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The regulatory framework for the institute of the termination of an employment contract by a decision of the competent court – the Republic of Croatia and a comparative overview

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Abstract: A worker performs his or her professional activity for an employer on the basis of the employment contract. In some circumstances, the contractual relation between the worker and the employer is marked by particular circumstances because of which the contractual parties find that the continuation of the employment relation is no longer possible while the reasons based on which the employer intends to cancel the employment contract remain undetermined and unjustified. For that reason, the Croatian legislation introduced the institute of the termination of the employment contract by a decision of the competent court modeled on several European legislative solutions. Ever since its initial introduction into Croatian legislation, the general scope of that legal institute has not been changed. It is important to note that this institute is not uniform in all countries. The aim of this paper is to demonstrate the disparity between various legal methods of resolving court terminations of employment contracts, as well as possible improvements, especially in Croatian legislation. The paper relies on the following methods of research: legalistic, empirical, comparative and theoretical.

Key words: labour relations; employment contract; court termination; comperative regulatory frameworks.

1. Introduction

Article 104 of the Croatian Labour Act (OG 149/09) (hereinafter: LA) stipulates seven different ways for the termination of the employment contract. Under point 7 of the Article 104 one of the ways is that an employment contract may be terminated upon a decision of the competent court. Another name for this type of the termination of an employment contract is also called the court termination of the employment contract, and it is more precisely defined in the Article 117 of the LA (1).

This scientific paper intends to examine the general framework of the termination of the employment contract based on the decision of the competent court and legal sources that analyze this problem. Furthermore, it also provides the comparative overview of different regulatory frameworks, especially the scope of the German labour legislation which has mostly served as a model for the Croatian labour legislation as well as the comparison of legal solutions found in other European countries and abroad with the aim to provide an insight in the social and regulatory framework and the overview of different issues related to the termination of the employment contract by a decision of the competent court (2).

2. Employment contract

Employment relation between a worker and an employer is based on the employment contract and, as such, is a result of the will of the subjects of the employment relation indicating a bilateral legal matter. Having in mind that this manner of entering the employment relation is laid down in the Labour Act, being the general law enforceable to the labour legislation, it is important to note that employment relations may be also founded on other grounds (for example: a decision of the head of an office about the commencement of service as stipulated in the provisions of the Act on Civil Servants and Civil Service Employees In the Bodies of Local and Regional Self-Government (OG 86/08) or the provisions of other special laws regulating particular profession) (3).

As a matter of fact, there are no regulations in the Republic of Croatia determining the employment relations in their entirety. Being one of the basic rights and obligations resulting from the employment relation, it has been regulated that in the employment relation an employer has the obligation to provide work to a worker and to pay him/her a salary for the performed work whereas a worker has the obligation to personally perform work according to employer's directions given in accordance with the nature and type of work. Some of the characteristics of the employment contract are as follows: it is a bilateral, obligatory, enforceable, nominated, consensual, informal, with predefined content, durably effective and personal contract.

Having in mind that the termination of the employment contract by a decision of the competent court is the exclusive manner for the termination of the employment contract for employment relations based on the provisions of the LA, further analyses of the commencement and termination of employment relations based on other regulations is not the topic of this paper (2).

The regulation of the employment contract is one of the most important matters of the labour law. The termination of the employment contract is important from two different aspects: employer's and worker's. Legal system needs to provide conditions in which employers have the option to decide about how many and which workers they want to employ in accordance with their business needs. On the other hand, workers want some kind of security and steadiness of the employment relation (2).

The existence of an unlawful termination of an employment contract is the primary basis for a court termination of an employment contract. The LA does not strictly define terminations of employment contracts. The termination of an employment contract is a unilateral statement that expresses the intention terminating an employment contract. After being made clear to the other party, the employment contract becomes terminated. The possibility of terminating a contract exists for both contracting parties, for the worker and the employer. Taking into consideration that a termination of an employment contract is a unilateral legal action, the dispute arises between the side that wants to terminate the contract (most frequently the employer) and the side that wants to continue the employment (most frequently the worker).

The Labour Act provides two types of employment contract terminations: regular and extraordinary terminations. After several decades of theoretical and empirical research and debate, legal experts and the science of law have not reached a consensus about the rules of entering and terminating employment relations (3).

The main issue here is the flexibility of the organization of employment contract systems, because on one side there is the pressure placed on employer’s competitiveness, where the employer need to adjust their business activities to the demands of the market as swiftly as possible (quickly decrease the number of workers in case of reduced production, i.e. effortlessly decrease the number of workers in case robotized and highly sophisticated production lines are introduced, which decrease the need for human workers). This is the reason why the main focus of all parties involved in the creation of employment policies revolves around the protection of work places (employment contracts). Many countries have performed numerous comprehensive studies dealing with the costs of “employment protection legislation”.

