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## **ABOUT THE NEED FOR FURTHER CHANGES OF THE LEGAL STATUS IN RESPECT OF A CONTRACT OF EMPLOYMENT FOR A SPECIFIED PERIOD OF TIME – CRITICAL REMARKS IN THE LIGHT OF AMENDMENTS OF THE LABOUR CODE OF 25 JUNE 2015**

### **Abstract**

The amendment to the Labour Code of 25 June 2015, has introduced a number of changes in the contractual employment relationship. They took aim at a/o limiting the unjustified use of fixed-term employment contracts in respect of their abuse in the labour market. Despite the changes, which came into force on 22 February 2016, the legal status of law in respect of a contract of employment for a specified period of time requires further intervention of the legislator which has been called for long by significant part of the representatives of doctrine. The amendment, in fact, has not so much strengthened the situation of people employed on the basis of the fixed term agreement, it has even weakened it, the change was therefore illusory and seemingly beneficial.

**Słowa kluczowe:** umowa o pracę, umowa o pracę na czas określony, wypowiedzenie umowy o pracę, kausalność wypowiedzenia umowy o pracę na czas określony, ochrona stabilności stosunku pracy

**Key words:** work contract, employment contract for a specified period of time, termination of the employment contract, causality of termination of employment contract for a specified period of time, the protection of the stability of the employment relationship

In this article the author presents selected issues of a fixed time limit employment in the context of the amendment of the Labour Code of 25 June 2015,<sup>1</sup> including threats that involves its further development. The amendment, contrary to the intents, weakened the bond joining the parties of that agreement, that causes necessity to advocate for further proposals *de lege ferenda*.

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<sup>1</sup> *The Act on the amendment of the Act – The Labour Code and certain other Acts*, Dz. U. (Journal of Laws) of 2015, pos. 1220.

Contract of employment, as a basis to establish an employment relationship, determines the position of the parties, highlights the legal nature of legal relationship emerging through its intermediary, and it is an important instrument that shapes certain elements of the established employment relationship.<sup>2</sup> One of the types of this agreement – an agreement for a specified period of time – occupies a special place among completed set of employment contracts. It has exceptional character, because on the one hand, it shall allow employer to satisfy its needs during periods of heavy demand for work, without making a permanent bond with the employee, on the other hand, to develop active participation of workers, especially those, who take up an employment for the first time in their life or who are unemployed. The consequence of conclusion of a contract of employment for a specified period of time is the rise of employment relationship on the fixed by both parties time, designated by a specific period of time, a closing date or a future and certain event.<sup>3</sup> The essence includes limited in time need for work of the worker, which is an integral part of the market economy.<sup>4</sup>

The amendment to the Labour Code of 25 June 2015, has introduced a number of changes in the contractual employment relationship. They suppose to aim at a/o limiting unjustified use of contracts of employment for a specified period of time in respect of their abuse in the labour market. It is assumed that the basic form of employment of workers should be a contract for unspecified period of time.<sup>5</sup> The Supreme Court has repeatedly stated that the base type and the standard of labour law is contract for unspecified period of time and that it is a standard preferred and strengthened also in the light of the Directive of 28 June 1999, no. 99/70/WE on the Framework agreement on fixed-term work concluded by the Union of Industrial and Employer's Confederation of Europe (UNICE), European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC).<sup>6</sup> In turn, in the legal justification

<sup>2</sup> Z. Salwa, *Rola umowy o pracę w kształtowaniu stosunku pracy (The role of a contract of employment in shaping an employment relationship)*, Państwo i Prawo 1977, 11, p. 25.

<sup>3</sup> See B. Wagner, *Terminowe umowy o pracę (Fixed - term contracts of employments)*, Warszawa 1980 and U. Jackowiak, *Terminowe umowy o pracę a ochronna funkcja prawa pracy (Fixed-term contracts of employments and a protective function of labour law)*, Monitor Prawa Pracy 2004, 4, p. 9–100 and K. Łapiński, *Umowa o pracę na czas określony w polskim i unijnym prawie pracy (Contract of employment for a specified period of time in polish and EU Labour law)*, Kraków 2011.

