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Remote working and teleworking. Some points of reflection in the context of the current SARS-CoV-2 pandemic

Abstract

The purpose of adopting the Act on particular solutions related to the prevention, countering and combating COVID-19, other infectious diseases and the emergency crises caused thereby of 2 April 2020 was to minimise the threat to public life. This was to be attained *inter alia* by the introduction of remote working. The laconic wording, however, led to various interpretative difficulties as to the scope of obligations of both employers and employees as well as the framework of their mutual responsibility. In order to eliminate ambiguities and ensure the effectiveness of regulations, certain legislative amendments were introduced, but in the current legal circumstances these do not seem to be the target solution. The author, taking advantage of the historic method, was able to show the evolution of the incidental legal solution that is remote work. Based primarily on the analysis of applicable laws, on the other hand, she highlighted the advantages as well as defects of remote work as it is now, while comparing it to telework. In this context, it was possible to propose certain *de lege ferenda* (as it should be) conclusions as to the direction of desirable legislative changes, i.e. making the rights and obligations of a remote worker, settling accounts and rules of responsibility more precise. The main objective of the author was to present possible ambiguities in the current regulations, which should be removed in the legislative works carried out in the future. In this scope, the rules concerning the use and settling the use private equipment,

used by the remote worker in the performance of work duties, should be clarified and also the rules concerning the transfer of work results ought to be expressly specified. Further, the author points out the unclear limits of responsibility of parties to the employment relationship, where the work is carried out remotely and thus supervision over the worker is lighter. Looking at the global direction of socio-economic changes, it was also suggested that remote work be regulated in the Polish legal order on the permanent basis.

Keywords: COVID-19, remote work, telework, workplace

Introduction

The adoption of the Act on particular solutions related to the prevention, countering and combatting COVID-19, other infectious diseases and emergency crises caused thereby of 2 April 2020¹ was intended to minimise the threat to public health. It was thought that taking more decisive legal steps was necessary. The regulations contained, in particular, in the Act on preventing and combatting infections and infectious diseases of 5 December 2008² were deemed insufficient – in terms of guaranteed legal and organisational measures. The new Act was supposed to, in particular, ‘determine the rules and procedures for the prevention and combating infection and spread from person to person of a transmissible disease caused by the SARS-CoV-2, including the rules and procedures for taking anti-epidemic and preventative measures for the purpose of eradicating the sources of infection and eliminating the paths of spread of the disease (...)’³ The adopted solutions are relatively broad in scope. They include, for instance, regulations concerning the performance of work, covering the area of employee duties and granting further rights to employers, e.g. related to work time. This issue, however, is outside the scope of the present study. Without a doubt, considering its importance, it requires a separate in-depth analysis.⁴ This study, on the other hand, focuses on the essence and the legal nature of remote work and on its advantages and disadvantages as compared to telework.

Allowing employees to perform work remotely was supposed to be one of the proposed instruments aimed at improving the state of the pandemic in the country.

1 Dz.U. (Journal of Laws) of 2020, item 374, as amended, hereinafter the COVID-19 Act.

2 Dz.U. (Journal of Laws) of 2019, item 1239, as amended.

3 Draft no. IX.265.

4 See Stefański, K., *Rozwiązania antykryzysowe dotyczące czasu pracy w ustawodawstwie pandemicznym*, “Monitor Prawa Pracy” 2020, No. 6, pp. 14-18 and also idem: *Czas pracy w sektorach krytycznych w dobie COVID-19*, “Monitor Prawa Pracy” 2020, No. 5, pp. 19-23.

Especially in the beginning this solution brought about numerous negative reactions related to the laconic wording of the introduced regulation. This stemmed from difficulties in determining the relation between the new method and the legal solution that was already present in the Labour Code – i.e. telework.⁵ The first, incidental in nature, mention of the possibility to provide work remotely can be found in the COVID-19 Act,⁶ where it stated that for the purposes of preventing COVID-19 an employer may order an employee to perform work described in the employment agreement, for a specific period of time, outside the place of permanent performance (remote work).

