DOI: https://doi.org/10.69592/2952-1955-EXTRA-JUNIO-ART-5

Modalities of dismissal in Serbia

Modalidades de despido en Serbia

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Abstract: The development of any legal institute, as well as the valid form of such an institute, largely depends on the state itself, that is, on its state and social organization, culture, tradition and history. Same can be said about dismissal. In this paper, therefore, various modalities of dismissal in Serbia will be presenteed, both through the eyes of the Labour law, as the main law in the field of labour relations, but also through the practice of Serbian courts. However, the paper will be limited to the issue of dismissal within the sphere of general employment regime, thus leaving out the specifities of special regimes.

Resumen: *El desarrollo de cualquier instituto jurídico, así como su forma válida, depende en gran medida del propio Estado, es decir, de su organización estatal y social, cultura, tradición e historia. Lo mismo puede decirse del despido. Por lo que, en este estudio se presentan las diversas modalidades de despido en Serbia, tanto a través de la legislación principal en el ámbito de las relaciones laborales, como a través de la práctica de los tribunales serbios. Sin embargo, el presnete artículo se limitará a la cuestión del despido en el ámbito del régimen general de empleo, dejando de lado las especificidades de los regímenes especiales.*

Keywords: Serbia, dismissal, professional knowledge and capacities of an employee, conduct of an employee, the operational needs of the employer, unlawful dismissal.

Palabras clave: *despido, conocimientos profesionales y capacidades de un empleado, conducta de un empleado, las necesidades operativas del empleador, despido ilegal.*

I. Introduction

The development of any legal institute largely depends on the state itself, that is, on its state and social organization, culture, tradition and history. Serbia, on the other hand, belongs to countries with a long and turbulent history.

The first opportunity to regulate the issue of performing work for others in more modern Serbian history, at least in part, arose in the middle of the 19th century after the liberation from centuries-long Turkish rule.

Since this historical moment largely implies the need to rebuild the state and its legal system from the ground up, the evolution of labour law was not an easy task at all.

Its entire development was not helped by the fact that relatively quickly after these first regulatory steps the First World War started, during which the country was almost completely destroyed and in which it lost almost a third of its population, as well as by the fact that the Second World War followed in a historically relatively short period of time.

Additional complications are the product of the fact that throughout history it has been an integral part of various state unions with different political and status arrangements — through the Kingdom of Serbs, Croats and Slovenes, the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia, all the way to the Union of Serbia and Montenegro — with whose dissolution (in the year of 2006) it finally became an independent entity again.

Consequently, the institute of termination of employment at the initiative of the employer, along with all other legal institutes, has come a long way to what it represents today.

However, it differs to a great extent depending on the regime of employment relationship itself, which is why the author will in this paper focus solely on the issue of dismissal in the general regime of an employment relationship.

II. Historical development of the institute of dismissal

The prerequisites for regulating the contractual relationship between employers and workers in Serbia appeared after the Constitution of 1838, which proclaimed the freedom of labour[1] as well as the adoption of the Serbian Civil Code (1844), which guaranteed the inviolability of property, full freedom of contract and the idea that labour can be subject to negotiation[2]. Nevertheless, the first act that even exemplifies the justified grounds for the termination of the relationship between the provider of services and the employer (Act on Activities) was adopted only in 1910, thus introducing the concept of an "important reason" for the termination od such a relationship against the will of the worker into the Serbian legal system[3].

After 1918 and the formation of the Kingdom of Serbs, Croats and Slovenes, the need for the unification of regulations was introduced, of which the Law on the Protection of Workers from 1922 is of particular importance for the topic of this work[4], which prescribed the cases that required special protection against dismissal — such as the case of women who gave birth to a child and who were still facing health problems two months after giving birth (Article 23). A bit later (in the year of 1931), the new Law on the Protection of Workers[5] established notice periods in certain cases, as well as important reasons that justify leaving the service without the obligation to respect the notice period (articles 233-241).

In this way, with state interventionism in the field of work, the application of the principles of civil law, on which the issue of termination of the employment relationship was originally regulated, is slowly beginning to be abandoned. However, the development of labour law was soon interrupted by the outbreak of the Second World War, the end of which was further followed by the strengthening of the communist government and, consequently, significant changes in the field of work.

One of the important characteristics of labour relations during socialism was the policy of full employment regardless of the economic conditions, which also caused latent unem-

1 Lubarda, B. *Uvod u radno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, pp. 183-184.

2 Kovačević, Lj., *Razvoj uređivanja prestanka radnog odnosa na inicijativu poslodavca*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2016, p. 261.

3 *Ibid.* p. 264.

4 Law on the Protection of Workers, (*Official gazette of the Kingdom of Serbs, Croats and Slovenes*, n. 128/1922).

5 Law on the Protection of Workers, (*Official gazette of the Kingdom of Yuugoslavia*, n. 262/1932).

ployment, due to the fact that not all of the employees had something to do[6]. Moreover, the Constitution of the Federative People's Republic of Yugoslavia from 1946 even prescribed the duty of every citizen to work according to his capacities[7].

The first step in the regulation of socialist labour law was made by the adoption of the Basic Law on the Management of State Economic Enterprises and Higher Economic Associations by Labour Collectives[8], while the institute of termination of employment was regulated by a special Regulation on the procedure of termination of employment for workers and officials of labour organizations[9]. It was not until 1957 that the first codification of labour law came into being in this new socialist creation, with the adoption of the Law on Labour Relations[10].

The right to work is guaranteed only by the Constitution of the Socialist Federal Republic of Yugoslavia from 1963[11], which simultaneously establishes that the employment relationship cannot be terminated against the will of the worker, except under the conditions and in the manner determined by federal law[12]. Consequently, in 1965, the Basic Law on Labour Relations was adopted[13], by which as justified grounds for termination of work in the organization against the worker's will are determined as following: abolition of work post, permanent reduction of the volume of work, i.e. business, and unsatisfactory capacity of the worker to work in a workplace that he is entrusted with[14]. Such a legal solution was necessary, bearing in mind that the earlier policy of economically unjustified extensive employment, akin to the socialist period, became unsustainable, which caused the need to respect the objective needs and possibilities of the work process and the overall economy of the state[15].

Nevertheless, the next phase in the regulation of the institute of dismissal is marked by the adoption of the Constitution of the Socialist Federal Republic of Yugoslavia from the

6 Brajić, V., *Radno pravo- radni odnosi, drugi odnosi rada i socijalno osiguranje,* Savremena administracija, Beograd, 2011, p. 37.

7 Constitution of the Federative People's Republic of Yugoslavia, (*Official gazette of the Federative People's Republic of Yugoslavia*, n. 10/1946), art. 32.

8 Basic Law on the Management of State Economic Enterprises and Higher Economic Associations by Labour Collectives, (*Official gazette of the Federative People's Republic of Yugoslavia*, n. 43/50).

9 Regulation on the procedure of termination of employment for workers and officials of labour organizations, (*Official gazette of the Federative People's Republic of Yugoslavia*, n. 20/52 and 33/52).

10 Law on Labour Relations, (*Official gazette of the Federative People's Republic of Yugoslavia*, n. 53/57).

11 Constitution of the Socialist Federal Republic of Yugoslavia, (*Official gazette of the Socialist Federal Republic of Yugoslavia*, n. 14/1963) — in further text: Constitution of the Socialist Federal Republic of Yugoslavia (1963).

