SILESIAN UNIVERSITY OF TECHNOLOGY PUBLISHING HOUSE

SCIENTIFIC PAPERS OF SILESIAN UNIVERSITY OF TECHNOLOGY 2022
ORGANIZATION AND MANAGEMENT SERIES NO. 167

OUTSOURCING MANAGEMENT CONCEPT AS A DISTINCT LEGAL CONSTRUCTION

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Purpose: The aim of the article is to analyse the legal structure of outsourcing as a management concept. Outsourcing is a contemporary phenomenon that is at the development stage. There are no precise legal regulations in this regard. Due to the dynamically developing tendency of entrepreneurial activities in the form of outsourcing, it is necessary to analyse and research outsourcing activities, clarify and systematize the regulations concerning such a broad and complex form of activity of economic entities.
Design/methodology/approach: In this case, the subject of application is the analysis of judicial decisions, doctrine studies and legal practice.
Findings: The boundaries between the concept of outsourcing of services and the concept of transferring the work establishment or part thereof to another employer have been defined with the application of article 23(1) of the Labor Code.
Originality/value: Detailed analysis of outsourcing in the field of labor law. Isolation of the outsourcing structure in comparison with the takeover of the work establishment pursuant to Article 23(1) of the Labor Code.

Keywords: outsourcing, qualification, economic entity, management.

Category of the paper: Research paper.

1. Introduction

Outsourcing is a long-term assignment to perform specific functions necessary for the efficient operation of the organization, to a specialized external company, which allows the organization to focus on its core activities.

The aim of the article is to thoroughly analyze the structure of outsourcing and show its features as a legal relationship between business entities. However, in order to proceed to

a detailed analysis of outsourcing at the level of civil law, it is first necessary to clearly define the distinctiveness of the concepts of "outsourcing" and "taking over a work establishment or its part by a new employer".

We will draw our detailed attention to the relationship, similarities and difference between outsourcing and the takeover of a work establishment in accordance with article 23(1) of the Labor Code (Svitana, 2021). We will conduct considerations and analysis in the field of labor law issues in order to distinguish and prove the different nature of the legal structures of outsourcing and the transfer of a work establishment or its part to another employer.

2. Outsourcing of services versus taking over the work establishment or its part - separate legal structures

In the literature, we find the statement that "according to the generally accepted terminology, the term" employee outsourcing "is the same as the transfer of a work establishment or part of it to a new employer, made in accordance with article 23(1) of the Labor Code. This solution is aimed at the continued use of the work of a given employee by the current employer, with the simultaneous transfer of the burden related to formal employment to another entity" (Socha, 2018). We will consider and analyze this claim. According to the definition adopted by us, outsourcing is a long-term assignment to a specialized external company to perform specific functions necessary for the efficient operation of the organization, which allows the organization to focus on its core activities (Svitana, 2021). Assuming that the commissioning of specific functions is carried out for a specialized external company, it is obvious that this company already has its own complex and specialized staff. In such a situation, it will not necessarily, or even not at all, need to take over employees along with accepting the outsourced functions/tasks. In this case, it does not take over a part of the work establishment, but only undertakes the obligation to perform a specific order for the company. Therefore, we need to draw a clear distinction between these concepts: taking over a work establishment or part of it, and undertaking a specific task by the outsourcing company - i.e. outsourcing of services.

In a situation where we are to take over the entire work establishment, there is probably no problem with the assessment of the takeover. The entire work establishment is then taken over as a set of material, functional and organizational elements. Then also article 23(1) of the Labor Code concerning the takeover of the work establishment along with human resources is applied. Here, the construction of outsourcing as a commissioning of specific tasks to an external entity is not the case too, because we are dealing with a general succession of rights and obligations between business entities.

On the other hand, the takeover of a part of the work establishment within the meaning of article 23(1) of the Labour Code needs to be considered more widely.

