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Economic grounds for employer termination in the light of EU and domestic law

Doctoral thesis

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Introduction

The subject of my dissertation is the examination of the grounds for termination of employment related to the employer's operation in Hungarian and EU law. The actuality of the topic is that terminations related to the employer's operation are generally based on economic reasons and circumstances, as a result of which the employment relationship is terminated completely independently of the person and behavior of the employees. The economic reason can be an economic downturn caused by a global economic crisis, a health crisis, or even an organizational or technological reorganization affecting the employer alone, which necessitates changes in human resources. The global, European and domestic economic events of recent years have had an impact on domestic labor law and thus on the rules for termination of employment.

The legislator has sought to make the system for terminating employment more flexible and to reduce the costs of employer terminations. However, the regulation does not specify what facts may lead to terminations related to the employer's operation. There is no doubt that the economic decisions of employers and the interests of employees are often in conflict, therefore labor law regulations must create a balance where the economic interests of employers and enterprises are not harmed and at the same time the rights of employees are adequately protected. This conflict of interest is constantly present in the development of employment termination rules, and is its main driving force, since strict regulations protecting employees may reduce the decision-making power of employers, while permissive regulations may increase the vulnerability of employees.

The hypothesis of my thesis is that the lack of the concept of grounds for termination of employment related to the operation of the employer in domestic labor law regulations leads to legal application uncertainties on the part of employers, employees and even the courts. Therefore, the main goal of my thesis is to explore and classify the grounds for termination of employment related to the operation of the employer.

Of course, the regulation on the termination of employment cannot be separated from the right to work and entrepreneurship, as well as from the international and EU legal developments on the termination of employment.

Structure of the thesis

Following the Introduction, in Part II of the thesis I presented the positions and views on the fundamental content and nature of the right to work and some of its elements.

The right to work is declared in several international legal documents, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Revised Social Charter, but the definition of the concept is not uniform. It is defined most broadly by the Charter, which also includes employee rights. In contrast to the right to work, the right to conduct business does not appear independently in international human rights conventions, since in international law this right is defined within the framework of the right to property. The Charter of Fundamental Rights is the first document that independently names the right to conduct business. I considered a detailed analysis of the right

to work and conduct business necessary because the freedom of enterprise, the operation and interests of the employer are often contrary to the interests of employees, which leads to a conflict between the two fundamental rights. The practice of the CJEU has taken the position regarding this fundamental right conflict that the protection of employees' rights can be limited against the freedom of enterprise.

Following the international legal outlook, I turned to the domestic constitutional law practice in relation to the right to work and the right to conduct business. I highlighted the difference between the Constitution and the Fundamental Law of Hungary that the former still contained the right to work, but the latter chose the regulatory technique of covering the content of the right to work by ensuring specific rights.

Domestic practice considers the free choice of work and occupation, as well as the right to conduct business, to be interrelated, the former being an aspect of the latter. In this context, I analyzed the constitutional content of these rights in the practice of the Constitutional Court. Based on this, the right to work, occupation and conduct business is a fundamental right and enjoys protection similar to other freedoms, but at the same time, the right to work and occupation is not unlimited. I agree with György Kiss in this regard that the state itself restricts this right due to economic considerations, since it comes into conflict with the freedom of the economy.[1] We can also say that ensuring employee rights can necessarily lead to the restriction of employers' right to conduct business and at the same time the market, and to a conflict between employee rights and the right to conduct business.

In Part III, I focused on the rules of protection against termination of employment, which is part of employee rights, in international and EU law. I stated that protection is necessary only against unlawful, unjustified termination of employment. I presented in detail the provisions of ILO Convention No. 158 on termination of employment; according to them, the employer may only terminate the employment relationship on the basis of a valid reason that is related to the employee's ability, conduct or the employer's operations. The Recommendation includes, by way of example, changes in production, structure, organisation or technology as reasons related to the employer's operations.

The ratification of the Convention, although small, undoubtedly had a significant impact, among others, on Article 24 of the Revised Social Charter and Article 30 of the Charter of Fundamental Rights, which, similarly to the text of the Convention, declare protection against termination of the employment relationship.

