter into another contract at the end of the contract term. Secondly, under the conditions laid down in Article 33 LC (i.e. in case of fixed-term contracts for more than six months and provided with a clause about the possibility of early termination by notice) a fixed-term contract may be terminated at any time, with two weeks notice regardless of its duration. The employer is neither obliged to present a reason of dismissal in writting, nor to consult the trade union representing the worker propr to dismissal. These obligations are imposed on the employer in case of termination of the contract for an indefinite period and in case of termination of employment contract without notice. For an open-ended contract the notice period is increased by the growing number of years in employment with the given employer. It is extended from two weeks in the first six months of duration, to one month afterwards and then up to three months for an employee who was working for the same employer for at least three years.

But this is not the only difference between the LC provisions on fixed-term and open-ended employment contracts. In case of unlawful dismissal, the fixed-term employee is not entitled to reinstatement, but only to compensation paid for the time until which the contract was supposed to last, but not more than three months, even if a long period of one, two or even five years remains until its end. Employees covered by special protection against dismissal are exempted

[5] A "specified task" for which a contract can be concluded means an individual working task in the framework of a specified character. The completion of this task is at the same time a goal of the contract and constitutes an ending date for the contract - Supreme Court Judgement of 2001.11.15 (II UKN 627/00, OSNP 2003/16/385).

[6] If there is a need to substitute an employee during his/her excused absence, an employer can employ for this job another employee for a period of this absence (replacement contract). In this case an ending date of a contract depends only on the date of the actual return of the absent employee (replacement contract).

from this rule and may claim for reinstatement. This exemption concerns trade union leaders indicated by their organisation according to the rules stipulated in the trade union act and pregant women, as well as employees during their maternity or paternity leave.

Limitation on fixed-term employment

The LC does not set explicitly any time limit of duration of a single contract for a definite period. However, Article 25.1 of the LC limits the number of consecutive fixed-term contracts. In its current form this provision was designed to implement Directive 99/70/EC (hereinafter "Directive 99/70/EC") concerning the framework agreement on fixed-term work concluded by the European Union of Industrial and Employers' Confederations (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC).

The social partners entering into the agreement set themselves the goal of improving working conditions of workers employed for a specified period of time, by ensuring compliance with the principle of non-discrimination and to establish a framework to prevent abuse arising from the use of successive contracts or relationships concluded for a fixed period. In the preamble of the agreement they recognise that contracts of indefinite duration are, and remain, the general form of employment relationship between employers and employees. According to the European social partners, work contracts for an indefinite period promote the quality of life of employees and contribute to improve efficiency.[7]

The current LC provision (Article 25.1) limits the number of renewals of fixed- term contracts. The conclusion of a subsequent employment contract for a definite period has the equivalent legal effects as the conclusion of an employment contract for an indefinite period, if the parties had previously concluded two employment contracts for a definite period of time in succession, where the interval between the termination of the preceding and the establishment of the subsequent employment contract was no longer than 1 month (30 days).[8] This applies both to the interruption of employment between contracts and to concluding during this interval another

[7] According to Directive 99/70/EC, in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships concluded for a fixed period, Member States may take one or more of the following measures: a) objective reasons justifying the renewal of such contracts or relationships; b) the maximum total duration of successive fixed-term employment contracts or relationships for a specified period; c) the number of renewals of such contracts or relationships. At the same time, Member States may lay down the conditions under which the contract will be considered further and the conditions under which the contract will be considered to be of indefinite duration.

[8] Supreme Court judgement of 15.02. 2000 r. I PKN 512/99, OSNP z 2001 r., Nr 13, item 439.

type of contract, such as a replacement contract or civil law contract. In its original version, this provision was introduced into the Labour Code in 1996, then suspended from 29 November 2002 until Polish accession to the EU, and came into force again from 1st of May 2004 supplemented by additional paragraphs.

First one was thought as a measure to counteract a practice to extend the duration of fixed-term contract with a specific clause, the aim of which was usually only to circumvent the Article 25.1 of the LC. Gradually many controversies arose both in the doctrine and jurisprudence regarding this practice. In several consequent judgements the Supreme Court either found it admissible to introduce such clauses or, quite opposite, discarded it as an action *in fraudem legis*. Therefore the legislator introduced a provision of Article 25.1 subsection 2 of the LC. If the parties agreed upon a longer period of performance of work, than previously provided for, within the duration of an employment contract for a definite period of time, then it is deemed, that the parties have concluded, from the date following the termination of the previous contract, a subsequent employment contract for a definite period of time. Its third subsection excluded the application of Article 25.1 to contracts concluded for a fixed period for the purpose of substituting an employee during a justified absence from work (e.g. long-term illness, maternity leave), for the purpose of completing occasional or seasonal work, or tasks performed periodically and in case of employment by temporary work agency.

