

## COMMENCEMENT OF CRIMINAL PROCEDURE AND ITS INFLUENCE ON EMPLOYMENT CONTRACT

### *Abstract*

*Commencement of a prosecution might cause some consequences for an employee regarding the employment contract, which raises several issues. First of all, if there is a reasonable doubt that one has committed a crime at work place or work-related crime, without being sentenced, an employer has no legal right to rescind the employment contract. That is the newest provision of novel of Labour Law. Before that, there were disagreements about whether the fact that criminal charges were submitted and the prosecution started were enough to rescind the employment contract. In the light of changes, there are serious doubts that the previous provision has jeopardised the presumption of innocence. On the other hand, ordered custody or any other violation of duty is followed by removal from work up to three months. The Labour Law also prescribes special removal for those defendants who are prosecuted for the crimes committed at work or work-related crimes until the ending of the case. Having in mind that the average duration of prosecution in Serbia takes up to several years, it is possible for an employee to suffer damages even though he/she has not been sentenced yet. The Labour Law also does not specify if an employee has the right to wage compensation in this particular case, which can jeopardize not only the employee, but also of his family.*

**Key words:** *criminal case, employment contract, employee, presumption of innocence, custody, starting a criminal case, termination of employment.*

### 1. Introductory remarks

Employment contract is a voluntary relation between employer and employee, which regulates their duties and rights. Employee obligates to follow all the legal instruction from employer and to perform tasks

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in order to get wage. These characteristics of employment contract are noticeable in most of the definitions given by authors.<sup>2</sup> It is not an easy task to harmonize the interests of employer and employee. On the one hand, there is interest for employer to use knowledge of employee, his experience and skills in order to obtain profit. On the other hand, there is an employee trying to take advantage of the more of his employment place, not only to obtain better salary, but also to learn more and get new experience. The balance cannot be easily found. Writing about dismissal, we cannot avoid the discipline duties and some other measures which can be legally imposed by employer. An employee must respect rules of behaviour, written in employment's act. The fact that the prosecution has started effects the position of the employee and can result in dismissal or removal from work.

In practice, there were concerns regarding the interpretation of Labour Law, whenever the employer is in position to dismiss the employee from work. Doubts were concerning the question in which stage of the prosecution can there be legal dismissal. Is it the time when the charges are put, or we should wait for the indictment to be written or sentence to be brought? The newest novel of Labour Law brings no doubts, but there are some new questions to be answered.

## **2. The novel of Labour Law – new normative principles**

In July 2014 was enacted the latest novel of Labour Law that regulates the consequences of committing crime at work or work-related crime by employee. The reasons for the changes are justified differently - from those who state that it is related with the European integration process of our country to those who think that this act brings better work standards for employees, and those who think the opposite - that this is the way to increase the power of the employer.

### **2.1. Duration of dismissal**

Dismissal is a specific measure that can be seen as temporary solution until employer decides about employee's responsibility or as a disciplinary measure, without wage compensation.<sup>3</sup> According to Labour Law, dismissal can last until the judgment becomes final if there is a crime at work or work-related crime. Trying to understand this provision, it seems that it was brought to save interests of employer more than of employee. While proving his innocence, the employee will stay out

<sup>2</sup> P. Jovanović, *Radno pravo*, Beograd 2003., 153.

<sup>3</sup> N. Tintić, *Radno i socijalno pravo. Knjiga prva : Radni odnosi (II)*, Zagreb 1972., 604.

of the work environment and the provision of the Labour Law is not precise about the question whether the employee has the right to wage compensation. The duration of persecution process in Serbia can last several years and dismissal will increase the work isolation of employee and certainly complicate his resocialization.

