



Fixed term nature of the grounds for legalization of employment of foreigners in the context of fixed time employment contracts in Poland

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1. General remarks

A permanent employment contract should be the standard of labour law as due to its manner and scope of protection against its termination it most fully respects justified needs of the employee.¹ In Poland, however, fixed-term employment contracts are used on a very large scale. At the same time, it is pointed out that fixed-term employment should be “an exception which, if used, then only due for the justified interest of both parties to an employment relationship and it cannot be abused by the employer [...]”²

This leads to a conclusion that, due to the fact, that an employment contract for a definite period of time is not a typical employment contract, an objective justification should exist for such contract to be used.³ At present, apart for an employment contract for a trial period where justification for a fixed term can be proved easily, Polish labour code provides for only an employment contract for a definite period of time (Article 25¹ of the labour code). From an economic perspective, employment for a definite period of time is considered as one of the four basic elements of the flexibility of the labour market apart from the flexibility of working time, wages, and labour supply.⁴ Studies also show that employment under contract for a definite period of time in Polish realities pertains to professions

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¹ See: e.g. judgment of the Supreme Court of 16. 04. 1998, III ZP 52/97, OSNP 1998, no. 7–8, item 54; point 6 of Directive 99/70/EC; judgment of the Supreme Court of 25.10.2007, II PK 49/07, OSNP 2008, no. 21–22, item 317; judgment of the Supreme Court of 19.02.2014. I PK 269/13, Legalis 1169344.

² Resolution of the Supreme Court dated 16.4.1998, III ZP 52/97, OSNAPiUS 1998 no. 19, item 558.

³ More on the right to work in the context of fixed term employment in: A. SOB CZYK: Prawo do pracy a zatrudnienie terminowe i niepełnowymiarowe [Eng. Right to work and fixed term and part time employment]. *PiZS*, 2016/11. 3–5.

⁴ M. BEDNARSKI: Zatrudnienie na czas określony. Perspektywa pracodawców [Eng. Employment for a definite period of time. Employer’s perspective] In: M. BEDNARSKI – K. FRIESKE (eds.): *Zatrudnienie na czas określony w polskiej gospodarce. Społeczne i ekonomiczne konsekwencje zjawiska* [Eng. Fixed term employment in Polish economy. Social and economic consequences of the phenomenon]. Warszawa, 2012. 36.

with a lower status in the fields that offer less advantageous working conditions and in small work establishments.⁵

Employment of foreigners for a definite period of time in the Polish labour market, especially the employment of the persons from outside of the European Union, is an indisputable phenomenon. In general, it is tightly connected to the temporary nature of the grounds for legalizing the foreigner's stay, *i.e.* a fixed-term residence or work permit.

At the same time, the current needs of the labour market determine a constant increase in the employment of foreigners in Poland as shown in the statistical data for the last three years. According to the data of the Ministry of Family, Labour, and Social Policy (MRPiPS), in 2016, 127,000 work permits for foreigners were issued (an increase by 93.6% in relation to the year 2015) and 1.3 million declarations on the intention to employ foreigners were registered (an increase by 68%). Also in 2017, we can observe a dynamic increase of the number of foreigners interested in working in Poland. In the first half of 2018 alone, 108,000 work permits were issued (110% more than in the respective period of 2016) and over 948,000 declarations were registered (49.4% more than in the preceding year).⁶ According to the data of the Main Statistical Office (GUS), 2,356,000 work permits for foreigners were issued in 2017. It was 1,082,000 more than in 2016 and 196,500,000 more than in 2012. In 2017, the number of work permits issued by Voivods to foreigners from all third countries (from outside of the European Union) increased by almost 100%, whereas the number of declarations of intent to employ foreigners by almost 40%.⁷

An increasing number of work permits are being issued in all regions of the country, most commonly for Ukrainian nationals.⁸ In 2017, over 80% of foreigners, who were granted permits to work in Poland, were accompanied by a passport of that country. The labour market of foreigners has been to a very large extent dominated by Ukrainian nationals in the Kujawsko-Pomorskie and Podkarpacie regions.⁹ The increasing interest in Ukrainian workers constitutes a significant change, especially in markets other than agriculture. According to the GUS report, in the years 2015-2017, 507,000 persons came to Poland from Ukraine to work.¹⁰

⁵ A. KIERSZTYN – J. DZIERZGOWSKI: Portret zatrudnionego na czas określony: wyniki badań ilościowych [A portrait of a fixed term employment contract employee: results of quantitative studies]. In: BEDNARSKI–FRIESKE op. cit. 88.

