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JUSTIFIED TERMINATION OF EMPLOYMENT ALONG WITH VIOLATION OF PRESCRIBED PROCEDURE - APPLICATION OF ARTICLE 191(7) OF THE LABOUR LAW IN PRACTICE

Consensus on the particular importance of the provisions of Article 191 of the Labour Law ("Official Gazette of the Republic of Serbia" No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014 and 13/2017 – "Labour Law"), entitled "Legal consequences of unlawful termination of employment" is indisputable. This Article regulates employees' rights if a court establishes that their employment was terminated unlawfully, in addition to the employer's obligations in this regard. However, this Article has also undergone certain amendments through enactment of the Law on Amendments and Supplements to the Labour Law ("Official Gazette of the Republic of Serbia" No. 75/2014), which have been applied since July 29th, 2014.

One of the changes relates to paragraph 7 of the specified Article of the Labour Law, which reads: "If during proceedings the court finds that grounds for termination of employment existed, but that the employer failed to observe the provisions of the law that prescribe the procedure for termination of employment, the court shall reject the employee's request to be returned to work, and shall order the employer to pay the employee compensation of damages amounting to up to six salaries of said employee." Introduced into Serbian labour law for the first time, this provision could in a way be considered revolutionary, particularly for employers, whose liability is thereby somewhat decreased, that is to say, the consequences suffered by employers in cases of unlawful termination are lessened.

Given that just over three years have passed since these new elements of the Labour Law began being applied, it would be reasonable to expect that there would be some case law with regard to application of Article 191(7) of the Labour Law. However, there is still no published or available case law on that subject at all! When we wrote to the Ministry of Labour, Employment, Veteran and Social Affairs to enquire whether this Ministry had provided any opinions in this regard, we received a reply on July 7th, 2017, stating that the Ministry has provided no opinion relating to paragraph 7. Therefore we will focus here on the possibilities of the application of this provision in practice, and on the opinions voiced at relevant round tables and by certain judges in the Republic of Serbia. We will also discuss interpretations and case law relating to other provisions of the same Article, regarding which interesting dilemmas often arise.

The right to cumulative compensation - damages in the amount of up to 18 salaries and compensation in the form of lost salaries, or not?

First we would like to point out the inconsistencies in case law relating to paragraphs 1-5 of Article 191 of the Labour Law, because we believe them to be very important. Paragraph 1 specifies that If during proceedings the court finds that an employee's employment has been terminated without legal grounds, at the employee's request the court will order that the employee be returned to work, and that the employer is to pay compensation of damages and the full amount of contributions for compulsory social insurance for the period of time in which the employee did not work. The compensation referred to in paragraph 1 is assessed in the amount of lost salaries, including accompanying taxes and contributions in accordance with the law, but excluding lunch allowance, compensation for use of annual vacation, bonuses, awards and other income based on contribution to the employer's business results.

If during proceedings the court finds that grounds for termination of employment existed, but that the employer failed to observe the provisions of the law that prescribe the procedure for termination of employment, the court shall reject the employee's request to be returned to work, and shall order the employer to pay the employee compensation of damages amounting to up to six salaries of said employee. The newly-introduced provision of Article 191 paragraph 7 of Labour Law is aimed at enabling a more just resolution of the dispute between the employer and the employee.

The compensation referred to in paragraph 1 is paid to the employee in the amount of lost salaries, minus taxes and contributions calculated on the salaries in accordance with the law. The taxes and contributions for compulsory social insurance for the period of time in which the employee did not work are calculated and paid on the assessed monthly amount of lost salaries referred to in Article 191(2) of the Labour Law. Paragraph 5 of this Article specifies that If during proceedings the court finds that an employee's employment has been terminated without legal grounds, but the employee does not request to be returned to work, the court shall, at the employee's request, order the employer to pay the employee compensation of damages amounting to 18 salaries of said employee at the most, depending on the total duration of employment at that company, the employee's age and the number of dependants.

Where a dilemma could potentially arise is in the matter of whether employees are entitled to cumulative compensation being a sum of the compensation of damages in the amount of up to 18 salaries in lieu of returning to work, and compensation of damages in the form of lost salaries and payment of taxes and contributions starting from the date of the unlawful termination of employment. Taking into consideration the above legal norms, the Court of Appeals in Novi Sad pronounced Judgment No. Gž1.599/2014 dated April 7th, 2014, stating, inter alia, that these two types of compensations are mutually independent. "This entitlement is independent of the entitlement to compensation of damages in the amount of lost salaries and other income that the employee would have earned had his employment not been unlawfully terminated... The sole aim of the lump-sum compensation is as a substitute for returning to work, and, at the request of the employee, it in essence constitutes compensation for the employee's waiver of his right to be returned to work. Determining entitlement to this compensation has no impact on ordering payment of compensation of damages for lost salaries, so in such case the employee is entitled to payment of contributions for compulsory social insurance on those salaries as well." Therefore, this court is of the opinion that the employee is entitled to both types of compensations.