The above mentioned provisions of Article 25.1 undoubtedly limit the parties' contractual freedom in determining the category of the contract, and specifically the number of successive fixed-term contracts. This intervention of the legislature in the freedom of contracting is one of the manifestations of the protective function of labour law and serves to strengthen long-term employment by providing an employee employed for a longer period with the same employer protection against unjustified dismissal as indefinite term employees.[9]

Unfortunately, in practice, determination of the maximum number of successive fixed-term contracts is an example of a fairly limited protection of long-term employment. There is unfortunately a widespread practice of concluding employment contracts for a period of 10, 15, 30 years or even "until the worker's retirement".

Such agreements, however, should be considered as concluded in order to abuse the law and treated as a contract of indefinite duration, because the basic feature of the fixed-term contract is its temporariness: it is widely assumed, that a fixed-term contract should be concluded for a

[9] Unterschütz, J. (2013): Ograniczenie w zakresie zawierania umów na czas określony a „miękkie" domniemanie istnienia stosunku pracy (uwagi na marginesie wyroku Sądu Najwyższego z dnia 14 czerwca 2012 r. I PK 222/11). *Rozprawy Naukowe i Zawodowe PWSZ w Elblągu*, vol. 16, p. 124.

relatively short time. As the law does not limit the maximum duration of fixed-term contracts, employers prefer this type of contract because of the extremely simple termination procedure and the shorter notice period. The Supreme Court recognizes, however, that contracts concluded for a long period (e.g five or ten years) are inadmissible, unless the contract is "justified and compatible with the interest of both sides of the employment relationship".[10] If we assume, therefore, that the maximum duration of contracts may not exceed five years, then two consecutive contracts sum up to 10 years. Such employment is not temporary in its nature and there is definitely a lasting bond between the employee and the employer.

There are also some problems regarding the material scope of the Article 251 of the LC. While there is no doubt, that the scope of Article 25.1 covers fixed-term contracts, however, the legislator does not name explicitly the contract to complete a specified task. Should they be treated on a par with fixed-term contracts within the meaning of Article 25.1 subsection 1 of the LC? I share the view expressed by Florek,[11] that in the light of EU law, this type of agreement is a contract for a definite period. The definition of a "fixed-term worker" in Directive 99/70/EC "means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event". The duty to interpret national law in conformity with European law, encourages the broad interpretation of the concept of fixed-term contracts, to prevent the abuse of such agreements.[12] Consequently, contracts to complete a specified task should be covered by Article 25.1 of the LC.

It should be noted, however, that other academics express the contrary view, operating primarily on literal interpretation of Article 25.1 of the LC. According to their view, the present legal text covers only fixed-term contracts, otherwise the contract to complete a specified task would be explicitly mentioned in Article 25.1, or the legislator would apply a different term such as "temporary contract".[13]

---

[10] See Supreme Court Judgement of 7.09.2005 r., II PK 294/04 (OSNP 2006 nr 13-14, item. 207) and Supreme Court Judgement of 25.10. 2007 r., II PK 49/07 OSNP z 2008 r., Nr 21-22, item. 317.

[11] Unterschütz, J. (2011): *Prawo pracy*. Zarys instytucji, Gdynia Wydawnictwo WSAiB, p. 68.

[12] Florek, L. (2011): Komentarz do Article 25.1 k.p. In: Florek, L. (ed.): *Kodeks pracy.* Komentarz, SIP LEX (accessed on 23.07 2014).

[13] Świątkowski, A. (2012): *Kodeks Pracy.* Komentarz, Warszawa, C.H. Beck, 2012 SIP Legalis (accessed on 23.07 2014); The legislator does not apply a common term to all these types of contracts, therefore each time the law refers to a fixed-term contract or a contract to complete specified task, this must be interreted narrowly. Tomaszewska, M. (2012): Komentarz do Article 25.1 k.p. In: Baran, K.W. (ed.): *Kodeks pracy.* Komentarz., Warszawa WKP SIP LEX (accessed on 23.07 2014); Walczak, K. (2012): *Kodeks pracy.* Komentarz, Warszawa, C.H. Beck, SIP Legalis (accessed on 23.07 2014); Zieleniecki, M. (2004): Komentarz do Article 25.1 k.p. In: Jackowiak, U. (ed.): *Kodeks pracy z komentarzem.* Gdynia, Fundacja Gospodacza, p.… ; a discrepancy between

At the same time replacement contracts, contracts in order to work on casual, seasonal or cyclical tasks, temporary agency work contracts are fixed-term contracts by their nature, however, they are unanimously considered as exempted from the application of Article 25.1. Also introducing the provision, which obliges the parties to regard prolongation clauses as another consecutive contract, did not eliminate possible abuses in this sphere.