There are two types of dismissal - obligatory and voluntary. The distinction is made by the fact that in the first case the employer has to dismiss the employee without the possibility to decide and in the other case it is legally given the opportunity for employer to decide. There is a place for voluntary dismissal when there is a prosecution started against the employee for crime at work or work-related crime.<sup>4</sup> In the same article of Labour Law other reasons for voluntary dismissal are stipulated, such as violation of obligation that causes loss of greater value that is determined by the general act of employer. Other reason is specific and extended because it treats the violation of obligation that kind that there is no reasonable way to keep that employee to continue his work at the work place. The maximum duration of dismissal is determined by the Labour Law and it is limited up to three months. After that period, the employer must either terminate the employment act or give back the employee the possibility to work.

It could be put as a question why is there deadline of three months? Is there a need for it to be longer? According to the duration of the custody before the persecution of six months maximum, it is unknown the position of the employee during the time.<sup>5</sup>

There are some particularities of this institute in Montenegrin law, that proscribes the same reasons for dismissal as Serbian law, but it is extended by the provision that prescribes the sanction for the employee who is caught committing violation of the obligation.<sup>6</sup> The provision goes by prescribing a new reason for dismissal – started prosecution for crime related to corruption.

Labour Law in Croatia has no provisions about the dismissal, neither the Bosnian legal act.

### 3. Consequences of ordered custody

Ordered custody implies obligatory dismissal for employee. Practically, the employer has no freedom to take another action or decision. The employee must be removed from work from the first day that custody has started. It is important to recall the provision that provides/

<sup>4</sup> Act on Labour, *Official Gazette of Serbia*, no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, art. 165.

<sup>5</sup> M. Škulić, *Krivično procesno pravo*, Beograd 2013., 156.

<sup>6</sup> Act on Labour of Montenegro, *Official Gazette of Montenegro*, no. 49/2014, art. 130.

stipulates wage compensation for the employee but there is a difference when employee raises a family. In that case the wage compensation is increased up to 1/3 of the salary that he/she earned compared to the wage compensation of 1/4 that is provided for those employees that does not support the family. The consequences of the ordered custody maintain factual disability for worker to be at his work place and to do tasks. If it continues, it could jeopardise the employer's production process.<sup>7</sup> Ordered custody does not always mean the reason for termination of contract by law and it could not be understood as unjustified absents from work by the employee. In those cases comes the dismissal. But there is a considerable number of employers who are not informed of ordered custody which brings us to the determination of employment contract after five days because of the unexcused absence of employee. The Supreme Court of Serbia passed a ruling that stands for the fact that custody can be ordered only by state authority and employee has no influence on that decision. In accordance with that, employee's absence during the custody cannot be seen as unjustified absence. Therefore, the state authority that ordered custody is the one to inform the employer of the ordered custody and employee must not suffer any consequences if there is the omission of the authority.<sup>8</sup> Speaking of which, that provision is maintained in Montenegrin labour law and provides the obligation for the authority that ordered custody to inform the employer of that fact within three days.

The duration of custody is in direct casual connection with whether the employee is going to be dismissed from work or if there is a fact of determination of employment contract. If the employee must be absent from work more than six months there is determination of employment contract by force of law.

#### **4. Consequences of employee's absence due to serving a prison sentence, security measures and corrective measures**

Employment contract must be terminated by force of law if the absence of employee during the prison sentence is going to be longer than six months and relevant moment is the day of entry to the prison/the day of incarceration.<sup>9</sup> Social justification for this kind of provision is the need for protection not only for the workplace but for the other workers.<sup>10</sup> It is important to underline that there will not be termination of employment

<sup>7</sup> I. Crnić, *Otkaz ugovora o radu*, Zagreb 2013., 82.

<sup>8</sup> The judgment of the Supreme Court of Serbia, Rev. 2830/93 from August 24, 1993., available on: [www.jio.org.rs](http://www.jio.org.rs), 31. 05. 2014.

<sup>9</sup> B. Lubarda, *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu*, Beograd 2013, 729.