⁶ I. CHMIELEWSKA – G. DOBROCZEK – A. PANUCIAK: *Obywatele Ukrainy pracujący w Polsce – raport z badania. Badanie zrealizowane w 2017 r.* [Eng. *Ukrainian nationals working in Poland – a report from the study. Studies completed in 2017*] 7.

⁷ <https://www.money.pl/gospodarka/wiadomosci/artykul/praca-w-polsce-praca-dla-cudzoziemcow-w,209,0,2395345.html>.

⁸ <http://stat.gov.pl/obszary-tematyczne/rynek-pracy/opracowania/zezwozenia-na-prace-cudzoziemcow-w-polsce-w-2017-r-,18,1.html>.

⁹ Ibidem.

¹⁰ CHMIELEWSKA–DOBROCZEK–PANUCIAK op. cit.7.

Studies show that at present as much as 40% of Polish companies employ non-EU foreigners.¹¹ The main reason is lack of staff resources in the labour market in Poland.¹² Most frequently, foreigners are employed to perform manual work. As follows from the statistical data of the Ministry of Family, Labour, and Social Policy, from among 235,626 work permits for foreigners in Poland that were issued in 2017 alone, 72,158 were craft and related trade workers and, 66,624 workers performed simple work, whereas 50,737 of foreign workers were machine operators and fitters.¹³ This constitutes approximately 75% of jobs performed by foreigners.

The labour market policy of the Polish state assumes that, in its nature, employment of foreigners is subsidiary to the national employment. Under Article 90b of the act of 20 April 2004 on employment promotion and labour market institutions¹⁴ (hereinafter: the act on employment promotion), the minister in charge of labour policy can determine, in consultation with the minister of economy and the minister of internal affairs, through a regulation, a maximum number of work permits, which voivods can issue in a given calendar year, taking into account the needs of the labour market, the reasons of state security and public order, and the rule of complementarity of hiring foreigners in relation to Polish nationals. Furthermore, issuing a work permit must be each time preceded by labour market research (Article 88c § 1 point 2 of the act on employment promotion). Therefore, the aim is to protect above all the domestic labour market as well as its own employees by the state.

In the above context, it is reasonable to conclude that employment of foreigners is, by assumption, primarily subject to time limits. Thus, the issue requires an analysis in the context of provisions of Polish law concerning employment contracts for a definite period of time. The employment relationship of foreigners in Poland, especially of those from outside the European Union, is determined by time limits of their legal stay in Poland, which, as a rule, will cause employers to choose in the first place the rule of a limited time when employing citizens from such countries. After the trial period, it will be in particular employment for a definite period of time. Another factor of such a decision is the subsidiary nature of hiring foreigners rather than domestic workers.

The reform of the labour code concerning employment contracts for a definite period of time introduced in the act of 25 June 2015,¹⁵ which went into effect on 22 February 2016, significantly restricts the possibilities to reduce labour costs by employers who offer contracts for a definite period of time. This arises from the introduction of a maximum combined duration of employment of the same worker under limited term employment contracts amounting to 33 months.

¹¹ <https://gratka.pl/regiopraca/portal/rynek-pracy/wiadomosci/blisko-40-proc-polskich-firm-zatrudnia-pracownikow-spoza-unii-najczesciej-w-b>. K. WYSIŃSKA-DI CARLO – W. KLAUS: *Raport "Pracodawcy i pracodawczynie a zatrudnianie cudzoziemców i cudzoziemek"* [Eng. Report "Employers and employment of foreigners"]. Drawn up by Association for Legal Intervention and Konrad Adenauer Foundation, June 2018.

¹² D. KAŁUŻA-KOPIAS: *Imigranci na polskim rynku pracy według statystyk MPiPS* [Eng. *Immigrants on the Polish labour market according to MPiPS statistics*]. 18.

¹³ Department of Labour Market of MRPiPS, update: 10.11.2018, <http://psz.praca.gov.pl/web/urzed-pracy/-/8180075-zezwolenia-na-prace-cudzoziemcow>. Data re. work permits for foreigners are collected within the public statistics based on the report by MRPiPS-04.

¹⁴ Dz.U. [Journal of Laws] 2018, item 1265.

¹⁵ Act of 25.06.2015 on amendment of the act – labour code and certain other acts, Dz.U. [Journal of Laws] 2015, item 1220.

Additionally, employment termination notices were made coequal for workers with contracts for definite and indefinite periods of time. Empirical research shows that an employment contract for a definite period of time ranks second in terms of popularity of employment form in Poland. Almost 30% of employed persons are employed under a contract for a definite period of time.

However, so far the available statistical data have not confirmed a decrease in using fixed term employment contracts. According to the Eurostat data, in the years 2015-2017 the number of persons employed under limited term contracts decreased just slightly. For the total number of employees, in 2015 15.811 million persons were employed, 15.901 million in 2016, and 16.078 million in 2017, of which 3.506 million in 2015¹⁶, 3.485 million in 2016, and 3.364 million in 2017 respectively had employment contracts for a definite period of time.