Another method of limiting fixed-term employment was applied in the so-called „Anti-crisis Act" which was in force from mid 2009 to the end of 2011.[14] According to Article 13 of the Anti-crisis Act, the period of employment under a fixed-term employment contract, and the total period of employment on the basis of successive fixed-term employment contracts between the same parties, cannot exceed 24 months. Another contract is considered as „succesive" within the meaning of paragraph 1, if the agreement is concluded within three months after the termination or expiration of the previous contract term. Within the period, when the anti-crisis law was in force, the regular mechanism stipulated in Article 25.1 was suspended.

Employment contract v. civil law contract

The various types of employment contracts, which in turn will be transformed into an open-ended employment contract, mean only one aspect of the effectiveness of Article 25.1 of the LC. Another aspect of Article 25.1 is the conclusion of civil law contracts (contract to perform services) instead of employment contracts. Civil law contracts are not covered by the provisions of the Labour Code and do not guarantee workers any protection regarding working time, paid holidays etc.

It often happens that employers and employees conclude several civil law contracts before the establishment of a fixed-term employment contract. Only after a longer duration of such contracts employers decide to hire workers on an employment contract basis for a trial period and then on the basis of a chain of fixed-term contracts. Another practice is to conclude civil law contracts also between successive fixed-term contracts, the duration of which exceeds one month.

---

the wording of Article 25.1 LC and the agreement is also noted by K. Jaskowski In: Jaśkowski K. and Maniewska E. (2013): *Komentarz aktualizowany do ustawy z dnia 26 czerwca 1974 r. Kodeks pracy* (Dz.U.98.21.94)., LEX (accessed on 23.07 2014). Also the Supreme Court in its judgement of 8.07. 2009 r., (I PK 46/09, LEX nr 529758) opts for excluding contracts to complete a specified task from the Article 25.1 LC.

[14] Act of 1st July 2009 on moderation of the effects of economic crisis for employees and entrepreneurs (Anti-crisis law).

In many cases, the nature of the work performed by the employee does not change throughout the period of employment: this applies in particular to the nature of duties, the way how they are performed and subordination of the worker. According to the view expressed by the Supreme Court and supported by labour law scholars, if the type of the contract may not be changed (from employment contract to civil law contract) without changing the nature of the work, its intensity and character, then it is an abuse of the law, which is not justified.[15] The means to protect workers against such forms of abuse are the definition of the employment contract, and so called „soft" presumption of employment contract as well as a ban to conclude civil law contracts instead of an employment contract.[16] There is also a specific proceeding available to establish the existence of an employment contract. Let us then have a brief look at the above mentioned legal institutions in order to asses how effective they are to protect workers.

„Soft" presumption of an employment relationship

The definition of an employment relationship can be constructed on the basis of Article 22.1 of the LC. It is a contractual relationship between the two parties, under which the employee voluntarily agrees to provide a continuous and repetitive work subordinated to a particular employer, and the employer agrees to hire an employee for remuneration.[17] The basic features of the employment relationship are as follows: voluntary character, personal work performance, subordinated nature of the work, risk of the employer and remuneration for the work performed.[18]

Performing work for the benefit of the employer (and for his account) means that an employee is not working on his/her own behalf, even in cases when an effect of work has a character of intellectual property. Performing work under the employer's supervision is explained as a requirement for the employer to organise the entire work process, furnish workstations and the

[15] Article 58 of the Civil Code; Supreme Court judgement of 14.12.2009, I PK 108/09, MOPR 2010, No. 7, p 364) E. Suknarowska-Drzewiecka (2013) In: Walczak, K. (ed.): *Kodeks pracy.* Komentarz, Warszawa, C.H. Beck SIP Legalis (accessed on 23.07 2014); G. Goździewicz and T. Zieliński underline the autonomy of the parties to transform an employment contract into a civil law contract or a civil law contract into an employment contract, however, this change should be accompanied by a change of the character of the work performed. (G. Goździewicz, T. Zielinski (2011), In: Florek, L. (ed.): *Kodeks pracy.* Warszawa, WoltersKluwer, p.148; Tak też M. Gersdorf (2012) In: Gersdorf, M. – Rączka, K. –Jackowski, M.: *Kodeks pracy.* Komentarz, Warszawa LexisNexis, p.119.

[16] J. Unterschütz (2013), ibid. p. 131.

