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LABOUR DISPUTES AS PART OF WORK ENGAGEMENT OF THE JUDICIARY IN BIH

Summary: *Labour relations in BiH are regulated by a set of laws that have been adopted in four jurisdictions within BiH: Labour Law of FBiH, Labour Law of RS, Labour Law of the Brčko District, and Labour Law in Institutions of BiH, as well as a set of other laws that are directly related to the area of labour. The general system of labour relations is governed by the adoption of the mentioned labour laws in BiH. At the same time, the source of legislation in the field of labour relations are also the conventions - international and regional - signed by BiH, which means that BiH is committed to their implementation. In the area of labour and employment,the International Labour Organization conventions are particularly significant, as well as agreements signed with the European Union. In this regard, it is important to mention that the implementation of conventions and agreements is problematic in BiH since the domestic legislation is not yet fully harmonized with international regulations and the monitoring and evaluation of their implementation is performed in rare occasions and sporadically by the competent institutions.*

Key words: *labour disputes, work engagement, judiciary*

JEL classification: *K23, K29*

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INTRODUCTION

Labour disputes are the disputes between employees and employers, or between trade union and the employer, i.e. employers' associations, concerning the infringement of rights or interests, or non-performance of obligations, i.e. employment contracts, which are resolved before the independent impartial authority outside the work environment (Srdić 2006, 27). This definition of a labour dispute contains two fundamental substantive characteristics: that the right which is the subject of dispute, as such, has been determined, or that an obligation was not carried out; that the right, i.e. direct interest or obligation arise directly from labour or from labour relations or that they are related to this relationship (Dedić, Gradaščević-Sijerčić 2003, 26).

This term is not complete unless it is not added legal and procedural elements in the resolution of labour disputes (authorities, jurisdiction and procedure), and unless their basis provides a general idea of a labour dispute. The prerequisite for the occurrence of labour disputes is the evidence of the existence of conflicting interests of employees and employers, because the realization of interests of one subject at the same time means, in principle, the impossibility of the realization of the interests of the other subject. Any significant investment in human factor-work collective (salary increases, investment in occupational health and safety, education, pension funds, rights in case of redundancy, increase of premiums, etc.) results in a decrease in profit of the employer, or company owners. It is a permanent clash of real material interests between employees and employers, which objectively results from the inability to ensure the satisfaction of all the needs or demands of employees through the production process. Therefore, labour disputes are the result of objectively different positions of the social partners, the legitimacy of their different economic, social, professional and other interests. More specifically, labour disputes are an inseparable part of the performance of the dependent labour, i.e. the nature of relations in the labour market, where, on the one hand, there are owners of the capital - employers who organize labour, and on the other there are employees and their representatives (Brajić 1991, 41).

A concrete manifestation of failure to satisfy individual or collective interests of those who take part in labour relations is manifested in the form of conflicts

and contentious issues in the relations of the social partners. Therefore, any dispute opposes the parties to the labour relations regarding the subject of the dispute, putting them in positions in which they have contradictory requirements. Broadly speaking, any issue which is a subject of dispute between employee and employer, if it is solved by a third party, may be considered a labour dispute.

1. CHARACTERISTICS OF LABOUR DISPUTES

In the theory of the labour law it is said that the direct link with the rights, obligations and responsibilities arising from labour relations, is an essential element that makes the most subtle characteristic of a labour dispute. In this regard, considering the subject of a labour dispute, the important things are: that there has been a violation of the rights, interests or obligations arising from labour relations, i.e. from the right to work and related to work; that the law, i.e. the immediate interest or the obligations are set out in heteronomous or autonomous regulations; that it is a dispute arising from determining the rights and obligations arising from labour relations or from regulating the labour relations (Jovanović 2012, 36).
In theory and judicial practice, the division of labour disputes is made with regard to their specific features: parties, subject, nature, authorities and procedures for their resolution. With regard to the parties and the subject of a dispute, labour disputes are divided into individual and collective labour disputes (Srdić 2006, 46). If we start from the nature or specific features of the dispute, then we have a division into legal and interest (economic) disputes. In relation to the authorities and procedures for resolving the disputes, labour disputes are divided to labour disputes which are resolved by the courts in judicial proceedings, disputes which are resolved by non-judicial authorities in the process of conciliation and arbitration, and disputes which are resolved using the methods of collective action taken by employees, or employers (Dedić, Gradaščević-Sijerčić 2003, 34).