12 Constitution of the Socialist Federal Republic of Yugoslavia (1963),art. 36, par. 6.

13 Basic Law on Labour Relations, (*Official gazette of the Socialist Federal Republic of Yugoslavia*, n. 17/65) — in further text: Basic Law on Labour Relations.

14 Basic Law on Labour Relations, art. 98.

15 Kovačević, Lj., *Razvoj uređivanja prestanka radnog odnosa na inicijativu poslodavca*, *op. cit.*, p. 278.

year of 1974[16] and the Law on Joint Work[17], when the needs of the organization of joint work are omitted as justified grounds for dismissal (due to the confirmation of the rule that the worker status cannot be lost due to technological and social improvements)[18]. This because self-management as a concept implies public property of the means of production[19], which logically neutralizes the opposing interests of the parties to the employment relationship.

The right to self-management actually represents the biggest difference between Yugoslavia and other socialist countries[20]. It effectively recognizes the right of workers to decide on all business issues, including the issue of disposing of the company's assets and deciding on its possible structural changes (thereby re-examining the classic concept of the worker, the employer and the termination of the employment relationship as such)[21]. The employment relationship during this period can therefore be terminated only if it is established that: 1. the worker does not have the capacity to perform the work and work tasks entrusted to him or that he does not achieve the work results that are usually achieved, and that within a prolonged period of time; 2. the worker does not fulfill his work duties in such a way as to harm the common interests of other workers; as well as that 3. when entering the employment relationship, the worker remained silent or gave false information regarding the working conditions that are essential for the execution of the work[22]. This kind of employment stability, on the other hand, also created a kind of monopoly of employees on certain jobs, which had a negative impact on their motivation for work and productivity[23].

The self-management concept was finally abolished in 1989, with the adoption of the Law on Basic Rights from the Employment Relationship[24], which was definitely confirmed by the Law on the Basics of Labour Relations (1996)[25], which for the first time introduces the phrase "termination of employment contract" and establishes a more detailed catalog of reasons for termination of employment without the employee's consent[26]. One part of such a catalog also includes reasons for termination that concern the needs of the employer[27]. According to this

16 Constitution of the Socialist Federal Republic of Yugoslavia, (*Official gazette of the Socialist Federal Republic of Yugoslavia*, n. 9/74).

17 Law on Joint Work, (*Official gazette of the Socialist Federal Republic of Yugoslavia*, n. 53/76) — in further text: Law on Joint Work.

18 Kovačević, Lj., *Razvoj uređivanja prestanka radnog odnosa na inicijativu poslodavca*, *op. cit.*, p. 278-279.

19 Lubarda, B., *Radno pravo-rasprava o dostojanstvu na radu i socijalnom dijalogu*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, p. 221.

20 Brajić, V., *Radno pravo- radni odnosi, drugi odnosi rada i socijalno osiguranje*, *op. cit.*, p. 37.

21 Kovačević, Lj., *Razvoj uređivanja prestanka radnog odnosa na inicijativu poslodavca*, *op. cit.*, pp. 272-273.

22 Law on Joint Work, arts. 211 and 215.

23 Jovanović, P., „Stabilnost radnog odnosa u uslovima tehničko-tehnoloških, organizacionih i drugih promena u procesu rada", *Radno i socijalno pravo*, n. 4-7/2000, p. 31.

24 Law on Basic Rights from the Employment Relationship, (*Official gazette of the Socialist Federal Republic of Yugoslavia,* n. 60/89 and 42/90).

25 Law on the Basics of Labour Relations, (*Official gazette of the Federal Republic of Yugoslavia*, n. 29/96 and 51/99) — in further text: Law on the Basics of Labour Relations.

26 Kovačević, Lj., *Razvoj uređivanja prestanka radnog odnosa na inicijativu poslodavca*, *op. cit.*, p. 282.

27 Law on the Basics of Labour Relations, art. 64.

new "current", the subsequent law regulating the field of labour relations, i.e. the Labour Law from 2001, introduced non-acceptance of the employer's offer to conclude an employment contract under modified conditions as new grounds for termination of the employment relationship as well[28]. However, this Law, for the first time, also introduced a catalog of unjustified grounds for dismissal, such as: membership in a political organization or a trade union, use of maternity leave, temporary incapacity for work, etc[29]. On the other hand, this same law abandoned the already established tradition of regulating the disciplinary liability of employees, by sublimating provisions on disciplinary liability into provisions on termination of employment, due to the newly emerged need to create a more flexible labour market, to which the possibility to object to the decision on dismissal as disciplinary measure did not suit at all[30]. Such a distorted conception, on the other hand, created the possibility for the employer to "get rid" of the employee even for the most banal reasons related to work discipline. Therefore, it is "surprising" that the legislator did not use the opportunity to reregulate this issue when he had the opportunity to do so only a few years later (in 2005), with the adoption of the new Labour Law[31]. This legislative situation persisted in an unchanged form until 2014, when amendments to the Labour Law introduced the possibility that the employer, if he believes that the violation of work duties or non-compliance with work discipline is not of such a nature as to require the termination of the employee's employment relationship, or that there are facilitating circumstances, may impose one of the three measures prescribed by this Law on the employee[32]. In other words, as Bojan Urdarević rightly observes, from that moment "the disciplinary procedure is reduced to a dismissal procedure in which the employer chooses whether to terminate the employee's employment or to impose one of the other disciplinary sanctions."[33]

The fact that in recent history there has been a trend toward easier dismissal does not imply inadequate protection of employees from dismissal, although practice has shown that, even in moments that are normatively adequately regulated, there are abuses — which is especially visible with the so-called blank termination of the employment contract (a practice that was banned in 2005)[34]. Namely, although conditioning the establishment of an employment relationship with the prior giving of a statement on termination of an employment relationship of a potential employee is strictly prohibited, practice has repeatedly encountered this phenomenon, which more than ones left a lot of employees without any rights based on

28 Labour Law, (*Official gazette of the Republic of Serbia*, n. 70/01 and 73/01) — in further text: Labour Law (2001).

29 Labour Law (2001), art. 102.

30 More on this subject in: Urdarević, B., „Disciplinska odgovornost zaposlenih u svetlu novih zakonskih rešenja," *Radno i socijalno pravo*, n. 1/2014, pp. 195-210. Senad Jašarević also points to the flexibility of firing employees in this period. See. Jašarević, S., „Zaštita od otkaza u Srbiji u svetlu međunarodnih standarda i uporedne prakse," *Radno i socijalno pravo*, n. 1/2018, p. 87.

31 Labour Law, (*Official gazette of the Republic of Serbia*, n. 24/2005) — in further text: Labour Law (2005).

32 Labour Law, (*Official gazette of the Republic of Serbia*, n. 24/2005, 61/2005, 54/2009 and 75/2014).

33 Urdarević, B., „Disciplinska odgovornost zaposlenih u svetlu novih zakonskih rešenja,"*op. cit.*, p. 206.

34 "The employer cannot make the establishment of an employment relationship conditional on the prior declaration of the termination of the employment contract by the candidate." Labour Law (2005), art. 26, para. 4.

the termination of the employment relationship[35]. However, judicial practice has taken the view that this kind of practice is illegal, and that this type of dismissal must be annulled[36].

