

PROBLEMS OF INTRODUCTION OF FLEXIBILITY INTO LITHUANIAN LABOUR LAW

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Received 15 May, 2011; accepted 25 June, 2011

Abstract. *The problems of introduction of flexible work arrangements into Lithuanian labour law are analysed in the paper. Since 1990-ies Lithuania started making huge changes in its economy moving from planned (Soviet) to modern market economy. Together with these changes the employment relationship started to change as well. But after 20 years of development we still see a lack of modern view towards flexible work arrangements in labour laws. The problems of introduction of flexibility into Lithuanian employment relationship are discussed with the retrospective view and explanations of arising obstacles for implementation. Rulings of the Supreme Court of Republic of Lithuania are given to reveal problems existing in practice. Conclusions and suggestions for the improvement of legal provisions are presented.*

Keywords: *flexible work patterns, employment contract, working time, labour law.*

Introduction

During the period of economic recession EU countries were searching for solutions to fight rising unemployment, help people to adapt to quick changes in labour market¹. The combination of flexibility of employment relationship and additional social security schemes should had been successful tool combining the needs of the industry and safeguarding employees' rights in EU countries². As there are many types of flexibility³ and it is understood differently depending on country implementing it, seems it is quite complicated to discuss flexicurity as a homogeneous and universal instrument. The aim of this paper is to describe the present regulation of employment relationship in Lithuania and steps of introducing of flexibility which was used in Western European countries for decades.

An open-ended contract no longer ensures a guarantee of job security – various crises show that even the 'secure' permanent contract can be threatened, due in particular to the processes of globalisation and the 'financialisation' of the economy, leading to considerable company restructuring help to improve provisions of the Labour Code giving recommendations for the changes to be made⁴.

To reach the selected aim we shall analyse and discuss existing legal regulation of employment relationship and its' practical application suggesting possible problem solutions.

Current topic was selected because flexibility and flexicurity are important tools for Lithuanian employment policy. As it reflects in court practice, there are lot of disputes regarding atypical employment conditions. Some of the aspects of this topic have been analysed in scientific publications by G. Dambrauskienė⁵, T. Davulis⁶, D. Petrylaitė etc.

In this paper we discuss the obstacles in Lithuanian Labour law preventing parties of employment contract to agree on flexible employment conditions.

1 Social dialogue and restructuring in Europe faced with the crisis: consequences and results. *Europe et Société*. 2010, 77-78.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards Common Principles of Flexicurity: More and better jobs through flexibility and security. COM(2007) 359.

3 Reichold, H.; Krauch, S. The impact of New Forms of Labour on Industrial Relations and the Evolution of Labour Law in Germany. *Europäische Zeitschrift für Arbeitsrecht*. 2008, 4: 487-494.

4 *Flexible forms of work: 'very atypical' contractual arrangements*. Eurofound study, 2010.

5 Dambrauskienė, G. Darbo teisės modernizavimo bei tobulinimo problemos [Problems of modernization and improvement of labour law]. *Jurisprudencija*. 2008, 8(110); Dambrauskienė, G. Lanksčių užimtumo formų taikymas Lietuvoje [Implementation of flexible forms of employment in Lithuania]. *Jurisprudencija*. 2002, 25(17): 19-25.

6 Davulis, T. Lietuvos darbo teisės modernizavimo perspektyvos [Perspectives on modernisation of Lithuanian labour law]. *Jurisprudencija*. 2008, 8(110): 27-33; Davulis, T.; Petrylaitė, D.; Petrylaitė, V. *Europos Sąjungos teisės aktų įgyvendinimas Lietuvos darbo teiseje* [Implementation of EU legal acts into Lithuanian labour law]. Monografija. Vilnius: Registrų centras, 2008.

1. The Influence of Soviet Labour Law

In general there was only one big owner of all employers in soviet Lithuania – the state. Due to specifics of political regime the decisions were made in centralised way and there was not much space for national flexibility in employment relationship. Aiming to understand former employment policy we should bear into our mind that one of the main goals of the society was 100% of employment by all means. Until late 1980-ies the state authorities prosecuted people that were not in employment relationship but were receiving income from personal business activities or even small entrepreneurship that at a time was called “speculation”. Speculation was punished strictly according to Soviet penal code⁷. Therefore the initiatives of employees for any kind of flexibility that resulted in a loss of remuneration looked very suspicious in the Soviet era. The labour laws enacted the state’s policy and it seemed enough to have just a few forms of flexibility: 1) seasonal work (mix of part-time work and fixed-term contract), 2) part-time work and 3) unpaid leave (having reasonable aim only). The given circumstances were the environment for the principle of stability of employment relationships. Unfortunately the core of this principle still refers to old fashioned (Soviet) understanding of functions of labour law. It should be stressed that strong active labour market policy existed at that time (and still remains). Generous but disproportional social security schemes were securing employees from social injustice and poverty. Nowadays these guarantees shall be revised because apparently they are granted too widely and lost their functions as sometimes are given without valid reason for those who do not really need help.

