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Labour market flexibility v. job security – a comparative analysis of Swiss and Polish labour law regulations on fixed-term employment contracts

Abstract: In the time of a knowledge-based economy, flexibility has become increasingly important for both employers and employees. The process of making the labour market flexible leads to the greater popularity of atypical forms of employment, with fixed-term employment contracts among them, which are considered to be less consistent with the protective function of labour law in comparison with indefinite-term employment contracts. The right balance between labour market flexibility and job security has become a real concern. Taking into account the legal regulations on fixed-term employment contracts which are now in force in Poland and Switzerland, this paper determines how that relationship has been shaped in those countries with reference to fixed-term employment contracts.

Key words: flexibility, job security, fixed-term employment contract, Poland, Switzerland

1. Introduction

A full-time employment contract for an indefinite period is traditionally considered the basic form of employment. An indefinite-term employment contract is considered to be the ‘backbone’ of the protective function of labour law, associated with the widest range of rights and scope of protection of the employment relationship. For this reason the full-time indefinite-term employment contract is defined as the ‘typical’ form of employment, in contrast to other so-called ‘atypical’ forms of employment, among them, the fixed-term employment contract (Weiss, 2011, p. 47). Atypical forms of employment are often opposite to the idea of job security. They are associated with uncertain and insecure employment, and therefore with greater risk of poverty and social exclusion, especially in cases where atypical employment is not a stepping stone to standard employment (OECD, 2002). It is emphasised that considerable differences in the level of protection between an employment contract for an indefinite-term and a fixed-term employment contract in the long-term perspective lead to labour market segmentation into low-income, insecure workers (called outsiders) and those with open-ended contracts (called insiders) (Cabrales, Dolado, Mora, 2014, p. 3).

However, in a time of making the labour market more flexible, the spread of atypical forms of employment, including fixed-term employment contracts, is an inevitable process. It is emphasised that atypical forms of employment to a greater extent facilitate an employer’s ability to adapt quickly to market fluctuations, and allow employees to find a place in the labour market if due to some circumstances they cannot, or simply do not want to, work under a full-time indefinite-term employment contract (De Grip, Hoeven-

berg, Willems, 1997, p. 52). As a result, the number of fixed-term employment contracts in Europe has been gradually growing since the 1980s (Eurostat, 2003). The global economic crisis of 2008–2010 only accelerated this process. As a result, in 2011, in as many as eight European countries more than 15% of workers were employed on a fixed-term employment contract basis. Switzerland was below this rate. In Switzerland, a large group of fixed-term contracts are linked with the vocational training system. As a result, in this country, contrary to Poland, the fixed-term contract in most cases plays the role of a so-called ‘bridge’ to permanent employment. In Poland, the proportion of fixed-term employment contracts is one of the highest in Europe and covers more than a quarter of all the employed (OECD, 2014). However, this group is mostly made up of young people (15–29 year old), women, less-educated and lower-skilled workers, for whom a fixed-term employment contract is usually not a voluntary choice (Eurostat, 2014; OECD, 2014).

With this regard, there is still a heated, ongoing debate on how to reach the right balance between labour market flexibility and job security. It is emphasised that good balance between labour market flexibility and job security is achieved “when labour input can be easily and quickly adjusted to the needs of labour demand by assuring, at the same time, a reasonable level of protection for workers” (De Gobbi, Nesporova, 2005). Usually it is necessary to reconcile the often contradictory interests of the parties to the employment relationship. Taking into account the legal regulations on fixed-term employment contracts which are now in force in Poland and Switzerland, the aim of this paper is to determine whether that relationship in those countries is reasonable with reference to fixed-term employment contracts.

2. The run towards greater labour market flexibility

There are a number of different definitions of labour market flexibility. According to neo-liberalism, labour market flexibility refers to the “ease of labour market institutions in enabling labour markets to reach a continuous equilibrium determined by the intersection of the demand and supply curve” (Standing, 1989). Her Majesty’s Treasury (HM Treasury)¹ has provided three basic “overall” definitions of labour market flexibility. “Flexibility as the speed with which the labour market can adjust in response to an economic shock; a flexible labour market as one that exhibits a good equilibrium, i.e. a low structural unemployment rate; a flexible labour market as one that has institutional features that allow wages and employment to adjust smoothly and freely to equate supply with demand” (HM Treasury, 2003, p. 9). Atkinson has distinguished between four different types of labour market flexibility, which include “external numerical flexibility”, “internal numerical flexibility”, “functional flexibility” and “financial or wage flexibility” (Atkinson, 1984). In later works we can also find other types of flexibility, such as “locational flexibility” and “flexibility of place” (Reilly, 2001; Wallace, 2003). Employment protection legislation, including the use of temporary employment contracts, is the predominant factor in the measure of external labour market flexibility, which refers to

¹ The United Kingdom’s Economics and Finance Ministry.

the capacity to quickly and efficiently adjust the volume of work to the changes in demand (Matusik, Hill, 1998).

