Mészáros, M., Divékyová, K. (2019). Immediate termination of employment relationship by the employer. *Central European Journal of Labour Law and Personnel Management*, *2* (2), 33-43. doi: 10.33382/cejllpm.2019.03.03

IMMEDIATE TERMINATION OF EMPLOYMENT RELATIONSHIP BY THE EMPLOYER

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Received: 20. October 2019, Reviewed: 30. November 2019, Accepted: 05. December 2019

Abstract

The article addresses the issue of immediate termination of employent initated by the employer. Termination of employment by the employer is interpreted as a unilateral legal act, under which the employer can terminate employment with the employee solely on the basis of defined reasons. The main objective is to point to problematic aspects of the Slovak legislation and to clarify their application with reference to judicial practice. The authors summarized the current legal background, analyzed the relevant court decisions, and applied logical thinking, using deduction, induction and synthesis in order to draw the appropriate legal conclusions. The article contains the comparison of the Slovak and the Czech legislation in the affected field.

Key words: termination of employment, immediate termination of empolyment, serious breach of employment discipline, intentional crime

DOI: 10.33382/cejllpm.2019.03.03

JEL classification: J80, J83, K31

Introduction

Labour wage is one of the sources of financial security for the citizens of each state. The Constitution itself guarantees its citizens the right to choose profession freely and prepare to conduct the chosen profession. The articles of the Constitution provide increased protection for the employees by guaranteeing fair and satisfactory working conditions; the right to receive remuneration for the work performed; protection of health and ensuring workplace security; the maximum permissible working time; adequate rest after work; the shortest permissible length of paid leave; the right for collective bargaining and the right to protection against arbitrary dismissal.

The Labour Code specifies the individual rights guaranteed by the Constitution of Slovakia. The right to protection against arbitrary dismissal protects the employee against the unilateral termination of employment by the employer. § 59 of the Labour Code defines the individual ways of termination of employment. While the employer has largely limited opportunities to terminate employment with an employee (the employer can terminate employment with the employee by termination or immediate termination on the basis it is defined in the Labor Code), the legislation allows the employee to terminate employment more easily (the employee can terminate employment for whatever reason). However, in order to have a valid termination of employment, both the employee and the employer have to meet the statutatory conditions.

As the immediate termination of employment directly affects the employee's guaranteed right to protect against arbitrary dismissal from employment, the issue is important not only in terms of the appropriate application of it, but has an increased importance in legal terms in the society that motivated the authors of this article to deal with this issue.

Theoretical background

Immediate termination of employment relationship by the employer is defined in § 68 of the Slovak Labour Code. By applying immediate termination of employment relationship, the employment relationship terminates immediately i.e. when this unilateral legal act is delivered to the other party of the employment relationship. Since the immediate termination of the employment relationship is a unilateral legal act, the interaction of the other party is not necessary. If the other party does not cooperate, i.e. not accepting or refusing to accept the written notice about the termination of employment, the Labor Code provides solution for these cases in § 38 (4). The employment relationship terminates immediately, regardless to the will of the other party. The agreement or disagreement of the other party is therefore irrelevant (in case of valid immediate termination of employment).

In order for the immediate termination of empoyment to be valid, the general legal requirements, as well as the requirements in § 70 of the Labor Code, according to which the termination of employment has to be delivered to the other party in a written form within the determined term. § 68 (2) of the Labour Code contains two terms of termination, each of which have a substantive character. These terms set in § 36 of the Labor Code are preclusive. The employer may immediately terminate the employment relationship with the employee within two months from the date he learned about the reason for immediate termination (subjective period), but no later than a year from the date the reason for termination arose (objective period). A statue of repose occurs at the end of one of these defined terms.

If the objective period expires earlier, and the employer becomes aware of the reason for immediate termination of employment more than a year since it occured, a statue of repose occurs as well as in situation when the employer learns about the reason for immediate termination of employment relationship, but fails to make the appropriate steps within two months, despite the fact that less than a year has elapsed since the reason occured. The objective period is thus the maximum framework, while the subjective period can only run within the objective period.

These periods have a strictly preclusive nature. If the employer misses this period, the immediate termination of employment relationship becomes invalid, regardless of whether the other conditions would be met for its validity.

For a valid immediate termination of employment relationship, it is necessary to determine the start of the subjective period. This period is calculated from the date when the employer learned about the decision of the employee to terminate employment, which may be the reason of immediate termination of employment relationship. The moment, when the employer becomes aware of this reason can be understood the moment when this information is provided by any of the employees in superior position. In case of larger institutions it is practically unrealistic the statutatory to be aware of all infringements. It is satisfactory if this information is acquired by the subordinate of the affected employee (Supreme Court of the Czech Republic No 21Cdo/3881/2008).

