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TERMINATING AN EMPLOYMENT CONTRACT AT THE EMPLOYER'S WILL: DOES EXPENSIVE AND SIMPLE MEAN SAFE? LITHUANIAN MODEL

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ABSTRACT

This paper aims to reveal the nature, specifics and limits of application of one of the legal grounds for termination of employment relationships established in the labour law of the Republic of Lithuania – termination of the employment contract at the employer's will. The analysis tests the hypothesis that the goal of increasing flexibility by simplifying the termination of employment relations, which was set at the initiation of the reform of the legal regulation, was not achieved. The presumption is put forward that this ground for terminating the employment contract is neither new nor safely applicable, and the benefits of relatively simplified procedural requirements do not outweigh increased financial burden. To reveal the impact of statutory amendments in question on the regulation of termination of employment relations in Lithuania, the historical background and the impact of obligations established in international documents on it are assessed, key indicators (such as legal grounds, procedural requirements, burden of proof and order of its distribution, etc.) are identified, and the relevant case law is examined.

KEYWORDS

Employment contract, employment relationship, employer's will, termination.

INTRODUCTION

On the 1st of July, 2017, a new edition of the Labour Code of the Republic of Lithuania[1] (hereinafter referred to as "Labour Code") came into force. One of the main goals of the reform was greater flexibility in the relationship between the employee and the employer. It was emphasized that due to very low regulatory weight of collective labour relations and the incapacity of employees to individually agree on better working conditions, statutory regulation of labour relations remains extremely strict and detailed.[2] Excessive statutory restraints, including the regulation of termination of employment contracts, complicates the adaptation to changing market conditions, therefore reducing the attraction of foreign investors and discouraging employers from creating new jobs.[3] Among the novelties related to the right of the employer to initiate the termination of the employment relations is termination of the employment contract at the employer's will (Art. 59 of the Labour Code). This was introduced in order to avoid legal regulation with an exhaustive list of grounds for termination of employment relationships directly established by law. The provision does not specify under what circumstances it is applicable, only limitations are set in relation to subjects and grounds.

In order to assess the real meaning of the legal norm, its place in the legal system, and its influence in creating a balance between the rights and obligations of the parties to the employment relationship, it is important to analyze under what circumstances the regulation is applicable, whether the employer must name the cause for the termination of employment relationship, and if so, what the standard of proof of the existence of such a cause is. Thus, the paper emphasizes the fundamental principles of termination of labour relations, determined by their contractual nature on the one hand and protection of public interest oriented statutory restrictions on the other. The analysis assesses the clause of termination of employment contract at the employer's will from the systematic point of view, reveals the impact of such clause on the development of legal regulation, and relates the specifics of linguistic constructions chosen on the interpretation of limits and consequences of its application.

The paper offers the hypothesis that the goal of increasing flexibility by simplifying the termination of employment relations, which was set at the initiation of the reform of legal regulation, was not achieved. The presumption is that this ground for terminating the employment contract is neither new nor safely applicable, and the benefits of relatively simplified procedural requirements do not outweigh increased financial burden.

The paper is structured as follows: the first section introduces historical evolution of legal regulation, the challenges of the post-soviet era and the impact of codification; the second section aims to reveal linguistic solutions chosen in the light of limitations on unilateral waiver of contractual obligations, mandatory indication of the reason for termination of the employment contract as well as criteria for validity of the reason provided; procedural requirements as well as subject-related limitations, their impact on the determination of the standard of proof and correlation with the goals of legal

1 *Labour Code of the Republic of Lithuania*, TAR (2016, no. 23709).

2 Ministry of Social Security and Labour of the Republic of Lithuania, "Explanatory Notes to the Draft Law on the Approval, Enforcement and Implementation of the Labour Code of the Republic of Lithuania (18 May, 2015, no. 15-5469)," accessed 24 March, 2023 // https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/01925b40fd7411e4a0edd66091ee4d78?jfwid=kbatvbih7.

3 Ministry of Social Security and Labour of the Republic of Lithuania, "Explanatory Notes to the Draft Law on the Approval, Enforcement and Implementation of the Labour Code of the Republic of Lithuania (8 June 2015, no. 15-5469(3)," (accessed 24 March, 2023) // https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e4c9ac900dfc11e5b0d3e1beb7dd5516?positionInSearchResults=56&searchModelUUID=72bb9051-ab6c-47e1-8233-c0f18221c962.

regulation are assessed in the third section of the paper. The paper relies on historical and systematic analysis, as well as linguistic and teleological methods of scientific inquiry.

1. HISTORICAL BACKGROUND

This section provides historical context, revealing the evolution of legal regulation of termination of employment relations by the employer, the impact of the previous legal regulation on the interpretation, and application of current legal regime.

