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TARGETED DECLINE OF COLLECTIVE BARGAINING

CILJANO ODUMIRANJE KOLEKTIVNOG PREGOVARANJA

Abstract

The key purpose of the analysis is to examine the status of employment contracts and collective labour agreements from the perspective of the new piece of legislation in the Republika Srpska. The main hypothesis is that the Government deliberately regulates certain issues through the law, as there is no expectation that the Collective Agreement will be reached soon.

The methodology has been based on contemporary analysis of labour legislation which 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, or in line with political intentions. There are two aspects of this approach: regulation as exogenous factors that influence economic flows, and also "perfect" regulation, enabling perfect market competition. More specifically, the focus is on certain mechanisms that are regulated by the new law in an innovative way, which has given rise to argumentative discussion on the new normative mechanisms and their practical implementation.

One of the most important novelties 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. On the other side 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.

Latest developments are showing that the Union of Employers' Associations of Republika Srpska is losing interest for tough negotiations with syndicate, as collective agreement is not obligatory requirement in front of them, similarly like in Great Britain, where it depends on the goodwill of the signatories, it seems that the Labor Law directly contributed to these developments.

Keywords: labour law, collective bargaining, syndicate

JEL: J21, J23, K31

Sažetak

Ključna svrha analize je razmatranje statusa ugovora o radu i kolektivnih ugovora iz perspektive novog Zakona o radu Republike Srpske. Glavna hipoteza je da Vlada sa svrhom definiše određena pitanja koja su do sada bila regulisana kolektivnim ugovorima, jer ne postoji očekivanje da će kolektivni ugovori biti popisani uskoro.
Korištena metodologija je bazirana na savremenim analizama radnog prava, koje nisu samo bazirane na principima samoregulacije, već i na potrebi da se reguliše tržište kako bi postalo efikasnije ili u skladu sa političkim namjerama. Dva su ključna aspekta ovog pristupa: regulacija kao egzogeni faktor koji utiče na ekonomske tokove, te "perfektna" regulacija, koja omogućava idealnu tržišnu konkurenciju. Da specificiramo, fokus je na određenim mehanizmima koji su regulisani u novom zakonu na inovativan način, što dovodi do argumentovane diskusije praktične primjene tih normativnih mehanizama.
Jedna od najznačajnijih novina je u tome da se trajanje kolektivnih ugovora ograničava na tri godine, što omogućava prilagođavanje promjenama na tržištu. Sa druge strane, zakonodavac je odlučio da određena pitanja koja su do sada bila regulisana kolektivnim ugovorima budu regulisana Zakonom o radu, čime se smanjuje manevarski prostor za kolektivno pregovaranje između radnika i poslodavca.
Posljednji razvoj događaja pokazuje da je Unija udruženja poslodavaca Republike Srpske izgubila interes za pregovaranje sa sindikatom, a kako kolektivni ugovor nije obavezan zahtjev pred njima, slično kao i u Velikoj Britaniji gdje zavisi od dobre volje strana potpisnica, čini se da je Zakon o radu upravo doprinijeo ovakvom razvoju događaja.

Ključne riječi: Zakon o radu, kolektivno pregovaranje, sindikat

JEL: J21, J23, K31

1. Introduction

The Labour Law of the Republika Srpska regulates certain normative instruments in an innovative way, which in our opinion could lead to significant changes in practice and in application of labour regulations. The National Assembly of the Republika Srpska (RS) adopted the Labour Law[1] 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 of the 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 Union. The adoption of this Law further harmonizes the obligations of BiH assumed under ratified 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.

The key purpose of this analysis is to examine the status of collective labour agreements from the perspective of the new law, *i.e.* 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 normative mechanisms and their practical implementation.

The distinction between this paper and some other analyzing labour laws is in its methodological perspective - "Law and economics" of employment law. Although many scholars see no substantive difference between 'Economic analysis' of employment law and "Law and economics" of employment law Geoffrey Miller' is making clear distinction. According to him, and in line with our beliefs, Economic analysis brings the principles and reasoning of economics to examine the effects of a law or legal doctrine. Law and economics combine both legal and economic modes of thought, and perhaps even prioritizes law. Law brings 'the understanding of complex institutions, politics, and social policies' to the analysis (Miller, 2011).

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 laws and 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, 1971).

This idea was especially examined 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 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 realistic market 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 on labour 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.