Any innovation or change towards flexibility of the Labour code is opposed by trade unions. Accordingly the collective bargaining is often stuck at completely unreasonable points. Lithuanian social partners acknowledge that new flexible forms of employment are expanding in Lithuania but instead of applying and defining it locally, they seek to define it in laws. Social partners are used, which state regulate everything and try to avoid responsibility of local regulation.

Relicts of Soviet centralised tradition in social policy decision-making are still blocking the development of collective bargaining in Lithuania. In Soviet times, social partners used to accept the opinion of the Government and were not responsible for the made decisions. Still, instead of trying to negotiate on the employment conditions locally the huge efforts are wasted convincing the Government to enact local type of rules in official resolutions. Since the positions are very different, the Government is swamped in debates that lead to complete failure of any wise decision-making. We are sure that this practice must be stopped and social partners should start to negotiate on their own, taking all the responsibility respectively. The background of flexibility shall be the transposition of circumstantial provisions from Labour code to local agreements.

Weak law enforcement is another problem. In Soviet times, strict rules were well enforced, but nowadays some labour laws remain of little practical value because they

7 Lietuvos TSR baudžiamasis kodeksas [Penal code of Lithuanian SSR]. *Official Gazette*. 1961, No. 18-148.

look good only on paper. That shows the attitude of labour market towards state social policy as well. As it was already mentioned, we agree that in the same period of time in different countries the problems of employment and social policy as well as the proposed solutions can be totally different.⁸

2. Flexible Types of Work in Lithuania

Lithuanian types of existing flexible employment relationship and the perspectives introducing new forms of flexibility are described in this section.

2.1. Fixed-Term Contract

Changes of work organisation during globalisation process issued the rise of various types of employment changing the traditional rules of labour law. On the EU level the Directive established general legal backgrounds⁹ for concluding fixed-term contracts as what should had been the source for Lithuanian legislation.

There are two stages of legislation in Lithuania concerning fixed-term employment contracts: 1) from 1991 to 2003 under Law on Employment Contract¹⁰, and 2) from 2003 to present under the Labour code.

Until the year 2003, the Law on Employment Contract Article 9 provided that an employment contract may be concluded for either an indefinite or a fixed period of time, but the duration may not exceed five years unless laws provide otherwise. It was prohibited to conclude a contract for a fixed period of time, if the employment was of a permanent nature, except in cases where such contract is concluded at the employee's request or when it is provided for in other laws. So there was an option to conclude a contract for a fixed period at the employee's request. The court practice shows that there were a lot of cases when employers were forcing employees to conclude fixed-term contracts every 3 months. These complaints were the background to change regulation of fixed-term work. Since 2003 the essential conditions for conclusion of a fixed-term employment contract were introduced: 1) the term of an employment contract and 2) the sufficient circumstances allowing to conclude it. According to the Lithuanian Supreme Court there is a breach of employee's rights when fixed-term contract is concluded without sufficient background provided by the Law.¹¹ Traditionally the fixed-term employment contracts were treated as worsening employees' rights in Lithuania therefore it was decided to regulate it by laws or collective agreements. The Court practice is maintaining the same opinion and explaining that the restriction to conclude fix-term

8 For example see Davidov, G. The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions. *International Journal of Comparative Labour Law and Industrial Relations*. 2010, 26: 61–82.

9 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. OJ L 175, 1999, p. 43–48.

10 Law on Employment Contract. *Parliamentary record*. 1991, No. 36-973.

11 Lietuvos Aukščiausiojo Teismo 2003 m. sausio 16 d. Civilinių bylų skyriaus nutartis *V.K. v. AB „Vilma“*, c. b. Nr. 3K-7-4/2003 [Case of the Supreme Court of Lithuania No. 3K-7-4/2003].

contract just on will of the parties is based on security of employee in order to prevail from abuse of employee's rights.¹²

There are some additional guarantees implemented for employees working under fixed-term employment contract. The employer must inform the employees about vacancies and ensure that they have the same opportunity to secure permanent employment as other employees. In respect of employment conditions or in-service training and promotion opportunities, employees working under fixed-term employment contracts may not be treated in a less favourable manner than employees working under employment contracts of indefinite duration. If the term of an employment contract has expired, whereas employment relationships are actually continued and neither of the parties has, prior to the expiry of the term, requested to terminate the contract, it shall be considered extended for an indefinite period of time. If an employment contract, upon the expiry of its term, is not extended or is terminated, but within one month from the day of its termination another fixed-term employment contract is concluded with the dismissed employee for the same work, then, at the request of the employee, such a contract shall be recognised as concluded for an indefinite period of time.

