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PROCEDURE IN LITIGATION FOR PROTECTION AGAINST UNLAWFUL TERMINATION OF EMPLOYMENT*

Abstract: *In situations where the fundamental human right to work is threatened by unlawful termination of employment, i.e., if the termination of employment occurs contrary to the provisions of the Labor Law or another special law, the employee achieves protection through the court in a procedure which is regulated by the Civil Procedure Law.*

In the paper, the authors deal with the peculiarities of the litigation procedure for protection against unlawful termination of employment, but also with the normative solutions and legal consequences of unlawful termination of employment that occur for the employer.

Keywords: *unlawful termination of employment, procedure in labor litigations, consequences of unlawful termination of employment, court practice.*

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1. INTRODUCTION

The right to work, as one of basic human rights, due to its importance, is proclaimed by the Constitution of the Republic of Serbia, which provides that all jobs are available to everyone under equal conditions, as well as that everyone is free in choosing their own employment. Everyone shall have the right to respect of his person at work, safe and healthy working conditions, necessary protection at work, limited working hours, daily and weekly interval for rest, paid annual holiday, fair remuneration for work done and legal protection in case of termination of working relations. No person may forgo these rights.[2] Rights, obligations and responsibilities from the employment relationship, that is, on the basis of employment, are regulated by the Labor Law and special law, in accordance with ratified international conventions.[3] The settlement of labor disputes in court is regulated by the Civil Procedure Law,[4] in the section called special proceedings (Art. 436 – 441), in which the procedure in disputes from employment relations are regulated as special. The reason for the separate, special norming lies in the fact that litigations from employment relations have a special social significance, given that employment is an important factor in ensuring the existential needs of the employee and his family. This special procedure, like other special procedures described by the Civil Procedure Law, is not fully regulated, so it is necessary to apply the provisions of general civil procedure accordingly.

2. PROCEDURE IN LABOR DISPUTES – PROTECTION AGAINST UNLAWFUL TERMINATION OF EMPLOYMENT

The CPL in Article 1 states that this law shall govern the rules of proceedings for providing legal protection of the court applied in acting and adjudicating upon civil law disputes arising from personal, family, labour, business, property and other civil legal relations, with and exception of the disputes in respect of which other type of proceedings is provided pursuant to the specific law. Therefore, the purpose of the mentioned law is to determine the rules and tools by which the

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[2] Constitution of the Republic of Serbia, *Official Gazette of the RS*, No. 98/2006 and 115/2021, Art. 60 para. 3-5.

[3] Labor Law, *Official Gazette of the RS,* No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – decision of the CC, 113/2017 and 95/2018 – authentic interpretation, Art. 1 para. 1.

[4] Civil Procedure Law, *Official Gazette of the RS*, No. 72/2011, 49/2013 – decision of the CC, 74/2013 – decision of the CC, 55/2014, 87/2018, 18/2020 and 10/2023 – hereinafter referred to as the CPL.

courts will discuss and decide, among others, in litigations concerning employment relations, which also includes litigation for protection against unlawful termination of employment.[5]

The general civil procedure is a fully and detailly regulated procedure. The rules of civil procedure have two types: general civil procedure and special civil procedures.[6] The general procedure regulates all principles of procedure, procedural institutes, conditions for undertaking litigation actions by the court and parties and their procedural effects. Special litigation procedures are regulated in Part Three of the CPL, considering their specific characteristics.[7] Special procedures contain legal norms that regulate only those principles, institutes, procedural situations and litigation actions of the court and parties that the legislator finds should be regulated differently than norms of general litigation prescribe.[8] In other words, the provisions of special procedures are *lex specialis* in relation to the norms of general civil procedure and are applied accordingly, when the situation isn't regulated through the special civil procedure. That means, not necessarily in the same way (as in the general procedure), but adapted to the principles, purpose and peculiarities of each special civil procedure. The reason for the separate, special regulation of the procedure in employment relations disputes is the fact that they have special social significance.

A labor dispute is a dispute between employee and employer, regarding the violation of a legally recognized individual right from employment and based on labor for its duration, upon its termination, as well as in connection with its establishment, which is conducted before the competent court in the established procedure, and upon a lawsuit filed by the employee.[9] The protective function is one of the most important functions of labor legislation, which is reflected in the state's aspiration to establish a balance, through legal protection of employees, between formally (but not actually) equal parties in the employment relationship,

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[5] See the CPL, Chapter XXIX, Labour-related litigations, Art. 436 – 441.

