RELATIONSHIP BETWEEN THE FUNCTIONS OF THE CIVIL LAW AND LABOR AND EMPLOYMENT LAW REGARDING THE TEMPORARY SERVICE AGREEMENT – THE IMPORTANCE FOR THE EMPLOYMENT

Draško Bosanac[1], Peđa Bosanac[2], Karl Schopf[3]

[1] Alfa Univerzitet, Beograd, Fakultet za obrazovanje diplomiranih pravnika i diplomiranih ekonomista za rukovodeće kadrove Novi Sad, Srbija

[2] Alfa Univerzitet, Beograd, Fakultet za obrazovanje diplomiranih pravnika i diplomiranih ekonomista za rukovodeće kadrove, Novi Sad, Srbija, student master studija-pravo

[3]Akademie fur wissenschaftliche forchung und studium, Wien, Austria

Abstract*: The aim of this paper is to study the relationship between the functions of the civil law and labor and employment law regarding the temporary service agreement, as a typical agreement of law of obligations. The use of this agreement in labor and legal milieu isn't doubtful if supported by a rational view that the legal basis used to engage work in a society is correlated with the actual (not declared) level of feasibility of the principle of the right to work and freedom of labor, and other principles underpinning the work and principles of business in society. Presenting civil law features of this agreement, and then their adjustment to employment related requirements, the authors attempted to determine the degree to which of achieving legal and practical logic, i.e. whether the legislative solutions as the function of practical needs, determined by supply and demand for certain forms of work on the labor market, in this case, to perform tasks outside the scope of activity of the employer.*

Keywords*: temporary service agreement, the function of civil law, labor and legal functions, activities outside the employer's business, the impact on employment*

I CIVIL LAW FUNCTION OF THE TEMPORARY SERVICE AGREEMENT

Temporary service agreement is a classic civil law institute, a binding agreement, which some time in our law is in legal and labor function. The excitement of this function is reflected in the relationship of the usage assigned by the legislature and the versatility of its properties, in certain contexts and forms. The aim of this paper is to critically review the suitability of this agreement to be used in the context of labor law i.e. to review the legal decision that its role in this respect, is specifically regulated by labor law or that it is just used for engaging labor work in the concept that is governed by the law of obligations, without creating a separate basis for that matter regarding the employment rules. **The legal doctrine is not concerned enough with this and therefore lacks its proper use.**

1. The concept

Article 600 of the Law of obligations[1] defines temporary service agreement as "*a contractual agreement that requires from one of the contractor to will perform a particular action to other, and achieved a certain result, i.e. to do something, i.e. to do a particular job, and the other will pay for that specific benefit*." We are talking about the general notion of service agreement

[1]"Official Gazette of SFRJ", no. 29/78, 39/85, 45/89, 57/89 and "Official Gazette of SRJ", no. 31/93

(getting adequate results for a fee) from which some agreements become independent, become a separate legal category and represents designated contracts (e.g. construction agreement, transport agreement, publishing agreement, etc.).
Participants of the contractual relationship that starts with conclusion of the temporary service agreement are ***the worker*** (entrepreneur) and ***contracting authority***, in our case the employer. *Characteristic of this agreement is that it not only requires the execution or commission, but a concrete result of the job.*

2. The legal nature, rights and obligations of the parties

A temporary service agreement is ***an informal agreement*** (for its development it is enough agreement on important elements). In principle, it is being concluded as "*solo consensu*" without complying with form as a condition to conclude the agreement (unless the participants agree upon a form as an essential requirement for the validity of the agreement or the law is prescribing the required form), ***double-bind*** and ***onerous agreement***, as it is the obligation of reciprocity and mutual benefit, with, as a rule, ***permanent commission of the obligation***. Usually is concluded with regard to *the personality of worker* (*intuitu personae* agreement).
It is also ***a commutative agreement***, because in the moment of its conclusion, the amount and reciprocity of prestation are known. It belongs to a group of ***simple agreements***, not mixed, because the elements of its contents cannot be broken down and qualified as any elements of other agreement, although it can be identified in other mixed contracts (for example, *Tenancy agreement*). However, the temporary service agreement may also contain elements of other agreement (such as, *Agreement for sale), where the question of the qualifications of such contracts must be taken into account.*
Important elements of the temporary service agreement are ***work of the professionals***, as the subject of the agreement and ***compensation or remuneration*** owed by the customer. Contracting parties often agree the deadline as an essential element of the agreement, and can induce the formation of the agreement and the approval of a number of other facts (*the crucial subjective elements*). The subject of the agreement is the work of professionals that achieve a certain score. It is necessary to mention a particular work, the production of certain parts by mechanical or other work, artistic, scientific or literary accomplishment. Work of professionals, as well as its result must be *possible, allowed, or a definable.*

The basic duties of professional in temporary service agreement, according to the Law of Obligations, are: 1) to perform the work as agreed by the rules of business (Article 607, paragraph 1) and 2) to hand over crafted or modified product to a client (Article 613, paragraph 1). In addition to these basic, the parties may provide for other obligations.