<sup>4</sup> See J. Piątkowski, *Umowa o pracę na czas określony w Kodeksie pracy – nowa jakość czy powolny zmierzch tożsamości? (Contract of employment for a specified period of time in the Labour Code – new quality or a slow dusk of identity?)*, Studia z Zakresu Prawa Pracy i Polityki Społecznej, K.W. Baran (ed.), Kraków 2016, p. 10 and the next one. Compare also L. Florek, *Umowa o pracę na czas określony (Contract of employment for a specified period of time)*, Praca i Zabezpieczenie Społeczne 2015, 12, p. 2 and the next one, and B. Bury, *Swoboda kontraktowa stron przy zawieraniu umów na czas określony (Contract freedom of the parties when concluding contracts of employment for a specified period of time)*, Służba Pracownicza 2012, 12, p. 1–5.

<sup>5</sup> M. Świącicki, *Prawo pracy (The Labour Law)*, Warszawa 1968, p. 182.

<sup>6</sup> Dz. Urz. UE L 175 of the 10 July 1999, p. 43. Already in the resolution of the 8 July 1955 the Supreme Court pointed out that the agreement is concluded for unspecified period of time, if the parties expressly or implicitly agreed not to contain another type of employment contract-II CO 11/55, Praca

to the Resolution of 16 April 1998,<sup>7</sup> the Supreme Court presented the view that the institution of a fixed-term contract is an exception which must be objectively justified by the interests of both parties and it must not be abused by the employer in order to circumvent the provisions on protection of stability of an unspecified employment relationship. The application for a large-scale contracts of employment for a specified period of time, especially perennial ones caused discussion in science of labour law, has also become the subject of controversy in the case-law.<sup>8</sup> Limitation of the duration of fixed-term contracts should not sever from the function that it can perform.

Works on changing provisions of the Labour Code on employing workers basing on fixed-term contracts of employment were dictated by initiation by the European Commission in relation to Poland proceedings on non-compliance of the Code provisions with the requirements of the aforementioned Council's directive – call for elimination of infringement no 2013/4161 (a letter of the European Commission of October 2013), as well as the case-law of the Court of Justice EU (CJEU), in particular its judgment of 13 March 2014 in the case C-38/13 Nierodzik. In this case, the Tribunal held, in principle, contrary to the directive, code solutions for termination of employment contracts for a specified period of time. It stated that the application of different lengths of notice periods in case of contract of employment for a specified period of time and employment contracts for an unspecified period of time in Polish legal order provides different treatment in the context of the conditions of employment; furthermore, that the clause 4 point 1 of the Framework agreement on fixed-term work must be interpreted in this way, that it is an obstacle for national legislation (...), which provides, in respect of the termination of employment contracts concluded for a specified period, which suppose to last longer than 6 months, the possibility of applying a rigid two-week notice period, independent from the length of the period of service of the worker, while the length of the notice period in case of contracts of employment concluded for unspecified period of time is determined according to the period of service of the employee and can vary from two weeks to three months, while both categories of workers are in comparable situations. Court of Justice of the EU, differently than the Constitutional Court,<sup>9</sup> decided that the employment on the basis of the employment contract is a relevant feature justifying the equal treatment of employees. Also the earlier case-law of the CJEU underlines that

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i Zabezpieczenie Społeczne 1956, 6, p. 55. More about regulations of international and European law see L. Mitrus, *Ochrona przed nieuzasadnionym zwolnieniem z pracy w świetle Karty Praw Podstawowych Unii Europejskiej (Protection against unreasonable dismissal from work in the light of the Charter of Fundamental Rights of the European Union)*, *Praca i Zabezpieczenie Społeczne* 2012, 4, p. 18 and A. Reda-Ciszewska, *Uzasadnienie wypowiedzenia umowy o pracę na czas określony (Justification for the termination of the employment contract for a specified period)*, *Annales Universitatis Mariae Curie-Skłodowska, Lublin, Polonia* 2015, LXIII, 2, p. 184 and n.

<sup>7</sup> III ZP 52/97, OSNP 1998, 19, pos. 558.

<sup>8</sup> From the legal justification of the Supreme Court of the 25 October 2007, II PK 49/07, OSNP 2008, No. 21–22, pos. 317.