The provision of article 23(1) of the Labour Code does not define the concept of a part of the work establishment or the concept of a work establishment. To clarify the meaning of these terms, we refer to the provisions of the Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the protection of workers' rights in the event of transfer of enterprises, plants or parts of enterprises. Article 1 of the Directive indicates that this Directive applies to any takeover of an enterprise, plant or part of an enterprise by another employer as a result of a legal transfer or merger. A transfer within the meaning of this Directive takes place when an acquired enterprise retains its identity, that is to say, an organized pool of resources the purpose of which is to conduct an economic activity, whether it is a principal activity or an ancillary activity (Council Directive 2001/23/EC of 12 March 2001). Thus, the key concept in the application of article 23(1) of the Labour Code is the concept of "an economic unit that retains its identity".

The Supreme Court of the Republic of Poland in many judgments adopted the definition of a part of the work establishment corresponding to the EU concept of an economic unit, indicating that it is a certain organized whole, which consists of specific material and property elements, an organizational system and management structure that allow for further work performance by its employees (Judgment of the Supreme Court of the Republic of Poland of April 13, 2010, I PK 210/09, OSNP 2011 No. 19-20, item 249 and the judgments cited therein). The concept of an economic unit was introduced into Community law by Council Directive 98/50/EC of June 29, 1998 amending Directive 77/187 / EEC. This change was made in response to the evolution of the jurisprudence of the Court of Justice of the European Union, leading to the recognition that the transition may only concern an economically viable unit whose operation is not limited to performing one specific task, such as completing construction work started by a previous employer (Judgment of the Supreme Court of the Republic of Poland of April 18, 2018, II PK 53/17).

The assessment of whether a part of the work establishment (economic unit) has transferred to a new employer requires determining whether the transferred part of the work establishment (economic unit) has retained its identity, and in particular, depending on whether the activity of the economic unit is based mainly on human work or on assets, it is necessary to determine whether the new service provider has taken over some of the employees or property (material equipment) of the acquired entity, which was decisive for its preservation (Judgment of the Supreme Court of the Republic of Poland of 20 April 2017, ref. I PK 153/16).

So let's analyse exactly what is included in the definition of the concept of "identity of a part of the work establishment" and, consequently, what are the reasons for taking over a part of the enterprise on the basis of article 23(1) of the Labor Code. We will separate the following elements of the work establishment:

1) material and property components,

2) place of work,
3) performed tasks/functions,
4) management system,
5) organizational structure,
6) employees.

When assessing the premise for retaining the identity of an economic entity, the function and purpose for which a given economic entity exists cannot be ignored. In order for occuring the take over a part of the work establishment to a new employer, the transfer of an economic unit must take place, which is an amalgamation of at least two elements of the work establishment in conjunction with the transferred task area. This is confirmed by the justification of the judgment of the Supreme Court of the Republic of Poland in which, inter alia, it indicated that the Court of Justice of the EU departed from treating the task area itself as an entity to be subject to transfer. The assessment of the nature of an economic unit has fundamental meaning for the correct resolution of transfer cases: is it an entity whose basic resources, values, and its nature and ability to conduct business, are employees and their qualifications, or is it a unit which character is determined by material components. In the case of the former, the transition can take place without the acquisition of material components, if the majority of employees (in terms of numbers and qualifications) have been taken over. This applies to services such as cleaning, home help for residents of the commune who need such help, supervision of facilities, maintenance of parks and gardens. In certain sectors that are mainly labor-based, a pool of workers who are permanently working together can form an economic unit. (Judgment of the Supreme Court of the Republic of Poland of April 18, 2018, II PK 53/17). In this case, the employees and the place of work are decisive.