The principal obligations of the contracting authority are: 1) to receive the work under the provisions of the agreement and business rules (Article 622), 2) to give the worker a compensation for the performed work (Article 623).

II LABOR AND EMPLOYMENT FUNCTION OF THE TEMPORARY SERVICE AGREEMENT

The employment laws of the republics and provinces have predicted tasks performed based on the temporary service agreement at the time of the Law on Associated Labor.[2] Depending on the results that can be achieved by performing tasks, the way of performing them and the mutual obligations of the client and executor, jobs that are performed on the basis of temporary service agreements can be classified into three groups 1) work at home, 2) handicrafts, and 3) the work under the agreement concluded on the copyright laws (preparatory work). The temporary service agreement was the legal basis of independent physical or intellectual work, as the work that is performing under the employment contract.

Application of temporary service contracts, as the contract for hiring work outside the employment relationship, is regulated by Article 199 of the existing Labor law[3] in almost identical manner as in the previous Labor Law[4] ("*The employer may with a particular person conclude a temporary service agreement, to perform tasks outside the employer's business, that is subject to self-manufacture or repair of certain product, independent execution of certain physical or intellectual work, as with the person performing art or other activity in the field of culture in accordance with the law.*"), but there is the additional paragraph stating that the temporary service agreement, concluded with a person who performs artistic or other activity in the field of culture in accordance with the law "*must be in compliance with a special collective agreement for self-employed persons active in the field of arts and culture, if such a collective agreement is concluded*" (Article 199, paragraph 3).

Unlike the previous law, the applicable law expressly provides that the temporary service agreement must be "***concluded in written***" (Article 199, paragraph 4). The written form of the temporary service agreement is common, but the previous legislature, as a condition of its legal validity, did not prescribe a written form.

From this problem and its practical consequences, **the current importance of the temporary service agreement**, regarding the need of the employer, in its legal framework, is ***not easy to evaluate***. Why is the legislature in labor relations predicted the possibility of using this mechanism in the context of the employer's business, when legislature, as a civil law institution of universal character and action, exist in positive legal regulations and is available for use to every juristic and physical person, it is difficult to answer with certainty. ***We think, it was not necessary to provide for that agreement as a temporary service agreement outside the employment in the labor law (or the agreement of representation and mediation), but to take it from the normative framework of the Law on Obligations***. However, if it is required under the law, it is not appropriate to be simplified and restrictively standardized, but to use specific formulation of related provisions in order to clarify each of its labor and legal characteristics, allowing participants to customize their employment needs to the specific features without the possibility of abuse by the present practice.

Without considering presented doctrinal dilemmas, we justify the practical importance of the use of this mechanism in its civil and law institutionalized form for labor and law purposes, taking into account all the peculiarities that characterized the relationship created on its assignment. Bearing in mind the fact this is the legally founded institute and has its constitutive

[2] "Official Gazette of SFRJ", no. 53/76

[3] "Official Gazette of the Republic of Serbia", no. 24/2005, 61/2005, and 54/2009

[4] "Official Gazette of the Republic of Serbia", no. 70/2001, and 73/2001

form of the Law of Obligations, its superficial norm in the Labor law is ***considered attempting legislators to draw attention of the participants regarding the relationship of engagement, especially employers***, to another legal basis for the work, which completes the plural form of flexible work, which is a good basis for responding to the needs of the labor market.

III RELATIONSHIP BETWEEN CIVIL LAW AND CONTRACT LAW FUNCTIONS OF THE TEMPORARY SERVICE AGREEMENT IN THE CONDITIONS OF ITS APPLICATION

Critical examining of the characteristics of the temporary service agreement, and the relationships that it establishes, in relation to characteristics and the relations to other contracts outside the employment and the employment agreement, we will try to come to a conclusion about the real importance of this civil law institute in labor law context and milieu of the relationship between workers and employer and the consequences of its usage at work, in particular collectivity and beyond.

In a parallel study of the individual characteristics of these legal issues, we will not select a specific methodological approach and look for possible regularities in any significant and less important respect, but ***we will access it in a way that makes practical use of known***.

1. Determination of rights and obligations

The temporary service agreement hire the work of the potential employee (an arbitrary legislator speaks of an employee who is not exactly that at the moment of the temporary service agreement), as one of the parties, by special arrangement, and employees are permanently included in the organization of the employer , where its work is functionally associated with the work of other employees, which, in effect, is a segment of the overall process by which the employer carries on business, with all the consequences of such an involvement, whether during the employment or out of employment. This work, in general, characterizes relative permanence and continuity. The employer manages the employee whose work is included in the system of labor organization and employer's work system, so their relationship characterizes labor subordination. In this sense, there is no equality of the parties. Employee obliges to provide continual work results, which are not always easily identifiable and measurable in relation to the work of professionals.