2. TYPES OF LABOUR DISPUTES

Considering all of these specific features, and observing the labour-legal theory and practice, a common division of labour disputes is in two groups: individual labour disputes and collective labour disputes.

The establishment of effective institutional mechanisms for resolving labour disputes, as well as effective measures in order to prevent their occurrence are basic prerequisites for the achievement of social and industrial peace in a democratic society. Labour disputes are primarily a disagreement on certain issues or groups of issues between employees and employers. For these positions it is typical that they are opposed with respect to the rights and obligations arising from their legal relationship (i.e. enforcement of legal rights), or they represent conflicting demands for the redistribution of economic resources through negotiation (Resolution no. 15 of International Labour Organization concerning the issues of strikes, lockouts and other action due to labour disputes).

At the very heart of the labour dispute there are three essential components: parties to the dispute, the subject of the dispute and the effects of the dispute. As the Labour Law, as a general law, does not contain general definition of a labour dispute, it can be said that the concept of labour disputes is based on the basis of the current legal doctrine and peculiarities of labour disputes arising from the analysis of legal regulations which regulate them (or more precisely, laws which are more closely related to this topic).

The theory of labour law distinguishes between three groups of classifications of labour disputes: according to the parties in a labour dispute (a subjective criterion), according to the type of labour dispute (objective criterion) and according to the subject of the violation of rights.

One of the most important division of labour disputes is the division in relation to the subject of the dispute, so we can distinguish between disputes concerning the rights (labour disputes on establishing rights in which the subject is prescribed through rights and obligations arising from labour relations), and disputes which are not of a legal nature, they are labour disputes according to the issue of interest (the subject of these disputes is the establishment of new rights and obligations of labour, and they are related to the new regulations on the interests of the parties to the labour relationship, and they usually occur as a result of unsuccessful collective bargaining).

Another division is into the collective and individual labour disputes. Collective labour disputes are disputes between the parties that are in the col-

lective labour relationship (a group of employees or employees' organization on one side and employers on the other), and their subjects can be collective rights or relating to general interests. Individual labour disputes can be defined as disputes arising between the parties and related to the individual labour relationship (employee and employer) and their subjects are rights and obligations which reflect the individual interests of the parties (the International Labour Organization, Substantive provision of labour legislation: Settlement of collective labour disputes).
Conventional procedures in resolving labour disputes, excluding judicial means of resolving a dispute that have been recognized in legal doctrine and comparative law, are alternative (non-judicial) methods of dispute resolution. Alternative dispute resolution includes various procedures that take place outside the court, usually with the help of a neutral third party, that, depending on the type of procedure, can have different roles and different levels of impact on the resolution of the dispute. Application of these methods in the resolution of labour disputes contribute to the achievement of social justice, to finding a functional solutions, while taking into account all the elements of the dispute and justice. Therefore they are adaptable and can be used in all situations (Jašarević 2000, 39).

3. SYSTEM OF LABOUR LEGISLATION IN BIH

The industrial relations system in BiH is a part of the system of general economic, social and legal organization of BiH and its entities, that is the Republic of Srpska (RS), the Federation of Bosnia and Herzegovina (FBiH) and Brčko District (BD). It is based on legal acts and collective agreements of various entities and the District, and it regulates the establishment of labour relations and other important issues, the resolution of labour disputes (mediation, conciliation, arbitration), the implementation of the tripartite and bipartite social dialogue (i.e. collective bargaining) and issues concerning strike. At the state level there are only acts that regulate the labour relations of civil servants and employees who are employed in the institutions of BiH. In the entities and in the District, the Labour Law enabled the establishment of the Social and Economic Council on a tripartite basis, while in the Republic of Srpska the Law on Social and Economic