Starting from the 1st of August 2010 there were few “anti-crisis” changes in Labour Laws.¹³ Comparing to previously adopted regulations it is now possible to conclude a fixed-term employment contract if work is of a permanent nature and an employee is employed to a new position which was created since the 1st of August. So, the Labour Code amendments opened way for fixed-term employment contracts at newly established positions without sufficient background. However, companies that wish to use this possibility must also comply with the requirement that the number of such fixed-term employment contracts cannot exceed 50% of all positions in the company. Fixed-term employment contracts cannot be made with former employees dismissed by mutual termination agreement or on the employer's initiative without the employee's fault. Fixed-term employment contracts for newly established positions are of temporary nature and may be up to a maximum of two years ending no later than the 31st July 2012. Of course, such amendments add to Lithuanian labour law some flexibility in the field of fixed-term contracts, but it is of temporary nature.

There are other two types of employment contract related to fixed-term: *seasonal employment contract and temporary employment contract* provided in Labour code.

A seasonal employment contract shall be concluded for the performance of seasonal work. Seasonal work shall be such work, which due to natural and climatic conditions is performed not all year round, but in certain periods (seasons) not exceeding eight months (in a period of twelve successive months). A list of exact cases when the seasonal work is allowed is approved by the Government.¹⁴ This was needed in Soviet times, because there

12 Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2006 m. sausio 30 d. nutartis *J.B. v. Panevėžio moksleivių rūmai*, c. b. Nr. 3K-3-74/2006 [Case of the Supreme Court of Lithuania No. 3K-3-74/2006]

13 Darbo kodekso 76, 77, 80, 107, 108, 109, 115, 127, 147, 149, 150, 151, 202, 293, 294 straipsnių pakeitimo ir papildymo bei kodekso papildymo 123(1) straipsniu įstatymas [Law on amendment of Labour code]. *Official Gazette*. 2010, No. 81-4221.

14 Lietuvos Respublikos Vyriausybės 1994 m. kovo 7 d. nutarimas Nr. 154 „Dėl sezoninio darbo“ [Government resolution on seasonal work]. *Official Gazette*. 1994, No. 19-313.

should have been a clear justification for the periods (months) of unemployment for employees because the remuneration for that period was not paid. Nowadays this kind of flexibility is still needed in certain sectors of industry such as road building etc.

A temporary employment contract shall be an employment contract concluded for a period not exceeding two months. The list of grounds for the conclusion of a temporary employment contract (circumstances under which a temporary employment contract may be concluded), the characteristics of the conclusion, change and termination of a seasonal and a temporary employment contract, as well as of working time, rest time and pay for work are established by the Government pursuant to Labour Code.

In conclusion, the national law of Lithuania set forth the strict requirements on conclusion of temporary employment contracts, however, the Labour Code of the Republic of Lithuania allows the exceptions to this imperative regulation to be agreed in collective agreements. Collective agreements bind about 10% of all employees in the labour market.

2.2. Temporary Agency Work

There was no phenomena such as temporary agency work in Lithuania during soviet time because there were no private employers. There was no importance of equal treatment at that time because the principal of non discrimination was widely applied and even a system of remuneration for work was regulated centrally by state. After 1990-ies agency work was recognised from the ILO Private Employment Agencies Convention¹⁵, EU Directive on the Posting of Workers¹⁶, Directive 2008/104/EC¹⁷ on temporary agency work etc.

There was no legislation governing temporary agency work until 2011 in Lithuania. This form of work had not been neither forbidden nor allowed. There were no restrictions, no licensing, no limitations of the use of temporary agency work.¹⁸ Due to this, opinions have been voiced in public debates that temporary agency employment in Lithuania is illegal. Arguments were based on definition in Labour code article 98: illegal (undeclared) work shall mean work performed without the conclusion of an employment contract (but on other grounds ex. Civil contract) although including elements of an employment contract (subordination, remuneration etc). The settled argues of course have made agency work look suspicious for business and prevented from using this staff management tool. Nevertheless the temporary work agencies appeared in Lithuania in 2003. Employees who worked in temporary agencies were applied to the same regulatory framework as any other employee working under employment

15 ILO Convention concerning Private Employment Agencies No. 181 [interactive]. [accessed 12-04-2011]. <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C181>>.

16 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Official Journal L 018, 1997, p. 0001-0006.

17 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. Official Journal L 327. 2008, p. 9–14.

18 Usonis, J.; Bagdanskis, T. Darbo nuoma ir jos teisinio reguliavimo perspektyvos Lietuvoje [Perspectives of regulation of Temporary Agency work in Lithuania]. *Jurisprudencija*. 2008, 8(110): 65–72.

contracts. Until now Temporary agency work is not mentioned in any of national/sec-toral collective agreement.