The succinct nature of the regulation from the very beginning led to various problems in its application. It should be noted that the wording thereof does not indicate whether remote work has to satisfy the conditions of telework, in particular with respect to formal requirements related to its introduction. The provision did not make any reference to the scope of obligations of the employee and the employer for the period when the work is rendered on a remote basis. It was necessary to take immediate legislative action aimed at clarifying this regulation so that it might be applied properly. The first changes, however, were introduced only in Article 77 of the Act on subsidised interest rates on bank credits, granted to entrepreneurs affected by the consequences of COVID-19, and on summary proceedings for the approval of arrangements in connection with COVID-19 of 19 June 2020⁷, which entered into force on 24 June 2020. According to clause 3 which was added to Article 3 of the COVID-19 Act, it was specified that remote work may be ordered if the employee has the skills and space in order to carry out such work, while the type of work allows this. In particular, remote work may be performed by means of direct remote communication or concern the performance of manufacturing parts or material services. In the extended period of the pandemic, another amendment of the COVID-19 Act proved necessary so that the employer could order employees to carry out remote work after 5 September 2020 as well. In the absence of relevant legislative action, ordering remote work, envisaged as a temporary solution, would be impermissible. Article 4 of the Act on amending the Act on the posting of workers in the framework of the provision of services employees and certain other acts of 24 July 2020⁸ introduced a rule that remote work may

5 Labour Code Act of 26 June 1974, Dz.U. (Journal of Laws) of 2020, item 1320, as amended, hereinafter the Labour Code.

6 Dz.U. (Journal of Laws) of 2020, item 374, in the wording as of the entry into force, i.e. 8 March 2020.

7 Dz.U. (Journal of Laws) of 2020, item 1086, as amended.

8 Dz.U. (Journal of Laws) of 2020, item 1423.

be ordered in the duration of the state of epidemiological threat or the state of epidemic announced due to COVID-19 and in the period of 3 months after such states are revoked⁹. The regulations of the COVID-19 Act were supplemented by appropriate executive acts, in particular the framework provisions contained in the Regulation of the Minister of Finance of 9 October 2020 concerning the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic¹⁰, which provided for detailed instructions with respect to the rules of operation in particular epidemic zones in Poland.

Remote work – definition and most important characteristics

The COVID-19 Act is the legal instrument in which the most important characteristics and rules of remote work performance are provided. The wording of Article 3(1) of the COVID-19 Act states that remote work is such work that: 1) is performed for the purpose of COVID-19 prevention; 2) scope-wise corresponds to the work described in the employment agreement; 3) is performed for a specific period of time, 4) is performed outside the place of permanent performance.¹¹

First, it should be indicated that the employer may order remote work performance 'for the purpose of COVID-19 prevention'. This is indicated in Article 2(2) of the COVID-19 Act. This includes any activities related to combating infection, preventing the spread of the disease, prevention and elimination of the consequences thereof, including socio-economic effects. Remote work may therefore be ordered in order to limit direct or indirect danger of COVID-19 and is not dependent on actions taken by other entities in this scope. A decision in this respect is made by the employer only.

Second, the legislator imposed the requirement that the type of work performed remotely corresponds to the work described in the employment agreement. For this reason, the employer may not order work to be performed remotely if it goes beyond the scope of work described in the employment agreement; such work may,

⁹ The regulation came into force on 5 September 2020.

¹⁰ Dz.U. (Journal of Laws) of 2020, item 1758.

¹¹ See also: Baran, K. et al., *Komentarz do niektórych przepisów ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*, in: Baran, K.W. (ed.), *Tarcza antykryzysowa 1.0 – 4.0, ustawa o dodatku solidarnościowym i inne regulacje, jako szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. Komentarz*, Warszawa 2020, LEX el.

on the other hand, include a particular part of duties that the employee performs on a permanent basis at the workplace.

A remote work order in accordance with Article 3(1) of the COVID-19 Act is an official order in the meaning of the Labour Code provisions. It may be issued in any form, but for evidentiary reasons it is recommended that the remote work order be issued in a written or document form. The employee without appropriate skills, technical conditions or space that would permit fulfilment of standards concerning transmitted data confidentiality is not obliged to accept the remote work order. The circumstances related to the actual organisational capabilities of an employee should be specified comprehensively by the employer in advance. As has been argued in jurisprudence, in these particular circumstances, in light of the facts, it might be permissible to terminate the employment relationship with the employee in accordance with Article 45 of the Labour Code or to change the terms and conditions of work in accordance with Article 42 §1 – 3 of the Labour Code.¹²

Third, remote work may be performed only 'for a specific period of time'. This does not exclude the option to extend the period of remote work performance. Ordering work to be rendered remotely for an indefinite period of time or without specifying an end date or any other event entailing the termination of work in this form is contrary to law and deemed invalid.¹³

Fourth, another characteristic of remote work is its performance 'outside the place of permanent performance', i.e. outside the workplace specified in the employment agreement. It also seems possible to implement a 'mixed' system of work, where work is performed partially on a remote basis, and partially as per the agreement. From the employer's point of view, it is of no consequence where the employee performs work provided proper performance thereof is possible, appropriate technical conditions and space are ensured, and the employer's interests are not harmed.