<sup>10</sup> R. Kukavica, *Pravne posledice krivične osude*, doctoral thesis (unpublished), Faculty of Law, University of Belgrade, 1965., 218.

contract if the employee is sentenced to prison for more than six months, but he/she will not be absent the whole time because he/she spent some time in custody. The reasons are given in statute of criminal law that proscribes that every deprivation of liberty related to the crime must be calculated in sentence of imprisonment. This question was disputable until the Supreme Court of Serbia ruled that the relevant moment is the day when employee enters into a imprisonment and six months of absence should be counted from that moment.<sup>11</sup> The ruling specifies: „When the absence is longer continuously than six months, the employment contract must be terminated regardless the fact that employee is serving two sentences that individually do not last longer than six months.“<sup>12</sup>

On the other hand, the question of suspended sentence is interesting because it does not bring any effects on employment contract until it has been revoked by court.<sup>13</sup>

Security measures can also bring to the termination of the employment contract. The Labour Law proscribes that duration of prison sentence, security measures and corrective measures up to six months leads to suspension of employment. On the other hand, if employee must be absent longer than six months because of the upkeep of the security measures, the termination of the contract is unavoidable. It is helpful to notice that in cases of security measures the employee's contract is determined by the day the decision becomes final. Therefore, the institutionalization of the employee will not bring to the termination of the contract until the decision that employee is sentenced to security measure becomes final. The same rule is applicable concerning corrective measures.<sup>14</sup>

Corrective measure is the name for specific security measures that are applied to minors, with the same purpose as security measure.

Ban of performing certain activities is one of the most important security measures, related with performing of work by the employee. It is ban that implies prohibition of performing certain calls, duties or activities that are related to disposal of assets, management or carrying other's assets.<sup>15</sup> This ban is conditioned by inability of employer to enable for employee other assignments. There are some alternatives conditions: employee must be the one who abused his work place, performing his duties or there is a threat that crime will be repeated. One of the authors stands for that one of the conditions must be obligatory and that refers to the threat of repeating the crime by performing duties and the other

<sup>11</sup> S. Andrejević, „Praksa Vrhovnog suda Srbije u sporovima iz radnih odnosa”, *Radno i socijalno pravo* 1/2008, 137.

<sup>12</sup> *Ibid.*

<sup>13</sup> A. Baltić, M. Despotović, *Osnovi radnog prava Jugoslavije*, Beograd 1974., 295.

<sup>14</sup> Z. Stojanović, *Krivično pravo-opšti deo*, Beograd 2011., 201.

<sup>15</sup> Z. Stojanović, *Komentar Krivičnog zakona SRJ*, Beograd 2003., 307.

can be voluntary.<sup>16</sup> This is justified by the fact that all the crimes that do not involve abuse would be excluded. Judge in his decision specifies duties, activities, calls that are covered by the ban. The main reason to sentence employee to this ban is danger of repeating the crime at work environment and duration of the ban is limited up to ten years. It is certain that legislator recognized the importance of this measure, demerged it and prescribed different conditions. Maybe this ban is seen as mode to prevent the recidivism in work environment.

### **5. Determination of employment contract due to crime at work or work-related**

The latest Labour Law brings new, changed provision that implies the right of employer to terminate employment contract of an employee when the final sentence for crime at work or work-related crime is passed. This provision is needed in Serbian law because the previous one that implied that employer can terminate employment act if employee commits crime at work or work-related crime, was seemingly clear. The question is – is the employer allowed to qualify actions of employee as crime without final sentence? In theory and in practice, there hasn't been plain explanation. Ministry of Labour and Social Affairs stands for the possibility/on the ground that for employer to terminate employment act when there are criminal charges put against the employee or there is request for investigation.<sup>17</sup> Some authors have the same opinion but with different explanation. The Supreme Court of Serbia passed a significant ruling, stating that only the final sentence may be the reason for termination of employment contract for work-related crime committed by worker.<sup>18</sup>

Two opinions are opposed we can not stand for one of them without an explanation. If we stand for the opinion/take the standpoint of Supreme Court of Serbia, there is a possibility that employee stays in work environment with criminal act until final sentence is passed. If support the stance of Ministry, it might jeopardise the presumption of innocence if employer has done wrong qualification of employee's act and terminated the employment contract.

