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Поштоваћи читаоци,

Научни радови садржани у редовном броју Зборника радова Правног факултета у Нишу (79/2018) покривају широку научну област права од међународног, преко компаративног права до ужих научних області које се баве појединим проблемима у националном правном поретку. У фокусу пажње редовног броја налази се Европско кривично право, а једнако можемо препоручити вашој пажњи радове аутора из региона и европских земаља који указују на различите аспекте хармонизације националног права са правом Европске уније. Уређивачка политика часописа се није променила у погледу подстицања младих истраживача, па ћемо у овом и у следећим бројевима наставити са објављивањем радова студената докторских академских студија.

Редакција часописа жели да истакне да је индексираност Зборника радова Правног факултета у Нишу у различитим базама података, као што су Central and Eastern European Online Library - CEEL, HeinOnline база података, EBSCO база података (Legal Source), ScIndex - српски цитатни индекс, Directory of Open Access Journals - DOAJ, допринела већој видљивости научних радова и истраживачких пројеката, као и да је то значајно повећало број прегледа, преузимања и навођења извора из нашем часописа у протеклој години.

У Нишу, новембар 2018.

Проф. др Ириена Пејић,
главни и одговорни уредник
between the EU and Macao: Qualification of Employees Rights in the Event of Restructuring; Key Aspects of Harmonisation of Collective Redundancies and Transfer of Undertakings
In the modern business environment, labour relations become increasingly dynamic and, as a consequence, there are more frequent changes on the side of the employer as a contractual party in the employment relationship. Usually, such changes are related to changes in the organization of the business and/or in the ownership of assets with which the business is being performed and which are directed towards a greater competitiveness and more efficient fulfilment of the employers’ business objectives. The change of the employer can lead to a transfer of the employment contracts of the employees and safeguarding of their employment relationships only as a consequence of a so called ‘transfer of an undertaking, part of an undertaking, business or part of a business’ from the employer-predecessor (transferor) to the employer-successor (transeree). The second substantial issue which will be treated in this paper is the analysis of the compliance of the Macedonian labour legislation with the EU labour law (and in particular with the Directive 2001/23/EC on safeguarding of employees’ rights in the event of transfers of undertakings, businesses, parts of undertakings or businesses), concerning the legal regime for regulating the transfer of undertakings and the protection of employees’ individual rights.5

2. Collective Redundancies

2.1. Forms (ways) of terminating employment contracts within the frame of collective redundancies – Definition and Scope

The Labour Relations Act defines the collective redundancies by taking into consideration their quantitative and temporal aspects, or the aspects referring to the number of employees encompassed in the collective redundancy and to the period of time over which the collective redundancy is supposed to be carried out. In this regard, Macedonian labour legislation is aligned with the EU Directive 98/59/EC on collective redundancies, since it provides that collective redundancies should cover at least 20 employees for a period of 90 days.4

The biggest gap between Macedonian labour legislation and the EU labour law can be found in the scope of the ‘collective redundancies’ and particularly in the forms (ways) of terminating employment contracts of employees that can be equated to redundancies.

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1. The title of the legal provision regulating the issue of collective redundancies within the Original text of the Labour Relations Act of 2005 states: „Notification obligations in case of termination of employment of larger number of workers due to business reasons”. For more information, see: Law on Labour Relations, Official Gazette of the Republic of Macedonia, no.62/05, Article 95.

2. The current title of the legal provision regulating the issue of collective redundancies pursuant to the Act amending and supplementing the Labour Relations Act, Official Gazette of the Republic of Macedonia, no.124/10, states: „Notification and consultation about collective redundancies due to business reasons”.

3. In this context, particular focus should be given to the ILO Convention on Termination of Employment, 1982 (No.156) and the ILO Recommendation on Termination of Employment, 1963 (No.119), which are ratified by the Parliament of the Republic of Macedonia.


6 Закон за работниите односи, член 95, став 1.
of termination or suspension of the worker; or the worker's quitting of work; or the worker's exercise of a statutory right; or the worker's participation in the activities of a trade union.