Furthermore, the Constitutional Court of the Republic of Serbia in its Decision No. Už-7398/2014 dated November 17th, 2016, took the same viewpoint: "Therefore, in the opinion of the Constitutional Court, the provisions of Article 191(2) and 191(4) of the Labour Law (version of the Labour Law at the time of initiating proceedings before this court - author's note) certainly do not indicate the conclusion that one form of compensation of damages - lost salaries and its full amount, is conditional upon or restricted by the (not) seeking of another - lump-sum form of compensation damages, given that the legislators' intent was, apart from such employee's entitlement to reintegration, to also provide the employee with the (substitutive) option to exercise his/her entitlement to limited compensation of damages in lieu of returning to work, if he/she does not want that, which as a rule corresponds with the employer's interests."

However, the Supreme Court of Cassation adopted a completely opposite point of view in the relatively newer Judgment No. Rev2-1846/2015, where it stated that "compensation of damages in lieu of returning to work as specified in Article 191(4) of the Law and compensation of damages in the amount of lost salaries, specified in Article 191(2), are two different forms of compensations, which cannot be cumulatively awarded to an employee whose employment has been unlawfully terminated."

According to that opinion, if an employee were to choose payment of lump-sum compensation of damages in lieu of returning to work, the court would no longer have the option to award compensation in the form of lost salaries for the period of time since termination of employment. It remains to be seen whether the lower courts will adhere to this viewpoint in future, which would be very favourable for employers, and contrary to the interests of employees, as it would significantly decrease the amount of compensation of damages employers would have to pay. When we also take into account the decrease of compensation of damages on the grounds of income the employee earned after the unlawful termination, this compensation of damages truly sees a massive decline. Not to mention the duration of labour disputes in Serbia and the possibility that the employee is working for another employer the whole time and earning a salary, meaning that the compensation at the end of the labour dispute against the employer could potentially amount to a very small sum or no sum at all, so that the court's upholding of the claim would essentially bring the employee nothing but moral satisfaction.

Is monetary compensation from the National Employment Office to be deducted from the sum of compensation of damages in cases of unlawful termination?

Another disputable moment seen in practice, which has caused much confusion - has in a way been resolved by Judgment of the Supreme Court of Cassation No. Rev2-505/2015 dated 10 April 2016. Namely, a dilemma frequently arose as to whether the monetary compensation received in some cases by employees from the National Employment Office after termination of their employment contracts is to be deducted from the sum of compensation of damages when calculating such compensation of damages in cases of unlawful termination, in accordance with Article 191(9) of the Labour Law, which reads: "The compensation specified in paragraphs 1, 5, 6 and 7 of this Article shall be decreased by the amount of income which the employee has earned on the grounds of work, upon termination of employment." Said Judgment clarifies this doubt in favour of the employee, and specifies: "As the right to monetary compensation in case of unemployment arises from compulsory social insurance of citizens, compensation received on such grounds, regardless of the reason for termination of employment, cannot be considered income earned by the employee on the grounds of work, upon termination of employment, by application of Article 191(3) of the Labour Law. That means that the compensation of damages could not have been decreased by the sum of compensation received from the National Employment Office for the period from November 1st 2009 to October 31st 2010 in the amount of 167,209.70 dinars, as was erroneously concluded by the second-instance court... The issue of whether the National Employment Office will request that the employee return the compensation he was paid during the period when he was listed as unemployed is a hypothetical question and cannot be taken into account at the time of payment of the compensation for lost salaries (compensation of damages). In any case, if that were to happen, it can be requested in a separate procedure, and on the basis of a relevant decision."

What is meant by violation of the "procedure for termination of employment"?

Now to move on to the subject and central theme of this text. What exactly would constitute a situation in which grounds for termination of an employee's employment existed, yet the employer failed to observe the provisions of the law prescribing the procedure for termination of employment? What is meant by violation of the "procedure for termination of employment"? As we said at the beginning, there is still no case law which would answer those questions.

But let us look at the scope of this provision of Article 191(7) of the Labour Law. We see that the legislators do not restrict it only to cases of unlawful termination of employment by the employer, but speak of "termination of an employee's employment", which encompasses all cases under Article 175 of the Labour Law, which specifies the grounds for termination (expiry of the employment term, when an employee turns 65 and has at least 15 years of insurance, agreement between the employee and employer, termination of the employment contract by the employer or employee, termination at the request of the parent or legal guardian of an employee under 18, death of the employee and other cases specified by the law).

