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SOCIAL ACTORS BEFORE INFORMATION TECHOLOGIES CHALLENGES IN SEARCH FOR NEW VISION OF SOCIAL PEACE

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SOCIAL ACTORS BEFORE INFORMATION TECHOLOGIES CHALLENGES IN SEARCH FOR NEW VISION OF SOCIAL PEACE

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IMPLEMENTATION OF NEW LABOUR REGULATIONS IN THE ERA OF INFORMATION TECHNOLOGY: ABATEMENT OF INSTRUMENT OF COLLECTIVE BARGAINING AND ROLE OF TRADE UNIONS

Ranko Markuš, Ph.D.[1], Milovan Dimić, MSci

Abstract: *The key purpose of this analysis is to examine the status of employment contracts and collective labour agreements from the perspective of the new piece of legislation in the RepublikaSrpska. More specifically, the focus is on certain mechanisms that are regulated by the new law in an innovative or different way, which has given rise to argumentative discussion on the new normativemechanisms and their practical implementation.*

The Labour Law of the RepublikaSrpska regulates certain normative instruments in an innovative way, which could lead to significant changes in practice and in application of labour regulations. The legislator has decided for certain issues that used to be defined under collective agreements to be regulated in detail by law, hence reducing the manoeuvre space for collective bargaining between the workers and the employers, with the trade unions losing part of their negotiating clout and the employers losing their flexibility to adapt to the market conditions. The objective of the Law seems to be simplification of labour relations, but, without improvements to the business climate, it cannot in itself bring about lower unemployment rate, as has been promoted to the general public.

Key words: *Labour Law, Collective Bargaining, Syndicate*
JEL Classification: J21, J23, K31

1. INTRODUCTION

The Labour Law of the Republika Srpska regulates certain normative instruments in an innovative way, whichin our opinion could lead to significant changes in practice and inapplication of labour regulations. The National Assembly of the Republika Srpska (RS) adopted the Labour Law[2] by quick legislative procedure, at the 16th special session, on 29 December 2015.

One of the reasons for the legislator to proceed with the adoption of the new Labour Law is further harmonization ofthe labour regulations with the obligations assumed by Bosnia and Herzegovina (BiH) upon signing the Stabilization and Association Agreement, aimed at its harmonization with the acquis of the European

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[2] The Labour Law was published on 12 January 2016, in the Official Gazette of the RS no. 1/16, and it came into force on 20 January 2016

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Union. The adoption of this Law further harmonizes the obligations of BiH assumed underratified international conventions of the International Labour Organization (ILO), such as Convention no. 87 - Freedom of Association and Protection of the Right to Organize, Convention no. 98 - Right to Organize and Collective Bargaining, Convention no. 132 - Holidays with Pay, Convention no. 138 - Minimum Age, Convention no. 103 - Maternity Protection, Convention no. 100 - Equal Remuneration (for Men and Women Workers for Work of Equal Value), etc.

Besides the aforementioned,these amendments to the law address a practical business need to further harmonize it with other applicable laws (primarily the Law on Companies, the Law on Protection of Personal Data, etc.), as well as the need to meet practical requirements for introducing new, more flexible forms of labour.

From the very start, trade unions have taken negative stance. Although this regulation carries less flexibility for the employers, which means more security for the employees, having regulated a number of issues that should be addressed through collective agreements reduces the manoeuvre space for negotiations between the social partners. The Agreement between the Social Partners and the RS Government was signed back in 2010, with the RS Government undertaking to prepare a new text of the Labour Law within 18 months from the adoption of the General Collective Agreement of the RepublikaSrpska (Official Gazette of the RS no. 40/10). Given the failure on the part of the RS Government to meet this obligation, right after the expiry of this deadline,the Confederation of Trade Unions has taken the stance that the Labour Law of the RS should not be changed.

The key purpose of this analysis is to examine the status of employment contracts and collective labour agreements from the perspective of the new law, i.e. the focus is on certain mechanismsthat are regulated by the new law in an innovative or different way, which has given riseto argumentative discussion on the new normative-mechanisms and their practical implementation.