1.1. The challenges of the post-soviet era

Although the termination of employment contract at the employer's will has been incorporated into the Labour Code only since the 1st of July, 2017, this regulation is not new to the Lithuanian legal system. The Law on Employment Contract of the Republic of Lithuania[4] (hereinafter referred to as "Law on Employment Contract"), which was in force from 1st of January, 1992[5] until the codification of labour law in 2003[6], contained a detailed list of specific grounds for termination of employment contract at the employer's initiative (Art. 29 of the Law on Employment Contract), at the same time establishing the right of employer to terminate the employment contract at its own will on the grounds, not explicitly listed in the statute (Art. 30 of the Law on Employment Contract). Among the main features of the termination of the employment contract at the employer's will were the limitation of application to the private sector employers[7], restriction of application to cases with existence of important, non-discriminatory ground for termination, as well as significant rates of severance pay.[8]

The sparse examples of interpretation and application of the legal regulation in question provided in legal doctrine and case law reveals its specific character when compared to the American model of employment-at-will. The original American model[9] is based on the general assumption (default rule) that the relationship between the employee and the employer do not create formal contractual obligations; self-regulatory principles of the free market are applicable, enabling the employer to terminate the employment relationship without any formal procedures on any ground, with exemptions, usually based on public order, antidiscrimination regulation or agreement between the parties to labour relations.[10] On the contrary, the termination of employment contract at the employer's will, as additional statutory provision, was chosen to

4 *Law on Employment Contract of the Republic of Lithuania*, Official Gazette (1991, no. 246-0).

5 Replacing the topic-related parts of the Code of Labour Laws of the Republic of Lithuania (*Code of Labour Laws of the Republic of Lithuania*, Official Gazette (1972, no. 18-137), the Soviet-era law, the validity of which was extended even after the restoration of the independence in 1990.

6 *Labour Code of the Republic of Lithuania*, Official Gazette (2002, no. 64-2569).

7 State-owned companies were eliminated from the list of subjects who are allowed to apply the ground in question in the original version of the Law on Employment Contract; later through the amendments of legal regulation this list was extended to include more public sector employers (state and municipalities owned companies, institutions and organizations).

8 Depending on the employee's length of service, these rates amounted to 3-18 average monthly wages in the original version of the Law on Employment Contract, were increased to 6-36 average monthly wages in 1993 and reduced to 4-12 average monthly wages in 1996. In any case, they were much higher than respective 1-6 average monthly wages severance pay rates due in case of termination of employment contract at the employer's initiative under Art. 29 of the Law on Employment Contract.

9 Deborah A. Ballam, "Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine," *Berkeley Journal of Employment and Labor Law* 17, 1 (1996): 91–130; Susan L. Catler, "The Case Against Proposals to Eliminate the Employment At Will Rule," *Industrial Relations Law Journal* 5, 4 (1983): 471–522; Douglas E. Ray and Calvin W. Sharpe and Robert N. Strassfeld, *Understanding labor law* (Danvers, MA: Matthew Bender & Company Incorporated, 1999), 43.

10 Charles J. Muhl, "The employment-at-will doctrine: Three major exceptions," *Monthly Labor Review* 124, 1 (2001): 3–11.

supplement the exhaustive statutory list with important grounds not explicitly provided in the law. The idea of not linking the dismissal of an employee at the employer's will with the existence of just cause, establishing the right to dismiss an unwanted employee without giving reasons, contemplated while drafting the Law on Employment Contract, was not implemented, maintaining the principle of casuistry (a detailed list of grounds for termination of employment) determined by the tradition of socialist law.[11]

The significant influence of the legislative model chosen in the field of employment relationships after the restoration of independence in 1990 was evident. As the building of new independent state was based on the legalization of private property and freedom of business activities, the role of the state as an employer declined. It was necessary to move from a centralized all-encompassing imperative to more liberal contractual regulation. However, instead of codification of labour relations to correspond to the new reality, the path of gradual modification of the existing legal basis was chosen, maintaining a high level of formal protection of employee's rights[12] and at the same time lacking fundamental solutions focused on greater flexibility of labour relations.

Such regulation resulted not only in the employer's obligation to name the reason for the termination of employment contract, the existence and importance of which must be verified by the court in the event of a dispute, but also in the specific rule of allocation of the burden of proof, according to which not the employee who initiates a dispute must prove the fact of unjust dismissal, but the employer must justify the decision made.[13] For instance, the shortage of production in the warehouse accompanied by the lack of evidence that would allow to apply disciplinary liability,[14] as well as psychological incompatibility with colleagues, unethical statements and behavior that creates tension between employees and disrupts work,[15] were referred to in the case law of the Supreme Court as circumstances that justify the termination of employment contract at the employer's will.

1.2. The impact of codification

As mentioned above, the Law on Employment Contract was abolished after the Labour Code entered into force on the 1th of January, 2003.[16] The new law did not provide for the termination of employment contract at the employer's will. The change was based on the argument that no other state has such dual regulation when the employment contract can be terminated at the employer's initiative with or without the employee's fault and at the employer's will.[17] It was implemented not only by abandoning the termination of employment contract at the employer's will, but also by expanding the application of termination of employment contract at the employer's initiative to include dismissals for important reasons, which can only be recognized as professional

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11 Viktoras Tiažkijus and Ramūnas Petravičius and Gintautas Bužinskas, *Darbo teisė* (*Labour law*) (Vilnius: Justitia, 1999), 70-71, 97; Henrikas Davidavičius, *Darbo įstatymų komentaras, Straipsnių rinkinys (Antras papildytas leidimas)* (*Commentary on Labour Laws, Collection of Articles (Second Supplemented Edition)* (Kaunas: AB spaustuvė "Spindulys," 2001), 77.

12 Tomas Davulis, *Darbo teisė: Europos Sąjunga ir Lietuva* (*Labour law: European Union and Lithuania*) (Vilnius: Teisinės informacijos centras, 2004), 55–58.