3. Croatian and international legislative sources arranging the court termination of an employment contract

The Constitution of the Republic of Croatia is the country’s most important legal source because it stipulates in Article 1 that the Republic of Croatia is a unique and indivisible democratic and social republic (4). Human and social rights are defined in Article 3 of the Constitution. The rights vital for our discussions are the following: freedom, equality, social justice, respect for human rights and the rule of law as the highest values and bases for interpreting the Croatian Constitution. The right to work and the freedom of work are defined in Article 54 of the Constitution and stipulate that every person has the right to work together with the freedom of work, that every person is free to choose their calling and work, and that every person has an equal access to all work places and professions. Article 56 of the Constitution stipulates that the right to social security and social insurance of all employed persons and their families shall be regulated by the law and collective agreements. That means that social security, which also includes job security, is not a

constitutional category, but a matter to be regulated by the legislation through laws and collective contracts (5).

The Croatian Labour Act regulates the termination of an employment contract in the following provisions (Article 117 of the LA):

(1) When the court establishes that a dismissal given by an employer was not permissible, and that it is not acceptable for the employee to continue employment, the court shall, upon the employee's request, determine the date of termination of employment and award him or her damages in an amount not less than three and not more than 18 average monthly salaries paid to the employee over the preceding three months, depending on the length of employment, age and maintenance obligations lying upon the employee.

(2) The court may render the decision referred to in paragraph 1 of this Article also at the request of an employer, if circumstances exist which reasonably demonstrate that, in view of all the circumstances and interests of both contracting parties, the continuation of employment is not possible.

(3) Both the employer and the employee may file a request for rescission of employment contract in the manner referred to in paragraphs 1 and 2 of this Article, until the conclusion of the trial before the court of first instance.

Further legal sources are collective contracts and employer's general acts. Paragraph 2 of Article 117 of the LA enables contracting parties to define, through collective contracts, general acts of the employer and even employment contracts, which specific circumstances justifiably indicate that further continuation of an employment contract, taking into consideration all circumstances and interests of both contracting parties, is no longer possible. In any case, these circumstances cannot be discriminating for the worker. For example, contracting parties may agree a method for determining damages that an employer must pay to a worker. However, the court would not have to obide by such a contract, but it would have to take it into consideration.

The Republic of Croatia has not signed Convention no.158 – the Termination of Employment Convention (1982). Apart from the above-mentioned Convention, the ILO has issued the Recommendation 166 (R166 Termination of Employment Recommendation), to which the Republic of Croatia of is not a signatory party. Our analysis of other provisions of the Convention no.158 has not ascertained any disagreement with the Croatian labor legislation; therefore it is not clear why Convention no. 158 has not become part of the Croatian legal system (6, 7, 8).

The Convention for the Protection of Human Rights and Fundamental Freedoms is an important legislative source in relation to court terminations of employment contracts, considering that Article 4 stipulates that no one shall be required to perform forced or compulsory labour, while Article 13 regulates the right to an effective legal remedy (9). The International Labour Organization (ILO) has compiled an extensive collection of legislative sources and regulations, which, through the signing of international contracts, agreements and conventions, became part of the internal legal system in certain countries. The Republic of Croatia has signed a considerable number of such conventions and agreements.

The European Social Charter One is one of the most important sources of the labour law. The introductory part of the European Social Charter stipulates that everyone shall have the opportunity to earn his or her living in an occupation freely entered upon and that all workers have the right to just conditions of work. With a view to ensuring the effective exercise of the right to work, all contracting parties of the European Social Charter undertake the obligation to effectively protect the right of the worker. In the Additional Protocol to the Charter, Article 1 stipulates that with a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without gender discrimination, the parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the access to employment, protection against dismissal and occupational resettlement (10).

4. Comparative overview of regulatory frameworks

This part of the paper provides a comparative overview of the labour legislation in several countries analyzing the possibility for terminating employment on the basis of court decisions and awarding damages to the worker (or even the employer) if the termination is unjustified. Among the countries included in this overview, those that have signed ILO's Convention no.158 are Bosnia and Herzegovina, Slovenia, Serbia and France, while Germany, the Czech Republic, Hungary while Bulgaria, along with Croatia, have not signed it.

According to Article 86 of the Bosnian Labour Act, the employment contract, among other instances, is terminated by the competent court, which results in the termination of employment (11). However, the remaining provisions of the Law do not in any way specify under which terms or in what way does the competent court reach a decision to terminate employment.

The German legislation offers the most detailed and comprehensive solution for regulating court terminations of employment contracts. The legislation of the Federal Republic of Germany does not contain any law whose title would indicate it refers to labour (labour legislation is derived from the *Bürgerlichen Gesetzbuch* (BGB), which translates to "Civil Code"), but a set of specialized acts related to the employment, including the specialized act entitled *Kündigungsschutzgesetz* (KSchG), which translates to "the Employment Protection Act" (12, 13).