III. Modalities of dismissal in Serbia today

The current Labour Law, which represents only a somewhat amended text of the law from 2005[37], underwent the biggest changes in terms of the issue of dismissal in 2014, when the employer was given the possibility to "measure" the severity of the violation of work duties or work discipline, and, in accordance with that, to impose one of the three measures established by law instead of dismissal, if he believes that there is no sufficient reason for dismissal.

The Labour Law itself makes a distinction between four different groups of reasons for termination of employment regardless of the employees will, the grounds of which are related to: 1. the employee's work capacity and his conduct; 2. culpable violation of the employee's work duty; 3. non-compliance with work discipline by the employee, and 4. the needs of the employer.

In other words, justified reasons for termination of an employment relationship at the initiative of the employer may be related to *the results of the work or the professional knowledge and capacities of the employee*, to *the conduct of the employee* or to *the operational needs of the employer*[38].

Since special rules regarding the dismissal procedure apply to violations of work duties and work discipline (the warning of the employee that he has committed a violation of a work duty or work discipline, as well as the presented possibility of "weighing" the severity of the violation of a work duty or work discipline when imposing punitive measures), and that both groups of dismissal reasons are related to the employee's conduct, they will be presented in the following text in the same section.

The structure of this part of the article will therefore be divided into three sections: 3.1. Reasons for dismissal that are related to the employee's capacity to work and his conduct; 3.2. Reasons for dismissal related to a culpable violation of work duty or non-compliance with work discipline by the employee; 3.3. Reasons for dismissal related to the needs of the employer.

35 According to some data, at least 30% of employees in the field of construction established their employment relationship in this way. Valtner, L., Blanko otkazi uslov za zapošljavanje, https://www.danas.rs/vesti/ekonomija/blanko-otkazi-uslov-za-zaposljavanje/, 12. 4. 2024.

36 Judgment of the Supreme Court of Cassation, Rev2. 1710/21 from 23. 12. 2021; Judgment of the Supreme Court of Cassation, Rev2 1664/2015 from 11. 2. 2016.

37 Labour Law, (*Official gazette of the Republic of Serbia*, n. 24/2005, 61/2005, 54/2009, 75/2014, 13/2017 (CC), 113/2017 and 95/2018 — authentic interpretation) — in further text: Labour Law.

38 After all, this is not surprising, since Serbia has ratified Convention 158 of the International Labour Organization, which in its article 4 states that: „The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." Convention concerning Termination of Employment at the Initiative of the Employer (No. 158), (*Official gazette of the Socialist Federal Republic of Yugoslavia- International agreements*, n. 4/84, 7/91).

The legal mechanism of termination of the employment relationship itself is complex due to the fact that it implies a whole series of facts that must be fulfilled in order for it to be terminated in a legal manner. In other words, it is necessary not only for one of the grounds for the termination of the employment relationship to have occured, but such grounds must also be determined and an individual act on the termination of the employee's employment relationship must be passed[39].

3.1. Reasons for dismissal that are related to the employee's capacity to work and his conduct

The current Labour Law, in its Article 179, stipulates that the employer can cancel the employee's employment contract if:

- he does not achieve the results of his work or if he does not have the necessary knowledge and capacity to perform the tasks he is working on;
- he is legally convicted of a criminal offense at work or in connection with work;
- if he has not returned to work within 15 days from the date of expiry of the period of the dormant employment relationship or an unpaid leave.

It is not completely clear why did the legislator decide to put the reasons concerning the employee's conduct next to the reasons concerning the employee's capacity to work within the same group of reasons for termination of employment. This, primarily, because, the first association when it comes to the employee's conduct as justified grounds for a dismissal, is violation of a work duty or violation of work discipline. Perhaps this is one of the reasons why certain authors point out that the grouping of grounds for dismissal into the four aforementioned groups was done in a "completely inconsistent and insufficiently clear way."[40] The only explanation that seems logical at all is that the legislator wanted to single out those conducts that do not necessarily constitute a violation of work duties or work discipline, and which, regardless, are a sufficient reason for the employer to issue a decision on the termination of the employment contract. In any case, bearing in mind this systematization of the Serbian legislator, the dismissal grounds belonging to this group will be presented according to the division made by the legislator.

3.1.1. Dismissal due to the non-achievement of the work results of the employee or due to the fact that he does not have the necessary knowledge and capacity to perform the tasks he is working on

This subgroup of justified reasons for dismissal includes two different cases, one in which *an employee who possesses the appropriate knowledge and skills does not achieve appropriate results* and another in which t*he employee (regardless of the level of his professional education) does not possess the appropriate knowledge and skills necessary for effective performance of work tasks*.

39 Brković, R., Urdarević, B., *Radno pravo sa elementima socijalnog prava*, Službeni glasnik, Beograd, 2020, p. 214.

40 Reljanović, M., *Alternativno radno zakonodavstvo*, Rosa Luxemburg Stiftung Southeast Europe and Centar za dostojanstven rad, Beograd, 2019, p. 175.

In order for the insufficient achievement of work results to be the grounds for dismissal, it has to be related to the employee's attitude towards work, that is, it cannot be a consequence of justified circumstances[41]. In other words, the employee's employment contract cannot be canceled if the employer has set unrealistic expectations regarding work results or if, for example, the employee was unable to achieve appropriate work results because he took a sick leave[42]. In addition, this grounds for dismissal can be "activated" only if the standards regarding work performance have already been established in advance, which also implies the criteria on the basis of which it is measured[43]. In this sense, this grounds for dismissal implies an inadequate attitude of the employee towards his duties from the employment relationship, which is why it is also connected to the conduct of the employee in the working environment[44].

As far as the lack of capacity to perform work is concerned, it can be defined as "the objective and non-culpable incapacity of the employee to correctly perform the work for which he was hired."[45] In other words, such an employee is not capable of performing his work satisfactorily. At the same time, in order for this lack of capacity and knowledge, i.e., skills, to be eligible to be justified grounds for dismissal, it must be permanent to a certain extent, since the employer is obliged to leave the employee an appropriate period in which he will be able to improve his work, which is also the case when it comes to the failure of an employee in achieving work results.

Namely, the procedure for canceling an employment contract due to the employee's lack of knowledge and capacities, i.e., skills, or due to non-achievement of work results, implies the prior submission of a written notice regarding the deficiencies in his work, along with instructions and an appropriate deadline for improving his work[46]. The legislator does not define what he considers to be appropriate in terms of this deadline, but the practice of giving notice along with the dismissal decision is most certainly unlawful[47]. Logically, however, such a deadline must be long enough so that the employee really has a chance to improve his work, but not so long that it represents an unreasonable burden for the employer. However, no matter how long this deadline is, it will mean nothing to the employee without adequate

41 " In order for the employee's employment to be legally terminated due to failure to achieve work results, it is necessary that the employee did not achieve an objectively possible task due to his own fault, inaction or insufficient performance." Judgment of the Supreme Court of Cassation, Rev2. 1843/20 from 7. 4. 2021; " In order for the termination of the employment contract due to the failure to achieve the required work results to be legal, it is necessary to determine that the work results are absent due to the insufficient work of the employee and his lack of commitment." Judgment of the Supreme Court of Cassation, Rev2. 470/22 from 16. 3. 2022.

42 Brković, R., Urdarević, B., *Radno pravo sa elementima socijalnog prava*, *op. cit*,, pp. 225-226.

43 *Ibid.*, 226.