2.THEORETICAL EXPOSITION OF LABOUR LEGISLATION

Over the past decade, the role of the legal system– as an important determinant of movement of economic indicators – has been put at the heart of economic issues(La Porta et al., 2008). Empirical studies guided by theoretical perspectives, in particular those written by neoclassical economists,deploy labour laws as exogenous intervention, as they are in contrast to the market lawsand attempting to restrain them. Under the neoclassical model, wages and employment are defined through direct interaction between supply and demand. The market also stimulates natural movement and getting equal pay for equal work, so the wages should be defined by the ratio of comparable productivity between workers (Becker, 1957).

This idea was especiallyexamined through Stigler's analyses of minimum wage (Stigler, 1946),which have set the basis for economic discussions on labour legislation since the late 1940s and have particularly inspired Posner and other researchers of the Chicago School of Law and Economics (Posner, 1984). Additional rights

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can be secured through bargaining, involving the employers and organized labour groups.

We can conclude that according to neoliberal economists, regulation of wages leads to separation of workers'earnings from the market conditions, i.e. to setting their price above objective price, which reduces demand for workers, i.e. curtails economic development, because part of the profit is redistributed onto workers. Therefore, development of economic thought based on neoclassicism embraced the position that a law onlabour is an external source of inequality, deriving from decisions created in the political sphere and advocating redistribution of the rights and gain onto the collective within the production process or service providing process. The bargaining power and the skill of trade unions may or may not secure additional rights for the workers, by making a deal with the employer.

Contemporary analysis of labour legislation is based not only on the idea of self-regulation, but also on the need to regulate the market in order to make it more efficient, and fairer. There are two aspects of this approach (Deakin and Sarkar, 2008):

i.Regulation as exogenous factors that influenceeconomicflows, and also

ii."Perfect" regulation, enabling perfect market competition.

The legal framework is seen as a tool for coordination of players' expectations in the conditions of uncertainty, which is the fundamental objective behind the struggle of trade unions. In response to economic crises, laws are not merely imposed onto employers, but attempts are made through mutual dialogues to crystallize international conventions that have arisen from the need to share experiences regarding-fair agreements for workers and statutory texts. Therefore, it can be concluded that redistribution has become the basic purpose of labour laws, while at the same time they serve as the basis for negotiations between the "parties" (Hyde, 2006). Under the International Labour Organization Convention no. 98, workers enjoy adequate protection against acts of anti-union discrimination in respect of their employment, such as conditioning their employment or terminating their contract by reason of union membership. Workers' and employers' organizations enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

Emerging from theconstructs defined by law and the bargaining on the rights is the employment contract as a complex "tool": a standard mode of transaction between the worker and the employer, i.e.mediating between the employer and the worker, to ensure that the employer gets adequate value for the work paid and for the worker it means mitigating the risks that ensue from dependence onmarket conditions and from decisions made by the employer.

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3.STARTING AND TERMINATING EMPLOYMENT

The Labour Law of the RepublikaSrpska, whose amendments are the focus of this analysis, provides for employment contracts to be concluded, as a rule, for indefinite period of time and for fixed-term employment contracts to be merely exception to the rule. If an employment contract does not specify the reason for concluding a fixed-term contractor duration of the employment contract, the employment contract shall be deemed to be permanent contract, which is a provision favouring worker's right.

ThisLabour Law (unlike previously applicable law) does not spell out the cases in which fixed-term employment contract may be concluded; rather, the issue is regulated in a manner that can be open to broader interpretation, depending on the objective business needs of the employer. Concluding a fixed-term employment contract as an exception is conditioned by the existence of "objective reasons that are justified by a deadline, doing a very specific work or occurrence of a predetermined event"; which provision can be deemedas working in the interest of the employer. On the other hand, another novelty is that a fixed-term employment contract, with or without interruption, can last longer than 24 months (with a period of up to 30 days not being considered as interruption in employment) in the following cases:

i. Replacing a temporarily absent employee, until such employee returns;

ii. Working on a project of predetermined duration until project completion, but no longer than 60 months; and

iii. Concluding a contract with an unemployed person lacking up to five years to meet one of the requirements forage pension, but only until the requirement has been met.