The Charter is therefore the first in EU law to provide for protection against unjustified dismissal for workers. The scope of application of Article 30 of the Charter has been interpreted strictly by the CJEU, and therefore it can only be invoked before a national court if the Member State is implementing EU law; therefore, the Charter cannot be invoked against national legislation that does not implement EU law.

[1] KISS György: *Alapjogok kollíziója a munkajogban*. Pécs, 2010. 100.

Although it would be theoretically possible to regulate the protection of employees against termination of employment in the EU in a uniform manner, this has not been done to date and it does not appear that this would be a realistic possibility in the near future. The most important reason for the lack of uniform regulation is the lack of political will, since legislation aimed at maintaining jobs would run counter to the concept of flexicurity. Nevertheless, rules on protection against dismissal – which are not general – are scattered throughout the labour law directives.

It contains rules on protection against dismissal and unfair termination of employment relationships, i.e. the Collective Redundancies Directive,[2] the Transfer of undertakings Directive,[3] the Posting of Workers Directive,[4] the Information and Consultation Directive,[5] and among the social directives, the Maternity Protection Directive,[6] the Equal Treatment Directive,[7] the Parents and Carers Directive,[8] the Predictable Working Conditions Directive,[9] and the Platformwork Directive.[10]

From the analysis of the practice related to the rules on termination of employment in these directives, I have come to the conclusion that termination of employment is often linked to the principle of non-discrimination, and that a change can be observed in the practice of the CJEU compared to the previous ones. In one case,[11] in the event of a collision between the freedom of contract related to the right to conduct a business and the principle of non-discrimination, the court declared the priority of social law over economic freedom. In my opinion, judicial practice has thus started in the direction that, in order to enforce social rights, economic rights can also be restricted in cases related to termination of employment and the prohibition of discrimination.

It is also worth highlighting that the Directive on Predictable Working Conditions provides that collective agreements may deviate from the rules of Articles 8-13 of the Directive, provided that full protection of employees is still guaranteed. The limitation of the deviation is that the

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[2] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies

[3] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

[4] Directive 96/71/EC OF the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

[5] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community

[6] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

[8] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers

[9] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union

[10] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work

[11] C-395/15. Mohamed Daouidi v Bootes Plus SL and Others

general level of protection of employees may not be reduced. I believe that the interpretation of the EU provisions is correct, that the general level of protection of employees is not reduced if the collective agreement provision that is more disadvantageous to them is properly balanced and compensated by other collective agreement provisions that are more favorable than the statutory minimum. An interpretation contrary to this would result in employees becoming more vulnerable and their protection being reduced, which would go against the purpose of the EU regulations.

After the presentation of the international and EU rules, the historical overview of the Hungarian employment termination rules was given in Part IV of the thesis. In the socialism of the 1950s, uniform and public law regulation of work-related relations was implemented. The Employment Act of 1951 considered the termination of the company, the reorganization of the company or production, and the presence of excess personnel in the company as grounds for termination related to the operation of the enterprise. The law did not precisely define the concept of reorganization, but legal practice developed principles that are still in effect today (so that for a termination to be valid, the reorganization had to actually take place, and the reason for termination had to be real).

The Labor Code of 1967 – which was adopted during the period of striving for an indirect economic management system – strengthened the rights of employees against employers (companies) that were becoming more independent (for example, the law provided in detail on termination prohibitions and restrictions). The law introduced an open-ended termination system, but in practice the reasons for termination according to the previous rules remained.

After the change of regime, the regulation of legal relations related to employment was divided into three parts, state influence decreased, as a result of which labor law shifted towards private law regulation. In the Labor Code of 1992, mandatory regulation applied to guarantee elements. The reason for the employer's termination could again be a reason arising from the employee's personality or a reason related to the employer's operations.

After the Labor Code of 1992 came into force, Resolution MK 95 elaborated in detail the requirements related to the justification for termination, which to this day represent the starting point of the court investigation in cases related to the invalidity of termination of employment. Resolution MK 95 further stipulated that only such additional facts and circumstances may be proven during the labor lawsuit that supplement the justification without exceeding the framework of it, so the employer may not refer to a new reason for termination - which was not stated in the notice of termination.

