Montenegro
Agency for Prevention of Corruption

Reference number: 03-03-2400 28 June 2017, Podgorica

Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption (Montenegro Official Gazette, no. 52/14) and Article 10 of the Statute of the Agency for Prevention of Corruption, the Agency for Prevention of Corruption, acting ex-officio, has passed:

THE OPINION

The lack of regulation in the provisions of the Labour Law of Montenegro (Montenegro Official Gazette, no. 49/2008, 26/2009, 59/2011, 66/2012, 31/2014) related to modalities for termination of employment and termination notice period, procedures which decide on the rights and obligations of the employees, makes it possible to jeopardise public interest and may impact undermining of integrity, equality and transparency of procedures deciding on the rights and obligations of the employed persons.

RATIONALE

Implementing ex-officio procedure, in line with Article 79 of the Law on prevention of corruption enabling the Agency to provide opinions for the purpose of improving corruption prevention, eliminating corruption risks and strengthening ethics and integrity in government bodies and other legal entities, the Agency has analysed provisions of the Labour Law, through which lack of precision was identified in terms of certain norms which decide on the rights of employees regarding termination of employment and termination notice period.

Namely, certain procedures, deadlines and conditions provided for in the Labour Law are not specific enough in their definitions, whereby leaving discretionary powers to employers in terms of regulation of the employment relationship.

Based on the ex-officio procedure the following was identified:

The Constitution of Montenegro guarantees and protects the inviolable rights and freedoms (Article 6). The Constitution prohibits any direct or indirect discrimination, on any grounds (Article 8, Paragraph 1). Furthermore, it guarantees equal protection of rights and freedoms (Article 47, Paragraph 1) and in Article 62 guarantees the right to work.

Law on prohibition of discrimination (Montenegro Official Gazette, no. 46/2010 and 18/2014) *prohibits any form of discrimination, on any ground.*

The Labour law (Montenegro Official Gazette, no. 49/2008, 26/2009, 59/2011, 66/2012, 31/2014) stipulates: *"Direct or indirect discrimination of the persons seeking employment, as well as employed persons, on the grounds of gender, birth, language, race, religion, colour of skin, age, pregnancy, health condition, or disability, nationality, marital status, family responsibilities, sexual orientation, political or other beliefs, social background, financial status, membership in political and trade union organisations or any other personal feature, shall be prohibited." – Article 5*

This Opinion focuses on modalities of termination of employment stipulated in the Labour Law, Articles 92 and 143, with review of provisions related to termination notice period.

Notification
Article 92

(1) If an employer determines that, **due to technological, economic and restructural changes, in the period of 30 days the number of redundant employees with a contract of employment for an indefinite period** is at least:

1) 10 employees with an employer employing more than 20, and less than 100 employees with a contract of employment for an indefinite time period;
2) 10% employees with an employer employing at least 100, and maximum 300 employees with a contract of employment for an indefinite time period;
3) 30 employees with an employer employing more than 300 employees with a contract of employment for an indefinite time period, the employer shall immediately inform the trade union or the representatives of employees and the Employment Agency of Montenegro (hereinafter referred to as: the Agency).

(2) The notification referred to in paragraph 1 of this Article shall also be delivered by an employer that determines at least 20 redundant employees in the period of 90 days, regardless of the total number of employees.

(3) The notification referred to in paragraph 1 of this Article shall contain:

1) reasons for termination of the need for work of employees;
2) the number and the category of employees with contract of employment for an indefinite time period;
3) the criteria for determining the redundant employees;
4) the number and the category of redundant employees;
5) period within which employment measures referred to in Article 93 paragraph 2 item 5 of this Law will be implemented;
6) the criteria for calculation of the amount of severance pay.

(4) If an employer determines that, due to technological, economic and restructural changes, the number of redundant employees with a contract of employment for an indefinite period will be less than the census determined in paragraphs 1 and 2 of this Article, the employer shall notify the employee at least five days prior to the decision to terminate his/her employment.