13 S. Ž., G. J. v AB "Hansa-LTB," Supreme Court of the Republic of Lithuania (2003, no. 3K-3-712); R. Š. v AB (data not published), Supreme Court of the Republic of Lithuania (2003, no. 3K-3-1610); R. S. v AB (data not published), Supreme Court of the Republic of Lithuania (2003, no. 3K-3-281).

14 M. K. v AB (data not published), Supreme Court of the Republic of Lithuania (2002, no. 3K-3-1135).

15 R. J. v AB "Klaipėdos nafta," Supreme Court of the Republic of Lithuania (2001, no. 3K-3-1204).

16 *Labour Code of the Republic of Lithuania*, *supra* note 6.

17 Ministry of Social Security and Labour of the Republic of Lithuania, "Explanatory Notes to the Draft Labour Code of the Republic of Lithuania (10 December 2001, no. IXP-1268)," (accessed 27 April, 2023) // https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.156024?jfwid=wny8rorq7.

circumstances that are related to the employee's qualifications, professional abilities, and behavior at work.[18]

European integration trends are clearly observed in such legal regulation. Shortly after the restoration of independence, the desire to focus on the prospect of European Union membership and the incorporation of *Acquis* into the national system was declared.[19] This led to the harmonization of the Labour Code, which entered into force before the accession to the European Union, with the law of the European Union, including the right to protection against unjustified dismissal, established in Article 30 of the Charter of Fundamental Rights of the European Union.[20] In addition, after becoming a member of the Council of Europe in 1993, Lithuania ratified the European Social Charter (Revised) in 2001,[21] on the basis of which the definition of the grounds for terminating the employment contract at the employer's initiative was formulated.[22]

In its scarce case law of application of the rule in question[23] the Supreme Court of the Republic Lithuania emphasized that the circumstances relating to the employee's behavior at work are understood as subjective personal characteristics, objectively manifested by inappropriate behavior, insufficient to initiate disciplinary action. Examples of this include: unreasonable conflicts with other employees, behavior that creates tension, psychological discomfort, demonstration of views incompatible with position occupied or moral norms of society, ignoring professional ethics, etc. Such employee-related circumstances may become an important reason to terminate employment contract when, due to the existence of such circumstances, the employee is unsuitable for the work assigned. In such cases, suitability should be understood as including the impact of his or her behavior on the working conditions of other employees, working capacity and performance, prestige of the company.[24]

In this context the incorporation of termination of employment contract at the employer's will in the new edition of the Labour Code that entered into force since the 1st of July, 2017, can be seen either as an attempt to re-implement old model that has historically been rated as unsuccessful, or as a focus on a greater flexibility of legal regulation that was emphasized in the explanatory notes of the draft Labour Code[25] oriented measure.

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18 *Labour Code of the Republic of Lithuania*, *supra* note 6, Art. 129.

19 *Statement on the Principles Of Lithuania's International Policy,* Parliament of the Republic of Lithuania, Official Gazette (1992, no. 35-1061); *Regarding the implementation of the National Acquis Adoption Program*, Resolution of Parliament of the Republic of Lithuania, Official Gazette (1998, no. 28-733).

20 *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union (2012, no. C 326/391), Art. 30.

21 *European Social Charter (Revised)*, Official Gazette (2001, no. 49-1704).

22 Article 24 of the Charter establishes the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service (*Ibid.*, Art. 24).

23 The vast majority of labour disputes regarding the application of Article 129 of the Labour Code were related to dismissals on employer-related economic, technological grounds or due to the restructuring of the workplace; there were only a few cases were employee-related grounds (qualification, professional skills or conduct) were analyzed.

24 E. M. v Barclays Technology Centre Limited, Supreme Court of the Republic of Lithuania (2015, no. 3K-3-48).

25 The document emphasizes that the need for changes is confirmed by the fact that dismissing an employee without a fault is too complicated and too expensive, the process takes too long and in certain cases the dismissal of employees belonging to protected groups is almost impossible; no other country has such a complex and detailed regulation of the termination of the employment contract at the employer's initiative, the laws of other countries indicate only the possible grounds for such dismissal (the employee's abilities, behavior and economic reasons), without describing each case in detail (Ministry of Social Security and Labour of the Republic of Lithuania, "Explanatory Notes to the Draft Law on the Approval, Enforcement and Implementation of the Labour Code of the Republic of Lithuania (28 May 2015, no. 15-5469(2)," (accessed 24 March, 2023) // https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/71940400054b11e5a0edd66091ee4d78?positionInSearchResults=57&searchModelUUID=72bb9051-ab6c-47e1-8233-c0f18221c962.

2. TEXT VERSUS CONTEXT: DO LINGUISTIC SOLUTIONS REVEAL THE SCOPE OF APPLICATION OF LEGAL REGULATION?

After discussing the historical development of the legal regulation in the first section of the paper, the second section aims to reveal the wording chosen by the legislator and its influence on the scope of employer's discretion to choose the ground in question. Several linguistic features should be mentioned here. Firstly, the concept of termination of employment contract at the employer's will is used. Secondly, the law does not directly specify reasons for dismissal at the employer's will.[26] Thirdly, there is no explicitly imposed obligation for the employer to justify the decision made with an important ground.[27]

2.1. Limitations on unilateral waiver of contractual obligations

The contractual nature of the legal relationship and *pacta sunt servanda* principle are hardly compatible with a subjective unilateral decision to waive contractual obligations, which would presuppose actions based exclusively on the expression of one's own will. In the employment relationship, the right of an employee to terminate the employment contract unilaterally without a reason is a part of universally recognized right to freely choose employment and principle of prohibition of forced or compulsory labour,[28] incorporated into Lithuanian legal system.[29] However, the absolute right of an employer to withdraw from contractual obligations would be difficult to justify having in mind the social significance of employment relationship and the employee's financial vulnerability associated with the termination of the employment contract.[30]

Even the aforementioned American employment-at-will model is fundamentally based on the concept that employment itself is not about granting job indefinitely rather than on right of unilateral, ungrounded withdrawal from obligations assumed. In

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[26] Only a reference is made that there has to be a reason that is not specified in Article 57 Section 1 regulating the termination of employment relationship at the employer's initiative (Article 59 Section 1 of the Labour Code).