Drafting of laws to regulate temporary agency work was started in 2004. During discussions social partners had been failing to reach an agreement as to the strictness of regulations imposed by the law: employers seek more liberal regulation of temporary agency work, while trade unions prefer stricter regulation thereof.¹⁹

During discussions on the law on temporary agency work it was stressed that if an inadequate means of safety will be applied the idea of agency work will be rejected by the industry. We are sure that there should be reasonable balance of rights and obligations created aiming to encourage people and industry to choose this flexible form of employment and create normal competition in the labour market. If inadequate or im-proper means are adopted businesses would choose alternatives of service provision or other contractual relations (possibly even undeclared work). Unfortunately the Lithua-nian Law on Temporary Agency Employment lays few inadequate requirements such as remuneration for temporary agency workers during idle periods between employment; responsibility for the damage caused etc.

The Law on Temporary Agency Employment will enter into force on 1 December 2011²⁰. In general terms the adoption of the law shall ensure more transparent and better business conditions; businesses will be able to use labour force more flexibly and at the same time to ensure the competitiveness of the Lithuanian economy. In addition, this should ensure safety to temporary workers themselves who sometimes used to look at this form of employment with distrust.

Temporary agency employment will contribute to creation of new jobs that would not have been created otherwise, and provide people (especially youth having little ex-perience) with employment opportunities in Lithuania.

According to the data of the International Confederation of Private Employment Agencies²¹, the average duration of the employment of a temporary agency worker is from one to three months. According to the data of the Association of Temporary-Work Agencies, the agencies belonging to the association employ temporary workers for 2 to 3 months on average. After the first employment contract expires, the majority of temporary agency workers are re-employed at the same temporary-work agency. On average, 80 percent of temporary agency workers are re-employed. The number of temporary agency workers in Lithuania account for 0.1% of total employees; mean-while the European average is 1.5%.

19 Blažienė, I. Lithuania: Temporary agency work and collective bargaining in the EU [interactive]. Institute of the Labour and Social Research [accessed 12-04-2011]. <<http://www.eurofound.europa.eu/eiro/studies/tm0807019s/lt0807019q.htm>>.

20 Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatymas [Law on temporary agency work of Republic of Lithuania]. *Official Gazette*. 2011, No. 69.

21 Data and Statistics on Temporary Agency Work. International Confederation of Private Employment Agen-cies [interactive]. [accessed 12-04-2011]. <<http://www.ciett.org/index.php?id=55>>.

2.3. Telework

No special statutory and/or collectively agreed definition of teleworking existed in Lithuania until 2010. Lithuanian legislation had known a definition of home working. Homework was defined as ‘work done by an individual at home for a wage agreed on with the employer’.²² It was stipulated that job implements used by a home worker should be in conformity with the statutory requirements of safety and health at work. Working time of a home worker could not exceed 40 hours a week but the flexibility was given to allocate their working hours at their own discretion. Home workers were granted possibility to account and record the working hours by themselves (anyway a model working-time accounting sheet was obligatory). Rules of operation of a company were not applied to home workers. Home workers were the subject to general provisions laid down in the Labour Code.

The amendment of Labour Code in August 2010 replaced home working introducing a new type of employment contract—telework. Under a telework employment contract an employee may perform working duties in places other than the employer’s office.

Telework coverage is not large but appears to be gradually increasing in Lithuania. The new legal environment is going to encourage the development of telework especially for individuals who use in their work computers and internet.²³

In fact, teleworkers in Lithuania may be divided into two groups. The first group are employees—individuals employed under regular employment contracts at the employer’s premises, but who in fact spend part of their work hours working outside office (such work is not formally reflected in any accounts). The second group are formally self-employed individuals, who usually conclude a civil contract (copyright or service agreement) instead of an employment contract. It shall be stressed that employment contracts with teleworkers are not popular in Lithuania due to the lack of organisational flexibility provided. The main problem remains with the distribution of health and safety at work guarantees between the parties of employment relationship. According to Labour code article 260 it is the responsibility of an employer to ensure safety and health at work even if the employee is performing work at home.

Teleworkers (with employment contract) enjoy the same social guarantees as those employed at the employer’s premises. They have the same access to training as workers at the employers’ premises, are protected with regard to health and safety in the same way and have the same collective rights.

22 Lietuvos Respublikos Vyriausybės 2003 m. rugpjūčio 19 d. nutarimas Nr. 1043 „Dėl atskirų darbo sutarčių ypatumų patvirtinimo“ [Government resolution on specific types of employment agreements]. *Official Gazette*. 2003, No. 81(1)-3690.

23 Blažienė, I. Telework in Lithuania [interactive]. Institute of Labour and Social Research [accessed 12-04-2011]. <<http://www.eurofound.europa.eu/eiro/2007/12/articles/lt0712019i.htm>>.