In this way, the legislator has partly created the possibility forincreased labour mobility and easier employment of workers; however, in view of the still applicable rule that employment contracts are concluded for indefinite period of time, it is questionable whether such provision will have any significant positive effects on the labour market and reduction of unemployment.

On the other hand, the matter pertaining to termination of employment was one of the topics that were subject to dispute between the social partners in the process of passing the Law. When it comes to consensual termination of employment, the statutory noveltyis that it takes legal effect with the day of verification of the employee's signature by the competent body of local administration. The very form of these agreements additionally complicates the procedure for consensual termination of employment and we are not aware of any similar normativemechanisms in the region. It seems that with this provision,the legislator aimed at protecting the worker from signing such agreements lightly. Namely, according to the available case-law, the workerscontest such agreements through the court relatively often, contending that they were signed under pressure from the employer. Inthese cases, the workers most often base their claims on submissions that they had signedsuch agreements, for example, under threat, by mistake, etc. (due to defects in consent). Despite hav-

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ing formalized the procedure for signing such agreements in principle, such normative mechanism could lead to reduced number of similar lawsuits in practice.

When it comes to termination of employment contracts by the employer, the legislator has prescribed three special groups of reasons that can constitute the ground for termination of employment contracts. The following can constitute the reasons for such termination:

i.If the employer has justified reasons to terminate an employment contract, for example, if the employee does not achievenecessary results, for technological, economic or organizational reasons, refuses to sign an annex to the employment contract, final judgment on a work-related criminal offense;

ii.If the employee is culpable of a serious breach of work duties; and

iii.If the employee does not abide by the work discipline of the employer. Another novelty is the right of the employer to refer the employee to a certified health facility of the employer's choice forexamination to determine whether there is potential abuse of the right for absence from work due to temporary inability to perform work or coming to work under influence of alcohol.

Trade union representatives have repeatedly opposed having law provisions that would regulate termination of employment contracts, arguing that these provisions are very flexible and that the employee can never be sure whether any one day is his/her last day at work.

Another novelty in the procedure for termination of employment contracts by the employer is provision of Article 187 of the Law, providing that in case of a dispute before the relevant authority, the employer is obliged to prove that there was a valid reason for termination of the employment contract, unlike the previous mechanism, where it was only in case of disputes concerning termination of employment contracts due to severe breach of work duty that the burden of proof was on the employer, while in all other cases the burden of proof was on the employee.This was the legal position of the courts in the RepublikaSrpska and the same position was taken by the High Judicial and Prosecutorial Council of BiH in their modules on labour law. As a consequence of this novelty, the employer is bound in each case to prove the validity of termination of the employment contract before the relevant authority, i.e. the burden of proof has been transferred onto the employer, without valid reasons. Such legal provision does not have any base in international treaties ratified by BiH.

As a novelty, the Labour Law explicitly prescribes legal consequences of an unlawful termination of employment contract. Thus, if in the course of the proceedings the relevant court finds that the employment of an employee was terminated without legal grounds and the employee does not request to be reinstated, the court shall, at the request of the employee, bind the employer to pay damages to the employee in the maximum amount of 12 employee's salaries, depending on the time spent working for the employer, the age of the employee and the number of dependant family members, which is stipulated in more detail by the collective agreement. Furthermore, if the court determines in the course of the proceedings that there was ground for termination of employment, but the employer acted in contravention of the pro-

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visions of the law prescribing the procedure for termination of employment, the court shall refuse the request of the employee to return to work, but shall award the equivalent of six employee's salaries to the employee in name of damages. The case-law shows that judgments in such disputes mostly go in favour of the employees.

Furthermore, it is not quite clear from the Law and there have already emerged different interpretations in practice as to whether the resort to the court by the employees for protection of their labour rights is conditioned by their prior resort to the Agency for peaceful dispute resolution.

4.BARGAINING AND COLLECTIVE AGREEMENTS

Collective bargaining is very important in labour relations. Ifminimum 10 employees or minimum 10% of the total number of employees concurrently address the employer for protection of their rights under employment, the employer is obliged to seek and take into consideration the opinion of the trade union or the employees' council if no trade union is organizedat the employer. The number of employees addressing the employer in any one case reflects the extent of the breach of their right, justifying the introduction of such mechanism by the legislator.