However, this provision will most frequently be applied in practice in cases of unlawful termination of employment by the employer when the employee is in violation of his work duties (Article 179(2) of the Labour Law) or fails to observe the work discipline at the company (Article 179(3) of the Labour Law).

The newly-introduced provision of paragraph 7 is aimed at enabling a more just resolution of the dispute between the employer and the employee when it is established without a doubt during the court proceedings that the employee has violated his work duties or the work discipline, but the decision on termination is unlawful due to formal omissions.

There have been various cases in practice where either no caution is given, or the caution is not in writing, or the decision on termination of employment is rendered before the time provided to the employee for his defence expires, or the employer delivered a request for the opinion of the labour union to the wrong union, or violated the rules relating to the manner of delivery, or the operative part or rationale of the decision does not clearly specify the time, place and manner of violating work duties or work discipline.

In most of the case law in Serbia accumulated by application of the Labour Law before the new elements introduced in 2014, if the employer failed to comply with Article 180 of the Labour Law (employer's obligation to caution the employee about the existence of grounds for termination before terminating the employment contract) or with Article 184 of the Labour Law (termination after expiry of the specified period of time following which the grounds for termination lapse), that would be sufficient to find that the employer's decision on termination of the employee's employment is unlawful.

Such a court ruling, finding that the said provisions have been violated, constituted automatic grounds for returning the employee to work if he so requested, regardless of the fact that grounds for termination of the employment did exist.

Now, under the current provisions of the Labour Law, during proceedings for annulment of the employer's decision on termination of the employee's employment the court will examine the legality of the decision both from the point of view of procedural law and of substantive law, and will have to establish whether the employment was terminated without legal grounds or legal grounds did exist, as well as whether the employer followed the procedure for termination of employment as prescribed by the law.

Regarding the (non)existence of grounds, the court will specifically establish the following: whether, in case of termination because the employee fails to achieve the required work results or lacks the necessary skills and capabilities to do his job, the employee is truly failing to achieve work results (Article 171(1)(1) of the Labour Law). Here the litigants will enter evidence proving whether work results have been achieved or not, what the employee's set targets were, how performance was measured, etc. As for termination for violation of work duties or work discipline, facts relating to those alleged violations will have to be proven. If the employee was, for instance, pronounced redundant, the litigants will prove whether there were indeed grounds to pronounce him redundant or not (based on the employer's economic, organizational and/or technological requirements). And so for each of the possible cases of termination of employment.

Further, we have an interesting question: if grounds for termination of employment did exist, but the employer violated the rules of procedure, does the court assess how many salaries to award to the employee as compensation of damages, 6 salaries being the limit?

The Labour Law does not provide an explicit answer. However, interpreting the provisions of Article 191 gives the indirect answer that in such a situation the court will always award the employee 6 salaries. This is because paragraph 7 of this article specifies no measures or criteria for the court to determine the number of salaries to be awarded as compensation of damages (as is the case in paragraph 5 of that Article which prescribes that the court is to assess the amount of compensation of damages up to 18 of the employee's salaries based on the time spent in employment at that company, the employee's age and number of dependants), and does not refer the court to apply the criteria from paragraph 5.

Moreover, Article 191 does not explicitly state whether an employee, besides the 6 salaries for compensation of damages, is also entitled to compensation of damages for lost salaries (and contributions for compulsory social insurance) from the date of termination of employment or not. The opinion of the Civil Section of the Court of Appeals in Niš is that the employee is not entitled to compensation of damages for lost salaries and other income, given that Article 191(2) of the Law, which refers to paragraph 1 of the same Article, prescribes the right to compensation of damages as a consequence of unlawful termination, to be awarded to employees whose employment was terminated without grounds.

As for the dilemma regarding what is considered to be a violation of procedure for termination of employment, the professional community is largely in agreement that this would be any act of the employer in contravention of Articles 184, 185 and 186 of the Labour Law, which prescribe the period of time for lapsing, the form, content and manner of delivery of the document on termination of the employment contract, and the obligation to pay any outstanding salaries in case of termination of employment. This opinion is shared by the Civil Section of the Court of Appeals in Niš. However, we believe that things are not that simple or uniform.

Speaking of other causes for termination, particularly termination for violation of work duties and work discipline, the words “that the employer acted in contravention of the provisions of the law prescribing the procedure for termination of employment” probably refer to the section of the Labour Law entitled “Procedure in Case of Termination” (when the relevant case law is formed, we will learn whether that is indeed so). This section contains Articles 184, 185 and 186 of the Labour Law.