2.4. Self-Employed Individuals

The people who are looking for flexible ways of work often realise that employment relationship cannot give them enough needed flexibility. Then they choose other legal ways of flexible activities. As for atypical form of activities in Lithuania we can mention two groups of self-employed individuals: 1) acting under business certificates²⁴ or 2) registered at revenue (tax) office as persons doing individual activity.²⁵ There is uncertainty still concerning legal background of relationship between the parties performing duties of babysitters, artists etc. The Government faces difficulties to provide people with clear legal definitions for their activities. It is difficult to find borders between atypical employment, self employment and employment relationship. As it is not solely Lithuanian problem the questions of fake self employment are discussed widely.²⁶

Individuals attributed to all the above-mentioned very atypical forms of employment are in rather favourable situation regarding organisation of working time, health and safety and sometimes pay levels also (as compared to income they would receive for the same job being engaged in typical employment under non-term full-time employment contract). There are no special control mechanisms to ensure that these rights are not being breached.

There is no freedom of will to choose a freelancer's status and work by civil contract in Lithuania, if relations have any elements of employment relationship, such as subordination or regular remuneration.

Freelance workers choose to work independently, despite a lower level of social protection, because it offers them more income and more freedom to control their activity on their own. Freelance workers usually will work from their own home or office space, but in certain cases can also be onsite. Clients as general rule have the right to control or supervise only the result of the work done by an independent contractor, and not the process or methods of accomplishing the result.

We can realise that the defensive function of labour law is eliminated by avoiding and bypassing the employment relationship. The labour code excessively tries to protect people but with no success because people are slowly escaping the area of its regulation. We are sure that Lithuanian labour law shall be revised and clear rules of activities shall be defined complying with the realities and needs of labour market.

2.5. Part-Time Work

Traditionally there were 3 types of working time in theory of labour law: Normal working time, Shorter working time and Part-time work.²⁷

24 A way of personal activity allowing to pay fixed sum of yearly income tax.

25 Performing an individual activity person shall pay 15% income tax.

26 Characteristics of the Employment Relationship. Publication of European Network of Legal Experts in the field of Labour Law (ELLN). Thematic Report October 2009.

27 *Darbo teisė* [Labour law]. Vadovėlis. Vilnius: Mykolo Romerio universitetas, 2008.

Normal working time constituted 40 hours of weekly working time—5 days, 8 hours each with Saturday and Sunday as rest days. Derogations were possible providing maximum weekly working hours for special groups of employees only.

Shorter working time was set as a guarantee for special groups of vulnerable employees to work less than normal working hours. It is similar to part-time work, but is applicable only for certain groups of employees provided by law and the lost remuneration is partly compensated by employer. The employer is obliged to set shorter working hours (even without the employees will or consent) for: 1) persons under 18 years of age; 2) persons who work in the hazardous working environment (up to 36 hours per week); 3) employees' working at night; 4) employees performing work involving heavy mental, emotional strain.

As it was a practice to regulate employment relationship in detail, until 1970-ies part-time work was available only for few groups of employees. Bearing into mind that there was no private property and in general the state was single big employer, most citizens were employees and were supposed to work full day.²⁸ The employers were allowed to apply Part-time work only for the special groups of employees provided in Labour code.²⁹ Later part-time work was allowed upon agreement between parties of employment relationship.

Regulation of part-time work had not been changed since 1970s. Actors of labour market started to discuss new flexible forms of work that were known in practice of the Western countries, but unfortunately Lithuanian Labour code remains unchanged. In 2003 the Ministry of Labour passed a recommendation³⁰ that promoted part-time work as a flexible type of employment. Labour code provides a duty for employer to set up a part-time work: 1) by request of the worker due to his/her health status in accordance with conclusions of medical institution; 2) on request of a pregnant woman, a woman who has recently given birth, a woman who breast-feeds, an employee raising a child until 3 years of age, as well as an employee who solely raises a child until 14 years of age or a disabled child until 16 years of age; 3) on request of an employee under 18 years of age; 4) on request of a disabled person upon conclusions of a health care institution; 5) on request of an employee nursing a sick member of his family, according to the conclusions of a health care institution. Other conditions related to the procedure of establishing part-time work and duration thereof were set by the Government.

Some employers had found part-time work as a tool to save income tax and social security tax. The employees used to agree to conclude part-time work agreements, but actually worked long hours, and the employers officially remunerated them only agreed

28 Usonis, J. Darbo ir poilsio laiko reglamentavimo raida Lietuvoje [Evolution of regulation of working and rest time in Lithuania]. Lietuvos darbo teisės raida ir perspektyvos [Evolution and perspectives of Lithuanian labour law]. *Liber Amicorum et Collegarum profesorei Genovaitei Dambrauskienei*. Vilnius: Mykolo Romerio universitetas, 2010, p. 189–205.

29 *Darbo įstatymų komentaras* [Commentary on Labour laws]. Vilnius: Mintis, 1970, p. 271.