The transition from Fordism to the post-Fordist model and from industrialisation to post-industrialisation at the end of the 20th century, accompanied by the process of globalisation, has completely changed the nature and organisation of labour. Mass production has shifted to specialisation, with the predominant significance of the service sector and skilled workers. Labour and workforce are still not homogeneous. At the same time, the labour market began to be associated with uncertainty and continuous change, which was linked with the process of increasing popularity of atypical forms of employment. The pressure to become more flexible has become significantly more important for both employers and employees, and at the same time it means they have to face new challenges. For the employer, remaining flexible is necessary to acquire and maintain a competitive edge in view of unexpected changes in the demand on the labour market. In the literature we may find studies that examine the positive link between organisational flexibility and competitiveness (Nandakumar, Jharkharia, Nair, 2014). It is emphasised that organisational flexibility enables a quick and effective response to a variety of market changes in the competitive environment (Volberda, 1996); it refers to the capability to quickly react to the opportunities and challenges created by such an environment (Sanchez, 1995). On the other hand, for the employee it is connected with the necessity to continuously acquire new skills and abilities in order to adapt to new working practices as a condition of maintaining employment (Balaneasa, 2013, p. 14). However, flexibility may also be used by employees to “adjust working life and working hours to their own preferences and to other activities” (Jepsen, Klammer, 2004, p. 157). A. Edmans, L. Li and Ch. Zhang have found that “the recruitment, retention, and motivational benefits of employee satisfaction are most valuable in countries in which firms face fewer constraints on hiring and firing. These benefits are lower in countries with inflexible labour markets, leading to a downward shift in the marginal benefit of expenditure on employee welfare” (Edmans, Li, Zhang, 2014, p. 20).

3. Labour market flexibility and job security

Job security is a type of security that derives from employment protection legislation (EPL) and is associated with restrictions placed on the employer's power to hire and fire employees at will. Job security regulations consist of two aspects. Firstly, they refer to the limits on the employer's capacity to dismiss employees, usually protecting employees against arbitrary dismissal. Secondly, they place certain limits on the employer's ability to hire employees on a temporary basis (Emmenegger, 2014, p. 2). Job security regulations strongly affect labour market flexibility. The more rigid employment protection legislation, the lower the level of employer's ability to freely adjust labour to changing market needs. The reason for job security regulations is the core goal of labour law, which is counteracting the imbalances of bargaining power of employees (Kahl-Freund, 1979, p. 7). The employment relationship has to be considered as a specific legal relationship (*sui generis* legal relationship) that is completely different from legal relationships which arise from civil law contracts. Since labour as the subject in an employment relationship

is not a commodity,² the labour market is not the same as the market in general (Weiss, 2011, p. 44). Among all labour market institutions, job security regulations are considered to be the most controversial (Blanchard, Tirole, 2003, p. 2). The debate over the economic effects of such regulations has not yet been settled. Some authors argue that restrictions on dismissals of workers are the most vilified labour market institution (Quiggin, 2010, p. 17), and maintain that employment protection laws have spoilt economic performance and led to the segmentation of the labour market and unemployment. Others state that those regulations are not harmful for economic efficiency.³ The Employment Protection Legislation Index elaborated by the OECD has remained the common instrument for measuring the strictness of the national employment protection legislation and thus the level of job security.

Job security has to be differentiated from employment and income security, both of which are more consistent with the idea of labour market flexibility. The first one is associated with employability, which means an employee's ability to "continue their employment career, either in another job with their current employer or in another job with another employer, whenever they need or want to" (WRR, 2007). This may be ensured, for example, by investing in the vocational training of an employee. Security of income refers to adequate expected income even in the case of unemployment, for instance through social security benefits (Emmenegger, 2014, p. 2).

4. Fixed-term employment contract – the attempts to reconcile labour market flexibility and job security in Poland and Switzerland

Both Poland and Switzerland are countries with a relatively high level of external numerical flexibility. However, in Switzerland this generally refers both to open-ended and fixed-term employment contracts alike, while in Poland only to the latter. Polish regulations on fixed-term employment contracts are disproportionately liberal compared to indefinite-term employment contracts; they enable the employer to quickly adjust labour to demand. The high discrepancy between job security regulations concerning indefinite-term and fixed-term employment contracts in Poland means that fixed-term employment contracts are commonly overused by employers, who perceive them as an 'attractive' alternative to permanent employment contracts, allowing them the straightforward conclusion and termination of the employment relationship. In Switzerland, where the labour market is not so strictly regulated as it is in Poland, there is a tendency for permanent contracts to resemble more the conditions of fixed-term employment contracts (Brunner-Patthey, 2007). The discrepancy in terms of protection, especially against arbitrary dismissal, between a fixed-term employment contract and a contract for an indefinite-term is not so large. As a result, in Switzerland the fixed-term employment contract is not considered by the employers as such an 'attractive' form of employment (Greppi

² It is also the main principle on which the International Labour Organisation (ILO) is based. It was included in The Declaration of Philadelphia of 10 April 1944.