Article 9 of the Act stipulates a clause under which the court can decide to terminate employment; however, in such instances the worker has the right to a settlement. Therefore, if the court rules that a particular termination of an employment contract unjustified, it can, based on a claim made by the worker, reach a decision to terminate employment and award a settlement fee to the worker that has to be paid by the employer. If further cooperation between the employer and worker shall no longer be expected, the same decision shall be reached by the court upon the request of the employer.

It is fairly obvious that the Croatian legislation had followed the German model of court employment terminations; with the addition that Croatian legislation specified necessary conditions with even more details, that is, circumstances must arise that justifiably indicate that further continuation of employment, taking into consideration all circumstances and interests of both parties, is no longer possible. Comparative examination of the necessary conditions stipulated by the German legislation indicates that conditions for a court termination of an employment contract in Germany are much milder, because the court decides upon the economic purpose of a continuation of employment.

The labour legislation of the Czech Republic does not include the institute of court employment contract terminations. According to the Czech labour legislation, the contracting parties can terminate employment through agreements, notices (both from the employer and the worker), immediate dismissals and dismissals during probationary work (14).

Court termination of an employment contract in the Republic of Slovenia is defined in Article 118 of the Slovenian Labour Act (15). The difference between Slovenian and Croatian legislations lies in the fact that the employer has no obligation to file a counterclaim. The court itself can, *ex offo*, independently determine the existence of circumstances causing a court termination of the employment contract. Both legislations lay down the court autonomy in determining the amount of the compensation.

The Republic of Serbia has not implemented in its legislation any type of provisions regulating court terminations of employment contracts. If the court reaches a legally binding decision that an employment contract was terminated unlawfully, the worker has the right to return to the workplace. Apart from the return of the worker to his or her original workplace, the employer must pay the worker damages amounting to the wages that the worker had not received upon the termination.

The compensation is then reduced for the amount equaling to earnings that a worker actualized upon the termination of the employment relation. Therefore, the worker may demand the termination of the employment relation but in that case he or she shall not obtain any kind of compensation.

The Hungarian labour legislation is defined in Document number 22 – the Labour Act of 1992, amended in 2006. Court terminations of employment contracts are defined in Articles 100 and 101 in the text entitled *The Unlawful employment* contract *termination and its legal consequences* (16). The Act unequivocally regulates that in case of an unlawful termination, the worker shall be entitled to unpaid wages and damages

that resulted from not receiving wages, but if the worker received wages or some other type of compensation from a different source, the employer's obligation toward the worker shall be decreased for that amount.

The French labour legislation regulates that court proceedings related to a worker's claim determine whether the employer followed the procedure in terminating the contract and whether there were sufficient grounds for the termination. When a worker is dismissed and there is some procedural mistakes making the dismissal ujustified, the court shall order the employer to implement the termination of employment procedure according to a regulated procedure and determine the compensation amounting to one mothly salary. In case it is found that the reasons for the dismissal were unjustified, the court shall order worker's reinstitution. This shall not be the case if one of the contractual parties refuses such a claim. In that case the court shall order that the employer must compensate the demage amounting to not less than 6 montly salaries (17).

The Bulgarian labour legislation does not contain provisions on court terminations of employment contracts. The protection of workers in the case of an unlawful termination is regulated through the subsection of the Labour Act – Chapter IV, Articles 344, 345, 346. In case the termination is deemed unlawful, the worker has to right to return to the workplace (18).

There are no provisions laying down the compensation of demage. However, Article 331 foresees that the compensation of damage shall amount to 4 monthly salaries if the termination of the employment contract has been initiated by the employer upon worker's consent.

5. Conclusion

The termination of employment contracts by the decision of a competent court is a specific manner of employment termination unknown to many countries. The obvious reason behind that is the protection of employment, different labour market arrangements and balances between the interests of employers and workers. Having in mind the evident difference between various countries, it is clear that there is no ideal solution, but that each individual country attempted to adjust the social and legal framework for the court termination of employment to the demands of the market, simultaneously trying to achieve compromise in the protection of the workers' living standard (19, 20). For that purpose, countries include in their legislation conditions that have to be met in order for an employment termination to occur, as well as, of course, determine the financial boundaries of the fees that shall be awarded as the result of a court termination of employment.

The Labour Act provides basic guidelines for the general assumptions to be met in case of the termination of employment. It must be determined that a termination of employment is unjustified, that one of the contractual parties has filed a claim for the court termination of the employment contract and that the continuation of the employment relation is no longer possible if the claim has been filed by a worker for whom the continuation of the employment relation is no longer acceptable or by an employer who claims that there are justified reasons for the termination of the employment relation.

Having in mind that the labour legislation develops and lives in line with the community to which it applies, it can be expected that in the future there will be more flexibilization of the labour market which would reflect both on the possibilities of employing and dismissing workers. On the other hand, the employers will most probably have more flexible conditions for the termination of the employment contract.

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