If an employee committed a breach of work discipline together with his/her superior, the employer will not gain information about it from the superior of the employee but will be aware of breach of work discipline other than being informed by the superior (Supreme Court of the Czech Republic 21Cdo/743/2007).

If a serious breach of work discipline by an employee occured abroad, the Labour Code regulates the postponement of the beginning of the subjective period. The subjective period in this case is also determined in two months, but starts with the employee return from the foreign country. However, the objective period remains unchanged, as well as the start date, which is a year after a day when the reason for immediate termination of employment relationship arose.

The Labour Code also regulates the postponement of the subjective period if in case of two months period when the breach of workplace discipline can be detected becomes the subject of proceedings by another authority. In this case, the employee might be immediately terminated within two months period starting with the date the employer was informed about the results of these proceedings. This applies if investigation is initiated within the original two-month period, provided that the objective period should be maintained.

The two months period (until 31/08/2007 it was only one month) may not be sufficient, especially in situation when immediate termination of employment relationship is delivered to the other party in form of a written notification by postal company. If the delivered document is not taken by the employee in term determined, its delivery is completed in accordance with § 38 (4) of the Labour Code, when the postal company returns the document to the employer as undeliverable or as the employer, by their action of neglect, hampered the delivery of such documentation (typically failing to collect the document within a determined period). This situation could practically be solved by shortening the storing of documentaion at the post office. The views on shortening the withdrawal period of the document differ. There is also an opinion that shortening of withdrawal period should not apply in case of delivering notice of termination or immediate termination of employment by the employer. However, according to our research, there is currently no established judicial practice on this issue, so we support the opinion that shortening of the withdrawal period should rather be possible.

The Labour Code does not prevent the immediate termination of employment relationship if the agreement about employment termination has already been concluded or the notice of termination of employment has been submitted, provided that the employment relationship is

not closed, so the date of termination of employment relationship specified in the agreement has not passed yet resp. the notice period is in progress/unfinished. It may also be theoretically assumed that an immediate termination of employment relationship will take place in the period when the other party has already received the legal decision about termination of employment during the probation period, in which the latest date of employment termination was stated during the probation period, although these cases occur marginally in practice, as it is easier and more practical for the other party to take advantage of the latter termination of employment in the probation period. According to our opinion, however, the facts justifying the immediate termination of employment should apply resp. the other party should be informed about after concluding an agreement (until the date specified in the agreement as the date of termination of employment) resp. after the notice on termination of employment relationship has been delivered to the other party (until the end of the notice period), or the other party has received the notice of termination during the probation period (until the date of termination of the probation period). Otherwise, the reason for which the legal action to terminate the employment relationship has already been applied would be repeated, which is unacceptable.

By delivering the immediate termination of employment relationship, the employment shall terminate on the date when this unilateral legal act was delivered to the other party, regardless to the date of termination specified. Thus, any other data provided in immediate termination of employment relationship has no legal relevance – cannot affect when the employment relationship between the parties terminates. In case, the employer or the employee decide to terminate their employment relationship by choosing this method, they can influence when the employment relationship ends only after the decision about termination is delivered to the other party. If the date of immediate termination of employment relationship is different from the date of delivery of the document, the employment relationship terminates despite of the indicated date of delivery to the other party (The Supreme Court of the Slovak Republic, 31 March 2018, 3 Cdo 12/2008).

Immediate termination of employment can also be considered, according to scientific literature, as an exceptional method of termination of employment, which should be applied by the employer only in exceptional cases (Barancová, 2019). It is important to address this issue seriously, and should be applied in situation when it cannot be required from the employer to employ the employee during the notice period.

Material and methods

The main objective of the present scientific article is to assess the application of relevant provisions of the Labour Code, concerning the termination of employment relationship in comparison to relevant legal regulations of the Czech Republic. The comparison of the Slovak and Czech regulations is used in research of practical cases of immediate termination of employment relationship when the employee was lawfully convicted of an intentional criminal offence. The partial goal is to assess the signficance and practical applicability of the existence of the fundamental obligations of emoloyee in § 81 g) of the Labour Code of the Slovak Republic in relation to the establishment of a presumption, which subsequently leads to termination of employment with the employee. Another sub-goal of this article is to highlight the possiblility of an employer to terminate the employment relationship with an employee, not only because the employee was lawfully convicted of an intentional criminal offence, but also

for serious breach of discipline as the second legally permissible reason for immediate termination of employment relationship. The achievement of partial objectives is crucial in case of the personnel management of the companies and the internal processes with regard to the legal possibilities of terminating employment, preventing litigation as well as the possibility to plan the possible replacement of employees by other employees of the employer.