It is indicated that in Poland the percentage of employees with contracts for a definite period of time is twice as high (28%) as the average for all EU states (13,8%).¹⁷ Lack of opportunities for permanent employment is believed to be the most frequently quoted reason for this phenomenon. In 2015, this exact reason was given by 64.7% of respondents, in 2016 by 62.6%, and in 2017 by 58.8%.¹⁸ At the same time, the studies conducted indicate that neither employers nor employees treat employment of foreigners as a long-term option.¹⁹

2. Legal basis for legalizing employment of foreigners under labour law

In Poland, foreigners can perform work on the basis of various grounds legalizing their employment or employment and stay (Article 87 of the act on employment promotion), namely work permits, seasonal work permits, declarations on entrusting the work, temporary residence permit for the purpose of highly qualified employment, temporary residence permit as an intra-corporate transfer, temporary residence permit with the purpose of long-term mobility, or temporary residence permit with the purpose to perform work by a foreigner delegated by a foreign employer in the territory of the Republic of Poland.²⁰ Only if an employee has a permit for permanent residence or an EU resident permanent residence permit, the employee is exempt from the requirement of having an additional

¹⁶ Data base of Eurostat, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ifsa_etgan2&lang=en (access: 5.01.2019). Unfortunately, the data available do not allow one to specify precisely how many of the persons had an employment contract for a definite period of time and how many of the persons used other forms of fixed term contracts (*inter alia* civil law contracts). See: M. FRĄCZEK: Umowa o pracę na czas określony a uwarunkowania rynkowe [Eng. Employment contract for a definite period of time and market conditions]. In: M. MĘDRALA (ed.): *Terminowe umowy o pracę [Eng. Fixed term employment contracts]*. Warszawa, 2017. 240. et seq.

¹⁷ FRĄCZEK op. cit. 240.

¹⁸ <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

¹⁹ WYSIŃSKA-DI CARLO – KLAUS op. cit. 2.

²⁰ See I. FLORCZAK: Terminowe zatrudnianie cudzoziemców w prawie polskim [Eng. Fixed term employment in Polish law]. In: A. MUSIAŁA (ed.): *Nauka i praktyka w służbie człowieka pracy: umowy terminowe [Eng. Theory and practice in the service of a worker. Fixed term contracts]*. Poznań, 2018. 80–81.

legal basis in order to take up employment. The requirements concerning obtaining a work permit do not pertain to EU citizens, either.

In this context, particularly essential is the institution of work permit itself. In accordance with Article 87 § 1 point 12 of the act on employment promotion, a foreigner may perform work in the territory of the Republic of Poland *inter alia* in the situation, where he/she holds a work permit and may reside in Poland for a specific period of time under a temporary residence permit or under another document legalizing his/her stay. The permit is granted in the form of an administrative decision and makes it possible for the foreigner to legally perform work in a given period of time.

The act on promotion of employment provides that work permits are assumed to be temporary. In accordance with Article 88e § 1 of the act on employment promotion, a work permit is issued for a specified period of time, however, not longer than for three years, and it can be extended. In accordance with Article 88f § 1 of the act on employment promotion, a work permit is issued for a named foreigner. A work permit defines the entity entrusting provision of work to the foreigner, the position or type of work performed by the foreigner, the lowest remuneration the foreigner can receive at a given position, hours of work, and the period of validity of the permit.

It is assumed, that temporary work permits are an expression of the state policy aiming at ensuring first of all jobs for their own citizens. In this context, a question arises whether, in principle, temporary work permits and other temporary grounds legalizing employment and the stay of a foreigner in the territory of the Republic of Poland shall always constitute grounds to conclude an employment contract for a definite period of time and what this situation looks like in the context of limiting the number of employment contracts for a definite period of time in Polish labour code.

3. Regular and specific types of employment contracts for a definite period of time with foreigners in Polish law

Notwithstanding the above administrative issues concerning legalization of stay and work performed by foreigners in Poland, from the perspective of labour law the type of an employment contract binding the employer and the employee is a separate issue. Undoubtedly, in the majority of cases of employing foreigners in Poland, Polish law governs their employment relationship. In the case of providing work in the territory of Poland, provisions of the Polish labour code apply unless they were effectively excluded. However, when employing a foreigner in Poland, the parties to an employment contract can enter an employment relationship in accordance with the law of their choice, which follows from:

- Article 8 § 1 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)²¹ providing that an individual contract shall be governed by the law chosen by the parties,
- Article 28 of the act of 4 February 2011 on private international law²² which stipulates that the provisions of Regulation Rome I shall be applied to contractual obligations.