[6] Both general and special procedural rules are the result of the effort to achieve the optimal realization not only of the protection of subjective civil rights, but also of public interests. Therefore, in each litigation, only that system of procedural rules that is specifically intended for the resolution of a certain dispute can be applied. Siniša Triva, Mihajlo Dika, *Građansko parnično procesno pravo*, Zagreb 2004, 755.

[7] However, these are not all special litigation procedures that exist in our legal system. The Civil Procedure Law does not represent a codification of the rules of civil procedure, because some civil procedures are regulated by certain substantive laws (for example, the Law on Public Information and Media, the Law on Prohibition of Discrimination, the Family Law, the Law on Protection of Whistleblowers and other laws). Nikola Bodiroga, *Parnični postupak*, Belgrade 2022, 503.

[8] Borivoje Poznić, Vesna Rakić Vodinelić, *Građansko procesno pravo,* Belgrade 2015, 528.

[9] Zoran Ivošević, *Radno pravo*, Belgrade 2007, 98.

because it is shifted in favor of the employer.[10],[11] Or, as the theory also points out, the right to work is violated by the employer in case of unlawful termination of employment, so therefore it must enjoy special protection.[12]

2.1. Lawsuit in litigations for protection against unlawful termination of employment

The procedure for protection against unlawful termination of employment is initiated with the filing of a lawsuit by the employee against the employer.[13] In the lawsuit, the employee outlines a claim (petitum),[14] which expresses the content of his legal protection request – annulment of the decision on the termination of the employment contract, because the subject of the procedure is the legality of the employer's decision on the cessation of the employee's employment. Therefore, these are disputes in which the invalidation of the employer's decision is asked for, that is, the removal of the effects of the employer's illegal decisions ae demanded, which leads to the annulment or cancellation of such decisions.

Regarding the type of lawsuit, in litigations for protection against unlawful termination, lawsuits are by their legal nature condemnatory – constitutive. They have this nature because the requests will most often be cumulated within the lawsuit, primarily a request to annul the decision on the termination of employment as illegal, then the request for the employee to be reinstated or be assigned to a suitable workplace, then that compensation be paid for damages, as well as the corresponding contributions for mandatory social insurance for the period in which the employee did not work. Of course, this does not exclude the possibility of filing only a constitutive lawsuit, with which the employee would only request

[10] Goran Obradović, „Zaštitna funkcija zakonodavstva o radu",*Zbornik radova Pravnog fakulteta u Nišu* 70/2015, 269.

[11] An employer, in terms of the Labor Law (Art. 5 para. 2), is a national, i.e. foreign legal or natural person which employs, i.e. hires for work one or more persons.

[12] More in Hugh Collins, Virginia Mantouvalou, Human Rights and the Contract of Employment, *T*he Contract of Employment (Mark Freedland (ed.), Alan Bogg (ed.), David Cabrelli (ed.), Hugh Collins (ed.), Nicola Countouris (ed.), A.C.L. Davies (ed.), Simon Deakin (ed.), Jeremias Prassl (ed.), Oxford 2016, 188-208.

[13] In a litigation initiated by the employer against the employee, the general rules of civil procedure apply. Gordana Stanković, Vladimir Boranijašević, *Građansko procesno pravo*, Belgrade 2023, 552.

[14] The court is, always, even in these lawsuits, obliged to move within the limits of the claim set by the lawsuit. Court practice also declares itself in that sense, and one decision states that "the second-instance court's conclusion is correct, that, as the plaintiff did not request in her claim to establish that there was a transformation of the employment relationship from a fixed-term to an indefinite-term, but only asked to cancel the defendant's decision on termination of fixed-term employment, according to the last concluded contract and return to work, that the conclusion of the first-instance court that the claim is unfounded is correct. (Judgment of the Supreme Court of Cassation, Rev2. 1832/2017, May 24, 2018).

that the court annuls the decision on termination, that is, a lawsuit with which he seeks to exercise one of his rights to change (transformative, potestative).