In Part V of the thesis, I presented the current rules on the termination of employment for reasons related to the employer's operations and the related judicial practice.

The Labor Code of 2012 came into force after the financial crisis that began in 2008, therefore, elements responding to this and the EU flexicurity strategy can be found in its regulatory system (such as the emphasis on atypical legal relationships, the reduction of the costs of termination of employment). These regulations strengthened the flexibility of employment relationships, but at the same time, the flexicurity strategy was implemented one-sidedly, since the protection

of employees and the security of employment are not strong enough. We can also say that the state's role is inadequate; state measures should compensate – with social care and education – what employees lose due to corporate flexibility.

When analyzing decades of court practice, I classified the reasons related to the employer's operation – knowing that there may be overlaps between the categories – into the following four groups: reorganization (including organizational and technological transformation, outsourcing and changes in the distribution of tasks), qualitative replacement of employeee, downsizing, and the consolidation and termination of jobs. In my opinion, the concept of reorganization does not cover all (economic) reasons related to the employer's operation.

In the context of special termination cases, I dealt with the EU and Hungarian rules on collective redundancies and employer succession.

In relation to collective redundancies, it would be worthwhile to define a period longer than thirty days when calculating the number of employees affected by collective redundancies in order to prevent employers from avoiding the application of the stricter provisions on collective redundancies.

In my opinion, it would also increase the protection (security) of employees if employers were obliged to adopt a social plan and other measures, and if, by limiting the termination of the collective agreement, employees would not lose the benefits provided by the collective agreement in the event of their dismissal. By extending the 15-day period for negotiations with the works council, companies would have more time to find a solution to avoid redundancies. It is also worth considering introducing a system whereby employees dismissed in the context of collective redundancies could enjoy an advantage when rehired by the employer, as this would allow the employee to find a familiar job sooner, and the employer could employ a qualified employee who is certainly suitable for the job.

In the case of business transfer, I highlighted that both EU and Hungarian regulations provide for the principle of automatic transfer of employment relationships. In relation to the enforcement of this principle, it can be stated based on EU and domestic case law that there is a difference in the examination of the transfer of an economic entity depending on whether tangible and intangible assets or human resources are transferred.

Based on the cases examined, it is obvious that the protection of employees' interests and the freedom to conduct a business are at odds.[12] In my opinion, in the case of outsourcing of human resource-based activities, it would be reasonable to take into account whether the entrusted enterprise already has the workforce necessary to perform the task. If so, then the entrusted enterprise could not be expected to take over the principal's employees by legal transfer, as this would create a surplus of workforce. However, if the entrusted enterprise does not have its own employees to perform the transferred activities (for example, it immediately posts a job

[12] EBH.2014.M.6, C-13/95. Süzen vs Zehnacker Gebäudereinigung Krankenhausservice, C-319/94. Dethier Équipement vs Dassy and Sovam, C-392/92. Christel Schmidt vs Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel and Cronshagen, C-101/87. Bork International vs Foreningen af Arbejdsledere i Danmark.

advertisement for jobs related to the activity), then taking over the original employees would be less infringing on its freedom of decision. Thus, in my opinion, in these cases the aim of the directive can be achieved without violating fundamental rights.

In Part VI of the thesis, I first briefly presented how the serious changes in the economic situation – such as the financial crisis that began in 2008 and then the economic shock caused by the Covid-19 pandemic – influenced the regulation of the termination of employment for economic reasons; what measures and legal rules – different in the two periods – were adopted by the Member States and the European Union.

I then reviewed the specific provisions of the new Labor Code related to labor litigation. In doing so, I drew attention to the special importance of negotiation; based on my research, I determined that 50% of the cases of unlawful termination of employment at the Budapest Regional Court between 2020-2022 were concluded with a negotiation.

In Chapter 3 of this part, I presented legal cases from the cases of the Budapest Regional Court, based on which the judicial practice between 2020-2022 regarding the grounds for termination related to the employer's operation can be reviewed.