In determining whether the worker's participation in an activity is deemed to be in the worker's own interest, the court shall take into consideration whether the activity is directly or indirectly related to the worker's occupation.

The principle of legality is that the law of the place of work shall apply to the activities of the worker.

The concept of legality is that the activities of the worker shall be carried out in accordance with the law of the place of work.

The court shall consider the following factors in determining the legality of the worker's activities:

1. Whether the worker's activities are within the scope of the worker's employment or are carried out outside the scope of the worker's employment.

2. Whether the worker's activities are carried out in the interests of the employer or in the interests of the worker.

3. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.

4. Whether the worker's activities are carried out in the interests of the employer or in the interests of the worker.

5. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.

The court shall, in determining whether the worker's activities are deemed to be in the worker's own interest, take into consideration the following factors:

1. Whether the worker is aggrieved by the activities of the employer.

2. Whether the worker's activities are carried out in the interests of the employer or in the interests of the worker.

3. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.

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3. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.

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3. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.

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3. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.

4. Whether the worker's activities are carried out in the interests of the employer or in the interests of the worker.

5. Whether the worker's activities are carried out in the interests of the public or in the interests of the worker.
The latest Act amending and supplementing the Labour Relations Act of 29th July 2018 stipulates the following selection criteria in terms of dismissal due to business reasons: the criteria arising from the needs for efficient functioning of the employers’ work, vocational training and qualification of the employee, work experience, work performance, the type and significance of the employee’s working position, length of service and other criteria determined in the collective agreement, including the criteria for protection of disabled persons, single parents and parents of children with special needs whose employment is terminated due to the same reasons. In practice, there are several collective agreements (primarily concluded at a branch level, that is, department level) which stipulate criteria and measures for the selection of employees with the priority of retaining their working position. In most of them, the prevalent criteria are: vocational training and qualification, length of service, type and value of the working position, work results, age and similar criteria. There are also collective agreements which provide for certain social criteria (such as, health condition or economic and social position of the employee), but although these are stipulated in the agreements, such criteria are given less value compared to the other criteria mentioned above.

2.2.2. Consultation of the workers’ representatives in the event of collective redundancies

The consultations begin only after informing the workers’ representatives, but at least one month prior to the commencement of the collective redundancies. The purpose of the consultations is the ‘reaching of an agreement’ between the employer and the workers’ representatives with regards to the ways and means for avoiding裁剪冗员

9 See: Case European Commission v United Kingdom (C-382/92).
10 The latest Act amending and supplementing the LRA of 29.06.2018 (Official Gazette of the Republic of Macedonia, no.120/2018) introduces a new provision that sets certain selection criteria (Art.7). In any case, we note that the provision is vague and unclear from a terminological point of view.
11 See: Decision of the Basic Court in Tetovo, PO. 6p. 42/2013 from 03.07.2013 год.

12 See: Act amending and supplementing the Labour Relations Act of 29.06.2010, Art.7.
13 Collective Agreements that envisage such criteria are: Collective Agreement for the Employees in the Food Industry (Колективен Договор за работниците от здравството и прехвърлена индустрия); Collective Agreement for the Textile Industry (Колективен Договор за текстилна индустрия на Република Македония); Collective Agreement for the public facilities for children in the field of care and education of children (Колективен Договор за детството и за децата за деца на децата и за децата на децата на децата), etc.
14 Collective Agreements that envisage such criteria are: Collective Agreement of companies of other monetary intermediation and the activity of intermediation in operations with securities and commodity contracts (Колективен Договор за търговия с акцизи и налични средства); Collective Agreement for Culture (Колективен Договор за култура); Collective Agreement for the Elementary Education (Колективен Договор за основното образование во Република Македонија), etc.
15 Закон за работните односи, член 95, став 2.
2.9.2 "Touting the Public Quotations for the Planned Collective Agreement"

The main points discussed in this section include the following:

1. The appropriate use of touting in the collective bargaining process.
2. The role of collective bargaining agreements in ensuring fair and equitable outcomes.
3. The importance of transparency in the collective bargaining process.
4. The implications of touting for employers and employees.