<sup>9</sup> Compare the judgement of 2 December 2008, P 48/07 – Dz. U. (Journal of Laws), No. 116, pos. 740 with the gloss of B. Bury, *Monitor Prawa Pracy* 2009, 7, pos. 382–387.

the objective reason for the conclusion of fixed-term contracts should rely on meeting temporary needs and cannot be used to meet regular and permanent needs of employers (the judgment C-190/13<sup>10</sup>), that the justification for the conclusion of a fixed-term contract may result from the specific nature of the tasks and their specific features or the implementation of legitimate objectives of social Policy of the state (point 70 of the legal justification of the CJ – Grand Chamber C-212/04<sup>11</sup>) as well that conclusion of fixed-term contracts should actually serve satisfying of actual demand of the employer for the attainment of the objective pursued and be necessary in this regard (the judgment in the aggregated cases: C-22/13, C-61/13, C-63/13 and C-418/13<sup>12</sup>).<sup>13</sup>

In turn, the Commission's allegations on non-compliance of the provisions of the Labour Code with the requirements of the Council's Directive 99/70/WE related to three areas: 1. shorter notice period on fixed-term contracts being in force for a long period of time in relation to the length of the notice period of contracts for unspecified period of time covering similar period means the less favourable treatment of workers employed for a fixed term without an objective justification. 2. the period of time that must elapse between two fixed-term contracts, so that they are not considered as "successive", is too short. 3. "tasks realized periodically" term, under which it is permitted unlimited conclusion of successive fixed-term contracts, is not sufficiently defined by the law, in order to prevent conclusion of an excessive number of such contracts. The above considerations lead to the conclusion that legislation and case-law of EU inspired to change the legal situation in the year 2015.

The new wording of the Article 25<sup>1</sup> of the Labour Code introduced explicit restrictions on the freedom of the parties to two essential elements of the agreement of employment for a fixed period of time: length (of a period of time), which may be concluded between the same parties for, and the amount of such contracts concluded. The legislator gave up also with the introduction of break, after which it would be possible to conclude again a fixed term employment contract, which led to elimination of the practice of "erasing" the fix term contracts limit due to occurring between them a month break.<sup>14</sup> Further

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<sup>10</sup> The judgement of 13 March 2014 – the case of Marquez Samohano.

<sup>11</sup> The judgement of 4 July 2006 – the case of Adeneler and others.

<sup>12</sup> The judgement of 26 November 2014 – the case of Mascolo and others.

<sup>13</sup> See A. Dral, *Zatrudnienie na podstawie umów terminowych w świetle nowelizacji Kodeksu pracy z dnia 25 czerwca 2015 roku (The employment based on fixed term contracts in the light of the amendments of the Labour Code of the 25 June 2015)*, Studia z Zakresu Prawa Pracy i Polityki Społecznej, K.W. Baran (ed.), Kraków 2016, p. 26 and n. and K. Jaśkowski, *Comment to the article 25<sup>1</sup> of the Labour Code*, Legal Information System LEX 2016, 40. See also the CJEU in the 12 June 2008 released in case C-364/07 Spyridon Vassilakis and others. About the latest case law of the CJEU incl. on the merits of extending fix term employment (C-184/15, C-197/15 and C-614/15), see M. Raczkowski, *Ponawianie zatrudnienia na czas określony (Renewing of employment for a specified period of time)*, Praca i Zabezpieczenie Społeczne 2016, 10, p. 32–34.

<sup>14</sup> See M. Rylski, *Przeciwdziałanie nadużywaniu umów o pracę na czas określony po nowelizacji kodeksu pracy (Preventing from abusing of contracts of employment for a specified period of time after the amendment of the labour code)*, Praca i Zabezpieczenie Społeczne 2016, 11, p. 21.

changes rely on equalizing of periods of termination of contracts for an unspecified period of time and a specified period of time and – as a consequence of this change – the introduction of a new wording of the subsequent provisions of the Labour Code, a/o the Articles 58–59. The aim of the amendment had to, in fact, allow employers to use without limitation of fixed-term employment contracts objectively justified, and in other cases – to protect employees using introduced limits on the duration of these contracts and their repeatability.<sup>15</sup> In current legal situation the division of contracts of employment for a specified period of time as “normal” – subject to restrictions related to their number and the duration and “specific”, i.e. not subjected to such restrictions, is created.<sup>16</sup>

Despite the changes, which came into force on 22 February 2016, legal status in respect of contract of employment for a specified period of time requires further intervention of the legislator, which has been called for a long time by significant part of the representatives of doctrine. The amendment, in fact, not just strengthened the situation of people employed on the basis of the fixed-term agreement, but even weakened it, the change was therefore illusory and seemingly beneficial. K. Jaśkowski<sup>17</sup> aptly points out in that regard, that more appropriate name for this agreement is currently “contract of employment subject to the maximum time of remaining in effect”, because it is concluded not to last for arranged time, but not to last longer than this time. Extending notice periods of this agreement were not accompanied by any other (positive), and even this change really affects on the situation of the employee employed on a contract of employment for a specified period of time, giving him the opportunity to take advantage of 3-month notice period, only if he remains under the employment of the employer by maximum total period of a contract of employment for a probationary period (3 months) and for the specified time (33 months).