The provision covering remote work orders does not pertain to matters related to safety of performance. It may not be accepted, however, that only the employee is responsible for the organisation of remote work. This would mean transferring a part of the risks related to safe work organisation onto the employee. Despite the particular circumstances in which remote work was introduced and the overriding importance of objectives specified in the COVID-19 Act, the employer is still responsible for protecting the health and life of employees by ensuring safe and

¹² Ibidem.

¹³ Article 58 of the Civil Code in conjunction with Article 300 of the Labour Code; Baran, K. et al., op. cit.

healthy working conditions by using scientific and technological developments.¹⁴ On the other hand, it would be difficult to accept that the employer is responsible for an accident at home or at any other location of remote work performance while having no influence over how the work is rendered.¹⁵

The proposed legislative solution concerning remote work generates several interpretative problems that may give way for impermissibly broad interpretation. This can be seen primarily in the analysis of regulations concerning the scope of employer's responsibility for actions of a remote employee. Due to the severity of legal consequences that may be imposed on employers, taking into account the actual limitations in supervising remote employees, legislative action in this scope seems essential. The provisions should be clear and precise. It should also be mentioned that legislative shortcomings are also evident in the way the responsibilities of remote employees are defined. It is still unclear how the employee should transfer the work results to the employer and upon what basis the employee should use and settle the use of private equipment for the purposes of performing work duties. The comparison between the newly introduced instrument of remote work and the telework which was already present in the Labour Code will prove the validity of the formulated conclusions.

Remote work v. telework – principal differences

In the present legal circumstances, we may not equate the incidental institution of remote work on one hand and telework on the other hand, which was already regulated in the Labour Code, due to a variety of significant differences between them.

Remote work is still a temporary solution. In the initial period after the COVID-19 Act entered into force, according to the wording of Article 36(1), Article 3 was to expire upon the lapse of 180 days after entry into force (i.e. on 4 September 2020). Due to the protracted pandemic, it was necessary to take legislative action and extend this period, as referred to above.¹⁶ Currently, for the duration of the state of epidemiological threat or the state of epidemic announced due to COVID-

¹⁴ Kryczka, S., *Koronawirus: praca zdalna to nie telepraca*, 29.03.2020, Rzeczpospolita, <https://www.rp.pl/Kadry/303259967-Koronawirus-praca-zdalna-to-nie-telepraca.html> (accessed 17.09.2020).

¹⁵ Rzemek, M., *Zmiany w kodeksie pracy dotyczące pracy zdalnej*, 30.07.2020, Rzeczpospolita, <https://www.rp.pl/Kadry/307309911-Zmiany-w-kodeksie-pracy-dotyczace-pracy-zdalnej.html> (accessed 18.09.2020).

¹⁶ See also: Leśniak, G.J., *Praca zdalna – rządzący gubią się w terminach*, 14.08.2020, Prawo.pl, <https://www.prawo.pl/kadry/jak-dlugo-bedziemy-pracowac-zdalnie,502370.html> (accessed 27.08.2020).

19 and in the period of 3 months after they are revoked, the employer may, for the purpose of COVID-19 prevention, order the employee to carry out work described in the employment agreement, for a specific period of time, outside the place of permanent performance (remote work).¹⁷ Contrary to remote work, telework is not subject to any time constraints. There are no statutory obstacles that would prevent the employee and the employer from agreeing to perform telework for an indefinite period of time.

Working remotely, after the employer has made the order, due to the need to implement the statutory objective, is the responsibility of the employee. Sanctions related to refusal to perform the order should be, of course, considered on a case-by-case basis. A refusal to carry out remote work, that was not justified by specific circumstances, exposes the employee to disciplinary sanctions provided for in Article 108 § 1 of the Labour Code since the employer may consider it, under certain conditions, as a failure to comply with the established organisation and order in the work process.¹⁸ Meanwhile, telework may result from an agreement between the parties (save for the case when it is entrusted pursuant to a notice of termination amending the employment agreement).¹⁹ It is proposed as an alternative for the employee.