[27] Unlawful grounds listed include participation in a case against an employer accused of violations of law or due to application to administrative bodies regarding discrimination based on gender, sexual orientation, race, nationality, language, origin, citizenship and social status, faith, marital and family status, intention to have a child/children, convictions or views, political affiliation, age, or other discriminative grounds (Article 59 Section 2 of the Labour Code).

[28] Enshrined in such international documents as Universal Declaration of Human rights (United Nations, "Universal Declaration of Human rights (1948)," Art. 23 Sec. 1 (accessed 27 April, 2023) // https://www.un.org/en/about-us/universal-declaration-of-human-rights); International Covenant on Economic, Social and Cultural Rights (United Nations, "International Covenant on Economic, Social and Cultural Rights (1966)," Art. 6 Sec. 1 (accessed 27 April, 2023) // https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights); Charter of Fundamental Rights of the European Union (*Charter of Fundamental Rights of the European Union, supra* note 20, Art. 15), European Social Charter (Revised) (*European Social Charter (Revised)*, *supra* note 21, Art. 1), Convention for Protection of Human Rights and Fundamental Freedoms (Council of Europe, "Convention for Protection of Human Rights and Fundamental Freedoms (1950)," Art. 4 (accessed 27 April, 2023) // https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.50265?jfwid=rivwzvp), ILO Abolition of Forced Labour Convention (*Abolition of Forced Labour Convention,* Information System on International Labour Standards (1957, no. 105)) and others.

[29] Article 48 of the Constitution of the Republic of Lithuania (*Constitution of the Republic of Lithuania,* Official Gazette (1992, no. 220-0), Art. 48), Article 2 Section 1 and Article 55 of the Labour Code.

[30] The vulnerability of employees, especially in times of economic recession, is emphasized in legal doctrine, highlighting the importance of a balance between flexibility and security guarantees in employment relationship (*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, Official Journal of the European Union (2007, no. COM 359); *Council Decision on guidelines for the employment policies of the Member States for 2015,* Official Journal of the European Union (2015, no. 1848); Richard Smith et al., "Evaluation of flexicurity (2007–2010): final report," 135 (accessed 27 April, 2023) // https://ec.europa.eu/social/main.jsp?langId=en&catId=102; Jason Heyes, "Flexicurity, employment protection and the jobs crisis," *Work, Employment & Society* 25, 4 (2011): 642–657).

other words, only evidence that the parties have agreed on the term of employment or the employer clearly (directly in an employment contract or other internal document,[31] by implied-in-fact promise, through behavior, personnel policies or practices[32]) assumed the obligation for some form of continued employment, refutes the default rule of dismissal without cause.[33]

However, the International Labour Organization formulates the fundamental principle of justification as the cornerstone of the Termination of Employment Convention No. 158,[34] interpreting its provisions as not only imposing obligation on employers to provide justification for the dismissal, but also requiring not to terminate employment unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.[35] Although Lithuania has not ratified this Convention, analogous international obligations arise out of being party to such aforementioned European level instruments as Charter of Fundamental Rights of the European Union[36] and European Social Charter (revised).[37]

Comparatively, Lithuanian labour law provides for two cases when the termination of employment is agreed upon at the time of conclusion of the contract – the probationary period[38] and the fixed-term employment contract.[39] In such cases the dismissal of an employee cannot be considered a unilateral employer's decision to withdraw from contractual obligations. They simply expire. It is important to note that according to the case law, dismissing an employee during the probationary period the employer must name the circumstances confirming that the employee failed, i.e., that the employee, due to his or her professional and/or personal characteristics, is unable to do the work, the performance of which was agreed upon when concluding the contract. Although the prerogative to decide whether the employee is suitable for the work assigned belongs to the employer, the duty of the court when examining such cases is to check whether the employer really had sufficient grounds for dismissal.[40]

For fixed-term employment contracts, there is an increasing flexibility of legal regulation justified by the contractual nature of termination. The provision that a fixed-term contract cannot be concluded for work of a permanent nature[41] (restricting application to such situations as implementation of a project or replacement of a temporarily absent employee) was replaced by a new regulation. According to it a certain proportion of employment contracts concluded by the employer (up to 20 %) may be fixed-term, even if the work is of a permanent nature.[42] With such amendments the legislator basically only expanded the boundaries on the conditions to agree upon when concluding