30 Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2003 m. spalio 17 d. įsakymas „Dėl rekomendacijų darbdaviams ir darbuotojams jų susitarimu taikyti lanksčias darbo organizavimo formas patvirtinimo“ [Order of Ministry of Social Security and Labour on Recommendations for organisation of flexible work forms]. No. A1-160. *Official Gazette*. 2003, No. 101-4573.

part of contract while other hours were paid from black accountancy budget. State institutions decided to fight this setting the minimum working time while working part-time—not less than 4 hours a day and 3 days a week. It was obvious that it was not a remedy for the problem, therefore this requirement was abolished in 2007. Because of previous infringements, even now the part-time work is treated by the state officials not as a tool for flexibility but some kind of a suspicious form of work.

During economical crisis employers wished to introduce part-time work due to decrease of work amount in the company. Unfortunately they did not have such discretion. As introducing part-time work the remuneration shall be cut as well, employees' representatives reminded rule existing in Labour code article 120 that in the event of changes in the conditions of remuneration, wages shall not be reduced without the written consent of an employee. The incorrect interpretation of the Labour code concerning remuneration prevented from using part-time work in practice widely. Probably possible solution could have been examples of Germany³¹ where special compensations from social funds covering the loss of employee's salary were introduced during economy recession. As Lithuania did not choose this tool and it was complicated to introduce part-time work, employers started to search for an alternative means to fight consequences of economical crisis.

2.6. Unpaid Leave

It should look as a strange kind of flexibility but it is very popular in present times of economical vulnerability in all kinds of establishments including state institutions in Lithuania. Unpaid leave in soviet time was a possibility for extra day off and was given only for a valid reason (such as funeral of a relative, wedding etc). Nowadays it become an official way to save employers budget though sometimes employees are forced to ask for the days off that were not paid. Because it is hardly possible to choose other kinds of flexibility according to Lithuanian labour code this way is often used. The employees "ask" for an unpaid leave and "help" employer to fight the economical crisis. As it is sometimes an alternative to dismissals the employees agree on temporary loss of income.

2.7. Zero Hours or Work on Demand

There was no possibility to work according to flexible (undefined) schedule in soviet times in Lithuania. Still, according to Labour code article 147 the daily (and weekly) schedule of work and rest time, beginning and end of a daily work (shift) for each employee, shall be set under the internal rules of an enterprise. Working time schedules shall be announced publicly in information boards of enterprises and their subdivisions not later than two weeks in advance. The employer must ensure consistent change of shifts. Due to these inherited strict Soviet rules, work on demand becoming hard to implement

31 Dietz, M.; Stops, M.; Walwei, U. *Safeguarding jobs in times of crisis - Lessons from the German experience?* International Labour Organization, International Institute for Labour Studies. Geneva, 2011.

in Lithuania. Good example is shown in ECJ case *Wippel v. Peek & Cloppenburg*³² where the court stated that the length of weekly working time and the organisation of working time can not be fixed but be dependent on quantitative needs in terms of work to be performed determined on a case-by-case basis if such workers are entitled to accept or refuse that work. Article 146 of Lithuanian Labour Code provides that part-time work may be established by decreasing the number of working days per week or shortening a working day (shift), or doing both. Part-time work during a working day may be divided into parts. Moreover, the typical form of employment contract set by the Government³³ requires provision of the exact number of hours agreed to work by employee. In short—it is not possible to establish in advance undefined flexible working hours for any reference period in Lithuania. These provisions are the main obstacle in a way of applying zero hour work. Another problem arises in social security field—the situations may appear when employee is not receiving any monthly payment because he/she was not called for work and had no income for calculating social security tax. To sum up—State labour inspectorate do not tolerate work on demand (zero hour work) and requires from parties of the employment agreement to show exact agreed number of hours while killing the very idea of such type of flexible work.

2.8. Accumulation of Working Hours over Reference Period

This type of flexibility is limited in both organisational and in functional level. Lithuanian labour code provides that working time may not exceed 40 hours per week, a daily period of work must not exceed 8 working hours. Exceptions may be established by laws, Government resolutions and collective agreements.

Accumulation of working hours³⁴ over reference period is allowed if necessary, in enterprises, establishments and organisations, also in individual workshops and sections having regard to the opinion of the employees' representatives. The length of working time during a recording period must not exceed 40 hours. The maximum working time may not exceed 48 hours per week and 12 hours per working day (shift). The duration of a reference period may not exceed four months. It should be stressed that there is no provision for average calculation of 40 or 48 hours.

In the case of summary recording of the working time, continuous duration of daily and weekly rest periods established in Labour Code must be ensured. If the number of working hours set for a particular category of employees is exceeded during the summary recording of the working time, a working day shall be shortened for employees on their request or they shall be given a rest day (days) in the manner prescribed by the employment contract, collective agreement or internal rules, or they shall be paid the amount equal to the amount paid for overtime work.

32 Ruling of ECJ in case *Wippel v. Peek & Cloppenburg*, C-313/02.

33 Lietuvos Respublikos Vyriausybės 2003 m. sausio 28 d. nutarimas Nr. 115 “Dėl darbo sutarties pavyzdinės formos patvirtinimo” [Government resolution on form of employment contract]. *Official Gazette*. 2003, No. 11-412.