44 This is perhaps also the reason why the second and third stated grounds for termination of employment that are within this group (final conviction for a criminal offense at work or in connection with work and failure to return to work within 15 days from the date of expiry of the period of the dormant employment relationship or an unpaid leave) are somehow artificially grafted here. Namely, their normative positioning somehow does not seem natural in the norm which also refers to the working capacity of the employee, as justified grounds for dismissal.

45 Kovačević, Lj., *Razvoj uređivanja prestanka radnog odnosa na inicijativu poslodavca*, *op. cit.*, p. 335.

46 Labour Law, art. 180.

47 Judgment of the Supreme Court of Cassation, Rev2. 3141/19 from 28. 10. 2020.

guidelines regarding how he can improve his work, since "instructions imply giving specific directions on how the employee can perform his duties satisfactorily."[48]

3.1.2. Dismissal of an employee who is legally convicted of a criminal offense at work or in connection with work

According to the principle of presumption of innocence, the criminal responsibility of the perpetrator must be determined by a final judgment in order to be eligible to represent justified grounds for dismissal[49]. On the other hand, the employer does not have to wait for the final conclusion of the court proceedings in order to initiate disciplinary proceedings against such an employee.

3.1.3 Dismissal of an employee who has not returned to work within 15 days from the date of expiry of the period of the dormant employment relationship or an unpaid leave

Dormant employment implies situations in which an employment relationship exists, but in which neither the rights nor the obligations related to such an employment relationship are realized. These are situations that are regulated by imperative norms, which do not allow any discretionary decision-making by the employer, but which occur *ex lege*[50]. Unpaid leave, on the other hand, is a special form of dormant employment that depends on the employer's approval[51]. In other words, it is up to the employer to decide whether the reasons stated by the employee in his request for exercising the right to an unpaid leave are justified and suitable for it to be granted, as well as whether it will not harm his business. Therefore, in theory, it is emphasized that such a right is only a "legal hope" until it is regulated by a general act of the employer, which will determine the conditions and cases in which the employee has the right to such a leave (when it cannot be denied)[52].

If the employee does not return to work with the employer after the expiration of 15 days from the end of the period of the dormant employment relationship, i.e. unpaid leave, the employer will have the right to cancel the employment contract[53].

48 Judgment of the Supreme Court of Cassation, Rev2. 3048/20 from 11. 3. 2021.

49 Judgment of the Supreme Court of Cassation, Rev2. 1604/21 from 29. 10. 2021.

50 Brković, R., Urdarević, B., *Radno pravo sa elementima socijalnog prava*, *op. cit*, pp. 146-147. In terms of the Labour Law, the employment relationship is dormant in cases when the employee must be absent from work due to: 1. leaving to serve in the military, i.e. to complete the period of military service; 2. being assigned to work abroad by the employer or within the framework of international technical or educational and cultural cooperation, to diplomatic, consular and other missions; 3. being temporarily assigned to work with another employer; 4. being elected i.e. appointed to office within a state agency, trade union, political organization or to other public office the exercising of which requires temporary cessation of work for the employer; and 5) serving a prison sentence i.e. imposed safety, correctional or protective measure, lasting up to six months. Labour Law, art. 79.

51 Labour Law, art. 78.

52 Brković, R., Urdarević, B., *Radno pravo sa elementima socijalnog prava*, *op. cit*, p. 146.

53 Labour Law, art. 179, para. 1, subpara. 3.

3.2. Reasons for dismissal which are related to culpable violation of the employee's work duties or non-compliance with work discipline by the employee

The Labour Law contains two different lists of employee conducts that can be qualified as a violation of work duties in the sense of this regulation, that is, as a violation of work discipline. Neither of these two lists is exhaustive, so conducts that are not determined by this act can also be considered a violation of a work duty, that is, work discipline. The main difference between these two grounds for dismissal is that a violation of the work duty that is not established by the Labour Law must be established either by the Collective Labour Agreement, the Work Regulations or the employment contract in order to be considered as justified grounds for the termination of the employment relationship[54], while for a violation of work discipline, it is sufficient that the conduct of the employee is such that he cannot continue working for the employer[55]. In other words, "work discipline represents a general standard according to which any act of indiscipline can lead to the termination of the employment contract, provided that the violation of work discipline is such that the employee, considering the work process and all the circumstances of the case, cannot continue working for the employer."[56] Thus, here we are talking about conduct that cannot be tolerated because it is unbearable according to a reasonable assessment[57].

As for the culpable conducts that, in accordance with the Labour Law, constitute a violation of the work duty, they are the following:

- the negligent or reckless performance of the work duties;
- the abuse of the employee's position or the excess of his authority;
- the unreasonable and irresponsible usage of means of work;
- the failure of the employee to use or an inappropriate usage of the allocated resources and equipment for personal protection at work.

Of the stated grounds for termination of the employment relationship by the employer, that is, regardless of the will of the employee, the norm concerning "negligent or reckless performance of work duties" can be particularly problematic. This because the flexibility of such a norm leaves a lot of room for further interpretation. Its purpose, however, is to punish the conduct of an employee who "does not act in accordance with the duties of his job description, who does not comply with the instructions for work in his work unit and who does not show the usual care expected of an average employee."[58] Such liability cannot therefore exist without the fault of the employee[59]. It is indisputable that an employee will be considered negligent in performing his duties if he drives a vehicle entrusted by the

54 Labour Law, art. 179, para. 2, subpara. 5.
55 Labour Law, art. 179, para. 3, subpara. 7.
56 Judgment of the Supreme Court of Cassation, Rev2. 3380/20 from 8. 4. 2021.
57 Decision of the Appellate Court in Belgrade, Gž1 2391/2015 from 26. 2. 2016.
58 Judgment of the Supreme Court of Cassation, Rev2. 791/20 from 20. 5. 2021.
59 Judgment of the Supreme Court of Cassation, Rev2. 2545/18 from 11. 3. 2021.

employer while intoxicated[60], just as it will also be indisputable that he will be considered negligent and reckless if he does not remove expired goods on time[61], but the interpretation of this conduct will largely depend on the employer, and only ultimately on the court itself. Judicial justice, however, can be quite slow and inappropriate to the urgency of the procedure implied by the rights from the employment relationship (due to their existential nature). Due to such a situation, some authors even believe that such cases call for a behavior that is more permanent in its nature[62]. This position could perhaps be taken in a large number of cases, but the author's opinion is that certain conducts of employees may be such that they do not have to imply repetitiveness and permanence in order to be characterized as a sufficient reason for dismissal due to demonstrated negligence or recklessness. This, of course, if the intensity of the violation of the work duty or the terribleness of the specific conduct of the employed person, can indisputably be considered as a justified reason for the termination of the employment contract from the point of view of a reasonable person and the understanding of society.

When, on the other hand, we are talking about a violation of work discipline by the employee as a reason for the termination of the employment contract by the employer, the Labour Law lists the following conducts that are classified as a violation of work discipline:

- the refusal to perform work duties and execute the orders of the employer without just cause in accordance with the law;
- the failure to submit a certificate of temporary impairment for work;
- the abuse of the right to a leave of absence due to temporary impairment for work;
- the arrival to work under the influence of alcohol or other intoxicating substances, i.e. usage alcohol or other intoxicating substances during working hours, which has or may have an impact on the work performance;
- provision of incorrect information that were crucial for entering into employment relationship;
- the refusal of the employee who works in jobs with higher risk, for which specific health fitness is a special requirement for work, to undergo a health condition test;
- non-compliance with work discipline prescribed by the act of the employer or conduct of the employee which is such that he cannot continue to work for the employer.

