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Legal definition of remote work in Polish labour law

Summary

Legal regulation of remote work was introduced to the Polish Labour Code by the Act of 1 December 2022 amending the Labour Code and certain other acts, which entered into force on 7 April 2023. The new legislation includes a legal definition of remote work. Remote work is a broader concept than the previously existing definitions of telework and teleworker. The essence of remote work is that it is carried out at a place indicated by the employee and agreed in each case with the employer, this place being outside the employer's premises.

Keywords: remote work, occasional remote work, telework, teleworker, means of direct communication over a distance

1. Introduction

The concept of remote work was introduced to Polish law during the COVID-19 pandemic by the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them¹. Subsequently, by the Act of 1 December 2022 amending the Labour Code and certain other acts², which entered into force on 7 April 2023, Chapter II C regulating remote work was introduced in Section II of the Act of 26 June 1974 – the Labour Code³ (Articles from 67¹⁸ to 67³⁴ of the Labour Code, hereinafter interchangeably referred to as 'LC' or 'the Labour Code'). By virtue of the same law, the regulation of telework was repealed (Articles 67⁵–67¹⁷ in the version of the Act of 26 June 1974 – the Labour Code before 7 April 2023⁴ hereinafter referred to as

¹ Unified text, Journal of Laws from 2023, item 1327 as amended.

² Journal of Laws from 2023, item 240.

³ Unified text, Journal of Laws from 2023, item 1465 as amended.

⁴ Unified texts, Journal of Laws from 2022, item 1510.

'the repealed Labour Code'). The purpose of this article is to analyse the statutory definition of the remote work, in particular to compare this concept with the definitions of telework and teleworker. Additionally, I will discuss types of remote work and types of work that can be rendered in a remote form.

2. Legal definitions of telework and teleworker

The telework regulation provided two definitions: of telework and teleworker. According to Article 67⁵ § 1 of the repealed Labour Code, telework was the work performed regularly outside the employer's premises, using means of electronic communication within the meaning of the regulations on the provision of services by electronic means. A teleworker was an employee who performs work under the conditions set out in § 1 and communicates the results of work to the employer, in particular by means of electronic communication (Article 67⁵ § 2 of the repealed Labour Code). The above-mentioned provisions have raised major questions of interpretation. First of all, there is a doubt in the literature about the scope of the definition of telework. Namely, whether it covers only the elements indicated in Article 67⁵ § 1 of the repealed Labour Code, i.e. the performance of work outside employer's premises, on a regular basis, using electronic means of communication⁵, or whether an additional element of the definition of telework is the communication of work results to the employer⁶. In my opinion, the clear separation of the two definitions and their construction indicates that these are two separate concepts. Article 67⁵ § 1 of the repealed Labour Code characterised the process of performance of work in the form of telework and focused on conducting work regularly outside the employer's premises and communication between the employer and the teleworker, whereas Article 67⁵ § 2 of the repealed Labour Code (definition of the teleworker) empha-

⁵ L. Mitrus: *Podporządkowanie pracownika zatrudnionego w formie telepracy*. In: *Z zagadnień współczesnego prawa pracy, Księga jubileuszowa Profesora Henryka Lewandowskiego*. Ed. Z. Góral. Wydawnictwo Oficyna, Warszawa 2009, p. 162; J. Wiśniewski: *Zatrudnianie pracowników w formie telepracy*. Wydawnictwo TNOIK, Toruń 2007, p. 44.

⁶ A. Sobczyk: *Telepraca w prawie polskim*. Wydawnictwo Oficyna Wolters Kluwer business, Warszawa 2009, p. 24; W. Muszalski: *Kodeks pracy. Komentarz*. Wydawnictwo CH Beck, Warszawa 2009, p. 238.

sised the transfer of work results. It should be noted that the wording formulated in Article 67⁵ § 2 of the repealed Labour Code such that a teleworker is an employee who performs work under the conditions set out in Article 67⁵ § 1 of the repealed Labour Code and communicates the results of the work to the employer, in particular by means of electronic communication, leads to the conclusion that the legislator allowed for the possibility of communicating the results of the work also by other means. Therefore, it must be assumed that a teleworker is an employee who performs telework in the meaning of the repealed Article 67⁵ § 1 of the repealed Labour Code⁷.