In accordance with Article 2 of Rome I, any law specified by the Regulation shall be applied whether or not it is the law of a Member State. In relation to a contract for employment, the choice can pertain to the entire agreement or a part thereof. It should be stressed, however, that such a choice may not deprive the employee of the protection he/she would be otherwise afforded to in accordance with the applicable law in the absence of choice. In accordance with Article 8 § 2–4 of Rome I, if the parties should not choose any applicable law, then the employment contract shall be governed by the law of the country:

- 1) in which or, failing that, from which the employee habitually carries out work in performance of the contract; the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country;
- 2) where applicable law cannot be determined in accordance with point 1), the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated;
- 3) other than the ones indicated in the preceding points where it appears from the circumstances as a whole that the contract is more closely connected with that other country.

It follows from the foregoing that in the vast majority of cases the provisions of Polish law apply, *i.e.* provisions of the law of the state in which contractual work is carried out. In this context, therefore, Polish regulations limiting employment for a definite period of time require an analysis.

In Poland, employment based on a fixed term employment contract, in particular employment contracts for a definite period of time, sparks debates among legal academics, practitioners of the law, and in the jurisprudence. In this respect, Polish regulations were frequently amended.²³ One of the reasons for comprehensive amendments concerning fixed term employment contracts was, in particular, the judgment of 13 March 2014 by the Court of Justice of the EU (case C-38/13, *Nierodzik*). Under the labour code amended in 2016, employment contracts were limited to three types: an employment contract for a trial period, an employment contract for an indefinite period, and

²¹ OJ no. L 177/6 of 4.07.2008, further hereinafter: “Rome I.”

²² Dz. U. [*Journal of Laws*] 2015, item 1792.

²³ First limitations were introduced by the act of 2.02.1996 on amending the act – labour law and on amending certain acts, Dz.U. [*Journal of Laws*] no. 24, item 110. Article 22 which introduced limitations in the scope of fixed term employment contracts was suspended on two occasions (act of 26.07.2002 on amending the act – labour law and on amending certain acts, Dz.U. [*Journal of Laws*] no. 135, item 1146; the act of 1.07.2009 on mitigating the effects of the economic crisis for employees and entrepreneurs, Dz.U. [*Journal of Laws*] no. 125, item 1035, as amended).

an employment contract for a definite period of time.²⁴ The amendment also introduced a division of contracts for a definite period of time into causal and acausal contracts (or: specific²⁵ and regular).

The former are not subject to limitations whereas the latter are subject to the limitations of time and quantity. In the case of a regular (acausal) contract, the employment period under an employment contract for a definite period of time and a combined period of employment under such agreements concluded between the same parties thereto and the employment relationship cannot exceed 33 months and the combined number of such agreements cannot exceed three.²⁶ The conclusion of a fixed term contract or contracts for a combined period exceeding 33 months or the conclusion of greater number of contracts shall be considered, starting from the day following this period or from the day of conclusion of this type of the contract, as having the same effects as employing the employee under an employment contract for an indefinite period of time (Article 25 § 1–3 of the labour code). Due to lack of exclusions, the limitation applies also to contracts for a definite period of time concluded with foreigners.

Exceptions to the rule of limited conclusions of fixed term contracts pertain to employment contracts concluded for a trial period (Article 25 § 3 of the labour code) and certain contracts for an indefinite term. In accordance with Article 25 § 4 of the labour code, the limitation of up to 33 months and to three contracts does not apply to employment contracts concluded for a definite period of time in the following cases:

- 1) to substitute an employee during their justified absence at work,
- 2) to provide occasional or seasonal work,
- 3) for a term of office,
- 4) in the case where the employer indicates objective reasons attributable to the employer,

if the conclusion of a contract in a given case serves the need to satisfy a genuine demand and is necessary in this respect in the light of all circumstances of the conclusion of the contract. In such a case, the employer is required to inform the competent district labour inspector in writing or

²⁴ The contract for work for the duration of performing specific work was deleted from the labour code, which was justified by the fact of its limited use in practice. Under the current state of law, an alternative are fixed term employment contracts for occasional and seasonal work (Article 25 § 4 point 2 of the labour code.) and also a possibility to conclude an employment contract for a definite period of time due to other objective conditions (Article 25 § 4 point 4 of the labour code). A separate regulation of an employment contract for substitution was also abandoned, which was given a construction of a special type of a fixed term employment contract (Article 25 § 4 point 1 of the labour code).