³ (Micco, Pages, 2007), including the description of views on this issue.

et al., 2010, p. 8). Therefore, employers are less eager to abuse fixed-term employment contracts.

Apart from the replacement of employment contracts in cases of justified absence from work, which is a separate type of fixed-term employment contract, in Poland concluding a fixed-term employment contract is not limited by legal regulations to any cases justified by the nature of the employment or the unanimous consent of the parties. The situation is the same in Switzerland, where no limitations are placed on the valid use of fixed-term employment contracts in the Swiss Code of Obligation. Only Article 334 of the Swiss Code of Obligations directly states that a fixed-term employment contract that is tacitly renewed is deemed an indefinite-term employment contract. In Poland, the same rule was introduced by case law.⁴ In Poland, the level of protection against abuses arising from using fixed-term employment contracts increased in 2003. It was due to adopting the regulation of Article 25¹ of the Polish Labour Code, connected with the implementation of the provisions of the directive of the Council 99/70/EC on fixed-term work that placed restrictions on an employer's power to use such contracts.⁵ Article 25¹ of the Polish Labour Code has placed limitations on an employer's free will to repeatedly use fixed-term employment contracts with the same employee. As a result, a third fixed-term employment contract with the same employee is considered to be an indefinite-term employment contract, unless the break between the termination of the previous contract and conclusion of the next contract exceeded one month. Moreover, if – during the term of the fixed-term employment contract – the parties agree on a longer employment period, it is equivalent to concluding another, consecutive fixed-term employment contract. That rule does not apply to employment contracts for a fixed term that are concluded to substitute an employee during a justified absence from work, or to perform occasional or seasonal work, or periodic tasks. However, the adoption of the regulation of Article 25¹ of the Polish Labour Code *de facto* has not changed the situation. Therefore, the coherence of this regulation with the goal of the directive 99/70/EC is, not entirely without reason, strongly challenged by the doctrine of labour law (Łapiński, 2011, pp. 288–291). Employers decide either to conclude a long-term, fixed-term employment contract, or to conclude another contract after the lapse of the one-month period of break. The weakness of the above regulation of Article 25¹ of the Polish Labour Code has been pointed out by the European Commission in the proceedings initiated against Poland in connection with the improper implementation of the directive 99/70/WE (European Labour Law Network, 2014, p. 3). In Switzerland the use of “chain fixed-term employment contracts” without any objective grounds (economic or social reasons) and aiming at circumventing the law of dismissal is considered prohibited by the Swiss Federal Tribunal on the grounds of Article 2(2) of the Swiss Civil Code on fraud. The Swiss Federal Tribunal regards as objectively legitimate,

⁴ However, the employment contract will be considered as concluded for a fixed term if such can be deduced from its circumstances – see e.g. judgement of Polish Supreme Court of 17 May 1995, I PRN 11/95, OSNP 1995, No. 20, item 250.

⁵ Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by BusinessEurope (UNICE), European Centre of Enterprises with Public Participation (CEEP) and European Trade Union Confederation (ETUC) (Official Journal L 175, 10/07/1999) – hereafter referred to as directive 99/70/EC.

for example, successive fixed-term contracts based on the uncertainty of the employer as to their future structure, when at the same time this situation has not been hidden from the employee.