The definition of telework is similarly understood in case law. The courts emphasise that telework requires three elements: 1. the regularity of the work, 2. its performance outside the workplace, 3. the use in its performance of means of electronic communication and transmission of its results in particular. These three conditions must be met together⁸.

It should be pointed out that the solution adopted in Article 67⁵ of the repealed Labour Code was too complicated and raised numerous interpretative questions, particularly with regard to the relationship between the concepts of telework and teleworker. The reference to the definition of electronic means of communication, which is not regulated in the Labour Code, made the definition of telework less uniform, as it required an analysis of the provisions of several regulations that use complicated terminology.

3. Elements of the legal definition of remote work

In contrast to the repealed telework regulation, at present there is only one legal definition – the remote work. According to Ar-

⁷ E. Pietrzak: *W kwestii ustawowej definicji telepracy i telepracownika*. "Monitor Prawa Pracy" 2011, no. 11, p. 566.

⁸ The judgement of the Court of Appeal in Łódź, III Labour and Social Insurance Division, from 11 June 2015, III AUa 981/14; The judgement of the Court of Appeal in Białystok, III Labour and Social Insurance Division, from 9 July 2013, III AUa 59/13; The judgement of the Court of Appeal in Lublin, III Labour and Social Insurance Division, from 11 July 2017, III AUa 1383/16; The judgement of the Court of Appeal in Gdańsk, III Labour and Social Insurance Division, from 27 April 2016, III AUa 1748/15; judgements available at the Portal of Judgments of the Common Courts (Portal Orzeczeń Sądów Powszechnych), <https://orzeczenia.ms.gov.pl>.

ticle 67¹⁸ LC, remote work may be performed, in full or in part, at a place indicated by the employee and each time agreed upon with the employer, which in particular may be the employee's home address, in particular with the use of the means of direct communication over a distance (the remote work). A significant novelty compared to the regulation of telework is the introduction of occasional remote work (Article 67³³ LC).

Legal definition of remote work is significantly different from the definition of telework and teleworker. A comparison of the wording of Article 67⁵ of the repealed Labour Code and Article 67¹⁸ LC shows that remote work is a broader concept than telework. Namely, the essence of telework was that it was carried out by means of electronic communication, whereas the definition of remote work refers to means of direct communication over a distance, whereby work can be carried out in particular by such means. It should be noted that the use of the phrase 'in particular' means that the use of these means is not a necessary condition for considering the work in question as the remote work. Thus, the legislator allows for the possibility of performing remote work without the use of means of direct communication over a distance⁹. Moreover, in contrast to the definition of teleworker, which emphasises the communication of work results to the employer, the definition of remote work does not refer to the communication of work results¹⁰.

The definitions of telework and teleworker used different wording regarding the place of work than the current definition of the remote work. Article 67⁵ of the repealed Labour Code stipulated that the place of work should be situated outside the employer's premises, whereas according to Article 67¹⁸ LC, remote work is performed at a place indicated by the employee and each time agreed upon with the employer. As an example, the aforementioned provision indicates the employee's home address. Accordingly, it should be assumed that the place of the remote work is any place outside the employer's premises (i.e. outside the employer's registered office or other place of business) that is idi-

⁹ L. Mitrus: *Pojęcie i rodzaje pracy zdalnej w świetle nowelizacji kodeksu pracy z dnia 1 grudnia 2022 r.* "Praca i Zabezpieczenie Społeczne" 2023, no. 11, p. 42.

¹⁰ D. Makowski: *Pojęcie i dopuszczalność pracy zdalnej w świetle przygotowywanych zmian Kodeksu pracy.* "Monitor Prawa Pracy" 2022, no. 4, p. 14.

cated by the employee and agreed to by the employer¹¹. Article 67¹⁸ LC, in contrast to Article 67⁵ § 1 of the repealed Labour Code, does not contain a reference to the performance of work outside the employer's premises, nevertheless, this is an obvious circumstance¹². It is difficult to imagine a situation in which an employee would indicate the employer's premises as the place of work – this would contradict the idea of the form of employment in question. Moreover, it has been rightly argued in the literature that remote work is not the work carried out in workplaces hired by the employer in remote work centres¹³. Therefore, it should be assumed that the qualification of work as remote work is determined by its performance outside the employer's premises at a location chosen by the employee.