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31 Woolley v Hoffmann-La Roche, Inc., Supreme court of New Jersey (1985, no. 491 A.2d 1257).
32 Pugh v. See 's Candies, Inc., Court of Appeals of California (1988, no. 203 Cal.App.3d 743).
33 Douglas E. Ray and Calvin W. Sharpe and Robert N. Strassfeld, *supra* note 9, 43–69.
34 *Termination of Employment Convention*, Information System on International Labour Standards (1982, no. 158).
35 ILO, "Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment," (accessed 26 April, 2023) // https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_171404.pdf.
36 *Charter of Fundamental Rights of the European Union, supra* note 20.
37 *European Social Charter (Revised)*, *supra* note 21.
38 *Labour Code of the Republic of Lithuania*, *supra* note 1, Art. 36.
39 *Ibid.*, Art. 67; it also applies to such labour contracts of temporary nature like project work (Art. 89 of the Labour Code) as well as some forms of seasonal and temporary agency work (Art. 72, 100 of the Labour Code).
40 D. Ž. v UAB "Distancija," Supreme Court of the Republic of Lithuania (2015, no. 3K-3-632); E. J. v SIA "Auto Kada," Supreme Court of the Republic of Lithuania (2016, no. 3K-3-484-701).
41 *Labour Code of the Republic of Lithuania*, *supra* note 6, Art. 109 Sec. 2.
42 *Labour Code of the Republic of Lithuania*, *supra* note 1, Art. 67 Sec. 4.

the contract, but did not give the employer the right to unilaterally withdraw from contractual obligations without cause.

The only example of a unilateral decision by the employer to terminate an employment contract without specifying the reason provided in law is the possibility to remove the head of a company from his or her position, established in Article 104 of the Labour Code, which is based on the interpretation that the relationship with the head of the company goes beyond the scope of the employment relationship, encompassing such principles of civil law as fiduciary duty. In this case the concept of removal (instead of dismissal) is used in the Labour Code, further highlighting the exclusive nature of the legal instrument used.

The above-discussed specifics of legal regulation, when evaluated systematically, lead to the conclusion that the mere indication of the concept of the employer's will in the wording of the legal norm cannot be interpreted as giving the employer the right to terminate employment relationship without a reason or to base the decision on any reason.

2.2. The "valid" reasons

The conclusion that even when terminating an employment contract at its own will, the employer must state the reason for decision made, is strengthened by the wording chosen by the legislator, naming the reasons for which the employment contract cannot be terminated, and, most importantly, statutory obligation of the employer to give the notice to the employee that must indicate the reason for termination of the employment contract and the legal provision in which the basis for the termination of the employment contract is specified.[43] Such regulation was interpreted in the case law as preventing the employer from termination of employment contract based on a different reason than that specified in the notice. If the reason for terminating the employment contract specified in the notice has disappeared during the notice period, in order to terminate the employment contract for another reason, the employer must give the notice to the employee again.[44]

It is important to emphasize that the chosen regulation differs not only from the American employment-at-will model, but also from models used in European countries that declare the inclusion of certain elements of the termination of the employment contract at the employer's will into their labour law systems (e.g. Austria, Belgium, Greece, Switzerland, etc.).[45] While some scholars admit the establishment of employer's obligations that would ensure the continuity of the employee's participation in the labour market (by setting a notice period; the so-called *at will with notice* doctrine) and/or income stability (through the severance pay; the *pay or play* principle), the absence of the employer's obligation to indicate the reason for the termination of the employment relationship remains an essential element of the American model.[46]

Although a notice period must be observed to grant the employee the time to look for a new job under Austrian law, all employment relationships of indefinite duration

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[43] *Ibid.*, Art. 64 Sec. 1.

[44] UAB "Marijampolės butų ūkis" v D. U., Supreme Court of the Republic of Lithuania (2020, no. e3K-3-199-701).

[45] Elena Gramano, "Comparative Overview on Dismissal Protection in Europe": 16-17; in: Bernd Waas and Effrosyni Bakirtzi and Elena Gramano, eds. *Restatement of Labour Law in Europe, Volume III: Dismissal Protection* (Munich: Verlag C.H. Beck oHG, 2023).

[46] Daniel J. Libenson, "Leasing Human Capital: Toward a New Foundation for Employment Termination Law," *Berkeley Journal of Employment and Labor Law* 27, 1 (2006): 111–177; Rachel Arnow-Richman, "Just Notice: Re-Reforming Employment At-Will," *UCLA Law Review* 58, 1 (2010): 1–72.

can be terminated without just cause, the legality of the employer's actions can be challenged on the general clauses of contract voidability.[47] The same general rule, according to which no justification for dismissal is required, is also applicable in Belgium. This rule is limited by prohibition of manifestly unfair dismissals.[48] The Greek law neither requires justification of dismissal nor statement of specific objective reasons.[49] The principle of freedom of termination, according to which employer does not have to specify a reason for the termination of employment contract is also applicable in Switzerland.[50] Summarizing it can be said that one of the most characteristic features of the legal regulation is exactly the right of the employer when terminating the employment contract not to indicate the reason for such a decision, but at the same time setting the standards of anti-discriminatory, fair behavior, the compliance of which the employer must prove in the event of a dispute. In this context, the model chosen by Lithuania reveals the establishment of a strictly formalized standard.

For further analysis of the limits of application of the legal regulation in question it is important to note that the capacity or conduct of an employee and operational requirements of the enterprise (economic reasons) are recalled by European Committee of Social Rights as an exhaustive list of valid grounds on which an employer can terminate an employment relationship while interpreting Article 24 of the European Social Charter (Revised).[51] The employer-related grounds (organizational restructuring, reduction of the number of employees, abandonment of the function performed by the employee for economic or technological reasons, etc.) as well as capacity of an employee (capability to achieve the agreed performance outcome) are among the reasons of termination of employment contract at the employer's initiative, listed in Article 57 Section 1 of the Labour Code.