In summary, touting is a valuable tool for ensuring that collective bargaining agreements are fair and equitable, but it must be used in a responsible and transparent manner.
The purpose of determining the deadlines for 'temporary suspension' of the legal consequences of the collective redundancy decision is implicitly regulated in the Labour Relations Act. In fact, for the duration of these deadlines, the Service responsible for employment intermediation requires an opportunity to provide assistance and services for labour mediation of workers covered by the collective redundancy, in accordance with the law (in particular, the Act on Employment and Insurance in case of Unemployment). 21

3. Transfer of undertakings

3.1. Legal reasons for transfer of an undertaking (cases of change of the employer)

According to the EU Transfer of Undertakings Directive 2001/23/EC, the transfer of an undertaking/part of the undertaking/business/part of business can be a result of a legal transfer or merger. 22 The legal basis for the transfer of an undertaking should reflect a 'contractual relationship' between the transferor and the transferee. Directive 2001/23/EC and its rules concerning the preservation of employment and safeguarding the employees' acquired rights shall be applied in all the cases that will result in an agreed change of the employer (legal entity or natural person). It means that every legal act on the basis of which there is a transfer of the employer's function may be subsumed under Directive 2001/23/EC and covered by its rules.

The Labour Relations Act of Macedonia regulates this issue by taking the respective provision from the Directive 'word for word'. Being willing to 'harmonize' with the Directive, the Act determines the legal reasons for transfers of undertakings, but it does that in a way which does not correspond with the legal terminology that is subject to regulation of the Acton Trade Companies, 23 and then with other regulations in the field of the broader contract law. The Labour Relations Act envisages the 'status changes', as 'cases on the basis of which a change of employer may occur on the one hand, as well as the 'legal transfers' or 'mergers' on the other hand. From the point of view of the Macedonian legal system, it seems that the notion 'legal transfer' is too general and can include different ways of transfer of undertakings, i.e. different cases of change of an employer, while the notion 'merger' is one of the possible types of status changes that are present in the Macedonian company law.

3.2. Determining the subject of transfer and retaining the identity of the undertaking

If a comparison is made between the 'subject of transfer' regulated with the Directive 2001/23/EC (which is the undertaking/part of the undertaking, business/part of the business) 24 and the notion 'subject of transfer' according to the Labour Relations Act (which is a trade company or parts of a trade company), 25 we will face an obvious terminological and crucial non-compliance between these two acts. The 'trade company' is and can only be a subject to law, and not an object, that is to be put in a legal circulation and to be subject of transfer (Belčaneć, Mladlihoza, 2011: 78). Such an object (subject) could only be the 'undertaking', defined as a collection of rights, assets and factual relations that have a property value and that belong to the trade business of the merchant, which is an entire and independent legal entity that can be put in circulation. 26 In short, the undertaking is a unity of property and people, connection of capital and labour, under a sole management directed towards achieving the economic objectives that have been set.

The transfer of the employment contracts of the employees is dialectically related to the fulfillment of another cumulative condition and that is the condition of the 'transferred undertaking to retain its identity' (i.e. the economic wholeness). In this regard, the Directive 2001/23/EC stipulates that a transfer of undertaking/part of an undertaking/business/part of a business is considered to be a transfer of an 'economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. 27 The transferred undertaking will retain its identity if the new employer continues or resumes to carry out the business that was previously performed by the old employer (Blanpain, 2012: 759). The existence of other circumstances should be taken into consideration too, without prejudice to their 'relative weight' and impact on the qualification of one transfer as 'a transfer of undertaking that retained its identity'. 28