An important novelty is that a labour rulebook can regulate labour relations of the employer if:

i.no trade union is organized at the employer or no trade union meets the representation requirements, i.e. no agreement to organize a trade union for the purpose of collective bargaining has been concluded pursuant to this law;

ii.no party to the collective agreement has launchedthe initiative to start negotiations for the purpose of concluding a collective agreement;

iii.theparties to the collective agreement do not reach consent to conclude a collective agreement within 60 days from the start of the negotiations; and

iv.within 15 days from the delivery of the invitation to start negotiations to conclude a collective agreement the trade union does not accept the employer's initiative.

An employer who has not accepted the initiative of a representative trade union to conclude a collective agreement may not stipulate labour relations by a rulebook. Furthermore, provisions of the labour rulebook shall cease to be effective with the coming into force of a collective agreement concluded between the employer and the trade union, stipulating those issues.

Collective agreements are concluded as general, special and collective agreements with individual employers. There is no assumption of direct application of any of the aforementioned collective agreements to all employees and all employers in the territory of the Republika Srpska. General and special collective agreements shall apply indirectly and shall be binding for all employers who, at the time of concluding a collective agreement, were members of employers' associations that are parties to the collective agreement.

The minister in charge of labour affairs may decide to extend the applicability of a collective agreement or particular provisions thereof to employers who were not

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members of the association of employers. The responsible minister can make a decision to extend the applicability for the purpose of realising the goals of economic and social policy in the RS, in order to secure equal working conditions, or to mitigate salary differences in a particular sector, provided that the collective agreement whose applicability is extended is binding for the employers who employat least 30% of all employees in such sector, field or branch. Before making a decision to extend the applicability, the responsible minister is obliged to seek opinion from the Economic and Social Council. If the Economic and Social Council does not give their opinion, the minister shall make the decision to extend the application of collective agreements independently.

A novelty in the Labour Law is the provision under which collective agreements are concluded for a period of three years, creating the possibility to track cyclical movements in the economy and to adapt to the market situation. Collective agreements have been a major problem thus far, because of lawsuitsbrought upon them by the employees. Although the exact data are not available, the information circling in the public was that upon lawsuits from educators alone, the damage to the RS was multimillion. In some cases, these lawsuits are a contributing factor to the inability of struggling companies to recuperate. This can be seen on the example of the railroad company "Željeznice Republike Srpske", where based ona decrease in the payment of meal allowances, around 2,000 employees have filed more than 170 lawsuits, withthe total claims between 2012 and 2015 exceeding BAM 14,000,000. They were mostly adjudicated in favour of the employees [3] and by the end of 2015, BAM 8,600,000 have been debited in the books upon receive dudgments against "Željeznice". The only reason why meal allowances were reduced from BAM 185 net (BAM 305 gross) to BAM 112 net (BAM 185 gross) in 2012 is difficult financial situation that "Željeznice" has been experiencing for many years.

An employer who has not accepted the initiative by a representative trade union to engage in negotiations to conclude collective agreement may not stipulate the rights and obligations arising from employment by a rulebook on labour, but this does not mean that a deal will be made. There are already some indications in practice that certain social partners are not interested in signing new general collective agreements if their demands are not met. Given that the law now regulates many of the issues that used to be dealt with under collective agreements, it could be argued that there is a (conscious) risk of abating the collective bargaining, at least at the level of general collective agreements.

These mostly regard issues that were regulated by the Labour Law, but would be stipulated in more detail by the general collective agreement. Now they are stipulat-

[3] Glas Srpske. Tužbe radnika Željeznice Republike Srpske po osnovu umanjenja toplog obroka prelaze 14.000.000 KM /Lawsuits by Employees of Željeznice Republike Srpske Upon Reduced Meal Allowances Exceed BAM 14,000,000/, daily paper 18 August 2016, available at http://www.glassrpske.com/drustvo/vijesti/Tuzbe-radnika-Zeljeznice-Republike-Srpske-po-osnovu-umanjenja-toplog-obroka-prelaze-14000000-KM/lat/215828.html

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ed in more detail by the Labour Law, and the general collective agreement has not yet been adopted, for instance:

I.Chapter VI: Breaks and Leave

II.Article 93: Suspension of rights arising from employment

III.Article 132: Other allowances upon employment (per diem for a business trip, transport allowance - reimbursement for the costs of travelling to/from work, field allowance - compensation for increased subsistence expenses during field work, meal allowance - expenses for one meal during one workday and for overtime exceeding three hours a day, if the employer does not have an organized system foreatingat work for the employees, severance pay when an employee retires, etc.)