Council has been adopted. The same laws allow for collective bargaining in order to conclude the general, sectorial and collective agreements at the enterprise level, as well as at the level of one or more cantons within the FBiH. According to Annex IV of the Dayton Peace Agreement, which is the Constitution of Bosnia and Herzegovina, the jurisdiction over social policy and labour legislation is entrusted to the entities. In the Federation of BiH, according to its Constitution, this is a part of joint jurisdiction of the entity and cantonal levels of government. Thus, the area of labour legislation is governed by the entity regulations. In the Federation of BiH, the regulations in the area of labour legislation include:

- Labour Law of the Federation of BiH (Official Gazette of FBiH no. 43/99, 32/00, 29/03)
- General Collective Agreement for the territory of Federation of BiH (Official Gazette of FBiH no. 54/05)
- Law on Employees' Council (Official Gazette of FBiH no. 38/04)
- Law on Strike (Official Gazette of FBiH no. 14/00)
- Law on Employment of Foreigners (Official Gazette of FBiH no. 8/99)
- Law on Mediation in Employment and Social Security of Unemployed Persons (Official Gazette of FBiH no. 55/00, 41/01, 22/05, 09/08)
- Law on Occupational Health and Safety (Official Gazette of BiH no. 22/90).

In the Republic of Srpska the field of labour legislation is regulated by:

- Labour Law of the Republic of Srpska 2000 (Official Gazette of RS no. 55/07)
- General Collective Agreement of RS (Official Gazette of RS no. 27/06, 31/06)
- Law on Employees' Councils (Official Gazette of RS no. 26/01)
- Law on Employment (Official Gazette of RS no. 54/05, 64/06)
- Law on Occupational Health and Safety (Official Gazette of RS no. 1/08)
- Law on Strike (Official Gazette of RS no. 10/98)
- Law on Employment of Foreigners and Stateless Persons (Official Gazette of RS no. 96/05, 123/06),
- Law on Professional Rehabilitation and Employment of Persons with Disabilities (Official Gazette of RS no. 98/04, 91/06).

In Brčko District the field of labour legislation is governed by the following regulations:

- Labour Law of Brčko District (Official Gazette of BD no. 19/06, 19/07, 25/08)
- Law on Occupational Health and Safety (Official Gazette of BD no. 31/05, 35/05)
- Law on Employment and Rights During Unemployment (Official Gazette of BD no. 33/04, 19/07, 25/08)
- The Law on Employment of Foreigners (Official Gazette of BD no. 15/09, 19/09).

In Bosnia and Herzegovina, together with the domestic law, there are numerous international laws and treaties in force. According to the Constitution, international treaties that have been drawn up and ratified in accordance with the Constitution and published are part of the internal order and their legal power is higher than the law. Their provisions may be changed or repealed only under conditions and manner as defined in them or in accordance with the general rules of international law.

In many countries of the Western Europe, the monistic principle is in force. It means that domestic and international law constitute a single system. In this case, international treaties ratified by the state do not have to be approved by special national legal acts and are converted into national law by ratification. They also automatically become part of the legal system of the country concerned. On the other hand, according to the dualistic theory, it is considered that international and domestic law are two separate and independent legal systems. In order for international law to become binding and applicable in the territory of a country, it first has to become a part of the legal system of that country. That is why the legalization of a treaty is necessary.

Under pressure of the complaints, the monistic and dualistic theories softened their views recently. The practical application of these theories is focused on the mutual relationship of the rules of domestic and international labour law. The legal nature of these standards is different. International standards can be divided into directly applicable (where the application does not insist on taking additional legislative measures) and program standards (which are made up of program statements or rules and general

terms of undetermined significance, and they cannot be directly applied, nor is it possible to realize any subjective right or assume any obligation by referring to them before a court).

A large number of economic and social rights in international treaties is regulated by means of the program standards, which means that the state undertakes, through the government, to implement an appropriate policy towards the gradual realization of international standards.

