

Conclusions of the summary report on the unlawful termination of employment

A jurisprudence-analysing working group has been set up within the labour law section of the Administrative and Labour Department of the Curia to examine the courts' case-law on the legal consequences of the unlawful termination of employment. The working group found that the courts had encountered problems and difficulties in interpreting the law in respect of the unlawful termination of employment by the employer. Employees lodge their claim with the court frequently not in compliance with the provisions of Act no. I of 2012 on the Labour Code. According to the Curia's viewpoint, labour judges could promote the submission of appropriate claims by way of ordering measures of organisation of procedure in a more active manner. The employees' failure to submit appropriate claims is due to the fact that the relevant provisions of the Labour Code are difficult to understand and interpret. As the labour law rules on the legal consequences of the unlawful termination of employment have always been of great significance, their clarity is of critical importance with respect to their interpretation by the courts.

The jurisprudence-analysing working group established that the courts' case-law is not consistent in interpreting the term loss of income and the employee's obligation in relation to the mitigation of damage. According to the Labour Code, compensation for loss of income from employment payable to the employee shall not exceed twelve months' absentee pay. This compensation, however, cannot be claimed on the basis of a separate legal title and cannot be considered as lump sum damages, since it should not exceed the amount of twelve months' absentee pay. The various elements of the term loss of income are detailed in Departmental Opinion no. 3/2014 KMK (31 March 2014) of the Administrative and Labour Department of the Curia, which points out that section 169, subsection (1) of the Labour Code and section 6:528, subsections (3)-(6) of the Civil Code should be applied in determining the amount of loss of income from employment. The calculation of loss of income should not be based only on the calculation of the employee's absentee pay.

The jurisprudence-analysing working group is of the opinion that the plaintiff's claim can be increased during the second instance court proceedings up to the aforementioned limited amount of absentee pay and that additional claims for compensation can be lodged with the court on the basis of the employer's unlawful acts after the delivery of a final labour court decision on the unlawful termination of employment. The Curia also stated that the burden of proving the employee's compliance with his obligation in relation to the mitigation of damage originating from his loss of income should rest on the employer and that the courts have no competence to order the taking of evidence *ex officio* in that regard.

A substantiated claim, based on section 83, subsection (1) of the Labour Code, for the reinstatement of employment relationship cannot be disregarded by the court and the employer cannot refuse to reinstate the employment relationship by simply referring to the impossibility of reinstatement. The Curia argued that the reinstatement of employment relationship should be requested in abuse of rights cases as well. The Labour Code provides *inter alia* for the possibility of reinstatement i) if the employee served as an employees' representative at the time his employment relationship was terminated, ii) if the employee served as an elected trade union official at the time his employment relationship was terminated without the prior consent of the higher ranking trade union body, and iii) if the employee was unlawfully terminated by notice during her pregnancy, maternity leave, leave of absence taken without pay for caring for a child or while receiving treatment related to a human reproduction procedure. On the other hand, the employment relationship cannot be reinstated in cases of unlawful termination without notice, which places the groups of employees concerned in a disadvantageous position in which they may be deprived of certain social security benefits.