Some of the authors argue that this provision must be interpreted together with provisions of suspension. As said, the duration of suspension is limited up to three months and in Serbia is not likely for criminal process to be ended in this time. So, the reason for termination must be

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<sup>16</sup> *Ibid.*, 119.

<sup>17</sup> P. Trifunović, "Krivično delo kao otkazni razlog", *Pravni informer* 2/2008, 60.

<sup>18</sup> The judgment of the Supreme Court of Serbia, Rev.II 1758/05 of 08. 11. 2006., *Ibid.*, 63.

related to the time the crime has been committed.<sup>19</sup> Some authors do not support the opinion of Supreme Court that reason for determination should be followed by final sentence, referring to those crimes, which are not prosecuted by public attorney. Waiting for the victim to start a prosecution may be in vain if he doesn't decide to do so and the provision applies to all crimes.<sup>20</sup>

The opinion of Supreme Court of Serbia is different and underlines that we cannot stand only for execution of crime without final sentence. Putting charges or request for investigation does not mean that there is a crime at work or work-related crime committed.

Even though the opinion of Ministry is not source of law, nor is the opinion of Supreme Court of Serbia, we chose the attitude of court. The opinion of Supreme Court is not formally the source of law but in practice has the significance for harmonization of practices. The act of crime is just one of the elements needed for existence of crime. At the moment of putting charges there is only one element, which is not enough to qualify someone's act as crime. But the stronger reason for deferring the opinion of Supreme Court is the presumption of innocence. The presumption of innocence is the main right according to European Convention on Human rights, which was ratified by Serbian legislator.<sup>21</sup> Even though this right if referring to accused, it can be expanded to employees in labour disputes, which is confirmed by the practice of European Court of Human Rights.<sup>22</sup> The Constitution of the Republic of Serbia provides the same principle: one is presumed innocent until his guilt is proved by final sentence by court.<sup>23</sup> It is the crucial principle in every prosecution. Qualification of employee's action a crime at work or work-related crime by employer without a final sentence could jeopardise the presumption of innocence.<sup>24</sup> One life event can be differently qualified from criminal or labour point of view and in order to keep legal security it is important to do the qualification only by court.

There is also a doubt if the civil court can qualify employee's action as crime at work or work-related crime during the decision of preliminary issue, as right or legal relationship that is important to be solved in order to pass a ruling. One of the authors does not support the possibility for civil court to decide for preliminary issue and suggests that courts stop the procedure and wait for the decision of criminal court.<sup>25</sup>

<sup>19</sup> Z.Ivošević, M.Ivošević, *Komentar Zakona o radu*, Beograd 2007, 368.

<sup>20</sup> *Ibid.*

<sup>21</sup> European Convention on Human Rights - *Official Gazette of Serbia*, no.9/2013, 5/2005 и 7/2005), art. 6.

<sup>22</sup> P. Trifunović, 63.

<sup>23</sup> Constitution of the Republic Serbia - *Official Gazette of Serbia*, no. 48/94 и 11/98, art. 34.

<sup>24</sup> P. Trifunović, 63.

<sup>25</sup> R. Keča, *Gradjansko procesno pravo – Priručnik za pravosudni ispit*, Beograd 2010., 72.



Other authors think that there is no equality between the crime and the act of crime.<sup>26</sup> In compliance to that, there is no preliminary issue and there is no need for stopping the procedure. There is only a need to determine if there is a final sentence. After all the above/considering everything above mentioned, we should maintain the Supreme Court's judgments, as the following provision in Labour Law.

This opinion is shared. One of the authors stands that the presumption of innocence must be respected either by employer as by employee. By starting a prosecution we cannot ignore the presumption of innocence. There is only a reasonable doubt that one has committed a crime when the charges are put and that does not mean that one is going to be accused.<sup>27</sup> Only the court must be called to give the final word about the innocence of an employee, not employer<sup>28</sup>.