According to Annex IV of the Dayton Peace Agreement, the European Convention on Human Rights and Fundamental Freedoms has direct application in Bosnia and Herzegovina. The Constitution of the Federation of BiH defines that the following instruments, important for the protection of human or labour rights, have the legal force equal to the legal force of constitutional provisions. These are: The European Social Charter of 1961 and Protocol I, the International Covenant on Economic, Social and Cultural Rights of 1966 and the Additional Protocols of 1989, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the International Convention on the Elimination of all Forms of Discrimination Against Women of 1979, the United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981.

The Constitution of the Republic of Srpska also protects the right to work and related rights. It was established that the employees' employment can cease only under the conditions specified by law and collective agreement, as well as the right to earnings gained through work. Employees, under this Constitution, have the right to limited working hours, paid annual vacation and leave, safety at work, special protection of youth, women and the disabled.

The freedom of union organization and the right to strike is also guaranteed, as well as the right to social security and social insurance of employees and their families, the right to insurance during temporary unemployment, all under conditions defined by law.

The international conventions of legislative character provide optimal conditions for the protection and promotion of respect for labour rights. The individuals in such cases can seek to satisfy their rights before the competent authorities and effectively defend them. However, when it comes to an

international plan, the point is that monitoring mechanisms that have been accepted so far do not have unlimited range.

Regular monitoring - or international monitoring carried out on the basis of reports submitted by states regarding the implementation of ratified conventions on human and labour rights, as well as special monitorings, regardless of whether they are of judicial nature or being implemented by the appropriate UN authorities, are essentially reduced to political pressure on the Member States, which is carried out through the recommendations of the UN authorities.

Bosnia and Herzegovina has ratified a total of 68 conventions of the International Labour Organisation (ILO) which it has to implement into the positive legislation. A large number of ratified conventions deal with the regulation of labour, labour relations, health and safety in maritime activities, which currently is not crucial for Bosnia and Herzegovina. Also, Bosnia and Herzegovina has ratified some of the most relevant ILO conventions relevant to the domain of labour, labour relations and occupational health and safety.

It can be said that the entity labour laws are based mainly on the fundamental principles of the adopted conventions. However, it would be necessary to ensure a higher degree of compliance of labour laws with adopted conventions, and thus the progress in the realization of a greater degree of social justice. This primarily concerns the Holidays with Pay Convention no. 132, the Minimum Age Convention no. 138, the Maternity Protection Convention no. 103, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value no. 100, Occupational Safety and Health Convention no. 155 and others.

In the Federation of BiH, some new provisions are foreseen in the latest Law on Amendments to the Labour Law, which was submitted to the legislative procedure, which further regulate the prohibition of discrimination and types of discrimination in the area of labour and employment, the prohibition of harassment or sexual harassment, gender-based violence, as well as systematic harassment at work or related to work, including mobbing as a specific form of systematic harassment. The aforementioned foresees the possibility of prosecution of cases of discrimination in the context of this Law, where the employer has the burden of proof and the right to compensation if the claim is merited.

There is also a new article which ambiguously provides that the employer is obliged to pay equal remuneration for work of equal value to the employees, regardless of their national, religious, gender, political or trade union affiliation. Work of equal value means work which requires the same degree of education, the same working ability, responsibility and physical and intellectual work.
In the case of non-compliance with the legislation a fine is foreseen for the offence for employer-legal entity, for employer-individual and for the responsible person within the legal entity.
With such proposals of legislation the legislator seeks, through more precise and detailed legal regulation, to act better regarding the issue of promoting gender equality and its application in this very important area of social relations. Furthermore, the general labour regulations partly still do not comply with the ILO Conventions (Forced Labour Convention no. 29 and Abolition of Forced Labour Convention no. 105), which prohibit all forms of forced or compulsory labour in all its forms. Specifically, Article 32, Paragraph 1 of the Labour Law of the Federation of BiH (Official Gazette of FBiH no. 43/99, 32/00, 29/03) and Article 43 of the Labour Law of the Republic of Srpska (Official Gazette of RS no. 38/00, 40/00, 47/02, 38/03, 66/03, 20/07) prescribes that in the case of force majeure (fire, earthquake, flood) and a sudden increase of workload, or in other cases of necessary need, at the request of the employer, the employee is obliged to work longer than full-time, i.e. to work overtime, but no more than ten hours a week. This provision of the Labour Law is the most frequently abused provision by employers so that the employees are often required to work more than full time referring to the sudden increase in workload. In such cases where the labour laws allow for the possibility of manipulation in a period of high unemployment rate, i.e. the lack of jobs and the fear of loss of employment, the employer can easily abuse the regulations and easily justify overtime work before the inspection.