21 See: Закон за вработување и осигурување во случаи на неработност, Сл. вестник на Република Македонија, No.37/1997
23 Закон за трговските друштва, Сл. вестник на Република Македонија, бр.28/04.
24 See: Закон за работничите односи, Чл. 68, став 1.
25 See: Закон за работничите односи, Чл. 68-а.
27 See: Закон за работничите односи, чл.68-a.
28 Закон за трговските друштва, Чл. 3, став 1, точка 40.
29 See: Council Directive 2001/EC, paragraph 1, (b)
30 Such circumstances may be: the type of undertaking or business; the fact whether or not the tangible assets of the business (such as: buildings or movable property) were transferred; the value of the tangible assets at the time of the transfer; whether or not the majority of the...
The performance of the business activities is to have a significant impact on the achievement of the corporate objectives and strategy. The business activities encompass economic and financial results that will lead to a better financial position in the business. The financial results are to be measured in terms of revenue, profit, and cash flows. The business activities are to be monitored and controlled to ensure that they are carried out efficiently and effectively. The performance of the business activities is to be evaluated regularly to ensure that they are aligned with the corporate objectives and strategy.
whether the activity is capital-intensive or labour-intensive), the employment contracts of the employees who have been previously employed by the employer that organized the performance of the activity or task in question are terminated, or are taken over by the new employer, but under different (deteriorated) conditions than the conditions the employees previously had.

3.3. Safeguarding the employment and preserving the conditions of the employment relationship

The principle of safeguarding the employment relationships of employees and preserving their terms and conditions of employment in the event of a change of the employer is inspired by the idea of 'legal succession' that has been known in the civil and commercial law for centuries, and has been later transmitted to the labour law (Мрхон, 2015: 311). The basic rule inspired from the Directive 2001/23/EC is that the 'transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee'. This rule does not have an identical transposition within the Macedonian labour legislation but, from several provisions of the Labour Relations Act, a conclusion can be drawn that the new employer (transferee) takes over all the rights and obligations deriving from the transferred employment contracts in an unchanged form and scope. It is considered that the contracting parties (employees employed at the employer-predecessor and the new employer) should not conclude new employment contracts because those are not 'new' contracts, but it is a transfer of their 'old' contracts of employment which are automatically transferred to the new employer-successor. The rights and obligations of the employees before and after the transfer of their employment contracts should be seen as a whole. Thus, the rights arising from the continuity of the employees' employment relationship (i.e. the years of service) with both employers (the former one and his successor), such as the rights to a severance pay and a period of notice, are particularly important. Additionally, the principle of 'safeguarding the employment of the employees and the preservation of their employment conditions' entails all other rights that the employee had with the previous employer, including the rights to identical salary, salary structure and other material compensations that derive from the employment relationship (Блапан, 2012: 783).

The criticisms that can be put forward to the Macedonian legislator in the regulation of this part of the legal provisions regarding the transfer of undertakings is that the Labour Relations Act did not determine the 'moment' when it comes to the transfer of the employment contracts of the employees. It only provides that 'all the rights, obligations and responsibilities under the employment contract and the employment relationship shall be transferred to the new employer'. From the point of view of the Macedonian law, the date (day) of the transfer of the undertaking can be considered the date (day) when the legal consequences of such a transfer occurred in accordance with the regulations governing the legal reason on the basis of which the transfer was carried out (for example, in the event of status changes the date of the transfer can be considered the date of the publication of the entry of the status change in the trade registry) (Недков, Величанец, 2008: 374)

3.3.1. Consent of the employee for the transfer of the employment contract

The key question in the event of a transfer of an undertaking, i.e. change of the employer is the following: whether the replacement of one employer with another causes an automatic (ex lege) transfer of the employment contracts of the employees, or, the employees have the free disposition to 'block' the transfer of their employment contracts to the new employer? In its contents, Directive 2001/23/EC does not give an explicit solution to this dilemma, so 'part' of the answer to this question can be sought in the approach of the European Court of Justice. Compared to the decisions of some older cases (as for example of the 'Daddy's Dance Hall' case or the 'Berg' case) in which the European Court of Justice has explicitly accepted the rule for automatic transfer of the employment contracts regardless of the will of the employees, in the 'Katsikas' case the Court alleviates its stance in the favour of the discretion right of the employees to 'object' to the transfer of their employment contracts. In this case, the European Court of Justice states that the rules for transfer 'must not oblige the employee to continue the employment relationship with the transferee' because such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.'