Previously, the Labour Law stated conduct that represents the act of committing a criminal offense committed at work or in connection with work, regardless of whether criminal proceedings for a criminal offense have been initiated against the employee as one of the reasons for dismissal regarding work discipline as well. This provision was quite controversial, since the question arose whether the employer should be left with the authority

60 Judgment of the Appellate Court in Belgrade Gž1. 3085/10 from 08. 9. 2010.

61 Judgment of the Supreme Court of Cassation, Rev2. 2545/18 from 11. 3. 2021.

62 Lakićević, S., „Promene u pravnom položaju poslodavca prema izmenama Zakona o radu do 2014. godine," *Radno i socijalno pravo*, n. 1/2015, p. 142 .

to independently determine that the employee's conduct constitutes the act of committing a criminal offense committed at work or in connection with work, which is why it was later declared unconstitutional by the Constitutional Court of the Republic of Serbia[63]. Namely, the Constitutional Court took the position that in this way the employer is given the authority that only the court can have, that is, that it entrusts the employer with the powers of the criminal court, which, according to this court, is against the Constitution of the Republic of Serbia. After all, as some authors note, this provision allowed for the sanctioning of an essentially "hypothetical" or unproven fault, which, among other things, is fundamentally against the presumption of innocence, which is one of the most important achievements of the rule of law and democratic society[64].

As far as the dismissal procedure in case of violation of work duties or violation of work discipline by the employee is concerned, it is specific primarily in that that it entails the obligation of the employer to warn the employee in writing of the existence of a reason for the termination of the employment contract, leaving a deadline of at least eight days from the day of delivery of the warning, in which the employee can respond to the allegations in the warning[65]. Such a warning must contain information on the grounds for dismissal, as well as facts and evidence indicating that the conditions for dismissal have been met. If, therefore, such a warning does not contain data such as the date and persons who participated in the execution of the act, along with a detailed description of the specific event, the court will hold that it was composed arbitrarily, that is, that it does not contain elements prescribed by the Labour Law. This due to the fact that, from such a warning, it will not be possible to specify the employee's action, which would be the grounds for the termination of the employment relationship[66]. The purpose of the period left for the employee to respond to the allegations in the warning is to give the employee the right to defend himself. Such a deadline must therefore be reasonable, because otherwise the employee will not be able to prepare and present his defense[67]. Bearing all this in mind, it is absolutely logical that the employer's failure to deliver such a warning to the employee in the manner and under the terms prescribed by the Labour Law, will imply the unlawfulness of such termination of the employment relationship[68]. Unfortunately, since 2001, the two-stage disciplinary procedure in the determination of disciplinary liability no longer exists in the general employment regime, since the employee's right to object to the employer's decision no longer exists. This is perhaps also a product of the fact that the two-stage process, that is, the right to appeal, is often seen as an unnecessary bureaucratization and delay in the dismissal procedure[69].

In theory, the question was raised whether the activity of an employee on social networks could be characterized as a type of violation of work duties or work discipline, if it is at least in some way related to the work of an employed person. This kind of question is particularly tricky considering that it directly affects the right of every person (including the employee) to

63 Decision of the Constitutional Court of the Republic of Serbia, (*Official gazette, n.* 13/2017).

64 Kovačević Perić, S., „Radnopravne posledice krivičnog dela na radu (opravdanost otkaza)," Zbornik radova Pravnog fakulteta u Nišu, n. 76/2017, p. 164.

65 Labour Law, art. 180.

66 Judgment of the Supreme Court of Cassation, Rev2. 150/21 from 8. 7. 2021.

67 Judgment of the Supreme Court of Cassation, Rev2. 2576/20 from 25. 5. 2022.

68 Judgment of the Supreme Court of Cassation, Rev2. 840/21 from 13. 4. 2022.

69 Reljanović, M., Misailović, J., „Sigurnost zaposlenja kao indikator dostojanstvenog rada: normativna rešenja država u regionu," *Strani pravni život*, n. 3/2022, p. 453.

a private life, but also the right to freedom of speech. Certain theoreticians thus believe that activity on social networks during working hours could be considered to be a justified reason for dismissal, since such performance of work tasks could not be deemed to be conscientious and responsible[70]. Also, they are of the opinion that negative comments on the account of clients or business associates of the employer or negative announcements and comments about the employer itself (unless they indicate the illegality of his business) could also be qualified as a violation of a work duty or of work discipline and, therefore, as justified grounds for dismissal[71]. Other authors also add here the use of social networks in order to harass other employees[72]. What seems indisputable, however, is that even in the case of adopting such a practice, it must certainly be extremely limited and reserved only for exceptional cases.

Violation of work duties or work discipline, even if it can indisputably be classified as conduct for which the employment contract can be terminated, does not always have to result with dismissal. Namely, the legislator, bearing in mind the existential character of the employment relationship as such, gave the employer the opportunity to decide in accordance with his free assessment that it is more expedient and fairer to impose some other punitive measure on the employee instead of dismissal. The employer will therefore be able to impose one of the following measures instead of terminating the employment contract, if he deems that there are certain mitigating circumstances or that the violation of a work duty, or non-compliance with work discipline, is not of such a nature that the employee's employment relationship should be terminated:

- temporary suspension from work without compensation of salary, for a period of one to 15 working days;

- fine of up to 20% of the base salary of the employee for the month in which the fine was imposed, for a period of up to three months (executed by deductions from salary, based on the decision of the employer on the measure imposed);

- warning with a threat of dismissal which states that the employer shall cancel the employee's employment contract without repeated warning, if within the following period of six months he commits the same breach of work duty, i.e. non-compliance with work discipline[73].

It should also be emphasized that disciplinary and criminal proceedings can simultaneously be conducted on the same matter. Namely, here we are talking about two separate and independent procedures, which is logical because they have two completely different goals. Thus, while the goal of the criminal procedure is to punish the perpetrator of the crime, the goal of the disciplinary procedure also includes the establishment of work discipline and preservation of the reputation of the institution where the employee works, in addition to punishment of the employee[74].

70 Božičić, D., „O (ne)opravdanom otkazu ugovora o radu zbog aktivnosti zaposlenog na društvenim mrežama," *Radno i socijalno pravo*, n. 2/2019, pp. 135-136 .

71 *Ibid*. 140-141.

72 Kovač Orlandić, M., „Otkaz ugovora o radu zbog ponašanja zaposlenog van radnog mesta i mesta rada," *Radno i socijalno pravo*, n. 2/2022, p. 195.

73 Labour Law, art. 179a.

74 Vlatković, M., Brković, R., Urdarević, B., *Službeničko pravo*, Dosije studio, Beograd, 2013, pp. 179-180.

Also, bearing in mind the fact that the presence of an employee charged with a criminal offense at work or in connection with work could negatively affect the working environment and the business of the employer as well as other employees, the legislator prescribes that the employer can impose a measure of suspension of the employee from work until the final conclusion of that criminal proceeding, with compensation of wages[75]. Such a measure should not be equated with a disciplinary sanction, but should be seen as a kind of preventive measure, since it is adopted as such independently of the disciplinary procedure, while disciplinary sanctions are imposed after the disciplinary procedure has been carried out and the disciplinary liability has been determined[76].