The prescriptive period for filing a lawsuit is 60 days from the date the employer's decision has been made, that is, from the moment the employee was made aware of the violation of his/her rights.[15] The prescriptive period for initiating a labor dispute is the absolute (preclusive) time limit under substantive law, the missing of which leads to the loss of the right to judicial protection, which results in the inability of the court to decide on the merits of the subject of such a dispute.[16] If the last day of the time period is a public holiday or a Sunday or any other day when the court is not in session, the time limit will expire with the end of the next working day.[17] If the lawsuit is filed after the time limit set by the law has expired, the court rejects the lawsuit as untimely.

The dilemma that may arise in practice regarding unlawful termination of employment relates to the situation in which the employer self-initiatively annulled the decision on the termination of the employment contract, and after the employee initiated a court proceeding. The Labor Law does not contain detailed provisions on this but considering that the employer has autonomy in deciding on the rights and obligations of the employees, he can certainly pass a decision canceling the previous one.[18] In this situation, the plaintiff no longer has a legal interest, so the lawsuit for the annulment of the decision on the termination of the employment contract, due to the lack of legal interest, should be rejected. That is, by canceling the decision on the termination of the employment contract, the employer, of his own accord, removed the decision from legal circulation, and therefore all the legal consequences that it produced.[19] However, the employer should compensate

[15] Labor Law, Art. 195 para. 2.

[16] See e.g. court practice: Judgment of the Supreme Court of Cassation, Rev2. 1315/21, September 22, 2021.; Decision of the Supreme Court of Cassation, Rev2. 279/20, February 12, 2020.; Judgment of the Appellate Court in Belgrade, Gž1. 2292/18, March 13, 2019.; Judgment of the Supreme Court of Cassation, Rev2. 2945/19, October 17, 2019.; Decision of the Supreme Court of Cassation, Rev2.2539/20, March 25, 2021.; Decision of the Supreme Court of Cassation, Rev2.1740/21, November 18, 2021.

[17] The CPL, Art. 103 para. 4 in relation to para. 5

[18] This decision-making autonomy also extends to the termination of the employment contract, however, in the interest of the employees, as the weaker party in the employment relationship, it is significantly limited in the legal system of the Republic of Serbia. In the Anglo-Saxon countries, especially the United States of America, the employer's autonomy, when canceling the employment contract, is much broader compared to the countries that belong to the European-continental legal system. Therefore, there are fewer situations in which one can talk about illegal termination of employment, because the freedom of the employer when canceling the employment contract is widely set. See Kate Andrias, Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, Report, New York 2021, 6-8, *https://scholarship.law.columbia.edu/faculty_scholarship/2945/*, September 3, 2023.

[19] See in that sense, the Judgment of the Supreme Court of Cassation, Rev2. 1864/21, August 18, 2021.

the damages (lost salaries) suffered by the employee during the validity period of the annulled decision and reinstate the employee at the workplace he had in the moment when the annulled decision was passed.

2.2. Parties and representation in litigations for protection against unlawful termination of employment

The parties in a litigation for protection against unlawful termination of employment are the employee and the employer. The conditions for party position, party procedural activity and substantive legal effects of litigation for protection against unlawful termination of employment relationship are assessed according to the rules of general litigation procedure, which regulate these institutes. Which means, as theory points out, that in order for litigation to produce the effects that it regularly does, a person appearing as a litigant should meet certain conditions, i.e. have certain traits: party capacity, capacity to litigate, postulation capacity and party legitimation – real and procedural.[20] When a minor, who is at least 15 years old, has established an employment relationship under the conditions provided for in the Labor Law, with the written consent of a legal representative (parent, adoptive parent or guardian), by acquiring work capacity they have acquired limited legal capacity.[21] They have the legal capacity to undertake all legal actions related to their employment, so they also have the procedural capacity to litigate in employment relations litigations.[22]

When it comes to representation of employees in litigation for protection against unlawful termination of employment, the provisions of the CPL, which regulate the procedure in litigations from employment relations (Chapter XXIX, art. 436 – 441), state, as already mentioned, that if it isn't prescribed differently by the provisions in this chapter, other provisions of the Law are applied accordingly. Representation of the parties is not regulated in the rest of the provisions of that chapter of the CPL, which means that other provisions of the CPL apply, including Art. 85.[23]

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[20] G. Stanković, V. Boranijašević, 126.

[21] In English language there is no adequate term that clearly distinguishes terms 'poslovna sposobnost' and 'pravna sposobnost'. Gordana Kovaček Stanić, Sandra Samardžić, „Legal protection and empowerment of vulnerable adults in Serbia", *Zbornik radova Pravnog fakulteta u Novom Sadu* 3/2022, 658.