It should be noted that, in accordance with Article 29 § 1 point 2 of LC, the substantive component of any employment contract is the place of work. In the case of remote work, this element acquires particular importance as its characteristic feature is the performance of work in the place indicated by the employee and each time agreed upon with the employer. What is more, in the case of remote work, the performance of work at the location different than the employer's premises does not result from the need to perform a specific activity outside the employer's premises (as, for example, in the work of drivers, postmen or sales representatives), but is a characteristic feature of this form of conducting work. The factor of distance does not in any way affect the possibility of qualifying a given manner of providing work as remote work. Indeed, an employee may perform the tasks in the form of remote work when the employee works near the employer premises (e.g. his/her flat is located in the same street) as well as when the place of performing remote work is further away, e.g. in another voivodship. At the same time, performing the same activities at the

¹¹ Ł. Prasolek: *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR*. Warszawa 2023. Legalis; Ł. Prasolek: *Praca zdalna po zmianach w Kodeksie pracy*. Warszawa 2023. Legalis.

¹² E. Suknarowska-Drzewiecka: *Komentarz do art. 67¹⁸ Kodeksu pracy*. In: *Kodeks pracy. Komentarz*. Ed. K. Walczak. Wyd. 33. Warszawa 2023. Legalis; M. Gładoch: *Praca zdalna. Kontrola trzeźwości. Nowelizacja Kodeksu pracy. Komentarz*. Wydawnictwo CH Beck, Warszawa 2023. Legalis.

¹³ A. Sobczyk: *Komentarz do art. 67¹⁸ Kodeksu pracy*. In: *Kodeks pracy. Komentarz*. Ed. A. Sobczyk, Wyd. 6. Warszawa 2023. Legalis.

employer's premises means that the work in question ceases to have the characteristics of remote work.

The specificity of remote work creates difficulties in determining the place of work, which raises issues concerning, in particular, the control of the employee at the workplace, health and safety, or the protection of equipment entrusted to the employee. The imprecise indication of the place of work may cause difficulties in the implementation of the employer's powers and obligations, such as in terms of health and safety and control of the employee. In this regard, it should be noted that there are no provisions in Section II Chapter II C of the Labour Code regulating workplace issues. It only follows from Article 67¹⁸ of the Labour Code that the place of work should be designated by the employee and accepted by the employer, and that it may be at the employee's place of residence.

The statutory definition of the remote work emphasises the autonomy of the employee's decision to choose the place of work. Indeed, it is the employee who indicates the place where the work will be provided. A feature of remote work is therefore that it is not possible for the employer to impose the place of work on the employee. However, the employee's autonomy in this respect is not unlimited – the employer must always agree to the location indicated by the employee. The absence of the employer's consent excludes the possibility to provide remote work in the location chosen by the employee. At the same time, it is not excluded that the employee specifies several locations for the provision of remote work (e.g. a flat, which is the employee's centre of life, and a summer house used by the employee during the summer period)¹⁴. However, such an arrangement must be in each case agreed with the employer.

The place where remote work is performed does not need to be necessarily the employee's home. Nevertheless, it should be such a place to which the employee has the legal title. This may be premises which

¹⁴ M. Gładoch: *Praca zdalna*. In: *Prawo pracy dla sędziów i pełnomocników*. Eds. K. Walczak, M. Wojewódka. Wydawnictwo CH Beck, Warszawa 2023. Legalis; M. Mędrala: *Praca zdalna. Komentarz do nowelizacji Kodeksu pracy*. Warszawa 2023. LEX; M. Mędrala: *Nowe zasady pracy zdalnej – nowelizacja kodeksu pracy*. 2022. LEX; D. Makowski: *Pojęcie i dopuszczalność pracy zdalnej...*, p. 14; L. Mitrus: *Pojęcie i rodzaje pracy zdalnej...*, p. 42; Ł. Prasolek: *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR...*; A. Sobczyk: *Komentarz do art. 67¹⁸ Kodeksu pracy...*

the employee owns or rents. The provisions of the Labour Code do not require it to be a housing apartment. It is therefore not excluded that an employee rents an office (business premises) for the purposes of performing remote work. What is more, the location in which remote work is performed must provide safe and hygienic working conditions. It should be indicated that according to Article 67³¹ § 7 LC, an employee may be admitted to perform remote work on condition that the employee makes a statement, in paper or electronic form, in which he/she confirms that the conditions of work at the remote working post at the place indicated by the employee and agreed upon with the employer are safe and hygienic. What is more, an employee shall organise his/her remote working post guided by the principles of ergonomics (art. 67³¹ § 8 LC).