3.3. Reasons for dismissal related to the needs of the employer

In accordance with the Labour Law, an employee's employment can be terminated if justifiable grounds related to the needs of the employer exists, i.e.:

1. if as a result of technological, economic or organizational changes, the need to perform a specific job ceases, or there is a decrease in workload;

2. if the employee refuses to conclude an annex to the employment contract in terms of this Law[77].

The court cannot assess the expediency and validity of the implementation of economic, technological or organizational changes because this falls within the autonomous and independent sphere of activity of the company, i.e., in other words, the court can only assess whether the reasons for dismissal due to the cessation of the need for work of an employee in such cases were justified and whether the dismissal was given in the manner prescribed by law[78].

3.3.1 Dismissal as a result of technological, economic or organizational changes or the cessation of need to perform a specific job

In the case of termination of the employment contract, which occurs because the need for the employee's work has ceased due to technological, economic or organizational changes, Serbian law makes distinctions between two situations — one when the employer is bound to develop a solution-finding program of employee redundancy and another when the obligation to adopt such a program does not exist.

75 Labour Law, arts. 165-169.

76 Kovačević Perić, S., „Udaljenje sa rada — pojam, svrha i karakteristike," *Radno i socijalno pravo*, n.1/2014, p. 176.

77 Labour Law, art. 179, para. 5.

78 Judgment of the Primary Court in Arandjelovac, P1— 666/16 from 19. 3. 2015; Judgment of the Court of Appeal in Kragujevac, Gž1— 2247/15 from 6. 10. 2015; Judgment of the Appellate Court in Novi Sad, Gž. 1667/13 from 10. 2. 2014.

The employer is bound to develop a solution-finding program of employee redundancy:

1. after finding that due to technological, economic or organizational changes within a period of 30 days the need for work of employees hired for an indefinite period of time shall cease, relating at least to:

   – 10 employees with an employer who employs more than 20, and less than 100 employees engaged for an indefinite period of time;

   – 10% of employees with an employer engaging a minimum of 100, and a maximum of 300 employees engaged for an indefinite period of time;

   – 30 employees with an employer employing more than 300 employees engaged for an indefinite period of time.

2. after finding that due to technological, economic or organizational changes there will be no more need for work of at least 20 employees within a 90 day period of time, regardless of the total number of his employees[79].

   Such a program particularly includes:

   – reasons for the cessation of the need for work of the employees;

   – total number of employees with the employer;

   – number, qualification structure, age, and years of insurance coverage of redundant employees, and jobs they perform;

   – criteria for establishing the employee redundancy;

   – measures for finding employment: transfer to other work assignments, employment with another employer, retraining or additional training, part-time work but not shorter than half of the full-time work, and other measures;

   – resources necessary for solving the social and economic position of redundant employees;

   – notice period within which the employment contract shall be cancelled[80].

Before, the criteria for determining employee redundancy were prescribed by the General Collective Labour Agreement[81].

In accordance with the text of the aforementioned collective agreement, the employer primarily had to take into account the results of the employees' work, which were determined

79 Labour Law, art. 153.

80 Labour Law, art. 155, para. 1.

81 General Collective Labour Agreement, (Official gazette of the Republic of Serbia, n. 50/2008, 104/2008 — Anex I and 8/2009 — Anex II) — in further text: General Collective Labour Agreement.

on the basis of appropriate norms and standards of work, that is, on the basis of the explanation of the assessment of the immediate manager if such norms and standards were not established[82]. Only if the employees would achieve equal work results, the employer could rely on supplementary criteria, in accordance with the following order: 1. financial situation of the employee; 2. number of earning family members (whereby the employee with a smaller number of earning family members had advantage); 3. length of years of service (whereby advantage was given to employees with longer period of service); 4. the state of health of the employee and members of his immediate family (whereby advantage was given to an employee who suffered from a serious illness or whose immediate family member suffered from a serious illness, in accordance with the findings of the competent health authority); 5. the number of children in school (whereby the employee who had more children in school had an advantage)[83].

The aforementioned collective agreement unfortunately ceased to be valid in 2011, and to date the new text of the General Collective Agreement has not been adopted, while the Labour Law, on the other hand, does not define in any way what criteria the employer can take into account when drawing up such a program, except negatively, that is, by defining criteria that are not allowed when determining employee redundancy[84].

In other words, in this way, the employer is allowed considerable freedom when determining such criteria, with the exception of the mentioned explicit prohibition regarding certain situations. However, such criteria must not be arbitrary or discriminatory[85], while the program itself, in which such criteria are determined, must be adopted before the adoption of individual decisions on the termination of employment contracts[86].

In fact, the employer must apply appropriate criteria when determining redundancy of employees even in those situations where the obligation to adopt such a program does not exist, because this fact does not give him the discretionary right to independently and arbitrarily determine which employees will be considered redundant and which will not. Otherwise, any such decision on the termination of the employment relationship on this basis would be unlawful[87]. On the other hand, in the event of the abolition of work post in which the employee is the only executor, there would be no need for application of the criteria determining employee redundancy, since there would be no employees to whom he should be compared to in order to determine that his work is no longer needed[88].

82 General Collective Labour Agreement, art. 39.

83 General Collective Labour Agreement, arts. 40-41.

84 The criterion for establishing employee redundancy cannot be: 1. the absence from work of an employee due to temporary work impairment, 2. the absence from work of an employee due to pregnancy, 3. the absence from work of an employee due to maternity leave, 4. the absence from work of an employee due to leave for nursing the child, and 5. the absence from work of an employee due to leave for special care of the child. Labour Law, art. 157.

85 Judgment of the Supreme Court of Cassation Rev2. 1053/21 from 2. 6. 2022.

86 Judgment of the Supreme Court of Cassation, Rev2. 983/21 from 9. 6. 2021.

87 Judgment of the Supreme Court of Cassation, Rev2. 491/20 from 6. 4. 2022; Decision of the Supreme Court of Cassation, Rev2. 2273/21 from 23. 6. 2022; Judgment of the Supreme Court of Cassation, Rev2. 2543/21 from 26. 1. 2022.

88 Judgment of the Supreme Court of Cassation, Rev2. 709/21 from 27. 5. 2021.

In order for the employer to be able to fire employees on this grounds, he really cannot have any other choice (transfer to other work assignments, retraining or additional training etc.). In this sense, if the employer, for example, was to employ a new employee in another post which required the same professional qualifications as the ones that an employee who was found to be redundant had, this would indicate that the employer could have met his needs by transferring that employee to another work post, and not by his dismissal[89].

If, within the next three months from the date of the dismissal, there was a need to perform the work that was performed by the employee whose employment relationship was terminated on this grounds, such an employee would have priority for concluding an employment contract. In other words, another person would not be able to establish an employment relationship in order to perform the same job within the specified period[90]. However, this guarantee does not apply to employees with health disturbances that have been determined by the competent health authority. Namely, although the employer has the "duty" to provide such employees with work according to their working capacity, he is not only liberated from this same duty in the event that he cannot provide them with work which is suitable[91], but for such persons, the protection in terms of priority in employment within the next three months from the termination of the employment relationship due to the needs of the employer does not apply either[92]. The legislator thus put these persons in a position that is not only not the same as the position of the other employees when the employer finds himself to be unable to provide them with a suitable job, but also in a position which is fundamentally less favorable. Such a solution is therefore not only unfair, but also completely contradicts the principle of positive discrimination of persons with disabilities when accessing employment — as it should, in its essence, indirectly imply the stimulation of employers to preserve their employment[93].