4. LABOUR DISPUTES IN BIH

Today, the labour legislation is highly developed in a number of countries. There is a constant pursuit of a permanent improvement of legislation that regulates and protects the rights of employees. A major contribution is

made by the constant activity of the International Labour Organization in Geneva, which is reflected primarily in the form of the adoption of conventions and recommendations in this field, which were implemented by a large number of countries in their legislation. However, traditionally used to unilaterally determination of standards of conduct in companies, employers in many countries continue to resist and frequently violate the rights of employees. It is therefore essential that the employees are provided with an effective and impartial, and, above all, quick protection of labour rights, in order to avoid labour disputes of large and small scale, and which bring with them a number of adverse effects on the workers and their families, on the company, on the region, and often can have a detrimental effect on the economy of the entire country.

Court protection is one of the common ways of protection of labour rights. Its aim is to correctly apply labour legislation to the presented case. In comparative labour law the labour disputes are resolved by: specialized labour courts, labour tribunals, the courts of general jurisdiction, and in some countries the Administrative Court (Srdić 2006, 188).

Recently, there has been more and more talk about the necessity of establishing specialized courts for labour disputes, and there is a number of reasons to do this. The most significant ones relate to the existence of mistrust of labour organizations, associations and trade unions in the regular courts, which are considered to mostly neglect the interests of employees and protect the interests of employers. The procedure before the regular courts is quite often complicated, lengthy and often unrealistically expensive, which, when you take all the mentioned facts into account, makes them seem inefficient. In addition, the judges who judged in cases of labour disputes are often not sufficiently specialized in problems of this kind, especially in case of collective labour disputes. The above reasons were crucial for the legislators in many countries to decide to establish labour courts, which deal with labour disputes.

Labour courts exist in many countries and are spread all over the world. However, there are four systems of protection of labour rights today which have the greatest influence: French, German, British and Swedish. It would not hurt to mention that in many countries, disputes related to the rights of employees regarding the social security are not considered to be labour

disputes, so special courts deal with them - social security courts. They exist in Germany and France, and they existed here in the period between the world wars, until 1950 (Petrović 2009, 72).

Labour courts usually deal with the individual and legal disputes because such disputes are suitable for the trials, since they concern the application and interpretation of defined rights. Individual labour disputes arise in relation to the violation of the rights or interests of individual employees, while the collective disputes involve the violation of the rights of groups of employees. Legal disputes could be defined as disputes concerning the application or interpretation of the rules on the rights of employees established by legislation and collective agreements. Interest disputes, pertaining to the sphere of labour disputes in connection with the establishment of new or modification of existing working conditions, are not as suitable for the trial. Therefore, these disputes are usually resolved by conciliation, mediation and arbitration, and labour courts rarely deal with them as in Portugal, Spain, Denmark and Israel. Most labour disputes in practice arise in relation to (Šunderić 2001, 110):

– termination of employment,
– salaries,
– disciplinary measures,
– rights of trade union activists and other employees' representatives,
– compensation for damages,
– sick leave,
– pensions and other individual rights arising from employment.

An important source of labour disputes are the rights and obligations of employees as defined by collective agreements and the collective bargaining. Basic features of the proceedings before the labour courts are flexibility and informality. Compared to the regular courts, the proceedings before the labour courts are quicker, more accessible and less expensive.