Quite a bit uncertainty to both employees and employers is brought about by the provision stating that if a collective agreement is not adopted, the Government is authorized to issue a decision on increase in salaries and other allowances until collective agreement is adopted, without any obligation to consult employers when making such decision. As of July 2016, the RepublikaSrpska does not have a general collective agreement, as it has ceased to be effective after two extensions. In order to prevent a legal vacuum from being created, the Government of the RepublikaSrpska has rendered the Decision Defining Increase in Salary, Allowances upon Employment and Assistance to Workers. This decision is temporary by nature and it shall be effective until the social partners reach consensus on the general collective agreement. According to this decision, the lowest employee salary in the RepublikaSrpska remains the same, i.e. BAM 370. Nonetheless, trade union representatives believe that this Decisionof the Governmentis incomplete and drastically diminishing labour rights, in particular as regards night work, transport, meal allowance, etc. and that the Government and the employers have made the decision without sincere intent to make a deal with the trade union. The Union of Employers' Associations of Republika Srpska asserts that in the new cycle of negotiations "it was impossible to negotiate with the Confederation of Trade Unions of the Republika Srpska"[4] , but it is not particularly critical of the Decision of the Government.

5.CONCLUSION

The new Labour Law isharmonized with the conventions of the International Labour Organization to a certain degree, but there are many inconsistencies, resulting in selective application of these conventions. We can say that content-wise, the Labour Law regulates the rights and obligations of the employees and the employers in the RS in much more detail than the previous Law. A series of new instruments has been introduced,which, on the one hand, enables the employers to organize their work in a more flexible way, and, on the other, grants additional rights to the em-

[4] Smanjuju plate i radničke naknade. /Decrease in Salaries and Compensations to Employees/. Source: Euroblic, 1 July 2016, p 6, available at: http://www.rtvbn.com/3823352/smanjuju-se-plate-i-radnicke-naknade

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ployees.

The most important novelties in the Labour Law are:

- An employment contract that does not specify the duration or the basis for concluding a fixed-term contract shall be deemed as a permanent employment contract.
- Exceptions to the rule that the longest duration of a fixed-term employment contract with or without interruption is 24 months have been provided. A period that is not deemed as interruption has been extended to the period of 30 days, which is done in favour of the employees.
- The reasons and the procedure for termination of employment contracts have been regulated in more detail. A possibility has been introduced to terminate the employment contract if the employee does not achieve necessary results at work.
- Provisions of a rulebook on labour cease to be effective with the coming into force of a collective agreement concluded between the employer and the trade union, stipulating the same issues.
- An employer who does not accept an initiative by a representative trade union to commence negotiations to conclude a collective agreement may not regulate rights and obligations arising from employment by a rulebook on labour.
- There is no assumption of direct application of any of the above collective agreements to all employees and employers in the RS territory.
- Duration of collective agreements has been provided for a maximum period of three years, which is reasonable, given that collective agreements should track movements in the labour market and economic indicators.

A series of provisions that used to be regulated by collective agreements have been introduced into the Law. However, such decision on the part of the legislator does not benefitthe actual needs of either employees or employers, because collective agreements still constitute a more flexible method of resolving specific labour issues and problems in mutual relations. Lack of flexibility prevents making adequate reactions in the conditions of changing markets. On the other hand, a reduced need for collective bargaining diminishes the relevance of the trade union's role (and the role of other social partners) in the process of collective bargaining.

It is indisputable that it was necessary to regulate the sphere of labour legislation in a more contemporary and more market-suited manner. Still, the question remains as to whether the new Law will bring about what it has been adopted for - higher employment rate, or such reforms require further efforts towards improving the business climate in the RepublikaSrpska.

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