In **the temporary service agreement**, the worker agrees to perform certain work correctly achieving appropriate results. ***The result of the work is the subject of the agreement, not the work itself***, which may not give results. Workman does not provide its skills to contractor to include them in the system of work for the employer. The contracting party does not manage the workers, their relationship is not characterized by working subordination and dependence, although, as we have seen, the contracting party shall be entitled to exercise supervision over the work, but only when that suits the nature of work and the worker is required to enable that.

Worker is totally beyond the reach of the organization and work processes using which the employer carries on business. ***The work of the worker is, in principle, in the function of the process of work, but with different factual and legal issues***.

Compared to workers who ***do not have to perform the work in person***, he/she is responsible for its execution; employee who performs the works, who engages the work under the temporary service agreement in employment or out of employment, ***the work must be done in person***. The subject of the temporary service agreement is his own work, and his personal commitment cannot perform anyone else in continuity. Employee's work performance is not a subject of the

agreement, it should go without saying and it is subject to continual assessment by the employer, as long as the work is active. The consequences of the lack of results are quite different sanctioned regarding the employment contract, employment-related measures and sanctions, while with the temporary service agreement we are talking about the termination of the agreement due to deviations from the agreed terms.

2. The process of engagement

The process of engagement regarding the temporary service agreement is different from the procedure for engagement with employment contract, whether it is employment or other forms of outside employment. The need for concrete work can be, although it is not mandatory, ***be advertised in accordance with the provisions of the law***, and the choice between the candidates performs, as a rule, the director of the employer. Worker is hired and the temporary service agreement is concluded at the end of the bidding regarding the price of the works or for artistic or technical solution of the anticipated work.

3. Compensation and salary

As regards compensation for the performed work, the nature and method of payment for the temporary service contracts and employment contract (in its various forms) are different, and the fee for temporary service agreement has no character or consequences of earnings.

4. Breach of agreement

Concerning the termination of the temporary service agreement, the Law of obligations provides 1) *breach of agreement by the will of the contracting authority*, 2) *breach of agreement due to deviations from the agreed conditions*, 3) *the termination of the agreement before the expiry*, 4) *breach of agreement in a separate case*.

In case of the breach of agreement on the request of contracting authority, the breach may be requested at any time with the payment of the agreed fee to worker, reduced for the non-realized costs, and that would have been required to make is agreement was not terminated, and the amount of income generated on the second side or that is deliberately failed to realize (Article 629).

In case of ***deviation of contracted conditions***, the contracting authority gives worker a reasonable time to correct identified deficiencies, and in case of default, it can breach the agreement and seek damages.

In the third case***, if the time is an essential component of the agreement***, the worker is in such a delay to initiate or to complete, and it is obvious that the work is not going to be finished in time, the contracting authority may terminate the agreement and demand compensation. The contracting authority has the same right even in the case when time is not an essential component of the agreement, if the contracting authority would have no apparent interest in the fulfillment of the agreement due to such delay (Article 609).

When the performed work has such a flaw that makes it unusable, or it is conducted contrary to the expressed terms of the agreement, the contracting authority may, without seeking prior defect removing to terminate the agreement and demand compensation (Article 619).

Employment contracts, used for employment or the work out of employment, terminate from different reasons and in a special way, corresponding to the ratio of the work for which they are established. Most of the contracts out of employment that have different characteristics and the legal nature than temporary service agreement, categorized in the gender term employment

contracts not intended for employment, ***cease at the end of the period for which they are based, or by finishing work for which they were concluded***.
Termination of the employment agreement is available on a range of grounds and reasons provided by the law. ***Employment may be terminated for justified causes***[5] and they are related to: 1) the ability of workers, 2) the behavior of workers, and 3) the employer's needs at a particular time.

RESUME

Temporary service agreement as obligation-legal institute, lawmakers in the field of labor law institutionalized as ***a form of engagement of outside employment for jobs outside the sector of the employer***. In its function, this agreement is not significantly modified in relation to its basic elements and characteristics; its purpose is concretized, with the sole requirement to be concluded in writing. Such standardization of the function of labor law imposes **a theoretical and a doctrinal dilemma** whether the institute should be used directly from the provisions of the Law of Obligations, like its parent law, without specific predictions in the Labor law, or it should be legally improved, so participants could have a clear basis for detailed planning of their relationship. ***Detail legal regulation of this institute would significantly reduce its abuse and that is obvious in the practice. The main question, after its institutional determinants, is its actual use, and what impact it has on the state of the labor market***. The practical usefulness of this mechanism for the engagement of employees of various activities outside the employer's business is undoubtful (although there are no relevant data), especially in jobs that are short-term or one of its variants, and provide support to the basic activity. Its significance for reducing unemployment isn't more obvious, but we support its use in order to increase the possible forms of engagement, because greater number of engaging makes labor market more flexible and support its functioning regarding the opportunity to be able to respond to the demand for certain types of work which correspond to specific legal basis of engagement.

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[5] To the term " justified causes" in international labor law corresponds the term "good cause" regulated by the Convention no. 158 and the Recommendation no. 166; Borivoje M. Sunderic, *Pravo Medjunarodne organizacije rada*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2001, p.489