Special procedures which take care of the speed and simplicity of the proceedings in labour disputes are in force in Argentina, Austria, Italy, France, Greece, Great Britain, Denmark and many other countries. In order to complete the proceedings of labour disputes as soon as possible, in some countries the deadlines are established for the completion of certain procedural actions and to end the labour dispute. Thus, in Italy, in 1970, the deadline for resolving the dispute in the first instance was reduced to 60

days, and in Switzerland labour courts have the duty to take care to avoid unreasonable postponing and delays in the proceedings (Srdić 2006, 192). In practice, the speed of resolving labour disputes depends on the type, the number of persons involved in the dispute, as well as the complexity of the matters at issue. The quickest are the labour courts in Germany and Switzerland. The disputes there are resolved in about three months. The detail of the proceedings which makes it special before the labour court is its gratuitousness. More specifically, the parties are exempt from paying taxes, each of which bears the cost of its procedural actions during the proceedings. The practice is that the losing party is obliged to reimburse the costs of the other party.

Significant specificity of a labour dispute is the fact that the courts, almost without exception, try to conciliate the parties. It is mandatory to attempt mediation in Germany, Belgium, Spain, France, Greece, Portugal, Sweden and many African countries, and it is optional in the UK, Denmark and Ireland (Blainpain, Hendrickx 2002, 163). If a labour dispute is settled through conciliation, the dispute is significantly shortened, and the relationship between the parties is considerably less damaged then after the trial.

Another specific feature of a labour dispute is that in the first instance it is usually not required, and even avoided, to hire a lawyer, and in some Swiss cantons (Geneva, Fribourg, Valais and Zürich) (Ivošević 2010, 94) it is strictly prohibited.

One of the main characteristics of the proceedings in labour disputes is to leave a possibility for the court to order temporary measures in order to avoid damage which cannot be reimbursed later. In terms of the information they learn during the course of the trial, the judges of the labour court mostly have an obligation of confidentiality. When making a decision in a labour dispute the aim is to make a unanimous decision. In addition, the aim is also to make judges of the labour court to act neutrally, not as representatives of their social group. In some countries the neutral member of the council votes only if the representatives of employees and employers do not reach an agreement. Labour relations as specific social relations insist on the quick resolution of disputes arising from these labour relations. Bearing in mind that the existing judicial protection is rather slow and inefficient, new models for the settlement of disputes are being implemented recently, with the hope that they would be able to live up to expectations, and to expedite the proceedings and thus bring about the resolution of disputes.

CONCLUSION

Labour relations in BiH are regulated by a set of laws that have been adopted in four jurisdictions within BiH: Labour Law of FBiH, Labour Law of RS, Labour Law of the Brčko District, and Labour Law in Institutions of BiH, as well as a set of other laws that are directly related to the area of labour. In addition, the sources of law in the field of labour are also the collective agreements and general acts of employers, such as employment rulebooks, agreements between employees' councils and employers, as well as employment contracts. The legislation adopted by government institutions is only a minimum of protection of individual and collective labour rights and related to labour, or it should be the framework for the protection of employees not covered by collective labour law, while collective agreements, employment rulebooks and contracts must appear as the most important sources of labour legislation and the driving force for the modernization of the labour relations system which must follow the globalization of the labour market.

Labour rights are divided into individual and collective. Individual rights include the issues of salaries, working hours, holidays, occupational health and safety and job security, while collective rights contain provisions related to trade union organizing, collective bargaining, participation in decision making, resolving disputes, strike, and the right to participate in the adoption of autonomous acts of employers (rulebooks, employment contracts). The above issues of individual and collective rights are dealt by labour laws of Bosnia and Herzegovina, which in addition to the above also contain provisions related to non-discrimination, the contents of the employment contracts or written certificate, the employment contract for a limited time, equal pay for women and men, disposal of surplus, part-time employment, and rights of maternity protection - which are fully or partially compliant with international labour standards and the EU directives.

It is evident that the system of rights in labour relations is developed in BiH, although it is not fully in line with international and regional conventions, and there is also the problem of harmonization of laws within BiH. However, this system provides a legally guaranteed protection of rights - individual and collective - in the field of labour. Resolving individual and collective disputes is regulated by two laws: Labour Law and the Law of Civil Procedure, while judicial proceedings are conducted before the regular courts in civil proceed-

ings. In BiH, there are no specialized labour courts. In the first instance the competent court is the municipal court (Federation of BiH) or the court of general jurisdiction (Republic of Srpska) which have a general jurisdiction over the defendant (based on the place of residence, or place of head office registration).

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