

Conclusions of the summary report on the courts' jurisprudence
in cases related to the prohibition of abuse of rights

Based on the examination of 310 cases filed to first instance courts after 1 January 2011 and finally adjudicated before 31 December 2015, the jurisprudence-analysing working group has made the following findings:

1. Where in an employment dispute various, parallel labor law principles are invoked, the actually applicable principles are to be determined by considering the following aspects:

a) The facts underlying misuse of rights cases (exercise of rights against their intended purpose) and abuse of rights cases overlap.

b) As compared to the above principles, the principle of good faith and fair dealing is more general: where a case involves additional facts evaluated by the law (e.g. revenge, intention to cause harm, suppression of the expression on an opinion), the principle of abuse of rights is applicable.

c) No violation of the principle of equal treatment alleged by an employee in the context of an employer's *lack-of-causal connection* defense can be established where the disadvantage allegedly suffered by the employee is related to individual circumstances (e.g. employer's antipathy, difference of opinion, conflict with the employee). For albeit such situations result from the employees' dependency and vulnerability (which is typical of employment relationships), they only resemble – but do not constitute – negative discrimination, given that such situations primarily result not from social processes, prejudices and discrimination but from the hierarchic nature of employment relationship. Therefore, such situations constitute abuse of rights. The same conclusion can be reached where a difference of opinion arises between the employee and the employer in a workplace-related court case.

2. Where a decision, for example a termination without notice of an employment relationship during the probationary period, does not need to be reasoned but the employer did, before the termination or in the court proceedings, give a reason by specifying a circumstance amounting to abuse of rights, the employer must be able to prove that reason. Where a termination of employment without notice specifies expediency or economic reasons as reason for the termination, such reasons must be evaluated in the context of the principle of good faith and fair dealing.

3. The jurisprudence-analysing working group has held that where the parties entered an agreement, no abuse of rights can be alleged, as no right to enter a contract unilaterally exists. The same applies to the stipulation of a probationary period as an element of the contract. In such cases the principle of good faith and fairness is applicable. A minority of the members of the jurisprudence-analysing working group has been of the opinion that where a probationary period being contrary to the very purpose of that legal institution is stipulated, the occurrence of abuse of rights can be examined.

4. The conclusion of a second and any later fix-term contract is only allowed under section 192(4) of Act No. I of 2012 where a rightful employer interest exists, with the proviso that the conclusion of the fix-term contract may not aim to impair the employee's rightful interests. A contract violating this statutory prohibition is against the law (that is, null and void) not under the principle of abuse of rights, but on account of violating a statutory provision.

5. Where a proven, material, imputable and significant breach of duty is established, abuse of rights can normally not be alleged. If in such a case employment is terminated without notice [section 78(1)a) of Act No. I of 2012], an absence of the cumulative statutory conditions exists, even if the party alleges abuse of rights.

6. Abuse of rights can only be established where the contested measure or decision is formally lawful and does not violate any statutory provision. Therefore, where unlawfulness is alleged under various grounds, those grounds are to be examined in the evidentiary proceedings not in their order of occurrence in the statement of claims. For first nonconformity with any statutory provision is to be examined then, where discrimination is alleged, evidence taking as specified under the Act on Equal Treatment is to be carried out and the ill-foundedness of the discrimination allegation is to be established, and only thereafter can a violation of the principles (abuse of rights, duty of cooperation, duty of good faith and fair dealing) be examined.

7. The difficulty of proving an abuse of rights derives from the fact that the party abusing a right causes damage to the other party by seemingly remaining within the boundaries of the law. Therefore the violation of law is not obvious. For establishing the violation, the circumstances must be uncovered, and extensive evidence taking must be carried out, in the course of which evidence proving abuse of rights must be submitted by the party alleging an abuse. Image or voice recordings may be submitted, though such recordings are usually made not with the consent of the persons in the recordings. Such persons, however, may not successfully allege a violation of their personality rights where they thereby attempt to conceal a false statement of facts made by them. Where a person wishes to prove an abuse of rights by invoking an unlawful practice in a set of proceedings conducted in another person's case, evidence is to be taken by having regard to Act No. CXII of 2011 on Informational Self-Determination and Freedom of Information and by protecting personality rights.

8. From the regulation of the various employment status laws on the legal consequences of unlawful dismissal it can be concluded that private and public employees' inability to demand reinstatement in their position as a legal consequence of a termination of employment communicated in a manner violating the prohibition of abuse of rights, is not justified.