Regarding termination for the employee's failure to achieve work results (Article 179(1)(1) of the Labour Law), the professional community is divided in its opinion on application of Article 191(7) of the same Law. One opinion states that failure to deliver a written notification with content as specified in Article 180a of the Labour Law constitutes an act in contravention of the provisions of said Law, and that there are grounds for application of Article 191(7), if it is found during the court proceedings that grounds for termination did exist (that is, that the employee did indeed fail to achieve work results).

The other opinion feels that if the employer failed to deliver to the employee the written notification of deficiencies in his work, with instructions on how to improve, which is part of the procedure for applying the cause for termination, but at the same time also the condition for applying that cause for termination, the employee's employment will be considered to have terminated without legal grounds and there is no room for application of Article 191(7) of the Labour Law.

Articles 184, 185 and 186 just might be the right answer to the big dilemma

Speaking of other causes for termination, particularly termination for violation of work duties and work discipline, the words "that the employer acted in contravention of the provisions of the law prescribing the procedure for termination of employment" probably refer to the section of the Labour Law entitled "Procedure in Case of Termination" (when the relevant case law is formed, we will learn whether that is indeed so). This section contains Articles 184, 185 and 186 of the Labour Law.

In the previous case law, failure to observe the employer's obligation to pay outstanding salaries and compensations of salary and other income within 30 days of the date of termination of employment, under Article 186 of the Labour Law, was not taken to be a material and sufficient fact to warrant annulling the decision on termination of employment, so in previous court practice employers suffered no penalties in that regard.

We suspect that this tendency will be continued, and that the employer's omission to fulfil this obligation will not be encompassed by the provisions of Article 191 of the Labour Law, including its paragraph 7.

As for the rule regarding delivery of the notification, under Article 185 of the Labour Law, in previous case law the moment of delivery and the validity thereof were determined primarily in order to check whether a lawsuit against an employer was instigated on time or not.

The compulsory content of the decision on termination (rationale and legal remedy) under this Article was taken as failure of the employer to prove the cause for termination which has occurred. But, on the other hand, oral termination of an employment contract, on the basis of which the work was de facto terminated, and decisions being rendered by persons not authorized to do so, were reasons for the court to annul the employer's decision as unlawful. We expect the courts to consider the said violations to be violations of the procedure for termination of employment, and to award employees 6 salaries as compensation of damages provided valid cause for termination of the employment contract did indeed exist.

The greatest number of dilemmas, in light of the application of Article 191(7) of the Labour Law, are now being caused by the periods of time for termination of employment, prescribed by Article 184(1) of this Law, which reads: "The employer may terminate an employee's employment contract as referred to in Article 179(1)(1), 179(2) and 179(3) of this Law within six months of the date of learning of the facts constituting the grounds for termination, or within one year of the date of occurrence of the facts constituting the grounds for termination."

According to one interpretation, taking into account the legal nature of these periods of time, and that the employer may use a cause for termination which has occurred, but does not have to, this provision prescribes the lapse of the cause for termination in the context of substantive law (although legislators have included it in the section dealing with procedure). This interpretation is based on the fact that upon expiry of the legally prescribed period of time the employer loses legal power to terminate the employment contract for reasons of the occurred cause for termination, and is considered to have waived its right to use the cause for termination of the contract, given that the employer is not obliged to terminate the employee's employment. The employer's inaction (for whatever reason) and the time that has passed lead the employee to believe that the employee-employer relationship has been stabilized, which is in the interest of legal certainty, so the employer is therefore considered to have no grounds for termination of the employment, which is why the norm on awarding 6 salaries to the employee cannot be applied.

The other viewpoint says that the lapse periods under Article 184 of the Labour Law do not refer to lapsing of the cause for termination, but rather to lapsing of the procedure of termination, so the conditions for applying Article 191(7) of the Labour Law are considered to have been met. Thus using a cause for termination after expiry of the legal deadlines (three or six months, respectively) constitutes the employer's acting in contravention of the law in the procedure for termination, regardless of when the employer terminates the employee's employment contract.

The problem with perceiving the lapse periods as elements of the procedure is that this nullifies observance of the principles of conscientiousness and fairness in employment relationships. The legislators have already extended the periods of time for termination of employment contracts by 100% in 2014, so termination after lapse of those periods of time constitutes malpractice on the part of the employer, because the employee had good reason to assume that the employer had forgiven the violation of work duty and work discipline after lapse of the periods of time prescribed by law.

This could also lead to "hyper-abuse" on the part of the employer, in as much as the employee's employment could be terminated at any time after lapse of the prescribed periods of time (e.g. two or five years later), and the only consequence the employer would face would be to pay the employee 6 salaries as compensation of damages, and after a (usually lengthy) labour dispute at that.

All we can do now is follow and take part in the developing of the case law, and wait for the relevant case law to be developed, which will finally in practice demonstrate the application of Article 191(7) of the Labour Law.

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