Upon the amendment a question arises whether in the realities of the modern labour market there is a need for further changes to the legal regulation in the field of employment contract for a specified period of time, first of all, whether the contract should be more intensively shaped by the rules belonging to sphere of public law, not leaving the counterparties – in principle – too much discretion typical for civil law relations. In my opinion there is still current view on unequal negotiating and economical strength of the parties, resulting in need to realign this imbalance by reaching out to legal instruments causing that the freedom of shaping by contractors of the employment relationship is to be subject to protective legislation as an expression of State intervention in favour of the employee. Actions based on the fight against labour market segmentation a/o by

<sup>15</sup> See Ł. Pisarczyk, R. Stępień, *Kodeks pracy 2016. Umowy terminowe (The Labour Code 2016, the fixed-term contracts)*, Warszawa 2016.

<sup>16</sup> J. Stelina, in: *Kodeks pracy. Komentarz (The Labour Code, Comment)*, A. Sobczyk (ed.), Warszawa 2015, p. 142. M. Rylski made a division for contracts objectively justified and objectively unjustified, see *Przeciwdziałanie nadużywaniu...*, p. 23.

<sup>17</sup> K. Jaśkowski, *Nowa umowa o pracę na czas określony (New contract of employment for a specified period of time)*, *Praca i Zabezpieczenie Społeczne* 2015, 11, p. 3.

more efficient converting from the fixed term employment to permanent employment should be still considered as necessary. This question becomes all the more relevant in the context of media reports and information about the situation on the labour market, which, especially in recent times, some people see as the advantage of the supply of jobs. The fact remains, however, that Poland still belongs to the European countries with the largest number of fixed-term contracts, “culture of fixed-term employment” is preserved, which is not so much an expression of a compromise between the interests of the parties, but the legitimacy of discretion of employers.<sup>18</sup> Meanwhile, the purpose of the Article 25<sup>1</sup> § 1 of the Labour Code is not only the protection of the employee against abusing of fixed-term employment, but also gradual elimination from the labour market an excessive number of fixed term contracts, so that over time, the principle would be the employment for an unspecified period.<sup>19</sup>

To justify claim about the need to strengthen the position of the contract of employment for a specified period of time, it is necessary to outline a certain evolution of the provisions of this agreement. In the period of real socialism flexibility of the provisions of the employment contract for a fixed period of time did not generate the lack of stabilization of employment in view of existence of full employment which was the determinant of social policy of the State of that time, this agreement was a peripheral agreement.

Its weaker protection against the termination belonged to the specificity of the agreement and on the background of the protected employment of that time, deserved for approval. Interestingly, political transformation, also in the socio-economic sphere, did not lead to changes in the model of fixed-term employment. Meanwhile, the transition to the market economy, by which the phenomenon of unemployment appeared, in the first place brought negative consequences especially for people employed on fixed-term employment contracts, who in the new circumstances were deprived of protection in the field of labour law. Employers increasingly began to notice the benefits of the admissibility of a prior notice of employment contract for a specified period of time in comparison with the termination of employment contract for unspecified period of time and began to massively apply this type of contract, that became a substitute for a contract for unspecified period of time. Stabilization of employment accompanying in the existing circumstances the contract of employment for a specified period of time, which is the natural consequence of the nature of this agreement, in the new circumstances – lost its mainspring. In the first place, the loss of employment was related to those people whose employment relationship was contracted on the basis of a contract of employment for a specified period of time, and that in addition could be terminated while maintaining a short – 2 – week period of notice and without giving a reason.<sup>20</sup> To frequent situation

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<sup>18</sup> See Ł. Pisarczyk, *Terminowe umowy o pracę – szansa czy zagrożenie (The fixed-term contracts of employment – a chance or a danger)*, *Praca i Zabezpieczenie Społeczne* 2006, 8, p. 2 and 7.

<sup>19</sup> See M. Ryński, *Przeciwdziałanie nadużywaniu...*, p. 22.