Modern Labor Law includes all legal regulation affecting the workplace, like prohibiting employers from discriminating against employees on the basis of race or sex, or laws mandating safety guards on workplace machines, or laws regulating leave time, including some issues which should be part of collective bargaining. Since 1990s, there is present differentiation between labor law and employment law. Before then, labor law was covering all laws regulating the workplace, while increasingly since 1990, 'labor law' regulates unions and 'employment law' (Schwab & Stewart, 2017). Alan Bogg published essay on philosophical perspectives on labor law (Bogg, 2017).

The role of law often is to reduce or correct market inefficiencies (Schwab & Stewart, 2017). Contemporary analysis of labor 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 & Sarkar, 2008):

1. regulation as exogenous factors through legislation that influence economic flows and
2. "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 the constructs 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 on market conditions and from decisions made by the employer.

3. Bargaining and collective agreements are not necessary any more

Collective agreements are concluded as general, special and collective agreements with individual employers. There is no assumption of direct application of any of 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 Law in principle stipulates collective bargaining, for example if minimum 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 organized at the employer. 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 still there is no obligation that they have to reach an agreement.

Although collective bargaining is very important in labor relations in all economic systems, 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, for instance:

- Chapter VI: Breaks and Leave;
- Article 93: Suspension of rights arising from employment;
- 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 for eating at work for the employees, severance pay when an employee retires, *etc*.).

One can conclude that the Labor Law of the Republika Srpska 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 a need for negotiations between the social partners. The last 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 Republika Srpska ("Official Gazette of the Republika Srpska" 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 Labour Law of the Republika Srpska, 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 contract or duration of the employment contract, the employment contract shall be deemed to be permanent contract, which is a provision favouring worker's right.

This 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 deemed as 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). The legislator has partly created the possibility for increased 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 novelty is 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 normative mechanisms 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 workers contest such agreements through the court relatively often, contending that they were signed under pressure from the employer. In these cases, the workers most often base their claims on submissions that they had signed such agreements, for example, under threat, by mistake, *etc*. (due to defects in consent). Despite having formalized the procedure for signing such agreements in principle, such normative mechanism could lead to reduced number of similar lawsuits in practice.

As a novelty, the Labour Law explicitly prescribes legal consequences of an unlawful termination of employment contract (*e.g.* 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, *etc*.) which could be 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 provisions 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.

For example, trade union representatives have repeatedly opposed having law provisions that would regulate termination of employment contracts, arguing that these provisions are very flexible (for example; if the employee does not achieve necessary results, for technological, economic or organizational reasons, refuses to sign an annex to the employment contract, a serious breach of work duties, or does not abide by the work discipline of the employer, potential abuse of the right for absence or coming to work under influence of alcohol) and that the employee can never be sure whether any one day is his/her last day at work.

The 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. 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 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 Republika Srpska, 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 employ at 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.

Collective agreements have been a major problem thus far, because of lawsuits brought 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 Republika Srpska 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 on a decrease in the payment of meal allowances, around 2,000 employees have filed more than 170 lawsuits, with the total claims between 2012 and 2015 exceeding BAM 14,000,000. They were mostly adjudicated in favour of the employees (Glas Srpske, 2016) and by the end of 2015, BAM 8,600,000 have been debited in the books upon received judgments against Željeznice Republike Srpske. 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 Republike Srpske has been experiencing for many years.

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 Republika Srpska 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 Republika Srpska 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 Republika Srpska remains the same, *i.e.* BAM 370. Nonetheless, trade union representatives believe that this Decision of the Government is 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" (Euroblic, 2016), but it is not particularly critical of the Decision of the Government.

These developments are following trends initiated in developed countries, where national agreements are more common in smaller countries, and it usually settle general matters, leaving more detailed issues for local consideration.

Collective agreements are not legally binding in all countries. In Britain their application depends on the goodwill of the signatories, while in Germany, France, and Australia the government has potentially strong role and may require that the terms of negotiated settlements be extended to all firms in an industry.

4. Conclusion

The new Labour Law is harmonized 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 employees. The most important novelties in the Labour Law are:

- 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 benefit the 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 Republika Srpska, what should be investigated further. Another question for future is does decline of collective bargaining lead to inefficient labour markets, as workers will be prevented from terms and conditions that are costly, and in principle decreasing company profits and investments.

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Endnote

1 The Labour Law was published on 12 January 2016, in the "Official Gazette of the Republika Srpska" No. 1/16, and it came into force on January 20, 2016.