(5) Trade union, or the representatives of employees and the Agency shall **submit** their opinion regarding the notification referred to in paragraph 1 of this Article to the employer within 15 days after receiving the notification. "

Termination by employer
Article 143

(1) An employer may terminate a contract of employment of an employee if there is justified reason for such action, as follows:

1) if an employee fails to meet the results of work defined by collective agreement, employer's act or contract of employment, in a period of not less than 30 days;

2) if an employee fails to comply with obligations prescribed by the law, collective agreement and contract of employment, which shall be harmonized with the law and the collective agreement;

3) if an employee's behaviour is such that he/she cannot continue employment with the employer, in cases prescribed by the law and the collective agreement or employer's act, which shall be harmonized with the law and the collective agreement;

4) if an employee refuses to conclude an annex to the contract of employment referred to in Article 40 paragraph 1 items 1 and 2 of this Law;

5) if an employee refuses to conclude an annex to the contract of employment referred to in Article 40 paragraph 1 item 3 of this Law[1];

6) if an employee abuses the right to temporary inability to work;

7) due to economic problems in operations;

8) in case of technical and technological or restructural changes causing cessation of the need for work of an employee.

(2) An employer may terminate a contract of employment as referred to in paragraph 1, item 1 of this Article if the employer has previously provided instructions for work to the employee. (3) An employer may terminate a contract of employment without the obligation to respect the notice period of termination referred to in Article 144 of this Law, in a case referred to in Article 143 paragraph 1 items 2 and 3 of this Law. (4) An employee referred to in paragraph 1 items 5, 7 and 8 of this Article shall be entitled to a severance pay as referred to in Article 94 of this Law.

Procedure for termination of contract of employment
Article 143b

(1) An employer may pass a decision on termination of a contract of employment in cases referred to in Article 143 paragraph 1, items 1, 2 and 3 of this Law after giving a previous warning notice to the employee of the possible reasons for termination of employment.

(2) The warning notice referred to in paragraph 1 of this Article shall be given in written form and shall contain the grounds for termination of employment, evidence pointing to

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[1] Annex to the contract of employment, Article 40

(1) An employer and an employee may offer amendment of the contractual terms of employment (hereinafter referred to as: annex to the contract):

1) for the purpose of deployment to another adequate job, due to the needs of the process and organization of work;

2) for the purpose of deployment to another position with the same employer, if the activity of the employer is of such nature that the work is performed in places outside the employer's headquarters, or employer's organization unit, in accordance with Article 42 of this Law;

3) which refers to defining of the salary;

4) in other cases defined by collective agreement, or contract of employment.

(2) An adequate job referred to in paragraph 1 items 1 and 2 of this Article shall include a job which requires the same level of professional qualification, or level of education and occupation.

realized conditions for termination and the time period to reply to the warning notice.

(3) The time period referred to in paragraph 2 of this Article may not be less than five working ways.

(4) An employer shall deliver the warning notice referred to in paragraph 2 of this Article to the trade union the employee is a member of, for the purpose of obtaining its opinion, and the trade union shall provide statement of the warning notice in writing within five working days

Decision on termination of employment
Article 143c
(1) A decision on termination of a contract of employment shall be passed by the relevant body of the employer, i.e. the employer, in the form of a decision, and it shall deliver it to the employee.
(2) A decision referred to in paragraph 1 of this Article shall contain: the grounds for termination of employment, explanation and note of legal remedy.
(3) A decision referred to in paragraph 1 of this Article shall be final.
(4) Provisions of the Law on General Administrative Procedure shall apply accordingly to delivery of warning notice, notification and decision, unless otherwise prescribed by this Law.