According to Article 3(8) of the COVID-19 Act, the employer may at any time and in any form withdraw the remote work order. Such withdrawal does not require any justification and the employee is obligated to comply with it without undue delay provided work conditions at the employer's office satisfy occupational health and safety standards and do not cause a direct threat to life or health, due e.g. to the epidemic.²⁰ Analogically to unreasonable refusal to accept the remote work order, an unreasonable refusal to cease remote work may lead to detrimental consequences for the employee. Meanwhile, telework may be revoked at the request by any of the parties within 3 months of when telework was commenced, where telework was pursued in the period of employment. Otherwise, it may be terminated by agreement between the parties or by means of a notice of termination amending the employment agreement.²¹

¹⁷ Koślicki, K., *Wynoszenie dokumentów z firmy i praca zdalna mogą naruszać prawo*, 19.03.2020, Prawo.pl, <https://www.prawo.pl/podatki/wynoszenie-dokumentow-z-firmy-i-praca-zdalna-moga-naruszac-prawo,498775.html> (accessed 27.08.2020).

¹⁸ See also: Baran, K. et al., op. cit.

¹⁹ Article 42 § 2–3 of the Labour Code.

²⁰ See also: Baran, K. et al., op. cit.

²¹ Article 67⁸ of the Labour Code.

Another feature to differentiate remote work from telework is the absence of the regularity requirement, i.e. the performance of work systematically, on dates or in periods agreed with the employer. Teleworkers, on the other hand, are obliged to perform work on a regular basis while outside the workplace, using means of electronic communication in the meaning of provisions on performing services by electronic means.²²

In this context, attention should be drawn to statutory regulations concerning the transfer of work results to the employer, which occurs primarily via means of electronic communication.²³ In the case of telework, the manner of reporting work performed and thus the tools used by the employer for supervision purposes of work performed are specified in detail. There is no such regulation for remote work. This does not mean, however, that the obligation in this respect does not exist as it follows from general rules of proper performance and supervision of work rendered under an employment agreement. It seems that these matters should be clarified by the employer in internal documents or in a remote work order. At employer's order, the employee performing remote work is obliged to report activities carried out, in particular the description of those activities as well as the date and duration of performance. The failure to comply with the employer's order or improper performance thereof may constitute a violation of base duties of an employee and result in detrimental work-related consequences. The legislator has indicated that remote work may be, in particular, rendered by means of direct remote communication or concern the performance of manufacturing parts or material services. To a certain extent, this resembles the regulation on telework, but seems to be wider in scope and concept.²⁴

It is also worth directing attention to differences related to the manner of remote work performance. According to clause 4, tools and materials needed for remote work performance as well as logistical support of remote work must be provided by the employer. In the performance of remote work, the employee may, however, use tools or materials that have not been supplied by the employer if this allows respect for and protection of confidential information and other legally protected secrets, including business secrets or personal data, as well as information whose disclosure could expose the employer to damage. The employer's failure to provide tools and materials does not mean that such tools and materials must belong to the employee.

22 Jaśkowski, K., *Komentarz do art. 67^s k.p.*, in: Jaśkowski, K. et al. (eds.), *Komentarz aktualizowany do k.p.*, LEX el. 2020.

23 Article 67^s §2 of the Labour Code.

24 *Ibidem*.

The term 'that have not been supplied by the employer' means that they may be the property of a third party. However, the risk of appropriate security measures and third-party consent for using them lies with the remote worker. On the other hand, the issue of financial equivalent for the used equipment has not been regulated. Of course, this does not prevent the employer from defining this issue in an order or internal regulation. The situation is different in case of telework. The employer is obliged to provide the teleworker with equipment necessary to perform telework, insure the employee, cover the cost related to installation, servicing, use and maintenance of equipment, and provide technical support as well as necessary training in respect of equipment used unless the employer and the employee decide otherwise in a separate agreement.²⁵ The employer may arrange with the employee that the latter will use his/her own equipment in the performance of work, but in such case the provisions impose the obligation to provide the financial equivalent, in particular taking into account the wear and tear standards of the equipment, the documented market prices thereof, the amount of materials used for the benefit of the employer, and the market prices thereof.²⁶