[17] Judgement of the Supreme Court of 14.12.1999, I PKN 451/99, OSNAPiUS z 2001r., Nr 10, item 337.L. Florek,, Prawo pracy, Warszawa 2010, p.46; por. Judgement of. Court of Appeal in Lublin of 26.06 1996 r., III A Pr 10/96 (Apel.-Lub. z 1997r. Nr 2, item 10).

[18] Unterschütz (2011), ibid. p. 43.

employee's role is to execute orders and instructions of the employer. This obligation to execute the employer's orders is limited by a character of performed work and legal provisions (one can refuse to perform task which is illegal) as well as health and safety rules (one can leave a working post if a threat to life or health is perceived). In the jurisprudence another feature of an employment contract is mentioned: an employer must assume risk incurred by his activity (economic, social and technical risk).

According to the Article 22.1 subsection 1 of the LC, employment on the conditions presented above must be considered employment within the scope of an employment relationship regardless of the title of the contract. According to Article 22.1 subsection 2 added in 2002, "it is not permitted to replace an employment contract by a civil law contract, if the work is performed in the conditions of an employment contract". This limitation to the general rule of contractual freedom is caused by a widespread and unfavourable practice of concluding contract of services or commission instead of an employment contract in order to reduce costs and employee's privileges steaming from labour law. However, establishment of the character of a contract concluded in case of doubts is a unique prerogative of the labour court and may not be replaced by a decision of a labour inspector. In order to define, whether work is performed on the basis of an employment contract or any other contractual basis, the labour court has to decide, what features of the contract prevail. If the features of an employment contract prevail in the given case, the labour court may decide, that work was performed on the basis of employment contract with all its consequences.[19]

The Supreme Court in its judgment of 1998[20] stated, that Article 22.1 subsection 1 does not create a legal presumption of an employment contract. Similar opinion was expressed in the judgment of 1999: "provision of Article 22.1 subsection 1 of the LC does not establish a legal presumption or legal fiction of an employment contract".[21] Moreover, it is universally acknowledged, that the parties may choose the legal character of the contract and work may also be performed on the basis of a civil law contract.[22] However, as Goździewicz and Zieliński rightly stated, that a legal relationship, which is in fact an employment contract, but was given by the parties a different name and legal basis, is not null and void, because Article 83.1 of the

[19] Supreme Court judgments of 1998.09.14 (I PKN 334/98, OSNP 1999/20/646) and of 1998.09.02 (I PKN 293/98, OSNP 1999/18/582).
[20] Supreme Court judgment of 23.09.1998 (II UKN 229/98, OSNAPiUS 1999, No. 19, item. 627).
[21] Supreme Court judgement of 12.09.1999 (I PKN 432/99, OSNAPiUS 2001, No. 9, item. 310).
[22] Article 353(1) of the Civil Code in conjunction with Article 300 of the LC.

Civil Code does not apply to it. Instead, Article 22.1 subsection 1 of the LC provides for different effect, namely to establish the basis of their relationship.[23]

Measures to prevent the replacement of an employment contract

We could see above, the law did not create a presumption of an employment relationship, although the labour law literature considered Article 22.1 subsection 1 of the LC as the so-called "soft presumption of employment".[24] There is no legal fiction, as opposed to Article 25.1 of the LC, which would allow to treat a contract as the contract of employment in case of doubt as to its character and therefore it is up to the employee or the labour inspector to bring an action before the labour court to determine the legal nature of the relationship. During the proceeding the claimant has to demonstrate all the essential features of the employment relationship, primarily personal subordination, reflected in the employee's obligation to perform prompt, mandatory personal work, as well as the risk of the employer.[25] However, as is has been elucidated by the profuse case law in this field, the boundary between the contract of employment and civil law contract is rather obscure.[26]

In addition, the employer's will to conclude a civil law contract in order to replace the contract of employment is an offense, but the labour inspector can not independently qualify the contract, and his/her decision to punish the employer with a fine or to initiate proceedings for a misdemeanour must be preceded by a ruling of the labour court, stating the very existence of an employment relationship.[27]

---

[23] Goździewicz and Zieliński (2011), ibid; Gersdorf (2012) ibid. p.127.

[24] Orłowski, G. (2007): Umowa zlecenia a „miękkie domniemanie stosunku pracy". *Monitor Prawa Pracy*, No. 3; Unterschütz (2013), ibid. p. 131.

[25] See Supreme Court judggements of, 14.12 2009, I PK 108/09, LEX nr 564760; 25.4.1997 r., II UKN 67/97, OSNAPiUS 1998, Nr 2, item 57; of 7.4.1999 r., I PKN 642/98, OSNAPiUS 2000, Nr 11, item 417; of 11.9.1997 r., II UKN 232/97, OSNAPiUS 1998, Nr 13, item 407; of 11.4.1997 r., I PKN 89/97, OSNAPiUS 1998, Nr 2, item 35; of 4.12.1997 r., I PKN 394/97, OSNAPiUS 1998, Nr 20, item 595.