The place of performance of remote work has a crucial impact on determining when an employee performing work in this form is on a business travel. According to Article 775 § 1 of the Labour Code, business travel is the performance, at the employer's direction, of a work assignment away from the place where the employer's registered office is located or away from the permanent place of work. In the case of remote work, a business travel will be, in accordance with Article 77⁵ § 1 of the Labour Code, the performance of work outside the fixed place of work, i.e. outside the employee's home address or other place indicated by the employee and accepted by the employer. There are no grounds for taking the locality in which the employer's registered office is located as the reference point for determining the employee business travel, unless it is situated in the same location as the employee home address or other place of work.

Article 67¹⁸ LC, in contrast to Article 67⁵ § 1 of the repealed Labour Code, does not contain reference to the regularity of remote work. This means that regularity is not a feature of remote work. Nonetheless, the introduction of a definition of occasional remote work indicates that the remote work referred to in Article 67¹⁸ LC cannot occur episodically. Since, pursuant to Article 67³³ LC, occasional remote work is work performed for up to 24 days in a calendar year, then the remote work referred to in Article 67¹⁸ LC should be performed for at least 25 days in the calendar year.

4. Types of remote work and types of work that can be rendered in the remote form

Different types of remote work are distinguished in the literature. Ł. Prasolek indicates three types of remote work: total, partial and occasional¹⁵, E. Suknarowska-Drzewiecka uses the term hybrid work¹⁶ and M. Tomaszewska – the term organisation of work in hybrid form (hybrid system)¹⁷, M. Rycak distinguishes regular and hybrid remote work¹⁸, M. Gładoch indicates permanent remote work, occasional remote work and *ad hoc* remote work, as well as typical, compulsory and incidental remote work¹⁹, L. Mitrus refers to standard remote work, remote work in exceptional circumstances and occasional remote work²⁰.

The Labour Code refers to remote work (Article 67¹⁸ LC) and occasional remote work (Article 67³³ § 1 LC). Consequently, these are assumed to be the two main types of remote work. In addition, Article 67¹⁸ LC indicates that remote work can be performed, in full or in part, at a place indicated by the employee. Therefore, it is reasonable to divide remote work into full remote work (i.e. provided exclusively at the place indicated by the employee) and partial remote work (i.e. provided partly at the employer's premises and partly at the place indicated by the employee).

As a general rule, the provisions of the Labour Code provide for the voluntary nature of remote work. According to Article 67¹⁹ § 1 LC, the arrangement between the parties to an employment agreement concerning the performance of remote work by an employee may be made upon concluding an employment agreement or during the employment. This provision emphasises the fact that the performance of remote work must always be an element agreed upon by the employee and the employer, and therefore the consent of both parties to the employment relationship to the introduction of remote work is necessary. Also, according to Article 67³³ § 1 LC, occasional remote work can be

¹⁵ Ł. Prasolek: *Praca zdalna po zmianach w Kodeksie pracy...*

¹⁶ E. Suknarowska-Drzewiecka: *Komentarz do art. 67¹⁸ Kodeksu pracy...*

¹⁷ M. Tomaszewska: *Elementy konstytutywne pracy zdalnej*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2023, no. 3, p. 213.

¹⁸ M. Rycak: *Nowe regulacje dotyczące pracy zdalnej*. "Edukacja Prawnicza" 2023, no. 2, p. 5.

¹⁹ M. Gładoch: *Praca zdalna. Kontrola trzeźwości...*; M. Gładoch: *Praca zdalna...*

²⁰ L. Mitrus: *Pojęcie i rodzaje pracy zdalnej...*, pp. 40–44.

performed only upon an employee's application. In addition, in certain situations, an employer may instruct an employee to perform remote work (in the period of the state of emergency, the epidemic crisis situation or the state of epidemic being in force and during three months following their cancellation or in the period where it is temporarily impossible for the employer to ensure safe and hygienic working conditions at the employee's existing workplace due to a force majeure operation – Article 67¹⁹ § 3 LC). On the other hand, the condition for the employer to issue such an order is that the employee declares that he or she has the premises and technical conditions to perform remote work. On this basis, we can distinguish between voluntary remote work (agreed upon by both parties to the employment relationship) and remote work at the employer's instruction. It should be noted that the telework regulations did not provide for the possibility of issuing such an instruction to an employee.