34 Also called “Summary Recording of Working Time.”

The rules mentioned in zero-hours chapter concerning schedule of working time are also applied strictly.

Unfortunately due to the problem of weak enforcement of labour laws the real flexibility is achieved only by violation³⁵ of provided rules what has negative reflection on the fair competition among employers.

2.9. Reflection of Flexibility in Collective Agreements

Some countries using advantages of collective bargaining where social partners agree on working conditions in collective agreements. As Lithuania is not the case we are looking for solutions to find a way for it to happen. Since introduction of Labour Code in 2003 it was expected that putting in some articles wording “unless this is provided for by collective agreements”³⁶ will encourage social partners to start negotiations. But it did not happen. There were a lot of problems linked with this issue, such as: identification of the social partner³⁷, passive staff³⁸ members, harassment from employer’s side and finally arising fear of employees. Aside from that we would think that the main reason for today – too much regulation provided in Labour code resulting insufficient differentiation of regulation towards different groups of persons in the labour market.

The provisions of Lithuanian Labour code reflect picture of welfare state. But just while reading it. A lot of guarantees are given to employees and huge responsibility for employers can not be implemented fully in practice. A lot of infringements are registered and many labour disputes arise because of little space to flexible agreements on working time, termination of employment, material responsibility etc.

Changes to Labour code made in 2009 and called anti-crisis solutions³⁹ shall be criticised. The idea of these changes was to let the parties of employment relationship agree in the collective agreement to lower the level of protection provided in Labour code. To our opinion this idea is faulty. In general the aim of collective agreement shall be provision of the working, professional, social and economic conditions and guarantees which are not regulated by laws, are not contrary to it and do not put employees in a worse position that provided by laws. The guarantee given in Labour code that can be easily derogated is just an illusion of this guarantee itself. The collective agreements shall be the creative instrument for parties of employment relationship to agree on the rules they want to follow. The examples of the strict Lithuanian regulation showed that instead of space for creativeness of the parties we have reached the desperate trying to “bypass” the law. Removing excess

35 Lietuvos Respublikos Valstybinė darbo inspekcija. Ataskaita apie darbuotojų saugos ir sveikatos būklę bei darbo įstatymų vykdymą Lietuvos Respublikos įmonėse, įstaigose ir organizacijose 2009 metais [Report of Lithuanian Labour Inspectorate on health and safety at work for 2009]. 2010 m. gegužės 31 d. No. NSD-5.

36 For example article 109–“It shall be prohibited to conclude a fixed-term employment contract if work is of a permanent nature, unless this is provided for by laws or collective agreements.”

37 Davulis, T. Kai kurios darbdavių organizacijų teisinio statuso problemos [Problems of legal status of employers’ organisations]. *Teisė*. 2001, 39: 8–16.

38 The staff shall comprise all employees connected with the employer by employment relationships.

39 Lietuvos Respublikos darbo kodekso 76, 77, 80, 107, 108, 109, 115, 127, 147, 149, 150, 151, 202, 293, 294 straipsnių pakeitimo ir papildymo bei kodekso papildymo 123(1) straipsniu įstatymas [Law on amendment of Labour code]. *Official Gazette*. 2010, No. 81-4221.

guarantees from Lithuanian Labour code could serve as a shock for employees at this stage of stagnation to start negotiations and bargaining providing backgrounds getting back into collective agreements. Employees shall create active trade unions at company level bargaining for the better working conditions. We see a lack of dialogue in practice but just the instructions how to fight other party of relationship. That is not collective bargaining, it is probably a collective war that has no winners.

We understand that our proposal may look dangerous because of the threat of de-regulation, but we believe it could serve as a temporary measure to activate social dialogue involving employees

Unfortunately the further initiatives to change any regulation are failing at the national social dialogue level. Even the Tripartite Council of the Republic of Lithuania⁴⁰ that was created according to ILO conventions⁴¹ shows its impotence to agree on the regulations that could help maintain effective labour market policy. Trade unions are fond of gathering statistics of extremely unfair actions of employers and present it as general view of whole labour market. Employer's organisations do not move any further than trying to argue on the 10 year old issues. The solution for the implementation of flexicurity according to strategy 2020⁴² could be the creation of new modern labour code containing provisions focused towards EU labour law policy and flexicurity strategies.

The Lithuanian labour market has changed since 1970-ies and the legal instruments that Lithuania had during soviet planned economy period do not fit nowadays.⁴³ Most enterprises are small and medium enterprises, private employers who can not work on the same employment conditions that are written for international companies! We hope that Lithuanian lawmaking bodies will recognise the urgent need for making quick solutions towards labour laws.