[26] The employment contract is sometimes replaced by a contract for voluntary work. However the Supreme Court in its judgement of 2.12. 2009 (I PK 123/09, OSNP 2011/11-12/152) and of 5.05. 2010 (I PK 8/10, LEX nr 602668) and also of 14.12 2009 (I PK 108/09, LEX nr 564760) recognised, that it is irrational to apply voluntary work as a basis of employment if a worker is not employed in any other company and has no income that could guarantee a decent life.

[27] S. Płażek (1997),Czy inspektor pracy może samodzielnie kwalifikować umowy?, PiZS, nr 9, p.39; A. Sobczyk (1997), Metody ograniczania umów cywilnoprawnych w stosunkach pracy − możliwości systemowe, PiZS, nr 9, p.37. Some othe authors state that the inspector may qualify the contract and decide on the nature of the legal relationship between the parties: H. Lewandowski, Z. Góral (1996), Przeciwdziałanie stosowaniu umów cywilnoprawnych do zatrudnienia pracowniczego, PiZS, nr 12, p.32. a judgement of the court which establishes the nature of legal relationship.???? A. Sobczyk (1997), ibid. p. 36−37; S. Płażek (1997), ibid. p. 39; U. Jackowiak (2000), Odpowiedzialność pracodawcy za naruszenie przepisów z zakresu ochrony pracy, GSP, tvol. VII, p.224.

There are two clusters of arguments to support this view. One of them is the principle of freedom of contract, according to which the parties may shape the content of the contract within the limits permitted by law.[28] Only the court is competent to establish a character of the legal relationship between the parties in an action to establish the existence or non-existence of a legal relationship.[29] The inspector by imposing a fine *de facto* determines the legal relationship between the parties, which is a prerogative reserved exclusively for the court.[30]

Another argument is the consideration of the specific situation of the parties to the agreement, qualified by the inspector as a contract of employment.[31] A civil court is not bound by the inspector's decision in this regard, so it is possible that in the proceedings to establish the existence of an employment relationship instigated after the fine was imposed by the inspector, the labour court will establish that the contract was in fact a civil law contract, contrary to the inspector's opinion. This situation is undesirable not only from the perspective of the stability of legal relationships between the parties, but also from a procedural perspective: the employer may demand to renew the criminal proceeding, which ended with a fine.[32] Unfortunately the proceeding before a labour court may be lenghty and last from 6 months up to two yearch, duching which the parties remain in the state of uncertainty.

The provisions of the Labour Code, which aim to reduce employment on the basis of fixed-term contracts (Article 25.1) and prohibit the replacement of employment contracts by civil law contracts (Article 22.1 subsection 1) came into force in the 1990s. Nevertheless, the problem of the protection against unfair dismissal of persons employed under temporary contracts remains largely unresolved. This problem is shown by large number of Supreme Court decisions issued in connection with these provisions. The Supreme Court has repeatedly ruled on similar cases, doubts arising as to the establishment of civil law contracts, as well as the notoriousness of these phenomena indicate the existence of important problems in labour law.

Again, we see that the available legal meaures do not provide an adequate protection for employees in practice. Notably Article 22.1 subsection 1 did not change this situation, even though the legislator expressed hope in 1996, when it was enacted, that "it should have a favourable impact on practice, because of its clarity".[33]

[28] Czachórski, W. (2004): *Zobowiązania. Zarys wykładu.* Warszawa, LexisNexis, p.137.
[29] Article 189 of the Code of Civil Proceeding; Broniewicz, W. (2008): Postępowanie cywilne w zarysie. Warszawa, p.173.
[30] Lewandowski, H. – Góral, Z. (1996): Przeciwdziałanie stosowaniu umów cywilnoprawnych do zatrudnienia pracowniczego. *PiZS*, No. 12, p. 32.
[31] These circumstances are also raised by Sobczyk (1997), ibid. p. 36−37.
[32] Unterschütz, J. (2010): *Karnoprawna ochrona praw osób wykonujących pracę zarobkową.* Warszawa, Oficyna WoltersKluwer, p. 296.
[33] Góral and Lewandowski (1996), ibid. p. 32.