The basic assessment base for processing the presented scientific article is the legislation laid down in the Slovak and Czech Labour Code, while the conclusion of the comparative analysis are confronted with the conclusion of the legal practice, which to a certain extent deviates from the legal solutions of the addressed issue. Secondary data were obtained mainly from domestic and partially from foreign scientific literary soruces. As for the nature of the researched issue, we chose to apply selected qualitative methods. As a qualitative method, a critical in-depth analysis of the legal situation and the logical-cognitive methods were applied.

Results and discussion

According to § 68 (1) of the Labour Code, the employer can terminate the employment relationship only if exceptional circumstances apply.

The first reason an employer may terminate an employment relationship exceptionally is when the emoloyee was lawfully sentenced for committing a wilful offence. The second reason for termination of employment relationship is a serious breach of labour discipline by the employee.

Lawful sentence for committing a wilful offence

The provision of § 68, paragraph 1a) of the Labour Code provides first of the two reasons the employer can immediately terminate the employment relationship with the employee. The employer may immediately terminate the employment relationship if the employer was lawfully sentenced for committing a wilful offence.

In order to terminate the employment relationship is not enough to initiate prosecution, but the employee must be lawfully sentenced for an intentional crime. It is also irrelevant what kind of wilful offence the employee was sentenced for, whether or not this offence was related to employment (whether the offence committed by the employee was related to or not with conducting his job; whether or not it was committed in direct connection with conducting his workplace tasks). To meet the requirements for immediate termination of employment relationship is not relevant whether the employee was sentenced to imprisonment or was given a sentence for other crime.

§ 55 (1a) of the Labor Code of the Czech Republic requires an employee to be lawfully sentenced for an intentional crime for unconditional imprisonment more than a year (irrelevant whether the crime committed was related to work conducted or not) or at least six months of unconditional imprisonment, when the employee was lawfully sentenced for committing a wilful offence, which was committed while conducting workplace tasks or in close connection of conducting it.

It can be considered whether the Slovak legislation is adequate for immediate termination of employment as the Czech legislation can be perceived as more social. If the objective of immediate termination of employment in this case is ensuring the smooth operation of business activity of the employer, there is a reason to follow the criterion of the type of punishment and its duration. If an employee committed an offence that is not related to work the employee is doing, the employer is affected by the fact that the employee is „absent" from work since he has been sentenced to imprisonment. A suspended or other type of sentence (financial penalty) cannot affect the activity of the employer. There may be an exeption when the reputation of employee might have an impact on the activity of the employer. The risk of an employer reputation might be caused by a negligent offence of the emplyoee, which according to current legislation could theoretically be conducted directly linked to an emoloyee activity, and would not necessarily be a reason for the immediate termination of employment relationship, so this perspective should not be taken into account. In case, the employee crime was committed while conducting work resp. in connection to performing workplace tasks, the unpleasant impact on the employer's activity is more likely in most of the cases. Therefore, the Checz legislation as well reduces the length of unconditional imprisonment for an intentional crime to six months instead of a year period, in case the employee's intentional crime committed is not connected to work performance.

As a part of *de lege ferenda*, it is possible to consider the abolition resp. modification of this reason of immediate termination of employment relationship. In case of conviction for intentional offence connected to work activity, there is always a breach of work discipline, usually a serious breach of work discipline (which is also a crime) resp, a situation, which as a result of conviction for intentional offence occurs in a vast majority of cases (unjustified absence from work in case of an unconditional prison sentence). The presented situations can be classified as a second among the reasons for immediate termination of employment relationship initiated by the employer (serious breach of workplace discipline).

The problem of immediate termination of employment relationship can be explained by the fact that the condition of integrity applies to certain type of work. In terms of § 41 (6c) of the Labour Code, integrity is required only in case the work for which integrity is required based on the nature of particular work the nautral person has to perform. Otherwise, in terms of the aformentioned provision, the employer is prohibited from requiring information about the employee integrity. Prohibition of requiring information on employee integrity is related to pre-contractual relationship, but no rational reason we can see to examine the employee integrity during the duration of the employment relationship, if it was not required when the employee was hired for the position (unless the position of the employee has not changed into a kind of work which requires integrity).