²⁵ J. Stelina uses the term “regular” and “special” contract for a definite period of time – see: J. STELINA: Nowa koncepcja umowy o pracę na czas określony [Eng. A new concept of an employment contract for a definite period of time]. *PiP*, 2015/11. 45. On the other hand, K. Jaśkowski introduces the division between limited contracts and contracts justified objectively – see K. JAŚKOWSKI: Nowa umowa o pracę na czas określony [Eng. New employment contract for a definite period of time]. *PiZS*, 2015/11. 3–6.

²⁶ Clause 5 of Council Directive 99/70/WE of 28.06.1999 concerning Framework agreement on fixed term work, concluded by UNICE, CEEP, and ETUC, OJ L no. 175, p. 43, provides that to prevent abuse arising from the use of successive fixed term employment contracts, Member states, following consultation with social partners, shall implement one or more of the following measures:

- a/ objective reasons justifying the renewal of such contracts;
- b/ maximum total duration of successive fixed term employment contracts;
- c/ the number of renewals of such contracts.

Polish law provides for each of the three said measures. See also more on the issue U. TORBUS: Ograniczenia zawierania umów o pracę na czas określony – ocena efektywności regulacji w przeszłości i obecnie [Eng. Limitations in concluding fixed term employment contracts – assessment of the effectiveness of the regulations in the past and at present]. In: MĘDRALA (ed.) op. cit. 30.

electronically within five working days about the conclusion of such a contract, indicating the reason therefor. Under Article 281 point 1a) of the labour code, the employer's failure to fulfil this duty is considered as an offence against the rights of the employee punishable by a fine of 1,000 PLN to 30,000 PLN.

From the above follows that the labour code does not introduce, as an exception from the limitation of up to 33 months and to three fixed-term contracts, the situation of one's holding a temporary work permit for a foreigner. Therefore, it means that the general rules on exclusion of the said causal contracts from the limits apply to foreigners.²⁷ Undoubtedly, excluded will be contracts with foreigners for occasional and seasonal work. In the case of seasonal work, the seasonality is additionally limited within the seasonal permits for work from five to nine months within a period of twelve months.²⁸

The literature indicates that the introduction of legal grounds for legalizing seasonal work performed by foreigners aims at supplementing labour shortages in the periods of increased demand for such labour.²⁹ A great number of work carried out by foreigners, especially in agriculture, is seasonal in its nature. A similar situation will pertain to declarations on entrusting work to a foreigner that are subject to registration in the register of declarations under Article 88z of the act on employment promotion. This case generally involves occasional and seasonal work as well that can justify their exclusion from the said limitations. It should be pointed out that in the above cases the exclusion from limiting employment contracts for a definite period of time will justify the type of work performed by a foreigner rather than the fact alone of having a fixed time basis that legalizes their performing work or their stay.

And so, the exclusion under Article 25 § 4 point 4 of the labour code remains to be considered. The employment under an employment contract for a limited period of time exceeding the limits of time and number laid down in Article 25 § 1 of the labour code and without the consequences set forth in Article 25 § 2 of the labour code can take place in a situation, which the legislator does not specify, where the employer should indicate objective reasons "attributable to the employer" which justify – due to the need to satisfy "genuine periodical demand" for hiring under a contract or contracts for a limited term – for his failure to comply with the limitations in number and/or time formulated in Article 25 § 1 of the labour code.

Hence the question arises whether the employment contract for a definite period of time - if work permits for foreigners are issued for a definite period of time and at the time of signing an employment contracts it is not known whether after the expiration of the validity of the work permit the foreigner will be granted another permit or residence card - can be for the same reason a causal contract in the

²⁷ In this case additional legal restrictions appear. Consequently, the institution under Article 25 § 4 of the labour code is subsidiary in relation to Article 25 § 1 of the labour code and it cannot be applied until there is a possibility to use the other one (A. SOB CZYK: Nowe regulacje dotyczące zatrudnienia na czas określony – uwagi systemowe [Eng. New regulations concerning fixed term employment –systematic remarks]. In: MĘDRALA (ed.) op. cit. 48–57).

²⁸ See: Article 88t § 1 the act on employment promotion.