The role of the EU Charter of Fundamental Rights

Another important issue is the role of the EU Charter of Fundamental Rights (CFR) in relation to the employment protection of fixed-term employees. According to Article 30 of the CFR, relating to the protection against unjustified dismissal, every employee is entitled to protection in the event of such termination of employment, in accordance with regulations of the European Union law and the laws and practices of the different Member States. This provision, as indicated by Mitrus, could be an independent basis for the claims, as it defines precisely its scope and subject.[34]

However, we cannot forget about the content of the Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. This Protocol is an international agreement and it became an EU primary law by the Treaty of Lisbon.[35] The content of the Protocol does not mean a derogation of the provisions of Title IV of the Charter, which includes Article 30, in relation to the Poland and the United Kingdom.[36] Under Article 1 of the Protocol, the CFR does not extend the competence of the CJEU or of the national courts to establish, whether the Polish laws and practices are contrary to the CFR, the provisions of which can be invoked only if and to the extent in which they were established and operate under national law.[37] Thus, even if we consider Article 30 of the CFR as the legal basis for extending the protection against termination of employment without just cause for employees employed under temporary contracts, the impact of the CFR has been significantly reduced.[38]

Nevertheless, as non-compliance of the fixed-term contract provisions in Polish law with the acquis communautaire had been long calling for an action, the NSZZ „Solidarność" trade union

[34] Mitrus, L. (2012): Ochrona przed nieuzasadnionym zwolnieniem z pracy w świetle Karty Praw Podstawowych. *PiZS*, No. 14, p.18.

[35] Wyrozumska, A. (2008): Inkorporacja Karty Praw Podstawowych do prawa UE: status Karty w prawie UE, zakres obowiązywania i stosowania, główne problemy interpretacyjne z uwzględnieniem stanowiska polskiego In: Barcz, J. (ed.): *Ochrona praw podstawowych w Unii Europejskiej*. Warszawa, C.H. Beck, p. 188. See also Mik, C. (2008): Znaczenie postanowień EKPCz dla ochrony praw podstawowych jako ogólnych zasad prawa w UE In: Barcz, J. (ed.): Ochrona praw podstawowych w Unii Europejskiej, Warszawa, C.H. Beck, p. 213.

[36] Unterschütz, J. (2010a): Ochrona praw podstawowych w UE. Uwagi na marginesie orzeczeń ETS w sprawach Viking i Laval. *Rozprawy Naukowe i Zawodowe PWSZ w Elblągu,* z. 9, p. 178.

[37] Article1 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

[38] Unterschütz (2010a), ibid. p. 180.

filed a complaint to the European Commission in September 2012 concerning the failure to implement Directive 99/70/EC.[39] The Commision announced that a formal infringement procedure had beed started.[40]

In this proceedings the European Commission considered the following aspects of the complaint of „Solidarność trade union:

1. The diifference between the length of the period of notice of contracts concluded for a specified period and the length of the period of notice of contracts for an indefinite period for contracts covering a similar period means less favourable treatment of workers on fixed-term without objective justification.

2. Polish legislation unfairly exclude apprenticeships and contracts or relationships concluded under a specific public or supported by the public authorities of the training, integration or retraining of protection against making excessive number of successive fixed-term contracts;

3. The 30 days period is too short, which must elapse between two fixed-term contracts to qualify as consecutive.

4. The term "tasks executed cyclically", under which it is permitted to conclude successive fixed-term contracts without any limit, is not sufficiently defined by law, to be able to prevent an excessive number of concluding such agreements.[41]

In January 2013 a labour court in Białystok turned to the CJEU for preliminary ruling concerning the interpretation of clauses 1 and 4 of the Framework Agreement on fixed-term work in a proceeding intiated by a nursing assistant, whose fixed-term contract was terminated by her employer (Psychiatric Health Care Institution). In the sentence the CJEU reminded, that Clause 4(1) of the Framework Agreement lays down, in respect of employment conditions, a prohibition on treating fixed-term workers in a less favourable manner, than comparable permanent workers, solely because they have a fixedterm contract or relation unless different treatment is justified on objective grounds.[42] The CJEU also argued, that the mere temporary nature of an employment relationship is not sufficient to justify such a difference, otherwise the objectives of Directive 1999/70 and the Framework Agreement would be negated.[43]

[39] http://www.solidarnosc.org.pl/stara/uploads/oryginal/1/4/2b5f6_Skarga_calosc.pdf (accessed 23.07 2014)

[40] Press release on Rzeczpospolita Daily Newspaper Website: Po skardze "S" interwencja KE ws. umów na czas określony we Polsce http://prawo.rp.pl/artykul/1074268.html

[41] Press release on NSZZ Solidarność website: „Po skardze „S": Komisja Europejska interweniuje w sprawie umów na czas określony" http://www.solidarnosc.org.pl/aktualnosci/wiadomosci/zagranica/item/7859-po-skardze-s-komisja-europejska-interweniuje-w-sprawie-umow-na-czas-okreslony?tmpl=component&print=1

[42] Judgment of the Court of 13 March 2014 in Case C-38/13 *Małgorzata Nierodzik v. Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy*

[43] C-38/13, para 38.