It may happen that the employee will be lawfully sentenced for intentional crime, but not in any way related to the work of an employee, while being subjected to a suspended sentence, but the employee will continue conducting the work activity, and the employer will have no information about the conviction of the employee (it will have no negative impact on the employer). At the same time, the employer will not be entitled to be informed about this fact (if the work performed by the employee is not subject to requirement of integrity) and the employee is not required to inform his employer about it. According to § 81 g) of the Labour Code, the employee is obliged to notify the employer in writing without unnecessary delay of all changes affecting his/her employment relationship. It is primarily an information that has

impact on the administrative duty of the employer in relation to the employee. It is in particular any change of name, surname, permanent residence or temporary residence, address for the delivery of correspondence, health insurance and if payment is made to the employee‟s account in a bank or branch of a foreign bank with the employee's consent, also any change in banking details. Although, it is about changes affecting the emplyoment relationship, in case of situation that the employee will be lawfully sentenced for intentional crime, but unrelated to work of the employee and will be a subject of suspended sentence, this change in relation to the employee will influence his employment relation only in terms of immediate termination of employment relationship only. It is questionnable, whether the employee is obliged to report that fact to his employer in this case. The interpretation of provision would also be considered in terms if the employee was obliged to inform the employer of this fact. It would be in contrary to the Constitution of the Slovak Republic, not only in terms of *nemo tenetur se ipsum accusare*, but in terms of *ne bis in idem* as well. The result could be an imposition of another sentence for the same act (for which the employee has already been punished by a court decision and this act has no connection with the work of the employee), which would not be imposed by the court, but the employer. In case of an employee's reporting duty, a teleological interpretation should be preferred to a grammatical interpretation. In this case „all the changes related to employment relationship" should be interpreted restrictively, so only those changes that might have an impact on fulfilling the duties of the employer, e.g. reporting obligations to Social Insurance Company, Health Insurance Company, providing pay for the employee or delegating tasks (the obligation to delegate tasks would be endangered if custodial sentence were imposed unconditionally – in this case the employee would be obliged to inform the employer about this fact)and not any other kind of change (certainly not changes resulting in termination of employment relationship for a deed, which does not have any connection with the employee s employment relationship).

Serious breach of labour discipline

The term „labour discipline" is generally one of the most commonly used terms in the field of labour relations. The Labour Code uses this term e.g. in connection with termination of employment relationship initiated by the employer or immediate termination of employment relationship initiated by the employer. It is defining one of the duties of executives, which include the obligation to ensure that there is no violation of labour discipline § 82 e) of the Labour Code, however this term is applied in case of temporary suspension of work (§ 141 of the Labour Code).

Theory refers to „work discipline" as a summary of legal norms and duties of employees as well as compliance with obligations of employees (Barancová, Schronk, 2018). In general, work discipline refers to the duties of the employee (possible to use „workplace duties" as well).

In order to talk about the breach of work discipline, the employee should breach those obligations the employee is bound in connection with his agreed type of work to be conducted. Consequently, the situations in which an employee refuses to fulfill an obligation, an instruction not related to the work performed in accordance with the employment contract, should not be regarded as a breach of work obligation.

The Constitutional Court of the Czech Republic points out that activities that might be considered as serious violations of work discipline do not always have to be specifically regulated by law, employment contract or internal regulation (eventually such behaviour may not be specifically prohibited), but it does not mean that it can be committed by the employee without any consequences. Neither the Labour Code nor the regulations can solve all of the situations that arise in the context of labour relations. In determining the reason for immediate termination of employment relationship in case of seriuos breach of the labour discipline, the Labour Code provides a wide scope to be considered by the court, whether the specific factual findings meet the concept defined or not. The breach of labour discipline is defined in internal regulations e.g. workload of the particular employee or further facts that can define the specifics in objective and understendable manner. According to provisions § 53 (1b) of the Labour Code of the Czech Republic (§ 68 (1b) in the Labour Code of the Slovak Republic), which belong to legal norms with an abstract hypothesis, it is solely the task of the competent court to determine the hypothesis itself, considering all the circumstances. The court is not restricted by any specific aspects or constraints, takes into account the specifities of the issue as well as the practice of general courts.

Breaching of work discipline with respect to the type of work conducted by an employee can occur not only at the workplace during the determined work time, but also outside the premises of the employer and not during the working hours. If an employee in the period in which, pursuant to special regulation, he/she has the right to wage compensation during temporary inability to work, will not follow the treatment regimen determined by the physician (§ 81 (d) of the Labor Code).