Law on prevention of corruption (Montenegro Official Gazette, no. 53/2014) has stipulated:

"Corruption is any abuse of official, business or social position or influence that is aimed at acquiring personal gain or for the benefit of another." - Article 2
"Public interest is the material and non-material interest for the good and prosperity of all citizens on equal terms."- Article 6, Paragraph 1, Item 1
"Threatening the public interest shall mean a violation of regulations, ethical rules or the possibility of such a violation, which caused, causes or threatens to cause danger to life, health and safety of people and the environment, violation of human rights or material and non-material damage to the state or a legal or natural person, as well as an action that is aimed at preventing such a violation from being discovered " – Article 22, Paragraph 2
"Integrity shall mean a legitimate, independent, impartial, accountable and transparent performance of duties based on which the public officials and other employees of an authority protect their reputation and the reputation of the authority, provide confidence of citizens in the performance of public functions and the operation of the authority and eliminate doubts about the possibility of the emergence and development of corruption" - Article 72

In this Opinion, the Agency quotes provisions of the Constitution and relevant legislation; not for the purpose of assessment of their constitutionality and lawfulness, but for the purpose of application and realisation of the purpose of Article 79 of the Law on prevention of corruption.

Namely, the given Law allows for manipulation with the category of redundant employees. In Chapter VI, Redundant Employees, Article 92, Notification, Paragraph 4, reads: *If an employer determines that, due to technological, economic and restructural changes, the*

number of redundant employees with a contract of employment for an indefinite period will be less than the census determined in paragraphs 1 and 2 of this Article, the employer shall notify the employee at least five days prior to the decision to terminate his/her employment..

Having this issue regulated in this way enables employers to consider any employee redundant, **without establishing any criteria** based on which the need for work actually did cease for certain categories of employees and **without quoting the reasons** that caused cessation of the need for work of an employee and without informing the Trade Union, i.e. representatives of the employees and the Employment Agency of Montenegro. Thus employers through a simple change to the Rulebook on internal organisation and systematisation of posts may terminate any work position, while the courts do not have competencies to look into whether the newly adopted Rulebook is lawful and whether the purpose of redundant workers is to dismiss workers really for the purpose of better organisation, technological changes or financial difficulties, or for reasons that may indicate the misuse of this institute. According to current legislation, it is sufficient for the employer to indicate that these changes are there, but not that they have essentially occurred. There is no mechanism for monitoring and control of whether the given changes have actually happened, i.e. whether changes to acts on internal organisation and systematisation were done due to reasons stipulated in Article 92, Paragraph 1 or due to reasons of different nature. Having this issue regulated in this way is of particularly high risk because this institute could be applied to a specific employee or a group of employees, and after their dismissal new systematisation could be adopted to again increase the number of work posts with the same or similar job description.

The EU Directive of 20 July 1998 (98/59/EC) on the approximation of the laws of the Member States relating to collective redundancies **does not recognise the redundant workers category from Paragraph 4, Article 92 of the Labour Law of Montenegro,** and that this paragraph actually cannot refer to redundancies, i.e. collective dismissal as is identified in the Directive.[2] Such broad discretionary powers on the part of the employer in terms of application of Article 92 allow for its misuse and undermining of integrity of the employees. This enables the employers to dismiss employees in several steps without quoting the reasons for declaring them redundant, number and categories of employees declared redundant, time frame for implementation of the procedure, proposed criteria for selection of employees whose employment contracts will be terminated based on the

[2] Article 1, Paragraph 1 of the EU Directive 98/59/EC
1. For the purposes of this Directive:
(a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:
(i) either, over a period of 30 days:
- at least 10 in establishments normally employing more than 20 and less than 100 workers,
- at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more,
(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

redundancy claim, or how compensation to dismissed employees will be calculated.

Looking at how this issue was regulated in the region, the given Directive was applied by Republic of Serbia into its Labour Law (Official Gazette of the Republic of Serbia, no. 24/2005, 61/2005, 54/ 2009, 32/2013, 75/2014) Article 153[3].

The consistent implementation of the given Directive does not provide for the option of referring to the categories of 'redundant' workers or 'collective redundancies' in case of dismissal of the workers below census indentified in the Directive.