<sup>20</sup> A. Dral, B. Bury, *Zasada ochrony pracy w Konstytucji RP (The principle of labour protection in the Constitution of the Republic of Poland)*, *Przegląd Prawa Konstytucyjnego* 2014, 3, p. 246–249.

was also “not renewing” of this employment i.e. the lack of the continuation of the employment relationship after the end of the fixed-term employment contract, which of course was and is legally permissible, as well as focusing by employers’ attention on the employees employed unconditionally (“investing” in them by-passing the “specified time” workers). At the same time also the High Court interpreted very widely the content of the Article 33 of the Labour Code, accepting that a decision on the admissibility of the notice period may be implemented at any time,<sup>21</sup> and its termination is possible also before 6 months.<sup>22</sup> The change of socio-economic conditions led to abuse of the Article 33 of the Labour Code to such extent that as a result of the wide use of the legal possibilities created by this regulation, the essence of a contract of employment for a specified period of time was in practice nullified. How not to talk about arbitrariness and discretion of the solution in the situation when “fate” of the employment relationship are subjected to the decision of one of its parties i.e. the employer. The above illustrates that significant socio-economic changes were not accompanied by adequate changes in the provisions of the labour laws ensuring the necessary level of protection of the employment relationship, especially in terms of sustainability of the employment. There are no doubts that the main remedial instruments are in the state policy and encumbering workers with crisis effects in employment should have statutory limits.

Here in after the lack of sufficient protection of workers employed on the basis of agreements concluded for a specified period of time in the changed conditions of management, raise serious concerns. In accordance with the current wording of the Article 32 of the Labour Code, all contracts of employment are subject to termination. After the repealing of the Article 33 of the Labour Code the legislator acknowledged this way to be admissible and unconditional also with regard to the contract of employment for a specified period of time. In this way the risk of more frequent recourse by the employers to make use of this type of contract increased, which remains contrary to the principle of preferring permanent employment. Importantly, this action were not accompanied by the introduction of obligation of causality (justify) for termination of contracts or consulting with trade unions, which are integral part of termination of the contract of employment for unspecified time. Thus, the position of the legislature on the employment is not consistent and straightforward. On the one hand it introduces the limitation of the duration of these contracts and their quantity, extends the notice periods, on the other hand, loosens the appropriate, formal, protective rigors for agreements for the specific period of time, allows their unconditional termination and without the restitution of the employment relationship. Consequently, there wasn’t even a close-up of the scope of protection accompanying the permanent employment in relation to the employment based on a contract of employment for a specified period of time, not to mention its equalizing i.e. covering the workers employed on the contract of

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<sup>21</sup> The resolution of the Supreme Court of 14 June 1994, I PZP 26/94, OSNAPiUS 1994, No. 8, pos. 126.

<sup>22</sup> The judgment of the Supreme Court of 7 September 1994, I PZP 35/94, OSNAPiUS 1994, No. 11, pos. 173.

employment for a specified period of time of at least the same scope of protection as the workers employed under a contract of employment for unspecified time in the sphere of termination of the employment relationship. This shows the lack of adequate reaction of the legislator on the actual problems accompanying functioning of employment contracts for a specified period of time.<sup>23</sup>

Using lack in regulations of this agreement and its advantage in the labour market, employers still impose the contracts of employment for a specified period of time to employees. The original cause of this state is their desire to limit the economic risks in case of conducting activities burdened with increased risk and organisational facilities to increase flexible shaping the composition of the staff. The personal reduction of the risk associated with employment is significant as well. Meanwhile, the freedom of the parties, manifested itself in the will of completion of legal ties linking them, cannot be detached from the substance of the employment relationship, agreed from the beginning of its existence for a certain time and should be subject to certain restrictions in accordance with the principle of protection of the stability of the employment relationship.<sup>24</sup> Serious, unsolved problem remains the lack of causality of the termination of these agreements, loosing the trade union consultation mode and – as a result of the amendment of 2015 – fully open their termination, which is not already dependent on the will of the parties (repealed the Article 33 of the Labour Code). Especially combination of the absence of the obligation to indicate the cause of the full lawfulness of notice period seems to be collisional. Such configuration is unknown even for the provisions of civil law, covering the principle of contracts freedom broadly (the autonomy of the will of the parties – the Article 353<sup>1</sup> of the Civil Code<sup>25</sup>). There are postulations, therefore, to derogate from the ability of termination of these agreements, especially when their duration is currently limited, as a remedy for their conscious and unrestrained terminating, with the lack of restitution of the employment relationship.<sup>26</sup> It is difficult, however, not to detect such problem that the total unacceptability of termination of the employment contracts for a fixed period of time could be impractical, because it could led to need to remain in employment relationship in the situation, when it would be unnecessary and the need for continuing its existence would drop out.