35 See Закон за работните односи, Чл 68, став 1; Чл 68, став 2.
36 See Закон за работните односи, Чл 68, став 1.
37 In this case, the ECI had the stance that 'the termination of the employment contracts does not depend on the willingness of the contracting parties since it is subject to the interest of the public policy' See: Case 324/86, 10.02.1988, Daddy's Dance Hall A/S ECR 739.
38 In this case, the ECI ascertains that 'the change of employer brings an automatic transfer of the obligations of the employer, from the transferor to the transferee', See: Joined Cases 144 and 145/87, 5.05.1988, Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, ECR 2559.
39 See: Joined cases C-132/91, C-138/91 and C-139/91, Grigoris Katsikas, IRLR 179.
40 Case Katsikas v Konstantidis, paragraph (31).
41 Case Katsikas v Konstantidis, paragraph (37).
relationship with the employer-predecessor, has concluded a new employment contract with the employer-successor on less favorable terms to file a lawsuit for exercising the rights from the employment contract against the ‘new’ employer who has not ‘formally’ taken over the undertaking and, as a consequence, has ‘malevolently’ avoided the fulfillment of his obligations towards the employee, guaranteeing the acquired rights that the employee had with the previous employer (Frtinić et al. 2017: 799).

4. Conclusion

Collective redundancies form an essential part of the legal regulations of the Republic of Macedonia that cover the termination of employment contracts by dismissals. In terms of changing economic circumstances and increased flexibility and deregulation of the labour markets, the dismissal protection of employees due to the cease of the need to perform some work (i.e. redundancy for business reasons) is faced by major challenges. The initial impressions after the comparative analyses between Council Directive 98/59/EC and the legal regime of collective redundancies in Macedonian labour legislation are “in favor” of a successful and comprehensive harmonization of Macedonian labour law with the EU law. Yet, if an in-depth inspection of the legal provisions in the Labour Relations Act is conducted and if a more profound cross-section of Macedonian labour system is carried out, one can conclude that the legal regime of collective redundancies is far from a clear and coherent whole which entirely corresponds to the contents and meaning of the EU regulations on collective redundancies and their consequences in relation to the workers.

The basic aims of the legal regime for regulating the consequences in relation to employees of the transfer of the undertakings, both in terms of EU labour law and in terms of the Macedonian labour legislation, are: safeguarding the security and stability of the employment relationships of the employees; prohibition of dismissals due to the fact that there is a change of the employer, i.e. transfer of undertaking and preservation of the acquired employment conditions and rights that had existed before the change of the employer, i.e. transfer of the undertaking has taken place. In our opinion, considering the approach of the Macedonian legislator in the regulation of this legal matter, the current legal framework for safeguarding the employees’ rights in the events of transfer of undertakings is partially harmonized with the Directive 2001/23/EC. In the absence of adequate national court practice through which it will be possible to examine and assess the court’s position on all ‘problematic’ aspects of the legal provisions governing the transfer of undertakings, we consider that this paper

can serve as a useful guide for the correct interpretation of the legal framework for the safeguarding of employees’ individual rights in the event of a transfer of undertakings in the Republic of Macedonia.

References

Беличанец, Т. и Миладинова, Д. (2011). Защитата на правата на работниците в случай на статутна промена или пренесуване на предприятие, бизнес или дел од бизнес од едно во друго трговско друштво. Во Деловно Право, Година XII, Бр. 25, Скопие
Frtinić F.D., Gović Pentić I., Hanzelak D., Milković D., Novaković N и K.Rožman. (2017). Detaljni Komentar Zakona o Radu, (Biblioteka Radno Pravo)
Мрчков, В. (2015). Трудово право. Сиби, 9 издание
Недков, М. и Беличанец, Т. (2008). Право на Друштвата. USAID, Скопие

Legal Sources