²⁹ FLORCZAK (2018) op. cit. 83.

meaning of Article 25 § 4 point 4 of the labour code. The legal analysis of the issue causes an answer in the negative: a foreigner's temporary residency permit to stay in Poland is the reason that hinders his/her providing work under an employment contract for a definite period of time that is attributable to the employee, not the employer. It is so as there are no grounds to state that the regulations on limiting fixed term contracts do not apply to foreigners since there is no direct exclusion in this respect. Although there are commentaries that argue to the contrary,³⁰ it is my belief that the fact of a limited in time work permit does not provide a sufficient basis for concluding with an foreign employee an employment contract for a definite period of time due to objective reasons attributable to the employer.³¹

In practice, the exception from limiting fixed term employment contracts will, therefore, apply to in particular seasonal and occasional work, work carried out for a term of office, or contracts for substitution. In the context of the fact of a temporary work or residence permit alone, however, one cannot invoke the reason arising from Article 25 § 4 point 4 of the labour code because the article clearly refers to the reasons attributable to the employer (unless such a reason should take place in a specific case). In the case of a permit for work or residence for a fixed term, the reasons arise from administrative law and are attributable to neither of the parties of an employment relationship and if so then it is more on the side of the employee, because it is the employee's work that will be illegal. In the case of one's failure to receive a work permit due to the reasons attributable to the employer, the employee is entitled to possible compensation claims connected thereto (Article 88g § 2 of the act on employment promotion) .

4. Legality of the foreigner's residence or of work permit v. his/her employment relationship

The intrinsic link between the fixed term grounds legalizing employment and the foreigner's residence and the fixed term employment manifests in the possibility of the foreigner's providing work. The foreigner's work ceases to be legal after the end date of the grounds for legalizing their stay even despite the employment based on an employment contract for an unlimited period of time.

In accordance with the provisions of the act on employment promotion, "illegal performance of work by a foreigner" means performing work by a foreigner who is not entitled to perform work in the meaning of Article 87 § 1 or who does not hold a work permit while not being waved under specific provisions from the duty to have a work permit or whose grounds for stay do not entitle him/her to perform work, or who provides work on other terms and conditions or on a different position than

³⁰ K. Walczak says (K. WALCZAK (red.): *Kodeks pracy. Komentarz [Eng. Labour code. Commentary]*., commentary to Article 25 labour code, thesis 10, Legalis 2018) that it will be also legally admissible to employ a forth or another contract for a definite period of time or to employ a foreigner for a period exceeding 33 months if the foreigner should receive a temporary work permit.

³¹ A similar view expresses FLORCZAK (2018) op. cit. 88.

the one stipulated in the work permit³² (Article 2 § 1 point 14 of the act on employment promotion). Moreover, the employer who entrusts a foreigner with work illegally is liable to a fine of from 1,000 PLN to 30,000 PLN under Article 120 of the act on employment promotion.

The issues of cessation of the conditions of legality of performing work by foreigners, especially due to the expiration of their work permit or residency permit, are regulated in Article 88g § 1 of the act on employment promotion. In accordance with this provision, the duty to perform obligations arising from a civil law contract or the duty to provide work in the territory of the Republic of Poland expire in the event where the foreigner no longer meets the conditions set out in Article 87, thus *inter alia* when the fixed term basis legalizing the foreigner's performance of work or residence in Poland expired.

Pursuant to § 1a of the article, if the deadline for filing an application for extension of a permit for work to be performed at the same employer and at the same position was preserved and the application is free of formal defects or when formal defects were rectified on time, the foreigner's performing work in the territory of the Republic of Poland is considered legal from the date of filing the application until the day on which the decision on the extension of the work permit becomes final. Periods of suspension of the proceedings upon the party's request do not count toward the periods of legal work.³³

Furthermore, in the case referred to in Article 88g § 1 of the act, the parties retain the right to claim damages if the refusal or revocation of the work permit was caused by one's failure to maintain due diligence unless specific regulations or the provisions of the contract stipulate otherwise. This thereby confirms the separateness of the issue of a work permit and the issue of the employment contracts that bind the parties.

Various views exist in practice and in the doctrine as to the effects of the expiration of the condition constituting the legality of a foreigner's residence in Poland or the expiration of the validity of the work permit as regards the existence of the employee's employment relationship. In particular, no well-established views exist that the employment relationship expires in such a situation, which would seem the most logical solution from the practical and functional standpoint. There is no unequivocal interpretation whether the regulation expires not only the obligations but also the employment relationship. According to one opinion, it constitutes an independent basis for termination the employment relationship and can be incorporated into an employment contract because it is *lex specialis* in relation to the provisions of the labour code. Pursuant to the position expressed by A.

³² Act on foreigners of 12.12.2013, consolidated text: (Dz.U. [Journal of Laws] 2018, item 2094).

³³ In accordance with item 1b, the provision of item 1a shall apply to the foreigner who applied for a temporary residency permit referred to in Article 114 item 1, Article 126 item 1, Article 127, or Article 142 item 3 of the act of 12.12.2013 on foreigners, or an application for granting a long term EU resident permit to continue work performed in accordance with the work permit or temporary residence permit one already has.

Drabek,³⁴ in such a case the obligation to perform acts arising from a civil law contract or the duty to provide work in the territory of the Republic of Poland expire under the regulation itself.