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<sup>23</sup> See A. Dral, *Zatrudnienie na podstawie umów terminowych...*, p. 26 ff. and A. Dral, B. Bury, *Zasada ochrony...*, p. 246–249.

<sup>24</sup> See T. Liszcz, *Prawo pracy (The Labour Law)*, Warszawa 2008, p. 81 and T. Zieliński, *Prawo pracy. Zarys systemu. Część I – ogólna (The Labour Law. An outline of the lecture. Part I – general)*, Warszawa–Kraków 1986, p. 204. Compare also the 2<sup>nd</sup> sentence of the judgment of the Supreme Court of 30 September 2009, II PK 88/09, LEX 559938.

<sup>25</sup> The Act of 23 April 1964, Dz. U. (Journal of Laws) 2016, pos. 380.

<sup>26</sup> B. Wagner, *O swobodzie umów o pracę raz jeszcze*, w: *Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego (About the principle of freedom of contracts of employment once again*, in: *The Labour Law and XXI Century Challenges. A Jubilee Book of Professor Tadeusz Zieliński*), M. Matey-Tyrowicz, L. Nawacki, B. Wagner (eds.), Warszawa 2002, p. 369.



There is no doubt that first of all the employer has interest in concluding fixed-term employment contracts, what derives primarily from different rules and scope of the formalism accompanying termination of employment for unspecified time. The lack of obligation to provide reasons for termination, the lack of trade union consultation and the lack of ability to restore to work in case of wrongful termination in case of fixed term employment contracts, cause that employees employed under this type of contract are protected at the level of the agreements for a probationary period.

Labour law doctrine<sup>27</sup> indicates that the exemption of the employer from the obligation to justify the reasons for termination of an employment contract for a specified period of time determines its unique flexibility. Such decision of the employer has, in fact, an arbitrary nature and is not subject to judicial review. On the other hand, the legal regulation which is its basis goes far beyond understandable in a market economy need to protect economic entity that creates jobs and makes segmentation of the labour market. The issue of termination legitimacy of fixed term employment contracts was examined by the Constitutional Tribunal, but with negative consequences for employees. In the the judgment of 2 December 2008,<sup>28</sup> the Tribunal stated that the will of the employee and the employer decides about the existence of an employment relationship on the basis of a contract of employment for a specified period of time. According to

<sup>27</sup> See B. Wagner, *Terminowe umowy o pracę... (Fixed-term employment...)*, p. 3–4.

<sup>28</sup> P 48/07 along with a separate view of judge T. Liszcz and a critical glose of B. Bury, *Monitor Prawa Pracy* 2009, 7, p. 382–387. The position of the Constitutional Tribunal found acceptance in the doctrine of employment law – see L. Florek, *Konstytucyjne i prawnomiędzynarodowe podstawy ochrony trwałości stosunku pracy*, w: *Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej (Constitutional and international bases of protection of the stability of the employment relationship*, in: *The protection of the stability of the employment relationship in the social market economy*), G. Goździewicz (ed.), Warszawa 2010, p. 44, M. Gersdorf, *O przyczynowości zawarcia i rozwiązania umowy na czas określony*, w: *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej Profesor Barbary Wagner (About the causation of conclusion and termination of the contract for a specified period of time*, in: *Employment relations in a social market economy. Annual report on the occasion of the 40th anniversary of the scientific work Professor Barbara Wagner*), A. Sobczyk (ed.), Warszawa 2010, p. 225 and L. Mitrus, *Kilka uwag o rozwiązaniu za wypowiedzeniem umowy o pracę na czas określony*, w: *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej Profesor Barbary Wagner (A few notes about early termination of the employment contract for a specified period*, in: *Employment relations in a social market economy. Annual report on the occasion of the 40th anniversary of the scientific work Professor Barbara Wagner*), A. Sobczyk (ed.), Warszawa 2010, p. 256. The opposite view express: A. Sobczyk, *Prawo pracy w świetle Konstytucji Rzeczypospolitej, t. II, Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka (Labour law in the light of the Constitution of the Republic of Poland, v. 2, Selected problems and institutions of the labour law and the constitutional human rights and freedom)*, Warszawa 2013, p. 244 and n. (long term employment and employment for an indefinite period have an import ant, common thing and you can talk about the infringement of the Article 32 of the Constitution) and E. Wronikowska, *Terminowe umowy o pracę a ochrona trwałości stosunku pracy*, w: *Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej (Fixed term employment agreements and protection of the stability of employment relationship*, in: *The protection of the stability of the employment relationship in the social market economy*), G. Goździewicz (ed.), Warszawa 2010, p. 194.