It is interesting to notice that Montenegrin law does not have this dismissal reason, and committing crime at work and work-related crime can only be the reason for suspension from work.<sup>29</sup>

Provision in Bosnia is unique because the employer can dismiss employee „if employee has been found guilty for a crime and sentenced to prison at least for three months.“<sup>30</sup>

Croatian law does not provide the possibility for employer to terminate employee contract because of the crime at work or work-related crime and only the facts such as technological surplus, work disability and violation of labour obligation can cause the termination.<sup>31</sup> But it is also interesting to point out the provision of the extraordinary termination when there is the fact of „particular serious violation“ by employee“ while the employment cannot be continued.

## 6. Concluding remarks

Even though the criminal law distinguishes to labour law, there are situations when they are interconnected. As the fact the decisions passed in criminal procedures effects employment, there is a need to harmonize their regulation. In that way, the latest novel of Labour Law can be considered as a step forward. The important change surely presents one that provides that only the final sentence can be the reason for termination of contract. In comparison with the earlier provisions,

<sup>26</sup> P. Trifunović, 63.

<sup>27</sup> B. Šunderić, „Kažnjavanje pre osude“, *Radno i socijalno pravo* 1-6/2004, 42.

<sup>28</sup> *Ibid.*

<sup>29</sup> Act on Labour of Montenegro, *Official Gazette of Montenegro*, no.49/2008, 26/2009, 59/2011, 66/2012, art.143

<sup>30</sup> Act on Labour of Bosnia, *Official Gazette of Bosnia*, no.43/99, 32/00, 29/03), art.86

<sup>31</sup> Act on Labour of Croatia *Official Gazette of Croatia*, no.149/09, 61/11, art. 107



this one is considered clear and precise and takes into consideration the presumption of innocence. Employment contract cannot be rescinded without affirming all the elements for his responsibility, which is the way of protection for employee as a subordinated party of the contract.

As stated, starting a prosecution can result by some consequences to employment. The legislature shows special concern by the possibility for employee to repeat an offence in work environment and security measure has the aim to prevent worker from taking some actions, duties or call. If employee must be absent longer than six months because of imprisonment, security measures or corrective measures, it will represent a reason for termination of employment contract. The connexion of criminal and labour law is not negligible and in order for legal system to function properly, some institutes must be compatible.

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## **ПОСЛЕДИЦЕ ПОКРЕТАЊА КРИВИЧНОГ ПОСТУПКА НА РАДНИ ОДНОС ЗАПОСЛЕНОГ**

### Резиме

Извршено кривично дело на раду и у вези са радом може узроковати удаљење са рада, али и отказ од стране послодавца. У складу са изменама Закона о раду од јула 2014. године, једино правносажна пресуда суда донета у кривичном поступку може бити основ престанка радног односа. У овом раду пошли смо од хипотезе да нова одредба, у односу на претходну којом је било предвиђено да послодавац може отказати уговор о раду запосленом, ако изврши кривично дело на раду или у вези са радом, отклања недоумице које су, с тим у вези, постојале у пракси и штити запосленог, као економски слабију и правно подређену страну у радном односу. Новина коју Закон доноси је и та да удаљење запосленог са рада може трајати до правноснажног окончања поступка када је кривично дело на раду или у вези са радом посреди, због чега је у раду размотрен и домашјај овог решења, посебно у светлу стварања услова за

делотворну примену претпоставке невиности. Изрицање притвора, мере безбедности, заштитне мере, васпитне мере и казне затвора, такође, може утицати на радни однос. Како се поља кривичног и радног права често додирују, настојаћемо да, користећи нормативни метод и друге методе правних и друштвених наука, укажемо на добре и лоше стране нових одредби Закона о раду, али и да укажемо на празнине које би, зарад остваривања правде и правне сигурности, морале бити попуњене.

**Кључне речи:** кривични поступак, радни однос, претпоставка невиности, притвор, започињање кривичног гоњења, одсуство са рада због издржавања кривичне санкције, престанак радног односа.