[22] G. Stanković, V. Boranijašević, 554.

[23] Art. 85 para. 1-3 CPL stipulates that the parties can take actions in the procedure personally or via attorney, that the attorney of a natural person can be a lawyer, blood relative in the direct line, brother, sister or spouse, as well as a representative of the legal aid service of the local government unit who is a law school graduate with a passed the state judicial exam. The representative of the employee in an employment relationship dispute can also be a representative of the trade union of which the employee is a member, provided that he or she is a law school graduate with a passed the state judicial exam. The history of the mentioned provision goes back to the decision of the Constitutional Court IUz-51/2012, May 23, 2013, which was published in the

2.3. Jurisdiction and composition of the court in litigations for protection against unlawful termination of employment

In litigation for protection against unlawful termination of employment, the Basic Court has subject-matter jurisdiction as the first instance court,[24] while the second instance court is the Appellate court.[25] In terms of territorial jurisdiction in this procedure, it can be both general (seat of the employer) and special (elective) at the choice of the employee as the plaintiff, because the provision of Art. 60 of the CPL stipulates that "if the plaintiff is an employee in an employment dispute, in addition to the court that has general territorial jurisdiction over the defendant, the court in whose jurisdiction the work is performed or was performed is also competent for the trial". Therefore, in the sense of this provision of the Law, the employee has the right to choose the territorially competent court before which he will initiate the proceedings, and it is considered that the choice of court was made by filing a lawsuit.

In the first instance, in accordance with the dominant monocratic principle aimed at speeding up the procedure and reducing costs, these lawsuits are judged by a single judge,[26] and in the second instance by a panel composed of three judges.

2.4. The course of the procedure and some specific principles in litigations for protection against unlawful termination of employment

Appropriate application of the provisions of the CPL from Art. 436 means that the court, upon receiving the lawsuit, assesses its timeliness and orderliness. If the lawsuit is filed within the legal time limit of 60 days and contains all the

„Official Gazette of the Republic of Serbia", number 49/13 of June 5, 2013, which established the unconstitutionality of the original Article 85 of the Law on civil procedure from 2011 (the Constitutional Court established that the provisions of the Article 85, Paragraph 1 in the part stating "who must be the lawyer", Article 85, Paragraph 2 were unconstitutional), which was changed by the amendments from 2014. In the aforementioned decision of the Constitutional Court, an opinion was stated that this challenged provision completely "takes away everyone's right to freedom of will and the freedom to choose who will represent them... and abolishes the previously already achieved level of human rights". In the amendments to the Law on Civil Procedure, in addition to lawyers, other people who can be attorneys of a natural person are listed, and in a labor dispute, the attorney of a natural person can also be a representative of a trade union.

[24] See The Law on Organization of Courts, *Official Gazette of the RS*, No. 10/2023, which by the provision of Art. 24 para. 3 states that the basic court in the first instance judges housing disputes; a dispute regarding the establishment, existence and termination of an employment relationship; on the right, obligation and responsibility from the employment relationship; on compensation for damage suffered by the employee at work or regarding work; dispute regarding meeting housing needs based on work.

[25] The Law on Organization of Courts, Art. 26 para. 1 item 3. In all four appellate courts on the territory of the Republic of Serbia (Belgrade, Novi Sad, Kragujevac, Niš) special departments for labor disputes were formed.

[26] CPL, Art. 437.

necessary elements for the court to act on it, it is serviced to the defendant and the litigation begins. The court gives the defendant employer a time limit of 30 days to respond to the lawsuit and instructs him on the content of the response to the lawsuit and the consequences of failing to respond to the lawsuit. After receiving the response to the lawsuit, the court schedules a preparatory hearing, the main purpose of which is triage of the procedural material, that is, a discussion about the proposals and requests of the parties and the factual statements used by the parties to justify their proposals and requests.[27] At this hearing, the court will determine which facts are undisputed, i.e. common knowledge and which facts are disputed and which legal issues should be discussed, it will also decide which means of evidence it will admit at the main hearing and will determine the time frame for the conducting of the procedure through a resolution.