the Tribunal, the employee suffers therefore consequences of his/her own actions in this regard, by giving consent to establish an employment relationship under such conditions. This view is inconclusive because it is based on the mistaken, theoretical assumption that the negotiating position of an employer and an employee at the conclusion of the contract of employment is similar, because formally they are equal entities. An important argument raised by employers – in case of questioning by employees the type of concluded employment contract – is the cited employee's consent to conclude a fixed-term agreement, also in terms of the length of its duration. It should be noted that, the employee was aware what type of agreement he entered into and expressed his consent to the terms of its content, in accordance with the principle of the freedom of contract. Such conclusion only *prima facie* does not raise any objections. The consent of the employee is often apparent and it comes down to acceptance of the conditions offered by the employer, because the alternative is not being employed.<sup>29</sup>

The issue of termination of fixed term employment contracts has been the subject of discussion for a long time, and not just in the labour law. In the civil law controversies are also stirred up by the admissibility of termination of contracts concluded for a specified period of time, especially long term ones. The literature of civil law indicates that the right of termination shall be entitled, in principle, within the framework of agreements concluded for an indefinite period of time. Only exceptionally the legislator allows for termination of the contract concluded for a fixed-term (The Article 673 § 3 of the Civil Code concerning the rental agreement or the Article 869 § 1 of the Civil Code *a contrario* relating to the Articles of Association). In the civil law the concept of admissibility of termination of permanent relations liability only for important reasons is considered dominant.<sup>30</sup>

As a characteristic of these agreements the persistence i.e. the stability – the continued existence of a legal relationship in a determined shape for a specified period of time is indicated. That feature also seems to have contract of employment for a specified period of time, because the legislator assumes that it ceases with the passage of time, on which it has been made for, and therefore the existence of stable legal ties. As the doctrine of civil law indicates, the right to terminate the agreement cannot be freely (arbitrary) reconciled with the feature of the stability of the agreement.<sup>31</sup> Therefore it should be noted that, even in case of the civil law contracts the existence of valid reason for early termination of the contract concluded on specified time is required. Actual conditions

<sup>29</sup> A. Dral, B. Bury, *Zasada ochrony pracy...*, p. 238–249. More B. Bury, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 2 grudnia 2008 r.* (Glose to the judgment of the Constitutional Tribunal of 2 December 2008), *Monitor Prawa Pracy* 2009, 7, p. 382–387.

<sup>30</sup> E. Rott-Pietrzyk, in: *System prawa prywatnego*, t. VII, *Prawo zobowiązań – część szczegółowa* (The System of Private Law, v. 7, *Contract Law – Particular Part*), J. Rajski (ed.), Warszawa 2011 (Legalis). Comment to the Article 764<sup>1</sup> of the Civil Code.

<sup>31</sup> R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych* (Boundries of the freedom of creating the content and the aim of obligation contracts). *The Article 351<sup>1</sup> of the Civil Code*, Kraków 2005, p. 368–371.

have changed and current practice has led to move closer aims/destinations of fixed-term employment contracts to contracts for indefinite time. Therefore, the current state of the law should be updated by introducing the obligation to justify termination of fixed-term employment contracts as well.<sup>32</sup>