In light of this comparison between remote work and telework, which is established in the Polish legal order, it seems that remote work could constitute, next to telework, a permanent element of the Polish legal landscape. The evolving social and economic circumstances and global context undoubtedly favour this determination. It is dubious, however, whether in this configuration, keeping both instruments – remote work and telework – is proper or whether it would be better to create a single optimal solution adapted to the world of employment. The latter solution, from the perspective of clarity and transparency of the legal order, seems more desirable. The issue of how remote work is performed in comparison to telework leads to the following conclusions. First, it would be appropriate to clarify the regulation concerning the use and settlement of the use of private equipment by a remote worker, as has been done with telework provisions in the Labour Code. Second, the legislative solution found in telework provisions as regards the teleworker's obligation to provide work results to the employer is to be welcomed. A clarification in this scope could also be introduced to regulations concerning remote work. Based on the conducted analysis, it seems reasonable to take legislative measures in the future aimed at changing and clarifying the currently applicable regulations.

²⁵ Article 67¹¹ §1 of the Labour Code.

²⁶ Article 67¹¹ §2(1) in conjunction with §3 of the Labour Code.

Remote work – governmental legislative plans

Due to the persisting state of the pandemic, it seems that remote work is becoming a permanent element of the organisational and legal landscape of the Polish reality. Not only employers and employees themselves but also State representatives are aware of this. Extending the effective period of this measure that is present only in an incidental Act does not seem sufficient for socio-economic purposes. In light of the growing number of questions from employees, an interpellation was submitted to the Ministry of Family, Labour and Social Policy on whether – and if so – when remote work would be regulated in provisions of the Labour Code as one of permanent forms of work provision outside the employer's office, even after the pandemic has ended.²⁷

In response to the submitted interpellation, Stanisław Szwed, the Secretary of State in the Ministry of Family, Labour and Social Policy, indicated that in addition to extending the effective period of the regulation, the government sees the need to introduce amendments to the provisions of the Labour Code with respect to remote work performance. Works in this scope have been commenced by the Labour Law Problem Team of the Social Dialogue Council, since introducing a new regulation – remote work – to the Labour Code necessitates extensive discussions among the interested stakeholders. The suggested solutions should be accepted both by trade unions and employers' organisations by means of consensus of the parties.²⁸

We have to agree with State representatives that the implementation of this solution should be undertaken very carefully, especially in the context of telework which is a measure already present in the Labour Code. Neither solution should be contradictory nor should they overlap; we may also opt for leaving only one measure. However, the regulation concerning remote work should not be laconic or produce ambiguity. It suffices to note how many doubts there were when it came to interpreting the provisions on remote work in the first period since their introduction. If this measure makes its way to the Labour Code on a permanent basis, special care should be taken in drafting the new regulations so as to avoid too-frequent amendments to such a framework act as the Labour Code.

27 Interpellation no. 9326 to the Ministry of Family, Labour and Social Policy concerning remote work, submitted by Anna Kwiecień, Member of the Polish Sejm, of 31 July 2020, Sejm Rzeczypospolitej Polskiej, <https://www.sejm.gov.pl/sejm9.nsf/interpelacja.xsp?documentId=D263A686308C36BC-C12585BA002470DE> (accessed 18.09.2020).

28 A reply from Stanisław Szwed, secretary of state in the Ministry of Family, Labour and Social Policy, of 19 August 2020, <https://www.sejm.gov.pl/sejm9.nsf/interpelacja.xsp?documentId=D2-63A686308C36BCC12585BA002470DE>, Sejm Rzeczypospolitej Polskiej (accessed 18.09.2020).

Conclusion

In summary, it can be stated that the very idea of regulating remote work was a good one. The speed of its practical implementation and the absence of excessive formalism foster better organisation in entities that undoubtedly faced difficulties in operation in the course of the ongoing pandemic. It is also impossible to disagree with the statement that the regulation required wording more precise than that which in the first period after its introduction generated too many interpretive difficulties. However, it seems justified, in this era of technological progress, to keep this solution on a permanent basis, not only when the threat of pandemic is prevalent. A step in this direction may even be unavoidable. To ensure that the proposed legal solution produces the expected results, it may be indicated, by way of *de lege ferenda* conclusions, that a stricter regulation of the following matters is desirable: the reporting of results of work carried out on a remote basis and the provision of such results to the employer, clarification of the measures that permit the employer to exercise supervision over the work carried out by a remote worker, and specification of the rules for settling the use of equipment provided by either the employer or the employee. Given the severity of legal consequences and the possibility of impermissibly broad interpretation, it also seems necessary for the new provisions to clearly and directly specify the limits of responsibility of the employee and the employer.

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