The procedure in these lawsuits is urgent in nature. Incidentally, the CPL was passed in 2011 with the primary goal of making the procedure more efficient and economical and removing those weaknesses in the litigation procedure that have been identified in practice as obstacles to achieving the postulate of a fair trial.[28] The principle of urgency in litigation for protection against unlawful termination of employment is applied throughout the entire procedure and is specifically declared by the provision of Art. 438 of the CPL, which in principle directs the court to act efficiently and promptly and without delay. In addition to the court, the parties themselves are obliged to undertake the necessary actions which will contribute to creating the conditions for reaching a decision in this procedure, that is, to a legally valid conclusion of the procedure without delay. The established need for urgent resolution of labor disputes is particularly manifested in the time limits that are shorter in this special procedure. However, it is also manifested when scheduling hearings, of which in this procedure should be as few as possible, in order to end the procedure as quickly as possible, and the interval of their holding i.e., the time between them should be shorter. The urgency in procedure requires the court to ignore non-appearance of the duly summoned defendant to the hearing, so in that sense the CPL states that if the defendant does not appear at the main hearing, and he was duly summoned, the court will hold the hearing and decide based on the established factual situation, and in the summon for the hearing, the court will warn the defendant of the consequences being absent from

[27] According to Art. 308 of the CPL, a party is obliged to present all the facts necessary for the explanation of its proposals at the preparatory hearing at the latest, to propose evidence that confirms the presented facts, to declare itself on the allegations and offered evidence of the opposing party, as well as to propose a time frame for the conducting of the procedure.

[28] Nevena Petrušić, Dragoljub Simonović, *Komentar Zakona o parničnom postupku*, Belgrade 2011, 11.

the main hearing.[29] In this way, the defendant (employer) is prevented from obstructing and delaying the procedure through passivity and inaction.

Apart from the stated urgency of procedure, with the aim of ensuring efficiency, the procedure in litigation for protection against unlawful termination of employment, in relation to the general litigation procedure, also contains a deviation from the principle of party disposition. It is contained in the provision of Art. 439 of the CPL and reflects in the possibility for the court in this procedure to *ex officio* determine provisional measures in terms of the Law on Enforcement and Security,[30] if it considers it necessary in order to prevent violent behavior or the occurrence of irreparable damage.[31] In addition, the court can determine a provisional measure, besides *ex officio*, also at the proposal of the plaintiff and temporarily reinstate the employee at the workplace until the end of the civil proceeding regarding the unlawful termination of employment. The court will decide on determining a provisional measure at a party's proposal within 8 days from the date of submission of the proposal. A separate appeal is not allowed against the decision on determining a provisional measure.

In litigation for protection against unlawful termination of employment, the principle of party control of facts and means of proof in Serbian civil litigation dominates, as a typical and key principle in the process of gathering procedural material.[32] The parties provide the court with the necessary procedural material (facts and evidence) for making a court decision. In this procedure, the court is authorized to determine only the facts presented by the parties and to present only the evidence proposed by them in order to formulate the so-called factual basis of its decision. Therefore, the court usually, as well as in these litigations, must form a complex of indisputably established facts that are relevant to the specific legal matter, it must conduct a very complicated operation of gathering factual material from the written or oral presentations of the parties, as well as some other participants in the proceedings (witnesses, experts), then, by proving, establish whether the facts exist or don't exist, whether the factual claims are true or false, so that at the end of the procedure, it would apply the adequate norm of substantive law to the indisputably established complex of facts and thus decide on the subject of the dispute.[33]

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[29] CPL, Art. 440 para. 2-3.

[30] Law on Enforcement and Security, *Official Gazette of RS*, No. 106/2015, 106/2016 – authentic interpretation, 113/2017 – authentic interpretation, 54/2019, 9/2020 – authentic interpretation and 10/2023 – as amended, Art. 447-460.

[31] Aleksandar Jakšić, *Građansko procesno pravo*, Belgrade 2021, 761.

[32] For more details on this principle in Serbian civil litigation, see Marko Knežević, Raspravno načelo u srpskom parničnom postupku, Doctoral thesis, Novi Sad 2014.

[33] Dušica Palačković, *Parnično procesno pravo*, Kragujevac 2004, 29.