Based on the cases examined, I will describe below the results of judicial law development activities in cases of invalidity of termination, and the uncertainties that can still be experienced in judicial practice today. I will also attempt to formulate my position on the still open questions of legal application, taking into account the domestic and EU regulations analyzed in the previous parts of the thesis.

Conclusion

Based on the analysis and comparison of legal cases regarding the grounds for termination and the requirements for justification, it can be clearly stated that in proceedings for the termination of an unlawful employment relationship, the courts must examine whether the termination is real, clear and reasonable. There is no requirement for the termination to be comprehensive; it is sufficient to include the reason for the termination in summary form. The existence of the requirement of clarity must be assessed from the employee's perspective, whether it was clear to him why the employer did not require his work. The employer must still prove the reality and reasonableness of the reason for termination, i.e. the reason for termination (e.g. reorganization, reduction in staff, termination of job) actually occurred and affected the employee's job.

Reviewing the application of the law over nearly thirty years, I have demonstrated that practice is still not uniform in the interpretation of the concept of reorganization.

It can be stated that reorganization has a narrower and a broader interpretation.

According to some positions, the narrower interpretation only includes organizational changes of the employer.[13] Of course, this does not exclude the fact that it can be closely related to the

[13] MOLNÁR Bence: Nem minden bogár rovar, avagy átszervezés-e a munkakör megszüntetése. In: Pál Lajos-Petrovics Zoltán (szerk.):Visegrád 18.0 A XVIII. Magyar Munkajogi Konferencia szerkesztett előadásai. Budapest, Wolters Kluwer Kiadó, 2021.

reorganization, and in fact, it often results in downsizing, job termination, merger and quality replacement.

Based on the broader interpretation, however, we can essentially understand reorganization as any change related to the employer's operations, which thus functions as a synonym for a reason related to the employer's operations. In practice, this is manifested in the fact that courts indicate reorganization in the justification of their judgments and examine its conditions even if the reorganization was not included in the termination notice. Reorganization in this sense is a collective concept that includes not only changes in the employer's organizational structure, but also all other measures, decisions or circumstances that affect the employee's job: organizational change, staff reduction, job termination, change and qualitative replacement of employee.

Among the cases concluded between 2020 and 2022, it was also observed that the courts did not interpret reorganization uniformly. There have been cases where the court considered the termination of a job not included in the termination to fall within the concept of reorganization and took the position that it is sufficient to prove that the reorganization affected the employee's job, but it is not necessary that the job of the employee whose employment was terminated be terminated.[14]

At the same time, we also find cases in both the fifth and sixth chapters that took the narrow concept of reorganization as the basis for assessing the legal case.[15] Accordingly, the court differentiated the concept of reorganization and narrowed its scope of interpretation, when it stated that proving reorganization in itself is not sufficient to justify the termination of employment, and that the termination of the job and its manner must also be proven, if this reason was indicated in the termination.[16]

In my opinion, if the courts apply the broad concept of reorganization and extend it to all grounds for termination, it would clearly violate the employees' right to enforce their rights. After all, in this case, the employer would not have to prove anything other than the implementation of the reorganization to justify the legality of the termination of the employment relationship. This would lead to the fact that, for example, in the event of termination of employment, it would not be necessary to terminate the employment relationship of the employee whose job role is affected; it would be sufficient to prove the change or reorganization related to the jobs.

There is no doubt that courts cannot examine issues of expediency or economy in connection with the grounds for termination. At the same time, judicial practice has developed a consistent system of criteria that in the case of reorganization, it must be examined whether it actually took place and whether there was a causal relationship between the termination of the job and the workplace. In the case of downsizing or termination of a job, the court must examine how the job duties developed when a new employee was hired. In the case of dismissals based on the termination of the job, the courts continue to conduct a procedure of proof as to whether the

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[14] M.70.231/2020.

[15] Mfv.10.034/2012/5.