According to another view, this regulation causes only the expiration of obligations, whereas specific acts, that are undertaken by one party or both parties, are necessary to terminate the employment relationship, e.g. an employment termination notice or an agreement of the parties on termination of the employment relationship. Such a view is represented by M. Culepa, M. Rotkiewicz, and D. Wołoszyn-Kądziółka.³⁵ These authors point out that the foreigner's losing their status of a person entitled to perform work in the territory of Poland, i.e. in the situations referred to in Article 87 of the act on employment promotion, brings about only the expiration of the duties arising from a civil law agreement or an employment contract, which is not tantamount to the expiration of the contracts. For a termination of a contract to take place, the parties must submit a relevant statement of will. The expiration of duties can also lead to withdrawal of the work permit (Article 88k of the act on employment promotion).

For the second view speaks the fact that Article 88g § 1 of the act on employment promotion does not provide for expiration of a civil law or employment relationship but only for the duties arising therefrom. Additionally, doubtful is the admissibility of incorporating into the employment contract for an indefinite time provisions on its termination (expiration) under law upon the expiration of the validity of one's work permit. In such a situation, such a provision can be treated as a terminating condition that aims at circumventing a special course of terminating the contract, which is connected with the protection of permanence of the employment relationship.³⁶ Pursuant to the established jurisprudence, conclusion of an employment contract cannot be conditional.³⁷ At best one can find admissible to write into the contract that the lack of grounds legalizing the employee's residence or work for the reasons unrelated to the employer can constitute a justified basis to terminate the employment contract. It should be pointed out that the labour code specifies exhaustively the events that cause the termination of an employment contract (Article 30 *et seq.*). Hence, there is no possibility to apply provisions of the civil code to this case.³⁸ This pertains to all types of employment contracts.

The provisions of labour law regulate the conditions for expiration of the employment contract in an exhaustive manner as well. In accordance with Article 63 of the labour code, an employment contract expires in the cases stipulated in the code and in special regulations. Article 88g § 1 of the act on employment promotion does not expressly provide for an automatic termination of an employment contract in the event where a foreign employee's work permit lost its validity. Functional reasons

³⁴ Z. GÓRAL (red.) – E. BIELAK-JOMAA – A. DRABEK – M. PALUSZKIEWICZ – E. STASZEWSKA – M. WŁODARCZYK – T. WROCŁAWSKA (eds.): *Ustawa o promocji zatrudnienia i instytucjach rynku pracy. Komentarz* [Eng. Act employment promotion and labour market institutions. Commentary]. 2nd ed. Warszawa, 2016., commentary to Article 88g of the act on promotion of employment, Lex 2018.

³⁵ M. CULEPA – M. ROTKIEWICZ – D. WOŁOSZYN-KĄDZIÓŁKA: *Ustawa o promocji zatrudnienia i instytucjach rynku pracy. Komentarz* [Eng. Act employment promotion and labour market institutions. Commentary]. 1st ed. 2015., commentary to Article 88g of the act, Legalis 2018.

³⁶ Cf. justification of the Supreme Court judgment of 29.03.2011, I UK 316/2010, OSNP 2012, no. 9–10, item 124.

³⁷ E.g. the Supreme Court judgment of 29.03.2011, I UK 316/10, OSNAPiUS 2012, no. 9–10, item 124.

³⁸ Cf. M. SKĄPSKI, Commentary to the Supreme Court judgment of 20.06.2001, I PKN 474/00.

speak for the view that in such a case the contract should expire as at the end date of the permit or the legalizing condition of one's residence because the fundamental duty, *i.e.* provision of work, expired. Furthermore, the employer may not allow the foreigner to work and access to work is the essence of an employment relationship.

Also, problematic is the termination of an employment contract due to one's forfeiting of the work permit as the termination notice would have to be given by the employer in advance and the employer would have to indicate a future event as the reason for the termination. This would give rise to the problem whether the reason was genuine, and especially justified, since the employee when given termination notice could have filed an application for an extension of the permit. And so, the possibility to terminate would exist only upon obtaining assurance that the foreigner will not receive a permit or after the permit has ended. In the latter case, during the notice period the foreigner would not be legally allowed to perform work and the employer would not be able to let him perform work, thereby he would not retain his or her right to remuneration (*a contrario* to Article 80 of the labour code³⁹).