2.5. Judgement in litigations for protection against unlawful termination of employment and legal consequences of unlawful termination of employment

The judgement in litigations for protection against illegal termination of employment is, just like the lawsuit, condemnatory – constitutive in nature.[34] The pronouncement of such a judgement, therefore, has an obligatory part, which indicates that this is a so-called mixed – transformative-condemnatory judgement. This judgement (if during the proceeding the court determines that the termination of the employee's employment relationship was not based on a reason prescribed in the law or was not carried out in accordance to a legally pre-determined procedure) firstly annuls the decision of the defendant employer on the termination of the employment relationship as unlawful, and then orders the employer to reinstate the plaintiff (employee) to work,[35] and can also decide on other, cumulative requests from the lawsuit. That is, if the termination of the employment relationship occurs contrary to the provisions of the Labor Law, the employer will face the consequences prescribed in Art. 191 of the Labor Law. The legal consequences of unlawful termination of employment are reinstatement, compensation for damages[36] and payment of the corresponding taxes and social security contributions for the period in which the employee did not work.[37]

Reinstatement implies the reintegration of the employee into the work process. Thereby, the provisions of the Labor Law do not define the way in which the employer will conduct the reintegration of the employee. In this case, there is a

[34] With the condemnation lawsuit, the plaintiff aims for a judgement that will have the character of an executive document, which means a judgement based on which, at his request, the enforced exercise of the right will be carried out if the defendant does not respond to his obligation within the time limit specified in the judgement. Borivoje Poznić, *Komentar Zakona o parničnom postupku, Prema tekstu Zakona iz 1976. godine sa docnijim izmenama i dopunama*, Belgrade 2009, 396. For more on the judgement as an institution of civil procedural law, see e.g., by Vladimir Boranijašević, *Presude u parničnom postupku*, Belgrade 2009; Mihajlo Dika, *Građansko parnično pravo – Sudske odluke i sudska nagodba*, Book IX, Zagreb 2013.

[35] Therefore, the (un)lawfulness due to which the decision on the termination of the employment contract can be annulled can be related, as stated, to its substantive or procedural nature. In contrast to the solutions, which were predicted until 2014, when a major amendment to the Labor Law was implemented, as well as the position of court practice, which until then was unified, that the violation of the provision on the warning or the statute of limitations of a dismissal or any other termination procedure always leads to the conclusion about the illegality of the dismissal and the annulment of the decision, the currently valid legal solution makes the position of the employee as the weaker party more difficult, considering that the employee does not have to be returned to work if the employer made a mistake in the termination procedure.

[36] Compensation for damages is paid to the employee in the amount of lost salaries, which is reduced by the amount of taxes and contributions calculated based on salaries in accordance with the law.

[37] Radoje Brković, Bojan Urdarević, *Radno pravo sa elementima socijalnog prava*, Belgrade 2023, 230.

legal fiction that the employee's employment did not cease, and therefore the employee does not have to conclude a new employment contract with the employer. In other words, the employee's employment contract with the employer is again in power and is considered to have never been canceled. Given the existence of the fiction, the employer may eventually pass a decision stating the existence of a court judgement. The employer should deliver the decision to the employee and use it to invite them to return to work at the workplace they occupied before the unlawful termination of employment. If such a place does not exist, i.e., if this position has been abolished or filled, that is, if the employee cannot return to the position he was at before the unlawful termination of employment, the employer can take two actions. Firstly, if there are jobs that are suitable for the employee according to Art. 171 of the Labor Law, i.e., jobs that require the same type and level of professional qualifications as determined by the employment contract, the employee may be transferred to them by an annex to the employment contract. However, if there are no such jobs, the employee's employment contract could be terminated, in accordance with Art. 179 para. 5 item 1 of the Labor Law, i.e., because the need to perform a job has ceased due to technological, economic or organizational changes at the workplace they occupied before the unlawful termination of employment or because there was a reduction in the workload at the workplace they occupied before the unlawful termination of employment.

Furthermore, if the employee has met the conditions for retirement, the employer is obliged to reinstate the employee, that is, cannot refuse to return him to work.[38] However, after returning to work, we are of the opinion that in this case the employer can, in accordance with Art. 175 para. 1 item 2 of the Labor Law, issue a decision on the termination of the employment relationship of an employee who has reached the age of 65 and has at least 15 years of insured work experience (except if the employer and employee do not agree otherwise – to extend the employee's employment).