3.3.2. Dismissal due to employee's refusal to conclude an annex to the employment contract

The employer can offer an annex of the employment contract to the employee:

- for the purpose of transfer to another appropriate job, due to the needs of the process and the organization of work;
- for the purpose of transfer to another place of work at the same employer;
- for the purpose of assignment to an appropriate job with another employer,;

89 Judgment of the Supreme Court of Cassation, Rev2. 2570/18 from 27. 5. 2020.

90 Labour Law, art. 182.

91 When such an employee is considered redundant. Labour Law, art. 102, para. 2. At the same time, the provision according to which if the employer *canno*t provide a job for such a person, he can declare him redundant and terminate his employment contract is completely nomo-technically different from the provision in which it is said that the employer is *obliged* to ensure the performance of work for a disabled person, and thus it represents a kind of legal antinomy. Jovanović, P., "Pozitivna diskriminacija (s osvrtom na oblast rada)", *Radno i socijalno pravo*, n. 1/2018, p. 15.

92 Labour Law, art. 102, para. 1.

93 Jovanović, P., "Pozitivna diskriminacija (s osvrtom na oblast rada)", *op. cit.*, pp. 14-16.

– if a redundant employee has been provided with one of the rights aimed at preserving his employment in the event that the need for technical, technological or organizational changes at the employer was determined;

– to alter the elements for determination of base salary, work performance, compensation of salary, increased salary and other employee earnings that are contained in the employment contract; in other cases as specified by law, general act (Collective Labour Agreement or a Work Regulations) or an employment contract[94].

Along with such an annex to the employment contract, the employer is also obliged to provide the employee with a written notice that must contain the reasons for the proposed annex to the employment contract, the deadline in which the employee must respond (which cannot be shorter than eight working days) and the legal consequences which can occur if the employee refuses to sign such an annex, whereby the employee can dispute the legality of this annex before the competent court even if he decides to sign it[95]. In this sense, it is much more expedient for the employee to sign the offered annex to the employment contract even if he is not satisfied with it, since he retains the right to challenge its legality, and that otherwise he would risk losing his job[96]. The position of the Supreme Court of Cassation (now the Supreme Court of Serbia) is that the right to determine the nullity of the annex to the employment contract does not expire[97].

Although the Labour Law does not contain a provision on the time limit in which the employer can or must make a decision on the termination of the employment relationship due to the employee's refusal to conclude the offered annex to the employment contract, it would certainly not be in the spirit of this law for such a period to be long[98]. Also, if the employer were to assign the employee to a work post that was abolished soon after, this act would be considered to be an abuse of the employer's rights, and such an annex to the employment contract would be illegal[99].

The employer is not obliged to offer an annex to the employment contract to the employee who has, in the meantime, acquired a higher degree of professional education than the one he had at the time of establishing the employment relationship[100]. Also, it is not necessary to conclude the annex with the employee if there is a need to carry out a certain job without delay, which is why the employee must be temporarily transferred to other appropriate jobs (up to 45 days in a period of 12 months), while in such cases the employee retains the base salary determined for the job from which he was transferred, if that is more favorable to the him[101].

94 Labour Law, art. 171.
95 Labour Law, art. 172, paras. 1-2.
96 Judgment of the Supreme Court of Cassation, Rev2. 2421/19 from 2. 7. 2020.
97 Conclusion adopted at the session of the Civil Department of the Supreme Court of Cassation held on 12. 10. 2021.
98 Judgment of the Supreme Court of Cassation, Rev2. 1563/21 from 5. 11. 2021.
99 Judgment of the Supreme Court of Cassation, Rev2. 632/17 from 24. 5. 2017.
100 Judgment of the Appellate Court in Niš, Gž1. 3785/21 from 2. 2. 2022.
101 Labour Law, art. 172a.

IV. Legal consequences of an unlawful dismissal

The Serbian legislator makes a distinction between unlawful dismissal due to the absence of legal grounds and unlawful dismissal due to non-compliance with the dismissal procedure. Therefore, depending on which of one of these two situations we are encountering, the consequences that may follow on that occasion will depend as well.

The legal consequences of unlawful dismissal can be:

- reintegration of the employee into the working environment;
- the compensation of damage;
- payment of tax and contributions for compulsory social insurance for the period in which the employee has not worked.

The employee cannot count on reintegration into the working environment if the court determines that there was legal grounds for the dismissal, but that the employer, in the specific case, acted contrary to the provisions regulating the procedure for the termination of the employment relationship. In those cases, therefore, the court will, if the employee has made such a request in the lawsuit, reject the reintegration request and award damages in the amount of up to six times the employee's salary[102].

On the other hand, if the dismissal is unlawful due to the fact that there was no legal grounds for it, the employee can be reintegrated into the working environment, if he has made such a request in his claim[103]. Namely, it is up to the employee to decide whether working in the same working environment, that is, with the same employer, is something that is in his interest or not. This is primarily due to the fact that "after the storm" that the labour dispute brings with it, it is very difficult to coexist in the same working environment without further tensions[104].

Therefore, if the employee makes such a request, and in court proceedings it is determined that there was no legal grounds for the dismissal, the court will decide that the employee should return to work, as well as that he should be paid compensation for damages and the appropriate amount of contributions for mandatory social insurance for the period in which the he did not work[105]. If in such a situation the employee, on the other hand, did not make the request to return to work, the court will, at the request of the employee, oblige the employer to pay compensation of damages to the employee in the amount of a maximum of 18 wages (depending on the time spent working for the employer, years of life of the employee and the number of dependent family members)[106].

102 Labour Law, art. 191, para. 7.
103 Labour Law, art. 191, subparas. 1-5.
104 Petrović. M., „Prednosti i mane mirnog rešavanja kolektivnih radnih sporova u Republici Srbiji," *Radno i socijalno pravo*, n. 1/2022, pp. 178-179.
105 Labour Law, art. 191, para. 1.
106 Labour Law, art. 191, para. 5.

Exceptionally, even if such a request for the employee's return to work was made, and it is determined during the court proceedings that there was no legal grounds for the dismissal, the court will not order the employer to reintegrate the employee into the working environment. Namely, the Labour Law provides an opportunity for the employer to prove during the court proceedings that there are circumstances which reasonably indicate that the continuation of the employment relationship is not possible, taking into account all the circumstances and interests of the parties in the dispute. In these cases, the court shall deny request of the employee to return to work, and order the employer to compensate employee in the amount of up to 36 of his wages[107].

Such a provision, on the other hand, is totally disputable. And while some authors believe that this type of compensation in the amount of up to 36 wages represents a kind of punishment for the employer in cases where, due to disturbed relations between the employer and the employee, it is not expedient to return the employee to work[108], it seems that they forget that the legislator prescribes only the maximum compensation for such damages, but not its minimum. In other words, it is absolutely possible that even in such cases the court decides to award damages in the amount of three, five, seven, nine or in any other number ranging from one to 36 of the employee's wages.

The first question that therefore arises is whether the employer should really be allowed to "get rid" of his employee in this way, even in situations where the employee's conduct is not the cause of such unhealthy relationships in the working environment? This especially so if this type of compensation is viewed as a "substitute for returning to work."[109]

Another question that arises is what is the conduct of the employee that is not suitable to qualify as grounds for dismissal, but, on the other hand, is of such a nature to disturb the relationship between the employer and the employee? This because even if a certain conduct is not determined as a conduct that represents a violation of a work duty, it can be characterized as a violation of work discipline and, therefore, as justified grounds for the dismissal, if it is such that the employer cannot be expected to enable the employee to continue with his work. What kind of conduct does not represent a violation of work discipline, but is such that it justifies the impossibility of the coexistence of these two sides in the working environment?