In the case of entities whom functioning is mainly based on material components, it is decisive to take over material resources, even if most of the labor resources have not been taken over. This applies, for example, to public transport service and catering for hospital patients. The transfer of an economic unit occurs on condition that it retains its identity. Consequently, the transfer of the enterprise, work establishment or part of the enterprise does not manifest itself only in the transfer of its property, but it is first of all necessary to consider whether it has been transferred as a functioning unit or whether its operation is actually continued or resumed by the new employer. In order to assess whether the conditions for takeover have been met, all the facts that characterize the behavior in question should be taken into account, including in particular the type of enterprise or establishment which it is about, the acquisition or not acquisition of assets such as buildings and movable property, the value of the intangible assets at the time of the acquisition, the acquisition or not acquisition of most employees by a new employer, the acquisition or not acquisition of customers, and the degree of similarity in the activities carried out before and after the acquisition, and the time of any suspension of such activities. These elements must always be assessed holistically in the context of a specific case, and none of them alone can be the basis for assuming that an entity

(enterprise, plant or part of a plant) has retained its identity. (Judgment of the Supreme Court of the Republic of Poland of April 18, 2018, II PK 53/17). The Court of Justice of the EU has consistently held that an economic unit (i.e. an enterprise, a permanent establishment, a part of a permanent establishment) that is the subject of a transfer cannot be reduced only to the activity it conducts. Its identity results from the multiplicity of inseparable elements, such as its personnel, management, work organization, methods of operation, or possibly its fixed assets (regarding the evolution of the jurisprudence of the Court of Justice of the European Union on the issues described above, see point 2 of the judgment of the Supreme Court of May 17, 2012, LEX No. 1219491; see the judgments of the Supreme Court of: March 29, 2012, I PK 150/11, LEX No. 1167736; June 14, 2012, I PK 235/11, LEX No. 1250558).

In this matter, it is worthy of noticing the position of the Ministry of Family, Labor and Social Policy of the Republic of Poland expressed in the letter of March 15, 2016, no. in cases of employee outsourcing: "In the practice using the institution of employee outsourcing, a mechanism was used, which was based on offering entrepreneurs a service consisting in HR and payroll services (which is the scope of services usually offered by accounting offices), as well as the payment of salaries to employees to their bank accounts. The last element of the offer was to suggest that the outsourcing companies involved in this practice are actual employers and behave like actual employers. However, in reality, HR and payroll decisions were still left to entrepreneurs (such as the amount of remuneration and its components, vacation dates and the like). It is important that, according to the offer of unfair outsourcing companies, the change of the employer was to take place as a result of the transfer of the work establishment under the procedure provided for in article 23(1) of the Labor Code, but there were no legal grounds to recognize that there was a change of employer at all. This type of relations between the entities did not meet the conditions for taking over a part of the enterprise on the basis of article 23(1) of the Labor Code, and for this reason there were grounds for recognizing the legal actions taken as invalid by operation of law. In connection with the above, the current employers are still burdened with obligations, inter alia, in respect of income tax advances and social insurance contributions (Journal of the Ministry of Family, Labor and Social Policy, 2016). The basis for imposing the obligation to pay advances is the facts established by the tax authorities in a specific case and if, despite the formal conclusion of the contract, the employees did not transfer to a new employer, the original employer would be responsible (Socha, 2018).

The analysis of this situation clearly shows that the role of companies providing employee outsourcing services was limited to taking over only servicing employees in terms of paying them remuneration, the amount of which was de facto decided by the employing entrepreneur, by sending the necessary data on their employment.

It is worth considering this issue, taking into account the judgment of the Supreme Court of the Republic of Poland of 27.01.2016 I PK 21/15, which indicated that the concept of the so-called outsourcing of HR and payroll services does not allow for establishing the transfer of