When compared to the legal regulation that was in force before the 1st of July, 2017, according to which economic, technological grounds or restructuring of the workplace as well as circumstances, related to the qualification, professional skills or conduct of an employee were listed as valid reasons for termination of employment at the employer's initiative,[52] the new list does not include employee's conduct related grounds. Along with the formulation chosen by the legislator, that "an employer […] shall be entitled to terminate an employment contract with an employee due to reasons not specified in Article 57 Section 1 of this Code […]",[53] such legal regulation can be interpreted either broadly as covering the grounds listed in other norms of the Labour Code, but at the same time expanding their list to directly unmentioned reasons (including conduct-related grounds), or narrowly as eliminating employer and capacity

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47 Martin Gruber-Risak, "Dismissal Protection: §1 Austria": 69-70; in: Bernd Waas and Effrosyni Bakirtzi and Elena Gramano, eds. *Restatement of Labour Law in Europe, Volume III: Dismissal Protection* (Munich: Verlag C.H. Beck oHG, 2023).

48 Wilfried Rauws, "Dismissal Protection: §2 Belgium": 111-112; in: Bernd Waas and Effrosyni Bakirtzi and Elena Gramano, eds. *Restatement of Labour Law in Europe, Volume III: Dismissal Protection* (Munich: Verlag C.H. Beck oHG, 2023); Marc De Vos, "From Dissmissal Law to Re-Employment Law. A Culture War": 225; in: Tomas Davulis, ed. *Labour law Reforms in Eastern and Western Europe* (Brussels: P. I. E. Peter Lang, 2017).

49 Costas Papadimitriou, "Dismissal Protection: §12 Greece": 471; in: Bernd Waas and Effrosyni Bakirtzi and Elena Gramano, eds. *Restatement of Labour Law in Europe, Volume III: Dismissal Protection* (Munich: Verlag C.H. Beck oHG, 2023).

50 Wolfgang Portman and Rahel Aina Nedi, "Dismissal Protection: §34 Switzerland": 1258-1259; in: Bernd Waas and Effrosyni Bakirtzi and Elena Gramano, eds. *Restatement of Labour Law in Europe, Volume III: Dismissal Protection* (Munich: Verlag C.H. Beck oHG, 2023).

51 European Committee of Social Rights, "Conclusions 2012 – Statement of interpretation – Article 24," Hudoc (accessed 27 April, 2023) // https://hudoc.esc.coe.int/eng?i=2012_163_10/Ob/EN.

52 *Labour Code of the Republic of Lithuania*, *supra* note 6, Art. 129 Sec. 2.

53 *Labour Code of the Republic of Lithuania*, *supra* note 1, Art. 59 Sec. 1.

of an employee related grounds from the scope of application of Article 59 of the Labour Code, and making the termination of the employment contract at the employer's will applicable only in exceptional cases related to the employee's behavior.

The narrow interpretation of the application of the legal norm is evident in the emerging case law of the Supreme Court of the Republic Lithuania.[54] Such restrictive interpretation undermines the importance of establishing in the labour law system a separate ground for the termination of employment contract. Although the possibility of dismissing an employee for reasons related to his or her conduct without applying a long notice period, during which such an employee would probably not contribute to the creation of a positive microclimate in the organization, but paying a relatively high compensation that would ensure income for a period of time sufficient for the search of a new job, can be seen as contributing to increased consistency and systematicity of legal regulation, neither the content of the law nor the drafting material reveal clear goals for limitation of the employer's right to use the norm in question when terminating employment contracts with employees on other grounds directly named in the law.

3. THE SIGNIFICANCE OF PROCEDURAL REQUIREMENTS AND SUBJECT-RELATED LIMITATIONS

Proceeding with analysis of the valid reasons to initiate termination of the employment contract at the employer's will, it is important to assess the impact of procedural restrictions and statutory limitations on the goals of legal regulation as well as on the determination of the standard of proof in the event of a dispute. That is what the third section of the paper is dedicated to. Features to be mentioned include an extremely short notice period,[55] a relatively large rate of severance pay[56], and the rule that only employers in the private sector can terminate employment relationship on the ground in question.[57]

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[54] UAB "Marijampolės butų ūkis" v D. U., *supra* note 44; the employee's behavior related grounds are clearly identified as a valid reason for terminating the employment contract at the employer's will both in the quoted ruling of the Supreme Court of the Republic Lithuania (namely, conflicting, tension-creating behavior that negatively affects working environment) as well as in the developing practice of regional courts, for instance, inappropriate attitude towards the employer (irresponsible approach towards work, the employer and its reputation, insufficient efforts, lack of concern for improving one's professional knowledge, declaration of lack of interest in innovations, etc.), unacceptable communication and lack of cooperation (inability to work in a team, unilateral decision-making, disobedience to legitimate instructions of superiors, lack of professionalism, disrespect towards colleagues, refusal of colleagues to work together due to constant discord, provocations that create tension in working environment, etc.), inadequate reaction to criticism (failure to admit mistakes, work related notes taken personally, emotionally, self-importance towards colleagues, etc.) (A. K. v UAB "Vilniaus lokomotyvų remonto depas," Vilnius regional court (2019, no. 2A-1379-852); D. V. v AB "LG CARGO," Vilnius regional court (2020, no. 2A-1204-912); L. C. v AB "Kauno energija," Kaunas regional court (2021, no. 2A-221-587); H. H. v AB "Amber Grid," Vilnius regional court (2021, no. e2A-959-910); S. K. v VšĮ "Žaliasis taškas," Vilnius regional court (2023, no. e2A-181-1097); AB "Vilniaus šilumos tinklai" v M. S., Vilnius regional court (2023, no. e2A-1444-1097)).