Remote work can be applied to various types of work that can be carried out away from the employer's premises, at a place designated by the employee. The only restriction in this respect is the catalogue of work that cannot be provided remotely foreseen in Article 67³¹ § 4 LC. Namely, remote work does not cover the following: the works which are particularly hazardous; as a result of which the admissible standards of physical agents fixed for living premises become exceeded; with hazard-causing chemical agents referred to in the provisions on safety and hygiene of work involving the existence of chemical agents at the workplace; which involve the use or emission of harmful biological agents, radioactive substances and other substances or mixtures emitting onerous odours; which cause heavy dirtying. It should be noted that such a catalogue was not included in the repealed telework provisions. What is more, remote work does not include work that by its nature is carried out outside the employer's premises, e.g. driving or work carried out in the course of a business trip²¹. In the case of the above work, the employee does not decide where the work is performed, as the performance of tasks away from the employer's premises is either inherent in the type of work in question or is a consequence of the employer's instructions (e.g. business travel).

²¹ A. Sobczyk: *Komentarz do art. 67¹⁸ Kodeksu pracy...*

As already indicated above, the use of means of direct communication over a distance is not a prerequisite for remote work. Accordingly, it should be assumed that there are two basic categories of work within the framework of remote work, namely work for which means of direct communication over a distance are used and work for which the employee does not use these means. It is indicated in the literature that the means of direct communication over a distance are tools that, in voice, video, written and graphic form, allow the interested party to express his or her position on an issue (e.g. by conducting a video or teleconference). Therefore, performing remote work by means of direct communication over a distance involves not only electronic means of communication (including e-mail), but also, for example, telephone, fax, instant messaging²². It should be pointed out that, in practice, remote work largely applies to work carried out by means of direct communication over a distance²³. This is because these means make it possible to be in contact with the employer's premises, e.g. in order to receive instructions from the employer or to cooperate with other employees.

5. Conclusions

The legal definition of remote work introduced in the Labour Code should be assessed positively. A favourable legislative move was the abandonment of two definitions, i.e. telework and teleworker, and replacing them with a single concept of remote work. This removed the interpretation doubts arising under the previous regulation of telework. The abandonment of the element of the definition, i.e. "performance of work by means of electronic communication within the meaning of the regulations on the provision of services by electronic means", which was an immanent feature of telework, also deserves approval. Thus, the definition of remote work is broader than the concept of telework. It should be noted that not only work provided by means of direct communication over a distance can be performed in this form,

²² M. Głądoch: *Praca zdalna. Kontrola trzeźwości...*; E. Suknarowska-Drzewiecka: *Komentarz do art. 67¹⁸ Kodeksu pracy...*

²³ M. Mędrała: *Praca zdalna...*; M. Mędrała: *Nowe zasady pracy zdalnej...*; M. Tomaszewska: *Elementy konstytucyjne pracy zdalnej...*, p. 217.

which makes it more universal²⁴. Summing up the above considerations, it should be stated that the definition of remote work introduced into the Labour Code is simpler and clearer than the previous concepts of telework and teleworker. The above may be an important factor favouring the popularisation of the use of remote work not only in times of epidemic emergency.

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²⁴ L. Florek: *Prawne ramy pracy zdalnej*. "Z Problematyki Prawa Pracy i Polityki Socjalnej" 2021, no. 2, pp. 1–14.

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Definicja prawna pracy zdalnej w polskim prawie pracy

Streszczenie

Regulacja pracy zdalnej została wprowadzona do Kodeksu pracy ustawą z dnia 1 grudnia 2022 r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw, która weszła w życie w dniu 7 kwietnia 2023 r. Nowe przepisy zawierają m.in. prawną definicję pracy zdalnej. Praca zdalna jest pojęciem szerszym niż obowiązujące dotychczas definicje telepracy i telepracownika. Istotą pracy zdalnej jest jej wykonywanie w miejscu wskazanym przez pracownika i każdorazowo uzgodnionym z pracodawcą, przy czym jest to miejsce znajdujące się poza zakładem pracy.

Słowa kluczowe: praca zdalna, okazjonalna praca zdalna, telepraca, telepracownik, środki bezpośredniego porozumiewania się na odległość