Finally, the inaccuracy of certain legal solutions introduced by the amendment of 2015 should also be indicated. About contracts of employment concluded for a specified period of time, in case when the employer has to indicate objective reasons lying on its side letting to depart from the limitation principle, the employer should notify the competent district labour inspector, in writing or by electronic means, together with an indication of reasons of concluding such agreement, within 5 working days from the date of its conclusion. With regard to the Article 25<sup>1</sup> § 4 point 4 of the Labour Code, it should be noted that the notify obligation performs statistical–reporting and proactive function, and its violation is misdemeanour against the rights of worker (the Article 281 point 1a of the Labour Code). The legislator has not regulated clearly sanctions which arise in respect of the conclusion of the agreement with violation of law i.e. without objective, hard to verify reason lying on the side of the employer (not defining effects of unfounded conclusion of a “special” fixed-term contract), which is an important legislative shortcoming. These sanctions cannot be searched in the Article 281 point 3 of the Labour Code. The contract is confirmed in writing, however not all necessary provisions are reflected in it.<sup>33</sup> The existence of objective reasons, however, will be subject to assessment of the labour court in the context of an action to determine the existence of an employment relationship for unspecified time, however it should return to the concept of equipping National Labour Inspection in the right to initiate legal proceedings in these cases, and based on denying of the existence of objective reasons attributable to the employer.<sup>34</sup> In addition, as a result of the notification referred to in the Article 25<sup>1</sup> § 5 of the Labour Code, the labour inspector may initiate a control of compliance of rights at work.<sup>35</sup> The view of L. Florek<sup>36</sup> should be accepted, that employer shall bear stricter consequences of infringement of the information obligation that accompanies the conclusion of the contract than in terms of behaviour relating to abuse of its application i.e. exceeding the permissible limits or unjustified application of exceptions to the restrictions of such agreement (except the Article 25<sup>1</sup> § 3 of the Labour Code). This situation also requires the legislator’s response.

<sup>32</sup> See A. Reda-Ciszewska, *Uzasadnienie wypowiedzenia...*, p. 184 ff.

<sup>33</sup> See M. Tomaszewska, *Komentarz do art. 25<sup>1</sup> k.p.* (Commentary to the Article 25<sup>1</sup> of the Labour Code), The System of Legal Information LEX 2016, No. 40.

<sup>34</sup> This term includes the existence of specific circumstances related in particular to the activities of the employer and the conditions of its execution – see M. Rylski, *Przeciwdziałanie nadużywaniu...*, p. 25, and a decision of the CJEU of the 24 April 2009, C-519/08.

<sup>35</sup> See A. Dral, *Zatrudnienie na podstawie umów terminowych...*, p. 33–34.

<sup>36</sup> L. Florek, *Umowa o pracę...*, p. 5.

Analysis of legal status, including the provisions of the Article 25<sup>1</sup> of the Labour Code, prompts to critical reflection. The level of stabilization of employed on fixed-term employment contracts still in fact remains low, we can even talk about destabilization.<sup>37</sup>

The introduction of the principle of freedom of termination of all fixed-term employment contracts is contrary to their essence and socio-economic purpose. Characteristic of fixed-term employment contracts is to ensure the stability of the legal ties, the parties agree, after all, to remain in a given legal relationship for a specified period of time. The conclusion of fixed term contracts of employment should be considered as justified when special statutory provisions fully define the circumstances and the conditions for the admissibility of concluding such contracts only, not leaving space for the will of the parties<sup>38</sup> or if the parties of the employment relationship and without doubt intended to conclude the fixed term agreement, which does not object to the socio-economic purpose of law and the principles of social coexistence. J. Piątkowski<sup>39</sup> aptly notes, that the applicable regulations can build the employment policy, in which most employers will carry it out only on the basis of fixed-term contracts, changing the staff from time to time. It may, therefore, promote more turnover of staff than the transition to employment for a indefinite period. We should continue to call for introduction of the obligation to indicate the reasons for termination the employment contracts for a specified period of time. Even on the basis of the provisions of the civil law, the admissibility of the early termination of the fixed term contract may only occur in the event of special circumstances.<sup>40</sup> We should remember that the admissibility of the termination of these agreements does not have to mean the introduction of facilitation mode of its application by the employer, in particular, to eliminate the requirement to justify or consultation with the representatives of employees. Perceived problem, which requires separate discussion, remains threat of deprivation in this way legal identity of the contract of employment for a specified period of time.

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<sup>37</sup> Compare K. Jaśkowski, *Nowa umowa o pracę...*, p. 3.

<sup>38</sup> See for example the Article 46 paragraph 6 of the Act of the 15 April 2011 on medical activities – Dz. U. 2016, pos. 1638.

<sup>39</sup> J. Piątkowski, *Umowa o pracę na czas określony...*, p. 13.

<sup>40</sup> J. Stelina, ..., p. 143.

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