The next question that can be asked is whether an employee who had a fixed-term employment contract can request to be reinstated. In court practice, the opinion has been expressed that when the time for which the fixed-term employment contract was concluded has not expired at the time of filing the lawsuit, the employee can request to be returned to work for the employer or to be awarded compensation for damages instead.[39]

Therefore, reinstatement is an option that the employee may or may not use in case of unlawful termination of employment. That is, the employee has the right to decide not to return to work. Namely, the termination of the employment contract can be the consequence of permanently damaged relations between the employer

[38] See Judgment of the Supreme Court of Cassation, Rev2. 1039/21, May 18, 2021.
[39] See Judgment of the Supreme Court of Cassation, Rev2. 3248/20, February 24, 2021.

and the employee, which can also arise due to harassment at work, among other things. An unfavorable working environment that exists due to harassment at work can result in the increase of sick leaves, reduced work productivity and inventiveness among employees,[40] so the employee often does not want to return to such an environment, fully aware of the negative repercussions. Therefore, instead of returning to work, they choose compensation for damages. If the employee decides to do so, they can demand the payment of damages in the maximum amount of 18 salaries, depending on the time spent in the employment relationship with the employer, the age of the employee and the number of dependent family members.[41]

After the amendments to the Labor Law, it is clear that the current legal solution is aiming for the annulment of the decision on the termination of the employment contract to not unconditionally lead to the decision to reinstate the employee, but the court can decide not to return the employee to work. The Labor Law, in the provision of Art. 191 para. 6, also prescribes that if the court determines during the proceeding that the employee's employment has been terminated without a legal basis, but during the proceeding the employer proves that there are circumstances that justifiably indicate that the continuation of the employment relationship, taking into account all the circumstances and the interests of both parties in the dispute, is not possible, the court will reject the employee's request to be reinstated and will award him compensation in double the amount of the amount that the court would award to the employee if he chose compensation of damages instead of reinstatement to the workplace. This exception should be interpreted narrowly, considering that it does not reinstate the employee, despite their wishes. The mentioned exception was established after the amendments to the Labor Law from 2014. It's rarely used in practice, and as a reason for that, we could state deeply damaged relations between the employer and the employee or between the employee and the rest of the work collective.

If the court determines during the proceeding that there was a reason for the termination of employment, but that the employer acted contrary to the provisions of the laws that prescribe the procedure for termination of employment, the court will refuse the employee's request to be reinstated, and will award the employee the amount of up to six of their salaries in the name of damages.[42] Until the amendments to the Labor Law in 2014, such a decision of the court would not have been possible, because in this case the decision on the termination of employment would

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[40] Jasna Genzić, Maja Bogović, Kristijan Marić, „Utjecaj mobinga na zaposlenike i uspješnost poslovanja organizacije", *Obrazovanje za poduzetništvo* 1/2018, 83.

[41] Salary, which is the basis for compensation, is considered to be the salary earned by the employee in the month preceding the month in which his employment had ended. See The Labor Law, Art. 191 para. 5 and 8.

[42] Labor Law, Art. 191. para. 7.

have been automatically annulled. However, after the amendments, the possibility for the court to make such a decision was established.

Finally, if it assesses that the employee's claim is well-founded, in the judgment in which (apart from the annulment of the decision on the termination of employment) is also decided on other cumulative requests and ordered the execution of some action, the court will set a time limit of 8 days for its execution (time limit for voluntary fulfillment of duty). The mentioned shorter time limit represents a deviation from the rules of general civil proceedings, in which the time limit for voluntary fulfillment of duty amounts to 15 days, and if the execution refers to acts that do not consist of monetary payment, the court can set a longer time limit.[43]

2.6. Legal remedies in litigations for protection against unlawful termination of employment

When it comes to regular legal remedies, in litigations for protection against unlawful termination of employment, an appeal can be filed within 15 days from the date of service of the transcript of the judgment. Special rules of civil procedure on labor disputes exclude the application of the general regime of permissibility of revision (second instance appeal on points of law).[44],[45] Namely, the permissibility of revision in a labor dispute is not assessed by applying Art. 403 para. 2 of the CPL, but by the provision of Art. 441 of the same Law, which expressly prescribes in which disputes from employment relations revision is permitted.

A revision shall be allowed in litigations pertaining to labor disputes on termination of employment (as well as on the establishment or the course of em-

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[43] CPL, Art. 345 and 440 para. 1. For more on the concept, justification and legal nature of the time limit for a voluntary fulfillment of duty, see Ranko Keča, Marko Knežević, „Paricioni rok u srpskom parničnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu* 1/2015, 49-73.