[55] Period of three working days (Art. 59 Sec. 1 of the Labour Code) is way shorter than notice periods from two weeks to three months used in case of termination of employment contract at the employer's initiative (Art. 57 Sec. 7 of the Labour Code).

[56] Severance pay in an amount no less than six average monthly wages (Art. 59 Sec. 1 of the Labour Code) is relatively high when compared with statutory obligation to pay an amount of half to two average monthly wages when other grounds for termination of employment contract are used (Art. 57 Sec. 8, Art. 60 Sec. 3, Art. 62 Sec. 4 of the Labour Code).

[57] State and municipal institutions or establishments funded from the budgets of the state, municipality or State Social Insurance Fund or from other funds established by the state, state and municipal enterprises, public institutions owned by the state or municipality, and the Bank of Lithuania are excluded (Art. 59 Sec. 1 of the Labour Code).

3.1. The idea behind the length of notice period and the rate of severance pay

A two-fold interpretation is possible when assessing the goals of the legislator, one of which would be clearly focused on the separation of grounds, and the other on the procedural aspects determined by the distribution of the burden of proof in the event of a dispute. Separation of the grounds for termination of the employment contract into two groups (at the employer's initiative and at the employer's will) can be interpreted as defining the employer's actions in situations of different nature. For example, for situations where the number of employees is reduced due to a decrease in business activities or it is decided not to retain an employee who does not meet the work standards or does not achieve the desired results, Article 57 of the Labour Code, regulating the termination of the employment contract at the employer's initiative, is applicable, and for cases where the conflicting character of the employee becomes apparent, his or her behavior creates tension in the team, termination of the employment contract at the employer's will is to be chosen in accordance with Article 59 of the Labour Code. As the grounds discussed are related to the application of notice periods of different duration and severance payments of different size, such an interpretation could be justified by the fact that in employee's conduct related situations the employer may be interested in eliminating the source of the problem as quickly as possible even if it would lead to a financially more expensive solution.

However, the legal regulation related to the rates of severance pays is hardly compatible with the goal to make the termination of employment contract more flexible and cheaper. According to the legal regulation that was in force before the 1st of July, 2017, in case of dismissal of an employee at the employer's initiative the rate of the severance pays, depending on the duration of the employment relationship, was up to 6 average monthly wages.[58] The current legal regulation provides for severance pay of 6 average monthly wages only in cases of termination of employment contract at the employer's will. In all other cases of the termination of employment relationship it does not exceed 2 average monthly wages. The payment of the seniority related part of severance pay became the obligation of the state after implementation of the so-called social model, the purpose of which was to reduce the employer's costs related to the termination of employment relations, without reducing the protection applied to the employee.

The interpretation that one of the grounds for terminating the employment contract (terminating the employment contract at the employer's initiative due to the employee's behavior that is not considered a violation of labour discipline) after the reform has become an independent ground for terminating employment relations (at the employer's will) would mean that the flexibility of legal regulation has not substantially increased and the employer's situation even worsened due to increase of termination related expenses (higher rate of severance pay). It should be emphasized that the strict, narrow interpretation of the termination of the employment contract at the employer's will is also named in the legal doctrine as making the application of the legal ground in question very problematic. The assumption is even proposed that the real objective of the provision could be to assist the employer and the employee in negotiations on financial compensation while terminating employment contract by mutual agreement.[59]

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[58] *Labour Code of the Republic of Lithuania*, *supra* note 6, Art. 140.

[59] Tomas Davulis, "Main Features of Lithuanian Labour Law Reform": 71; in: Tomas Davulis, ed. *Labour law Reforms in Eastern and Western Europe* (Brussels: P. I. E. Peter Lang, 2017).

Even if the severance pay of 6 average monthly wages can become some kind of reference for the parties to labour relations when looking for a solution in a conflicting situation, such a goal of including the legal norm in the Labour Code would minimize its role and importance. In addition, the determination of a higher amount of the severance pay, without linking it to seniority and without transferring the obligation to pay part of it to the state, does not in any way justify the model of legal regulation chosen by the legislator. If there was no goal to expand the list of grounds for termination of the employment contract, the option of setting different rates of severance pay for different situations of termination of the employment contract at the employer's initiative (Article 57 of the Labour Code) could have been used.

3.2. Correlation between elimination of public sector employers and the standard of proof

Not only the formulation of the ground chosen by the legislator, which is associated with the will of the employer, together with the absence of a direct reference to the importance of the reasons for initiating the termination of the employment relationship, but also the prohibition of the application of the ground in question by public sector employers, raises doubts regarding justification of the establishment of a separate ground for termination of the employment contract in the Labour Code. It is difficult to rebut the assumption that the aim of such legal regulation is to provide the manager of the employer (private entity) with the opportunity to assemble a goals-oriented, his or her needs and an understanding of a harmonious cooperation corresponding team, without requiring the determination of an objective violation of the work order, as provided for in Article 58 of the Labour Code, or objective employee's capacity to perform work functions or economical, organizational activities of the employer related circumstances.