Another issue concerns the fact whether indicating the reason for loss of a permit would be the reason attributable or non-attributable to the employee as the loss of a permit in no way depends on the characteristics of the employee or even on his or her actions. The inability to perform work due to its illegality arises from the content of an administrative decision. Therefore, one cannot exclude a certain risk of finding such a situation to be "the reason that does not pertain to the employee," which would be connected with necessity to pay severance in accordance with the act of 13 March 2003 on special principles for terminating employment with employees due to reasons not attributable to employees.⁴⁰

However, it is undisputed that the employee's inability to provide work due to the lack of the basis legalizing an employee's work or residence constitutes grounds or even the duty to not allow the employee to work. The employee then does not retain their right to remuneration. What is more, the employee cannot be granted holiday leave during such a period because, in principle, it can be granted only to a person who is legally able to work.⁴¹ If the interpretation were accepted that the employment relationship is in force, then this would be a non-paid absence or the parties can optionally agree on an unpaid leave for a certain period of time.

Therefore, *ratio legis* of the regulation points out that it should be accepted that upon the end of the period for which the permit was issued and lack of its extension, the employment relationship terminates. Upon the termination, an employment certificate should be issued to the foreigner, in which Article 63 of the labour code in conjunction with Article 88g § 1 of the act on employment promotion is given as the grounds for the termination. Despite such a functional interpretation, the

³⁹ In accordance with Article 80 of the labour code, remuneration is due for the work actually performed. An employee retains the right to remuneration for the time of not performing work only when the provisions of labour law provide for it.

⁴⁰ Dz.U. [Journal of Laws] 2018, item 1969.

⁴¹ See e.g. the Supreme Court judgment of 28.10.2009, II PK 123/09, OSNAPiUS 2011, no. 11–12, item 148.

legislator has not decided on the issue, which stirs serious doubts in the context of Article 63 of the labour code in relation to Article 88g § 1 of the act on employment promotion. These regulations can give rise to various interpretations. In the context of a growing scale of the phenomenon of foreigners' employment in Poland, this state of affairs leads to uncertainty within labour relations for employers and employees alike.

5. Conclusions

Employment of foreigners in Poland requires special attention on the part of the legislator in the labour market policy. The fixed term nature of work permits is an expression of the policy of the state according to which the access to the labour market should be ensured for the state's own citizens. Only in the case of market shortages it is allowed to employ foreigners. Therefore, it is necessary to carry on market research in this field. The guarantee of stable employment for the employees should be in particular the domestic labour market, which is in line with the standards of international acts concerning human rights.⁴²

The needs of the current labour market indicate that employment of foreigners is inevitable due to a continuous shortage of workers within domestic human resources. At present, Ukrainian nationals form the majority of foreigners in Poland. Over the next few years their number is likely to fall as some will return to their mother country while others will relocate to other EU countries. Looking ahead, we should think of opening the market to representatives of other nationalities from more distant countries.⁴³ It might require more flexible solutions within the grounds for legalization of employment of foreigners and the types of employment contracts for them.

In many cases, the fixed term grounds for legalization of work performed by foreigners causes one to first and foremost conclude with them an employment contract for a definite period of time. Such contracts are subject to limitations according to general principles of the labour code (Article 25 1–3). Limitations according to general principles do not apply only in the case of so-called causal contracts under Article 25 § 4 of the labour code. This particularly pertains to seasonal and occasional work where the lawmaker additionally provides for simplified procedures in obtaining a work permit. Nevertheless, the fact itself of fixed term grounds for legalizing a foreigner's residence or work along with a theoretical possibility of extending thereof cannot justify the application of unlimited in number employment agreements for a definite period of time for objective reasons (Article 25 § 4 point 4). But

⁴² Cf. FLORCZAK (2018) op. cit. 90–91.; the author's quote of Y. Ktistakis (Y. KTISTAKIS: *Protecting migrants under the European convention of Human Rights and The European Social Charter*. Council of Europe, 2016. 67–68.) – in the context of Article 1 of the revised European of the Social Charter.

⁴³ M. GOLISZEWSKI – M. OWCZAREK: Introduction to the Report "*Pracodawcy i pracodawczynie a zatrudnianie cudzoziemców i cudzoziemek*" [Eng. Report. *Male and female employers and employment of male and female foreigners*'], drawn up by Association for Legal Intervention and Konrad Adenauer Foundation, June 2018. WYSIENSKA-DI CARLO – KLAUS op. cit.

perhaps, in the context of an assumption of employing foreigners for a fixed term, *de lege ferenda* it would be reasonably expected that the legislator should introduce such a possibility by adding another exception to Article 25 § 4 of the labour code.

In this context, clear and transparent legislation procedures remain to be significant. The current provisions of Polish labour law do not have clear regulations concerning the status of an employee-foreigner or the existence of his/her employment relationship in the case of their loss of the work permit or of the grounds for legalizing their residence. This causes a significant uncertainty of employment itself for both employers and employees. In this respect, therefore, immediate legislative measures are advisable as due to a growing number of foreign nationals on the Polish labour market such situations are not a rarity.