[16] M.70.429/2020., Mf.31.041/2021.

new employee hired by the employer was employed to perform the duties of the employee affected by the dismissal.[17]

In the case of a dismissal based on a qualitative replacement, the court considers whether it was reasonable, whether the employer's procedure was bona fide and fair, and whether a more qualified employee was employed after the qualitative replacement.[18] It can also be examined whether the qualitative replacement was necessary, but not from the perspective of the employer's management, but from that of the employee. Therefore, the employer can prove that the employee did not have the necessary skills and professional knowledge to perform his job, so he needs a more qualified employee.[19]

The Labor Code does not include the concept of reorganization, nor does it provide an exemplary list of what can be grounds for dismissal related to the employer's operation. According to the ministerial justification for the law, such grounds may include reorganization, termination of the job, reduction in staff, and qualitative replacement. The Fundamental Law[20] and Act CXXX of 2010 on Legislation Act (Jat.)[21], in my opinion, the legislator did not intend – also in view of the ministerial justification – for the courts to interpret reorganization broadly, since then the justification would not have distinguished the above concepts, and it would have been sufficient to indicate reorganization as the reason for termination in the Labor Code of 2012.

Moreover, it can also be deduced from this that the courts act correctly if they apply a narrow interpretation of reorganization. Namely, if they examine the concept of reorganization even when they do not refer to it, they essentially either change the content of the termination, which must undoubtedly be based on the employer's decision, or they create law, which is not the task of the courts.

The practice also goes against the requirements of clarity, reality and reasonableness under Resolution MK 95 and the Labor Code of 2012 if they interpret reorganization broadly. It may happen that the court establishes a reason other than termination and thus, based on the termination, it is not clear to the employee why his employment relationship was terminated. However, using reorganization for every reason for termination does not serve the purpose of clarity at all.

Based on all this, the differences in interpretation that exist in current practice may cause problems for both employers and employees, since the employer may not know what to indicate as the reason for termination, and as a result, it may not reflect reality, and thus the reason for the loss of the job is not clear to the employee either.

[17] M.70.578/2020.

[18] BH1998.555., BH2003.968., BH2001.86.

[19] BH2001.86.
[20] Alaptörvény 28. cikk.
[21] Jat. 18. § (5) bekezdés

That is why I consider it necessary to amend Section 66 (2) of the Employment Act in order to clearly define the economic reasons arising in connection with the employer's operations in the terminations.

Based on my de lege ferenda proposal, the Labor Code could be included in the text that the reason for termination may be economic, structural, technological or other reasons related to the employer's operations.

In my opinion, this definition provides employers with a basis for which groups of cases may justify termination, while at the same time ensuring sufficient flexibility due to unexpected situations in economic life, because the list is not overly detailed.

It can be stated that the development of the concept of economic reasons related to the employer's operations and filling it with content is essentially the task of legal application. Judicial practice has clarified numerous legal gaps over the decades and significant economic events, but it can also be stated from the presentation of the legal cases and the above summary that open questions remain. I pointed out that the regulation of termination of employment, and within this primarily the grounds for termination related to the employer's operation, is a particularly sensitive area, since the interests of employers falling within the scope of freedom of enterprise and the aspirations and demands for the protection of employees are in most cases – especially in some unexpected economic circumstances – contradictory. Thus, labor law regulation must continuously balance these two spheres of interest. At the same time, therefore, the rules on termination of employment must contribute to maintaining the competitiveness of enterprises and counterbalance the subordination arising from the employment relationship, in order to ensure that employees are not placed in an even more disadvantaged and vulnerable position by making the system of termination of employment more flexible.

In my opinion, the Hungarian dismissal system cannot be considered a strict dismissal system from an employer's perspective. If employers wish to terminate an employment relationship for economic reasons – such as a downturn – it is sufficient to demonstrate the economic downturn and make a termination statement in accordance with the law to terminate the employment relationship legally. The courts cannot examine economic and expediency issues, so an economically incorrect employer's action does not make the termination unlawful.

For this reason, I consider it necessary – without prejudice to the economic interests and decision-making powers of employers, of course – to strengthen the protection of employees by making the legal declaration of termination clearer and by increasing employment security in the case of collective redundancies.