Although the CJEU states, that it is for the national court to determine whether the applicant, when she was working under a fixed-term employment contract, was in a situation comparable to that of other workers employed on a permanent basis by the same employer for the same period. But given the fact that she previously occupied the same post, as an employee with a contract of indefinite duration, it may be assumed that her situation as a fixed-term worker was comparable to that of a person with a contract of indefinite duration. It is interesting to see here, that the Court does not compare employment conditions (which includes also the notice period for the termination of fixed-term employment contracts) of two workers, but one throughout her employment by the same employer.

The Court concludes in that case, that the notice period, prior to the termination of the employment contract of the applicant in the main proceedings, is fixed without taking account of her length of service, was one of two weeks, whereas, if the worker had been employed under a contract of indefinite duration, that period, calculated in accordance with her length of service, would have been one month, that is to say, twice the length of the notice period she received. The only factor capable of distinguishing worker's situation from that of a permanent worker seems to be the temporary nature of the employment relationship. It follows from the foregoing that the application of notice periods of different length constitutes different treatment in respect of employment conditions.[44]

This judgement should bring essencial changes to Polish labour law in order to avoid discrepancies between the judgment of the CJEU and interpetation of the national courts, which had formerly accepted differences in employment conditions for permanent and fixed-term workers.

Possible solutions[45]

One possibility to change the state of affairs, which presently leads to the segmentation of the Polish labour market, is to return to the solution applied in Article 13 of the Anti-crisis Act.[46] In this law, as it has been described above, the legislator introduced a special mechanism to reduce employment for a specified period: by establishing a maximum duration of all contracts for a specified period, regardless of the duration of the agreements, assuming that the gap

[44] C-38/13, paras 34-35.
[45] Unterschütz (2013), ibid. pp. 133-135.
[46] Ustawa z dnia 1 lipca 2009 r. o łagodzeniu skutków kryzysu ekonomicznego dla pracowników i przedsiębiorców (Dz.U. Nr 125, item 1035).

between them should not exceed three months. After two years of experience of application, it is possible to avoid the difficulties steaming from unclear wording of the transitional provisions.[47] Especially the doubts arising on this background were already explained by the jurisprudence and doctrine.

Additionally it would be desirable to explicitly regulate the effect of extending the contract of determined duration beyond the stipulated limit (be it two years or other time-limit).[48] One possibility could be to introduce a mechanism similar to the one applied in the current Article 25.1 of the LC, which allows to regard a contract as an open ended one, if extended by the parties for a longer period. However, in connection with legitimate doubts raised by academics, as to the correctness of the implementation of Directive 99/70/EC, the new regulation should also cover the contract to complete a specified task.

The second option to prevent segmentation of the labour market is a fairly radical change proposed by the EU in the documents related to the Europe 2020 development strategy.[49] It was proposed to introduce one type of employment contract for an indefinite period, where worker's rights and in particular protection against termination of employment would increase with the time of duration of the employment relationship. Detailed solutions are left to the Member States, and the cited documents refer only to very general features of this institution.

Certainly, such a change would allow to avoid problems arising from concluding long-lasting fixed-term contracts, as well as circumvention of the provisions relating to the number of successive contracts and in this respect actually could lead to stabilisation of the situation of

[47] E.g. How should the 24 months period be calculated for contracts concluded before 22.08 2009? Since the day the contract was concluded or since 22.08. 2009? First solution allows for broader application of the act, but it is doubtful in the view of the "lex retro non agit" principle. The second one will narrow significantly the application of the act. However, if the fixed-term contract was concluded before 22.08.2009, and the term of its completion is after the expiry of the Act, i.e. after 31.12.2011, the Act has no impact on it, so the contract will resolve as foreseen by the parties. The Anti-crisis Act does not explicitly suspend the scope of Article 25.1 until the end of 2011, but does it implicitly. After that date the previous system of limiting fixed-term contracts will apply again. Stelina, J. – Zieleniecki, M. (2009): Regulacje antykryzysowe z zakresu prawa pracy. *PiZS,* No. 11, p.21; Wiśniewski, J. (2011): Mechanizm regulujący zawieranie umów na czas określony - w kontekście upływającego okresu obowiązywania ustawy antykryzysowej. *PiZS*, No. 9, p.16. See also judgement of the Supreme Court of 17. 01. 2012 r., I PK/11, Monitor Prawa Pracy 2012 nr 2, p.58.