This interpretation would lead to the conclusion that, if the employer decides that the employee does not meet the needs, a unilateral decision can be made to terminate the employment relationship, without the need to prove such facts of the employee's behavior that would lead to an objective determination of impossibility of further employment relationships. It can be based on the idea that the protection of the employee's rights in the case of the application of Article 59 of the Labour Code is also ensured by setting high rate of compensation. The amount of severance pay of 6 average monthly wages is intended to prevent the employer from abusing the right granted and encourage to assess whether the discussed solution meets the employer's interests. This type of fee for greater flexibility and the expansion of the employer's right to make unilateral decisions cannot be seen as violating the principle of balance of interests of the parties to the employment relationship, since the employer can continue to operate without an employee who does not suit, and the employee receives income for half a year ahead and the opportunity during that time to find another job, in which he or she could properly realize himself or herself.

References to the conclusion that the construction of the norm and its systematic interpretation in the context of other norms of the Labour Code presupposes a wider discretion of the employer to decide on the termination of the employment relationship, can also be found in legal doctrine.[60] However, when formulating the standard of proof in such cases, the Supreme Court of the Republic Lithuania pointed out that the

[60] Tomas Davulis, *Lietuvos Respublikos darbo kodekso komentaras* (*Commentary on the Labour Code of the Republic of Lithuania*) (Vilnius: VĮ Registrų centras, 2018), 235.

employer must indicate the reason for the termination of the employment contract in the notice given to the employee, and in case the dismissed employee initiates labour dispute, the employer must prove the existence of such reason. Failure to prove it may result in negative legal consequences for the employer. If the termination of the employment contract was based on the reason of the illegality or inappropriateness of the employee's behavior, then, in the event of a dispute, the employer has the obligation to prove such facts, while the employer's subjective will to recognize the employee as inappropriate is obvious and shall not be proven separately. In order to achieve a favorable outcome of the dispute, the employer should prove the illegality or inappropriateness of the employee's behavior at the level of the standard of proof, which would provide the body examining the labour dispute, evaluating the employer's actions and decisions according to the *bonus pater familias* standard, a basis for making a reasonable conclusion that the employer had sufficient grounds to decide that there was a sufficient reason to terminate the employment contract.[61]

Thus, the employer's burden of proof includes not only the existence of the circumstances that led the employer to make the decision to terminate the employment relationship, but also the sufficiency of such circumstances, or, in other words, the adequacy of the reaction to them. This interpretation can also be determined by the rules for the distribution of the burden of proof established in the law. In assessing whether prohibited discriminatory grounds, directly enshrined in the Labour Code, has not been used terminating employment contract at the employer's will, general rule of distribution of the burden of proof in settling discrimination related labour disputes could be used, according to which the duty of the employer to prove that there was no discrimination arises only after the employee specifies circumstances from which it may be presumed that the employee experienced discrimination.[62] However, having established the employer's duty in all cases, even when dismissing an employee at the employer's will, to clearly state the reason for such a decision, it is not the employee who must prove that the reason was unfair, but the employer must prove the lawfulness of the dismissal.[63] Thus, quite flexibly formulated legal regulation of the termination of employment at the employer's will becomes restrictive and formalized in terms of application, and the employer's subjective will to terminate the employment contract is tested using the standard of objectivity.

It is difficult to find a correlation between such interpretation of legal regulation and the statutory limitation, eliminating public sector entities from the list of employers who can apply the discussed ground for termination of employment relations. The elimination of state and municipal institutions or establishments funded from the budgets of the state, municipality or State Social Insurance Fund or from other funds established by the state, state and municipal enterprises, public institutions owned by the state or municipality, and the Bank of Lithuania, could be based on the approach that subjective decisions exclusively determined by the will of the head of the company, institution or organization may not be tolerated in the public sector. The limited number of possible grounds for terminating the employment contract and the high standard of proof would become sufficient safeguards for the expansion of the number of subjects of application of the legal norm in question. The simultaneous application of all the discussed limitations raises questions about their potentially excessive nature.

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61 UAB "Marijampolės butų ūkis" v D. U., *supra* note 44.
62 *Labour Code of the Republic of Lithuania*, *supra* note 1, Art. 26 Sec. 5.
63 *Ibid.*, Art. 214 Sec. 3.

CONCLUSIONS

The results of the analysis support that the hypothesis has been confirmed. The created set of legal regulation and its interpretation in the case law do not correspond to the wording chosen while formulating the ground for termination of employment contract in question, re-implementing an old model that has historically been rated as unsuccessful. Despite such statutory safeguards as high financial costs and restrictions of application in public sector, termination of employment contract at the employer's will is not safely applicable. The employer's subjective will to terminate the employment contract is not only limited by the obligation to have and name in advance the reason for the termination of employment contract, reduced to exceptional cases related to the employee's behavior, but also tested using a high standard of objectivity. The benefits of relatively simplified procedural requirements do not outweigh the increased financial burden, which negatively affects the attractiveness of the legal norm and does not allow for drawing a clear conclusion about the increased practicality (i.e. adaptation to labour market conditions) and/or flexibility of the legal regulation of termination of employment.

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