The Labour Code distinguishes between two levels of intensity breaching the labour discipline, less serious and serius breach of work discipline. The severity of breaching the work discipline is determined by the employer, depending on specific circumstances the labour discipline was breached by an employee. In case of a lawsuit, however only the court is competent to decide about the severity of breaching the labour discipline.

Taking into account the legal practice and the decisions made by the court, serious breach of labour discipline can be considered e.g. consumtion of alcohol in the workplace, utilizing the workplace equipment for private purposes during the working hours, breach of safety regulations, theft, physical assault of the employer or co-worker, using company car for private purpose without the consent of the employer and long-term absence from work. Less serious breach of labour discipline counts being late and leaving early from the workplace, short term leave without consent of the employer, failure to meet the deadline of submitting work (it is important to consider the importance of work), smoking in the premises of workplace etc.

Decisive factors for assessing whether an employee's conduct can be regarded as a serious or less serious breach of labour discipline are different in each situation. The seriousity of breaching labour discipline can also be examined in a term how long the breach of discipline lasts, whether it is a single or repeated breach of labour discipline and its tolerated or not by the employer. A situation, where certain activity of the employee is considered to be unacceptable and prohibited by the employer is lasting long-term (e.g. the bus driver did not clean the bus for a long time, however it was his work responsibility), the tolerance of the situation might decrease the intensity of the breach of labour discipline. It is supported by the argument that further employment of the employee until the notice period should not be particularly

problematic for the employer compared to the previous period. However, the fact that the employer has tried repeatedly to influence the employee to change his attitude regarding the completion of his duties, and the employee attitude had been tolerated in long-term, cannot be considered as a circumstance reducing the intensity of breaching conducting work duties.

It should therefore be emphasized that the employer should approach each case of breaching labour discipline individually. It should be in accordance with the law as well as the position of the employee in the company should be considered, the employee approach to fulfilling workplace duties, circumstances of the situation breaching the labour discipline, the intensity of breaching specific duties, the consequences of breaching labour discipline for the employer. It is also important whether the employee has caused damage through his action, but at the same time the particular circumstances of the employer must be taken into account as well.

A special situation occurs when it is about breaching several employee duties at the same time or within a short time interval. According to the practice of the Czech courts, it is irrelevant how many of the proceedings identified (legal act terminating the employment relationship) as a breach of labour discipline were assessed in the court proceedings as a breach of labour discipline. It is rather important whether the detected breach of labour discipline reaches an intensity (at least one of them) that might be classified as less serious breach of labour discipline or serious breach of labour discipline.

A breach of the same obligation for the same employer may have different level of seriousity. It results from the fact that circumstances of breaching the labour discipline are rarely the same or similar. A breach of particular work obligation, taking into account all the circumstances might be considered to be a serious breach of labour disciplne, while less serious breach of labour discipline in case of the other employee.

Many employers have stipulated in their internal regulations (working regulations/work rules), which violations they will assess as serious and less serious breach of labour discipline. Although the employer has defined in internal regulations which violations they will assess a serious and which are assessed as less serious breach of labour discipline, it is necessary to examine the circumstances of each case. Providing examples in internal regulations what an employer considers to be a breach of labour discipline should always be taken into account as a „guide“ to inform the employee. Such an internal regulation is not taken into account at a court proceedings, the court may evaluate the breach of labour discipline in a different way than it is laid down in the internal regulation of the employer.

In order to be able to terminate the employment relationship, the employer has to prove that the labour discipline was breached by the employer. The employer must have an evidence that the employee has breached the work obligation.

In order to terminate the employment relationship due to a breach of labour discipline, the employer has to prove that the breach of labour discipline happened due to the employee. The employer has to prove that the employee breached the labour discipline either intentionally or at least negligently. In the case of a serious breach of labour discipline, the employer can decide whether to give a notice to employee or choses an immediate termination of employment relationship. Immediate termination of employment is explained by serious breach of the labour discipline.

Conclusion

Immediate termination of employment relationship is one of those alternatives applied that results in termination of employment both by the employer and the employee. An employment relationship may be terminated by giving notice on the part of the employer or employee. Notice must be given in writing and delivered to the other party, or otherwise it shall be invalid. The Labour Code of the Slovak Republic allows the employer to terminate employment relationship if the employee has been lawfully convicted of an intentional crime or if he has seriously breached the labour discipline.

As a part of *de lege ferenda*, the authors propose to consider amending (resp. abolishing) the legislation on immediate termination of employment relationship in case of intentional crime. As a result of this kind of termination of employment relationship would be imposing further sentence for the same act committed. An employee would therefore not only be punished by the court decision, but also buy an employer who would immediately terminate the employment relationship as a result of committing intentional crime.

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