In Switzerland, protection against arbitrary dismissal for both types of employment contract was significantly improved in 1988,⁶ while in Poland those regulations remained almost unchanged after the adoption of the Labour Code in 1974. In Poland, the ability to end a fixed-term employment contract before its final date is not limited to serious cases, as an ordinary dismissal is also possible. The stabilisation of the employment relationship as regards fixed-term contracts is a fact only in the case of contracts concluded for a term of at least six months. According to Article 33 of the Polish Labour Code, the ability to terminate a fixed-term employment contract applied only to a contract concluded for a period longer than six months in which the parties agreed upon such a possibility, which – however – is the principle in reality. In this case the employer is allowed to terminate a fixed-term employment contract at any time, without giving any reasons or the necessity of consulting the intention to terminate with the trade union organisation that represents the employee. The above mentioned obligations refer only to indefinite-term employment contracts. An employee has no ability to challenge a decision that is made fully at the employer's discretion. In contrast to the indefinite-term employment contract, the statutory term of giving a notice of termination in the case of a fixed-term contract is two weeks, irrespective of its term or the period of service of the employee at the establishment. As a result, the protection against arbitrary dismissal of a fixed-term employee only exists in the case of its immediate termination, which is limited to just cause. The Swiss legal regulation on fixed-term employment contracts provides more security for a fixed-term employee. The expiration of the fixed term remains the basic way in which the employment relationship comes to an end. Therefore, the earlier termination of the employment relationship by one of the parties is an exception and generally is only possible in extraordinary situations and limited to just cause. The termination for a cause refers, in particular, to any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice (Article 337(2) of The Swiss Code of Obligation). However, Swiss courts are very reluctant to accept just cause as a ground for valid termination of an employment contract, usually they make it conditional on the previous formal admonition of the employer. At the same time, that regulation remains flexible, as the parties are free to agree on notice periods despite the fixed employment term. Moreover, termination with six months' notice applies in the case of a long-term employment contract that lasts at least ten years. However, in the case of termination with notice of both fixed-term and indefinite-term employment contracts, the employer is obliged to provide the reasons at the employee's request. As a result, the termination of a fixed-term employment contract may not occur at the employer's discretion and in both cases may be challenged by the employee.

⁶ See the amendment to the Swiss Code of Obligation by No I of the Federal Act of 18 March 1988, in force since 1 Jan. 1989 (AS 1988 1472 1479; BBl 1984 II 574).

5. Conclusions

As far as temporary employment is concerned, the right balance between labour market flexibility and job security may be achieved when this type of employment is not abused by the employer in cases not justified by the nature of employment or compatible interests of the parties. A fixed-term employment contract may – in certain fields, professions and jobs – be an acceptable and desirable solution for both parties in the employment relationship at the time of the struggle to remain flexible in the labour market. Thus, concluding a fixed-term employment contract may be justified in cases of temporary, increased demand for work, employment of workers for specific project tasks, for campaigns, for terms of office in the bodies of a legal entity, for the period of training, in order to prepare for a new profession or to gain further qualifications, and finally when the parties find it justifiable and express mutual consent (Ludera-Ruszel, 2014, p. 597). At the same time, the level of protection of fixed-term employees against arbitrary dismissal has to coincide to some extent with the level of protection with regard to permanent employment in order to make it less ‘attractive’ for the employer when compared with the more secure indefinite-term employment contract. The fixed-term employees may expect that the employment contract will last until the agreed final date, however earlier termination also has to be possible for the parties on principles that are not too far removed from the rules that apply to indefinite-term employment contracts. The Swiss regulation on fixed-term employment contracts represents a better balance between labour market flexibility and job security than the respective regulation that is now in force in Poland. This is partially so because labour law in Switzerland is not so strictly regulated, allowing for more freedom of parties. Thus, Swiss labour law is more flexible, responding to a greater extent to the needs of employer resulting from the changing market environment. At the same time, that regulation provides job security for fixed-term employees, which does not deviate so much from the security of those employed for an indefinite term. Although the conclusion of a fixed-term employment contract in either country has been limited to so-called ‘objective grounds’, in Switzerland, unlike in Poland, where there is a huge discrepancy in the level of protection, employers are less tempted to abuse fixed-term employment contracts over the cases justified by the nature of this type of employment contract or the reasonable interest of the parties involved.

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Elastyczność rynku pracy vs. bezpieczeństwo zatrudnienia – analiza porównawcza polskich i szwajcarskich regulacji prawa pracy w zakresie umowy o pracę na czas określony

Streszczenie

W dobie gospodarki opartej na wiedzy, elastyczność staje się istotna dla pracodawcy i pracownika. Dążenie do większej elastyczności na rynku pracy powoduje wzrost popularności atypowych form zatrudnienia, w tym także umowy o pracę na czas określony, które jednak są uważane za mniej bezpieczną formę zatrudnienia w porównaniu do umowy o pracę na czas nieokreślony. W tych warunkach istotnym wyzwaniem staje się zachowanie właściwej równowagi między elastycznością rynku pracy a bezpieczeństwem zatrudnienia. Opierając się na analizie regulacji prawnych o umowie o pracę na czas określony obowiązujących w Polsce i w Szwajcarii, przedmiotem niniejszego artykułu jest ustalenie jak powyższy stosunek został ukształtowany w odniesieniu do umowy o pracę na czas określony.

Słowa kluczowe: elastyczność, bezpieczeństwo zatrudnienia, umowa o pracę na czas określony, Polska, Szwajcaria