employees to a new employer within the meaning of article 23(1) of the Labor Code. Agreements concluded between business entities not aimed at the actual takeover of employees, referred to in Article 23(1) of the Labor Code, if, under the concluded agreement, there has been no actual transfer of employees to a new employer, do not result in the "transfer" of the work establishment to another employer. The mere fact that remuneration is paid for work by another entity that maintains appropriate HR and payroll documentation in this respect is not a premise of taking over employees pursuant to Article 23(1) of the Labor Code. Both the activities of signing contracts for the provision of services under the concept of the so-called outsourcing of HR and payroll tasks, as well as agreements on the taking over of employees, are definitely not covered by the provisions of Article 23(1) of the Labor Code and are inconsistent with the applicable standards of employee protection, and, consequently, invalid under Article 58 of the Civil Code. The court shared the view signaled in the judicature that the will of the parties to the contractual relationship (Article 3531 of the Civil Code) in the contact with the institution of transfer of the work establishment (Article 231 of the Labor Code) does not may correct or modify the mandatory provisions of law in this respect (judgment of the Supreme Court of 27.01.2016 I PK 21/15).

In connection with the above analysis, we come to the conclusion that the takeover of the work establishment or its part is a different and separate legal structure from the structure of outsourcing services. It should be noted that these two constructions may occur together in a specific transaction, when an enterprise decides to outsource a certain type of services while transferring part of the work establishment to another employer. However, the transfer of the work establishment will always be carried out on the basis and in accordance with the provisions of article 23(1) of the Labor Code when transferring an economic unit that retains its identity, regardless of the reasons for which it is transferred. Outsourcing of services here may occur as a cause, but will not be a qualifying feature for the takeover of part of the work establishment. The acquisition will have the feature of a transaction that pursues a specific goal and has a logical ending. On the other hand, the outsourcing of services as cooperation between two economic entities will appear as an obligation relationship aimed at long-term cooperation for the conduct of effective business of both parties.

We can even more notice the difference of these legal structures when considering the possibility of classifying a transaction as relating to the sale of individual assets in a situation where one of these components is a work establishment for which certain services are provided under outsourcing. The fact that the services necessary for the conduct of business by a given entity are performed somewhat outside it, does not exclude the possibility of qualifying the sold assets as an enterprise. These services, provided on the basis of civil law contracts, may be transferred as part of a transaction in accordance with the rules relating to the transfer of other contracts concluded within this enterprise (or its organized part), if they concern only a separate unit of the enterprise (Dąbrowska, Szydlik, 2013) . It is in this situation that we can see that outsourcing contracts for the provision of specific services are contractual, civil law and fall

into the overall succession of rights and obligations in case of merge of business entities. On the other hand, outsourcing contracts between business entities are not the basis for the takeover of a work establishment by another employer, but may only be contracts in connection with which the parties decide to transfer a certain economic unit. If this economic unit will have the characteristics of a work establishment, then it will apply the provision of article 23(1) of the Labor Code.

3. Outsourcing of services - civil law relation between business entities

When we talk about the outsourcing of services between business entities, we are dealing only with entrusting the performance of certain tasks to a business client.

When the entrepreneur focuses on the core activity in which he has a competitive advantage, the areas that constitute ancillary or side activity are transferred to the outside world. As a rule, the company's strengths must always remain in it (Kłos, 2009). When the activity is not a primary function and the costs of running it inside the company are high, outsourcing it may be the right solution, while in a situation where the activity is strategically important and results from the company's mission, it is best to present it in structure and lead with own resources and resources (Kopczyński, 2010). Delegating specific functions to external, specialized units is based on a contract, and the result of this cooperation is cost reduction (Kopczyński, 2010).

According to the position of the doctrine, outsourcing is recognized as a mechanism in the field of economics and economic processes, such as: activation of the enterprise, optimal employment strategy, etc. However, it is not defined and is not marked with a specific legal structure. When constructing an outsourcing agreement, various obligation structures are used in order to optimally adjust the legal conditions to economic requirements (Robaczyński, 2010). However, it is believed that due to the progress of economic development and the emergence of various legal relations between economic entities related to outsourcing, it is worth considering and distinguishing outsourcing as an independent legal structure. It is also necessary due to the fact that the legal relationship of outsourcing services is often related to the acquisition of a part of the work establishment, similar to employee leasing, and even used by legal entities in violation of the law, as described in the previous chapters of the article.