In addition, it is obvious that the law does not provide for different notice periods of termination in case of termination by employer that are linked to years of service, in view of the fact that those employees who are dismissed due to redundancy or other circumstances after 20 or more years of service will indisputably have more difficulties in finding a new job and thereby achieving the right to retirement. This is included in labour legislation of some EU countries, such as Germany where Article 622 of the German Civil Code (Biirgerliches Gesetzbuch, 'BGB')[4] stipulates that:

"(1) The employee may be issued a termination of the contract employment with notice period of four weeks, starting from 15th day of the month or from the end of calendar month.
(2) In case of termination by employer, the notice period of termination, in case that employment in the company lasted for:

1. Two years, is one month by the end of calendar month,
2. Five years, is two months by the end of calendar month,
3. Eight years, is three months by the end of calendar month,
4. 10 years, is four months by the end of calendar month,
5. 12 years, is five months by the end of calendar month,
6. 15 years, is six months by the end of calendar month,
7. 20 years, is seven months by the end of calendar month."

Closely linked to the above outlined manner of contract termination is Article 143 of the Labour Law: *Termination by employer, where in Paragraph 1, Item 5, it is stipulated that an employer may terminate a contract of employment of an employee if there is justified reason for such action, i.e. if an employee refuses to conclude an annex to the contract of employment referred to in Article 40 paragraph 1 item 3 of this Law (employer and employee may offer change to agreed conditions of work related to defining of the salary).*

[3] Employer shall enact a program to manage the issue of redundancy (hereinafter: program), should he/she come to the conclusion that due to technological, economic or organizational changes redundancy of employees employed for an indefinite term will ensue within the following 30 day term for the minimum of:
1) 10 employees for employers who has more than 20 and less than 100 staff employed for an indefinite term; 2) 10% employees for employers who has at least 100 and less than 300 staff employed for an indefinite term; 3) 30 employees for employers who has more than 300 staff employed for an indefinite term.

[4] https://www.gesetz e-im-internet.de/bundesrecht/bgb/gesamt.pdf

Such legislative provision is predominantly liberal and does not aim to protect existing work positions, but attempts to unburden the employers through flexible regulation of work relationships, so that they can hire and dismiss employees without any major obligations. Lack of specific criteria and protection of employees in case of the offered annex to the contract on employment leave wide powers regarding termination of contracts of employees and possibly misuse the given legislative provision.

The modalities for termination of employment outlined in Article 92 and 143 of the Labour Law are particularly problematic in the private sector, as well as for that part of the public sector where labour relations are regulated through general labour regulation and which carries out activities of public interest, whereby the above mentioned set up provides employer with wide discretionary powers to use these modalities for termination of employment. This may indicate potential danger from using this mechanism as a tool for pressuring the employees, which should not be the case when such decisions are taken, in particular in the institutions that perform activities of public interest.

CONCLUSION AND RECOMMENDATIONS:

Due to definition from Article 143, Paragraph 1, Item 5, Termination by employer, and Article 92, Paragraph 4, Notification, of the **Labour law**, there is the risk of undermining public interest by arbitrary interpretation of the law due to **wide discretionary powers given to the employer**, which may cause violation of integrity and activate corruption risks in terms of lack of transparency and lack of appropriate protection from possible misuse in procedures related to termination of the employment contract and manipulations in terms of redundancies.

Thus defined discretionary powers of employers related to termination of employment contract **especially violate integrity in the public sector** and may favour inappropriate influences when taking such decisions, so that certain levels of control of such procedures would have to be introduced.

In line with this, for the purpose of protection of the public interest, the Agency will send for the review changes to the above mentioned articles of the Labour law, **in order to fully exercise the protection of public interest through defining of adequate procedures and criteria, as well as restriction of discretionary powers of the employers.** The Agency finds that changes to these articles would contribute to reducing the space available for possible misuses in the area of labour legislation, **in particular when persons – due to insufficiently specific provisions, criteria or practice – are placed or could be placed in less favourable position.**

In this way, when contracts on employment are terminated and redundancies determined, **risks of undermining the public interest through the work of institutions form both public and private sector would be removed in particular**; in addition, this would contribute to reducing space for possible misuses related to labour legislation.

The risks related to discretionary powers related to labour legislation lead to lack of legal certainty and precariousness at the work place.

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