[48] The legislator did not specify the consequences of employment on the basis of fixed-term contracts exceeding 24 months. It was therefore proposed to treat the situation analogically to the third fixed-term contract under Article 25.1 LC – as an open-ended contract. Baran, K.W. (2009): Ogólna charakterystyka ustawodawstawa antykryzysowego na tle funkcji prawa pracy. *PiZS*, Nr 9, p.20; zob. także J. Stelina, M. Zieleniecki (2009), ibid. p.21.

[49] Communication from the Commission. Europe 2020 A strategy for smart, sustainable and inclusive growth. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF (access 2.04.2013), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regionp.An Agenda for new skills and jobs: A European contribution towards full employment.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0682:FIN:EN:PDF (access 2.04.2013).

workers. However, the introduction of such a contract would not entirely solve the problem of segmentation of the labor market, because the employers could still unlawfully replace an employment contract with a civil law contract. In consequence the „grey" sphere of employment could remain the same or even increase.

Another solution we could consider is the presumption of the existence of an employment contract and, at the same time, shifting the burden of proof to the employer. Then the civil law contracts would be concluded only if both parties find it beneficial. This solution however raises concerns of a too far-reaching legislative intervention in the freedom of contract.

The existence of various forms of employment, particularly labour law alongside civil law one has always occurred in labor relations.[50] This phenomenon, as noted by Wratny, is also accompanied by an "attraction" of the relationships based on civil law by the labor law. This can be demontrated by, among others, the inclusion of clauses in civil law contracts containing rights applicable normally to labour relations, such as the right to paid annual leave, salary guarantee etc.[51] This may result in the expansion of labour law in a way, that a uniform employment law covering all forms of work will develop[52]. According to Świątkowski, recognising that the subject of an employment relationship is any work provided by a worker for profit, could significantly contribute to the eradication of informal employment.[53]

These proposals also coincide with the Draft of a new Labour Code, which is the result of the work of the Labour Law Codification Commission (2002-2006).[54] A new type of contract appears in this Draft: it is the non-employee contract, which was drafted for workers employed on the basis of civil law contracts, performing work for the same contractor (employer) of a continuous or repetitive character for a remuneration not lower than half of the minimum wage. In the chapter on non-employment contracts, it is proposed to grant the persons performing the work on the basis of civil law contracts certain rights traditionally attributed to employees, such as the protection of women during pregnancy and shortly after birth, the right to annual leave required to confirm the contents of the contract in writing, at least weekly period of notice of termination of the contract, unpaid holidays, supervision of the labour inspection over the working conditions and the freedom of association.

---

[50] Wratny, J. (2011): Przemiany stosunku pracy w III RP. In: Florek, L. – Pisarczyk, Ł (ed.): *Współczesne problemy prawa pracy i ubezpieczeń społecznych.* LexisNexis, Warszawa, p. 42.
[51] Wratny (2011), ibid. p. 43
[52] Boruta, I. (2005): W sprawie przyszłości prawa pracy. *PiZS*, No. 4, p. 8.
[53] Świątkowski, A.M. (2011): Przedmiot stosunku pracy. Rozważania de lege lata i de lege ferenda. In: Florek, L. – Pisarczyk, Ł. (ed.): *Współczesne problemy prawa pracy i ubezpieczeń społecznych.* Warszawa, LexisNexis, pp. 56-58.
[54] http://www.mpips.gov.pl/prawo-pracy/projekty-kodeksow-pracy/ (accessed on 6.03.2013 r.)

The dilemma of the legislator, namely how to limit fixed-term employment and qualify some of the civil law contracts as an employment contract, is absolutely not new in labour law. Already in 2001, Supiot noted, that labour law and the social partners face an important choice: the defense of employment traditionally understood at all costs, which means maintaining a stable status of the employee performing work for the same employer on the basis of an open-ended contract, or adaptation to the situation actually existing in the labour market, which means protection of employment as far as possible and an effort to change the status of those working in the non-employment relations in a way to ensure the maximum protection of the social rights.[55] The third option is to redefine the concept of employment.[56]

It does not appear feasible to extend it in such a way as to cover all forms of work, because there is not necessarily a special personal relationship between employer and employee (and the obligation to provide personal service), or there are no specific groups of interests in non-employment relations, which could be represented by trade unions or other forms of employee representation.[57]

[55] Supiot, A. (2001): *Beyond employment. Changes in work and the future of labour law in Europe.* Oxford, pp. 54-55.
[56] Supiot (2001), ibid. p.54-55.
[57] Weiss, W. (2011): Re-inventing labour law. In: Davidov, G. – Langille, B. (ed.): *The idea of labour law.* Oxford, p.49; Zaz, N. D. (2011): The impossibility of work law. In: G. Davidov – Langille, B. (ed.): *The idea of labour law.* Oxford, p. 244.