Currently, the outsourcing contract belongs to the type of empirical, unnamed contracts, which do not have a legal definition provided in the act. The outsourcing contract, belonging to unnamed contracts, shows individual features, characteristic for named contracts, such as: commission contracts, contracts for the provision of services, contracts for specific work. This contract may have the features of one named contract, as well as of several contracts in total (Malarewicz-Jakubów, and Tanajewska, 2014). A special feature of an outsourcing

contract is the adaptation of its elements to the nature of the customer's relationship with the service provider (Radło, 2005).

Based on the analysis of outsourcing contracts concluded in general circulation economic, one can distinguish the essential elements of this contract, that is: description of the scope of work, agreement on the level of service provided, remuneration, period of validity contracts, process management conditions, intellectual property regulations, sectoral provisions, termination conditions, provisions relating to subcontractors and jurisdiction to settle disputes. From the above elements of the contract, the description of the scope of work and the agreement on the level of the service provided, due to its unique content, require special discussion. Thanks to them, the outsourcing contract has a different character, both in relation to named and unnamed contracts (Malarewicz-Jakubów, Tanajewska, 2014).

According to the authors of the article, an important feature of the scope of work performed under outsourcing, which is the content of the obligation relationship, is the fact that it is to be an activity necessary for the functioning of the enterprise and it is of a continuous nature. The detail that distinguishes an outsourcing contract from, for example, a mandate contract is that when outsourcing services, the performance of tasks is continuous, not periodic as in the case of a mandate contract.

The second, characteristic element of the outsourcing agreement is the service quality agreement, which is a set of activities specified in the description of the scope of work. Appropriate adjustment of quality standards fully allows for effective and optimal quality management of processes (Malarewicz-Jakubów, Tanajewska, 2014).

At this stage, the key feature will be to define the functionality of the outsourcing service in terms of effectiveness and optimization of performance. This feature is characteristic of outsourcing services, although it is necessary for the functioning of the enterprise as a whole of complex processes and is related to the management strategy.

Regardless of the outsourcing methods used, the assessment of effectiveness is a complicated process, taking into account the need to define the boundary between pure outsourcing and services or processes that have been added by the outsourcing provider to improve the implementation of processes or activities.

It is important that the service quality agreement is prepared in a detailed, specific and communicative manner, as it is an element of the contract that should remain unchanged and should guarantee the stability of the level of service provided. Then both parties to the contract will be fully aware of their rights and obligations under the contract (Radło, 2005).

4. Employment of workers by temporary employment agencies in relation to the outsourcing of services

A separate issue that requires detailed consideration in the light of legal provisions is the employment of workers by temporary employment agencies. Let us analyse whether such employment relationships are properly qualified as employee outsourcing and how to treat an employment relationship in which a temporary employment agency is an employer in a contract with an employee, but in fact the work is performed for and under the direction of another economic entity. Such use by an economic entity of the work of employees formally employed by another entity is called external employment. One must agree with the position of the doctrine that in the case of so-called external employment "the traditional paradigm of the employment relationship is disturbed. It consists in separating the functions of the formal employer with whom the employment contract is concluded and who performs legal and factual acts in relation to the employee, from the function of the actual employer for whom the work is performed. External employment does not include typical outsourcing, consisting in separating tasks previously performed independently by entity A and transferring them to an external entity B, specialized in activities including taken over tasks (Miętek, 2015). As a rule, in the case of external employment, the temporary employment enterprise (temporary employment agency) hires an employee to an enterprise conducting business activity. In the case of external employment, the appropriate term will be employee leasing. Pursuant to Article 2 of the Act on the Employment of Temporary Employees, the user employer assigns tasks to the employee referred by the temporary employment agency and controls their performance (Act, 2003). Such cooperation cannot be classified as service outsourcing, also known as employee outsourcing, because:

a) we cannot state the continuous nature of the cooperation, although the employees are employed by employment agencies temporarily,
b) the subject of cooperation between the user employer and the temporary employment agency is not the quality of the tasks performed, as in the case of outsourcing services, but only the technical employment of employees,
c) the user employer is the entity that actually provides the place of work of the temporary employee, and the temporary employment agency is the formal employer.