Conclusions

Analysis of legal regulation and practical application of flexibility in Lithuania leads to the following conclusions:

1. Lithuania Labour Law is still fundamentally based on soviet labour law principles therefore it lacks flexibility and freedom of will for parties of employment contract.
2. Labour code is not flexible enough in terms of concluding fixed-term employment contract because the parties could not freely agree on it.

40 The Tripartite Council of the Republic of Lithuania was established on May 5th 1995 following an agreement on tripartite partnership between the Government of the Republic of Lithuania, trade unions and employers' organisations for the purpose of solving social, economic and employment problems.

41 1976 ILO Tripartite Consultation (International Labour Standards) Convention No. 144; 1981 ILO Collective Bargaining Convention No. 154.

42 Communication from the Commission: Europe 2020 - A strategy for smart, sustainable and inclusive growth. COM(2010) 2020 final. Brussels, 2010.

43 Usonis, J. Pasiūlymai darbo ir poilsio laiko reglamentavimui tobulinti Lietuvoje [Suggestions for improvement of working and rest time regulation in Lithuania]. *Tarptautinės mokslinės konferencijos 2011 m. gegužės 12-14 d. straipsnių rinkinys*. Vilnius, 2010, p. 353–365.

3. Regulation of teleworking consists of lots of formal rules, which do not look flexible enough for this kind of work to be more popular in practice.

4. The regulation of Temporary Agency Work do not guarantee enough flexibility for this form of work to be attractive in labour market. Excessive guarantees such as payment to temporary employee for idle time period between assignments, full civil liability etc. shall be revised.

5. There is no freedom of will to choose freelancer or employment status, no clear rules defined for work according to civil contract in Lithuania, if relations have features of employment contract such as elements of subordination or regular pay. Misbalanced taxation rules make negative impact selecting type of person's activity.

6. Due to strict Labour code provisions concerning part-time work it is not very popular in practice. Moreover, state institutions look at this kind of work with suspicion because of misconduct of some employers' combining this flexible form of work with shadow economy.

7. Work-on-demand or zero-hour work is not applicable in Lithuania because Labour code rules are demanding to agree on exact hours of work over period and provide employee with work schedule in advance. Practical problems are not solved in social security taxation area as well.

8. Accumulation of working hours over reference period is allowed only in reasonable cases. Therefore employer shall prove why this type of flexibility is needed and consult employees' representatives in advance. Average accumulation of 40 working hours is allowed as the limit of weekly working time is 48 hours. The enforcement of these rules in practice is weak.

9. During the anti-crisis law making process collective agreements were made as a tool for lowering guarantees provided by Labour code. We strongly criticise these steps and think that Labour code should be revised removing old-aged guarantees and giving opportunity for parties of employment contract to agree on local level.

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LANKSČIŲ DARBO SANTYKIŲ DIEGIMO LIETUVOS DARBO TEISĖJE PROBLEMAS

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Santrauka. Šiame straipsnyje analizuojamos lankstaus darbo santykių reguliavimo perspektyvos Lietuvoje. Aptariama darbo santykių lankstumo samprata, paveldėta iš tarybinės darbo teisės, jos raida Lietuvai atkūrus nepriklausomybę 1990-aisiais ir atsirandančios problemos įžengus į XXI amžių.

Pasirinkta su darbo santykių lankstumu susijusi tema aktuali tuo, jog šiuo metu daugelis Europos valstybių ieško būdų, kaip pritaikyti darbo sąlygas įvairių poreikių turintiems darbuotojams taip, jog jie išliktų darbo rinkoje. Kritikuojamas Lietuvos delsimas tobulinti darbo teisės įstatymų bazę, neleidžiantis plėtotis moderniems darbo santykiams. Ši tema nėra plačiau analizuota ir nagrinėta Lietuvos teisinėje literatūroje anglų kalba.

Straipsnyje atskirai nagrinėjamos tradicinio lankstumo formos (terminuota darbo sutartis, sezoninis darbas, ne visas darbo laikas, suminė darbo laiko apskaita), taip pat aptariamos naujos lankstumo formos – agentūrinis darbas (darbo nuoma), darbas pagal poreikį, darbo valandų akumuliacija šalių susitarimu. Nagrinėjami kolektyvinio reguliavimo tobulinimo aspektai, nemokamų atostogų, kaip darbo santykių lankstumo formos, problema.

Išanalizavus teisinio reglamentavimo priemones padaryta išvada, jog būtina tobulinti Lietuvos darbo kodeksą. Siūloma panaikinti dalį apribojimų, draudžiančių lanksčiau tartis dėl darbo santykių pobūdžio, darbo laiko organizavimo, darbo laiko skaičiavimo ir kt. bei leisti dėl to tartis lokaliai. Pažymima, jog kai kurios siūlomos priemonės galėtų būti laikino pobūdžio, laikotarpiui, kol bus pasiekti reguliavimo tikslai.

Reikšminiai žodžiai: lankstaus darbo modelis, darbo sutartis, darbo laikas, darbo teisė.

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