V. Conclusion

The development of any legal institute largely depends on the state itself, that is, on its state and social organization, culture, tradition and history. In this sense, the situation we encounter in Serbia is especially complex, bearing in mind that it is a country with a very long and turbulent history.

Today, the Labour Law makes a distinction between four different groups of reasons for termination of employment regardless of the employee's will, the grounds of which are related to:

107 Labour Law, art. 191, para 6.

108 Antić, B, „Pravne posledice nezakonitog prestanka radnog odnosa," *Radno i socijalno pravo*, n. 2/2016, p. 106.

109 Misailović, J., „Naknada štete kao posledica nezakonitog otkaza ugovora o radu u pravu Velike Britanije i Republike Srbije," *Strani pravni život*, n. 3/2018, p. 205.

1. the employee's work capacity and his conduct; 2. culpable violation of the employee's work duties; 3. non-compliance with work discipline by the employee and 4. the needs of the employer.

In this way, the employer's grounds for dismissal are essentially related to *the results of the employee's work and his professional knowledge and capacity*, as well as to *the employee's conduct* and *the needs of the employer*.

However, the grouping of reasons for dismissal was not done in a completely consistent and clear way, which is why in this paper only a partial adjustment was made in the sense that the division of reasons for dismissal was presented through an analysis that was performed in three different sections. This, due to the fact that the dismissals due to violation of work duties or a violation of work discipline are related to the employee's conduct and imply special rules for the dismissal procedure, including the possibility that in certain situations the employer may opt for another punitive measure instead of a dismissal. This is the reason why they are discussed in the same section of this article. In this way, the justified reasons for dismissal are dealt with in three sections.

The first such section refers to the reasons for dismissal, which are related to the employee's work capacity and his conduct. The grounds for dismissal that belong to this group are following: 1. the fact that the employee does not achieve the work results or does not have the necessary knowledge and skills to perform his duties; 2. the fact that the employee has been sentenced by a final judgment for a criminal offense at work or in connection to work and 3. the fact that the employee did not return to work within 15 days from the date of expiry of the period of the dormant employment relationship or an unpaid leave.

This is also the group of reasons for dismissal in which the aforementioned inconsistency and ambiguity in the grouping of dismissal reasons is perhaps the most visible, since when talking about the employee's conduct as justified grounds for the dismissal, the first association that as a rule appears is conduct that represents a violation of work duties or of work discipline. In this sense, if the legislator's idea here was to single out those conducts that do not have to constitute violation of work duties or violation of work discipline in order to be a sufficient reason for the employer to decide on the termination of the employment contract, it may not have been implemented in the best way. This, because it seems that the second and third stated grounds for dismissal are somehow artificially grafted here on the basis of the fact that the failure to achieve work results as grounds for dismissal is related to the inadequate attitude of the employee who possesses the appropriate knowledge and capacity for his work or, in other words, that such grounds for a dismissal is essentially related to his conduct. Nevertheless, the normative positioning of these two grounds for dismissal somehow does not seem natural in the norm that also refers to the justification of dismissal on grounds of the employee's work capacity.

The second such section concerns the grounds for dismissal related to a culpable violation of work duties or work discipline by the employee. In this regard, the Labour Law contains two different lists of conducts — one that concerns exemplary violations of work duties and the other that contains a list of conducts that are considered violations of work discipline in terms of this Law. Neither of these two lists is exhaustive, while the basic difference between these two grounds for dismissal is that the conduct that constitutes a violation of the work duty, if it is not done by the Labour Law, must be established as justified grounds for the termination

of the employment relationship by another appropriate act. In order for a violation of work discipline to be considered as justified grounds for dismissal, on the other hand, it is sufficient only that it represents the conduct of the employee which is such that he cannot continue working for the employer since it cannot be tolerated, in accordance with a reasonable assessment. The biggest mistake that the Serbian legislator makes in this regard is that he reduces the disciplinary procedure to a dismissal procedure.

This situation was created in 2001 when, with the then valid Labour Law, the legislator abolished the already established tradition of regulating disciplinary procedure, by sublimating the norms concerning the employee's disciplinary liability into the provisions on the termination of the employment relationship. The policy of that time, namely, called for a labour market that is flexible, and such a market (or, better said, the interest of the employers) did not go well with the employee's right to object to the dismissal decision as a disciplinary measure. The severity of this position of employees was partially alleviated in 2014, when the legislator introduced the possibility for the employer, in cases where he believes that the violation of work duties or non-compliance with work discipline is not of such a nature as to require the dismissal of the employee, or in cases where there are extenuating circumstances, that instead of dismissing the employee, he may issue one of the three measures established by law.

Such a solution still does not change the fact that the general regime of labour relations still does not contain special provisions concerning the disciplinary procedure itself, as well as that it still does not recognize the two-stage procedure on this matter (the possibility of the employee to object to the employer's decision). In other words, the disciplinary procedure is still sublimated into the dismissal procedure in which the employer decides whether to terminate the employment relationship or to choose between one of the other disciplinary sanctions prescribed by this Law.

The third such section concerns the reasons for dismissal which are related to the needs of the employer, who can decide on the dismissal of an employee: 1. if as a result of technological, economic or organizational changes, the need to perform a specific job ceases, or there is a decrease in workload, or 2. if the employee refuses to conclude an annex to the employment contract in terms of the Labour Law.

The expediency and validity of the implementation of economic, technological or organizational changes cannot be judged by the court because this falls within the autonomous and independent sphere of activity of the company. However, the court can assess whether the reasons for dismissal due to the cessation of the need for work of an employee in such cases were justified and whether the dismissal was given in the manner prescribed by the Labour Law. In other words it is up to the court to determine whether such a dismissal is unlawful. In this sense it is important to note the fact that even in situations that, in accordance with the Labour Law, do not imply the obligation to develop a solution-finding program of employee redundancy, which also contains appropriate criteria on the basis of which it will be determined which employees should be considered redundant, the employer cannot dismiss any of his employees arbitrarily. This because the appropriate criteria must be applied in such situations as well, unless a work post is being abolished and a particular employee is the sole executor.

The employer's ability to dismiss employees if justified by the needs of his business is a necessary recognition of the fact that the employment relationship is a bilateral contractual relationship in which, regardless of the inequality of its parties, the interests of both such

parties must be respected. After all, throughout its history, Serbia has already experienced the consequences of an employment stability which was almost absolute in its nature, which necessarily reflected on the productivity and motivation of employees for work.

It is indisputable, however, that the Serbian legislation has been moving towards easier dismissal in recent history. After all, the employer's ability to "get rid" of his employee in situations where the dismissal did not have grounds for it, by simply paying damages in the maximum amount of up to 36 wages of the employee also speaks of this. Again, on the other hand, practice has shown that abuses are possible even in situations that are normatively adequately regulated — which is the case with conditioning the establishment of an employment relationship with the prior giving of a statement on termination of an employment relationship of a potential employee, which is strictly prohibited by the Labour Law. In other words, as in any other country, there is always room for improvement, and the law is only as good as much as it is applied, because otherwise it is just a "dead letter on paper."

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