5. Summary

Outsourcing of services is a separate legal structure, different from the structure of taking over a work establishment by another employer. Outsourcing of services is a construction of civil law as a legal relationship between business entities. Thanks to the outsourcing institution, enterprises reduce the scope of their activities, focusing on the development and promotion of their main activity (Malarewicz-Jakubów, Tanajewska, 2014).

It should be noted that in the event of a decision to outsource the services performed so far by the deciding entity and during the transfer of the assigned functions to another entity, a part of the work establishment may be transferred to another employer. But these will be two separate processes. The transfer of a part of the work establishment, provided that the above-mentioned conditions are met, will be a one-off transaction carried out pursuant to Article 23(1) of the Labor Code, aimed at ensuring continuity of employment and protection of employee rights. Whereas outsourcing of services will be a continuous legal relationship between business entities that establish cooperation for a long-term perspective. So when a certain area of the company's tasks is separated in order to transfer it to another company as part of an outsourcing strategy, and in connection with it part of the work establishment is transferred to another employer, then in this case these two economic entities will have two separate legal relationships. The first is a legal relationship regulated by labor law, where economic entities act as the current and new employer. This legal relationship is limited in time until the effect of the transfer of a part of the work establishment under Article 23(1) of the Labor Code is achieved.

The second legal relationship is an obligation relationship regulated by civil law, where economic entities act as business partners, where they have mutual obligations for long-term periods.

In view of the above, we assume outsourcing as a project consisting in separating from the organizational structure of the parent company the functions already performed by them in order to transfer them to other economic entities or entrusting these functions to other economic entities. In the common trade, such cooperation is often referred to as employee outsourcing, because the tasks for the enterprise are performed by employees who have an employment relationship with a completely separate, different economic entity.

Entrusting external entities with tasks previously performed on employers own may lead to the transfer of a part of the work establishment within the meaning of article 23(1) of the Labor Code if the taken over part of the work establishment (business unit) has retained its identity.

The main feature that distinguishes employee outsourcing from employing own employees is the lack of direct and permanent subordination (both legal and actual) of contractors to the entity (insourcer) at whom place such services or work are performed. If an employee is delegated by an outsourcer to work in another entity, the employee may only be subject to indirect and short-term supervision in the actual place of work (Judgment of the Supreme Court of the Republic of Poland of 27/01/2016).

It is also necessary to distinguish between the notions of outsourcing services, as well as outsourcing of employees, from the provision of work by temporary workers. When using the work of temporary employees, the employer-user assigns tasks to the employee employed and directed by the temporary employment agency and controls their performance.

The role of a temporary employment agency is significantly different from the role of a service outsourcer performing the HR and payroll function. The HR and payroll outsourcer constantly and continuously performs the commissioned area of tasks/functions for the company, the quality of which outsourcer is responsible only to the ordering company. On the other hand, before state supervisory authorities that control a certain area of activities, for example human resources and payroll, the responsibility will be borne not by the outsourcer of services, but by the company commissioning and on behalf of which the outsourcer performs these activities.

The situation is different in the case of employing temporary workers by a temporary employment agency. Here, the temporary employment agency carries out an order for the filling of certain positions of the user enterprise, which becomes the so-called work establishment for the employees of the agency. The temporary employment agency, as a separate entity and formal employer, is responsible for the entire employment process before the supervisory authorities. The employment agency is responsible for the performance of the staffing order in relation to the employer-user. The user company, on the other hand, is only obliged to become a place of work for temporary workers, ensuring safe working conditions and covering the expenses of the employment agency for the employment process, including the remuneration of temporary workers.

Summing up, it should be emphasized once again that the outsourcing of services as a management concept is a complex and multilateral phenomenon. It needs a deep examination, analysis and deserves to be regulated as a separate legal structure.

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