[44] Several terms are being used as translations from the Serbian Revizija and similar remedies in litigation proceedings. Some of these are "second appeal on the points of law," "further appeal on the points of law," or just simply "revision" as translated by Prof. Aleš Galič in his book about civil procedure in Slovenia (Aleš Galič, Civil Procedure in Slovenia, 2019, Alphen aan den Rijn: Walters Kluwer, 309-311), stated according to Branka Babović Vuksanović, Revision (second appeal on the points of law) in Serbian litigation proceedings", Strani pravni život 4/2023, 708.

[45] An important characteristic of revision is that it refutes the final judgment made by the second-instance court. It is an extraordinary, two-sided, devolutive and non-suspensive legal remedy in Serbian litigation proceedings that is decided on by the Supreme Court, to which revision provides the opportunity to eliminate deficiencies in the actions of lower courts, to standardize court practice and take positions on disputed legal issues, to ensure uniform application of law and legal certainty, thereby fulfilling its function as the highest court in the Republic of Serbia. For more on revision of a judgement as an extraordinary legal remedy, see for example G.Stanković, V. Boranijašević, p. 529-535; N. Petrušić, Građansko procesno pravo – Parnično procesno pravo, Book one, Niš, 2024, p. 401-406; N. Bodiroga, p. 480-487; B. Poznić, V. Rakić Vodinelić, p. 500-510.

ployment).[46] Outside of these labor disputes, revision is not permitted, unless the lawsuit refers to a monetary claim when the general regime of permissibility of this legal remedy is applied according to the value of the dispute from Art. 403 para. 3 of the CPL, which states that revision is not allowed in property disputes if the value of the subject matter of the disputed part does not exceed the dinar equivalent value of 40,000 euros at the middle exchange rate of the National Bank of Serbia on the day of filing the lawsuit.

3. CONCLUSION

The paper gives an overview of the essential features of the litigation procedure that the employee can conduct against the employer with the aim of protection against (un)lawful termination of employment. If, during the proceeding, the court determines that the employee's employment has been terminated due to the absence of a legal basis or due to non-compliance with the termination procedure of the employment contract, at the request of the employee, in the procedure provided for by the law, it can issue a resolution annulling the decision on termination of employment as unlawful and decide for the employee to be reinstated, to be rewarded compensation for damages and to be paid the corresponding contributions for mandatory social insurance for the period in which the employee did not work. The legal consequences of unlawful termination of employment are prescribed by the Labor Law and are established in favor of the employee, and at the expense of the employer, in order to enable the removal of all negative repercussions that occurred for the employee after the passing of the unlawful decision on termination of employment.

The provisions of the Labor Law do not precisely define numerous situations that may occur after the resolution to annul the unlawful decision on the termination of employment has been passed. Some of them are listed in the paper, along with proposed solutions that can be used. However, these legal gaps create legal uncertainty, and it would be necessary, during future amendments to the Labor Law, to more detailly regulate the employer's actions after the passing of the court resolution annulling the decision on the termination of employment.

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[46] CPL, Art. 441. Court practice also declares itself in that sense. See Judgment of the Supreme Court of Cassation, Rev2. 871/2020, June 24, 2020; Judgment of the Supreme Court of Cassation, Rev2. 2163/2019, June 18, 2021; Judgment of the Supreme Court of Cassation, Rev2. 1682/2019, June 5, 2019; Judgment of the Supreme Court of Cassation, Rev2. 1753/2019, June 12, 2019.

However, in court practice, many more judgment of the Supreme Court of Cassation (which continued to work as the Supreme Court as of May 11, 2023, after the constitution of the High Council of the Judiciary, in accordance with the Law on the Organization of Courts) can be found on which litigations are not considered to be litigations on disputes about the establishment, existence and termination of the employment relationship, that is, in which it isn't allowed to declare a revision.

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Поступак у парницама за заштиту од незаконитог престанка радног односа*

Сажетак: *У ситуацијама када је фундаментално људско право на рад угрожено незаконитим престанком радног односа, тј. уколико престанак радног односа наступи супротно одредбама Закона о раду или другог посебног закона, запослени заштиту остварује судским путем у поступку који је нормиран Законом о парничном поступку.*

Аутори у раду обрађују особености поступка у парницама за заштиту од незаконитог престанка радног односа, али и нормативна решења и правне последице незаконитог престанка радног односа које наступају по послодавца.

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