Judicial protection of employment rights during the COVID pandemic on the territory of the Autonomous Province of Vojvodina

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Abstract

Based on the collected case law of the basic courts in the Autonomous Province of Vojvodina (hereinafter: APV) from 2016 to 2022, the authors examine the frequency and reasons for initiating employment disputes, especially during the COVID-19 pandemic, and assess the extent of the negative impact the pandemic had had on the world of work and the degree of violation of employees' rights. The authors also suggest ways to improve and supplement the existing labour law framework, which contains numerous legal gaps. Notable among these is the lack of definition and type of disputes that arise on the basis of the employment relationship. The aforementioned gaps facilitate illegal practices, especially regarding flexible forms of employment and generally frequent cases of illegal dismissal by the employer. The research has confirmed that courts of general jurisdiction are commonly overloaded with labour disputes. Therefore, establishing special basic and appellate labour courts merits further consideration. The authors conclude, with certain reservations, that the pandemic conditions did not cause an additional increase in pending cases in the labour disputes section. The disputes related to payment of the employee's monetary claim against the employer are the exception since these disputes were the most frequent and significantly increased in number during 2020 and 2021.

Keywords: judicial protection, labour disputes, pandemic, APV, employee rights.

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Introduction

The coronavirus pandemic, the introduction of a state of emergency, restrictive epidemiological measures that often included bans or restrictions on movement, association, and business, together with a major economic crisis, have fundamentally changed the way people live and work worldwide (Gajinov, 2022, p. 154), exacerbating numerous security challenges, risks and threats (Bjelajac & Filipović, 2020). These tectonic shifts have had a major impact on the world of work and influenced its partial transformation and flexibility (Rajić Ćalić, 2020, pp. 88-89). The labour market in Serbia during the pandemic exhibited significant differences in the position of employees (Rajić Ćalić, 2021, p. 106). Due to the nature of some jobs, some employees had to work at the employer's premises, while other groups of employees were allowed to work from home. The economic collapse caused the loss of many jobs or income due to forced vacations, while many workers saw their wages significantly reduced. During the state of emergency, some employees found themselves on the "front line of battle", working longer hours or changing shifts, with the health and safety rules at work inadequately observed.

The right to work is a fundamental human right, and all democratic constitutions guarantee this right and the freedom to work (See more: Bjelajac, 2003). The protection of this right is increasingly viewed in the broader context of human security through the prism of human rights and contemporary threats. Human security, although broadly defined as "freedom from fear and freedom from want," is still not entirely as a concept "rounded." Today, it encompasses much more than access related to protecting people from violence and crime. The security of individuals can be approached, for example, from the perspective of unemployment, the economy, food, the environment, social exclusion, or health insurance, etc. Human security is such a flexible concept that it can be adapted to different contexts and various

circumstances in the lives and work of modern humans (Bjelajac, 2017). Nonetheless, the aforementioned circumstances proved to be a major cause of employment rights violations. These challenging issues prompted the authors to collect and analyze the practice of the basic APV courts from 2016 to 2022, focusing on the pandemic period,[1] in order to gain insight into the frequency and reasons for instigating disputes due to the violation of rights from employment relationship by the employer, especially during the pandemic. The authors have also examined the broader impact of the pandemic on the state of the labour market in the APV. In comparison with the pre-pandemic period, the results obtained indicated the violation of regulations in the field of labour law, a number of legal gaps, and the vagueness of legal norms. Thus, we gain a clearer idea of the competence of the Serbian legal system to respect one of the basic human rights even in extraordinary circumstances – the right to work. This, in turn, emphasizes the need to affirm social dialogue and develop anti-discrimination regulations, as key factors in the pre-accession negotiations (Mijatović, 2019, pp. 91–93).

Analysis of the practice of basic courts in the APV

The Labour Law (hereinafter: LL) does not contain a definition of labour disputes or list the reasons for initiating them (National Assembly of the Republic of Serbia, 2005). The Law on Peaceful Settlement of Labour Disputes, however, contains a list of possible individual and collective labour disputes that fall under the jurisdiction of the Agency for Peaceful Settlement of Labour Disputes (National Assembly of the Republic of Serbia, 2004, Art. 3). In this sense, individual labour disputes include disputes regarding the following: employment contract termination, working hours, the right to annual leave, payment of wages/salary, compensation of wages/salary and minimum wage mandated by law, meal and transport allowances, vacation leave and other expense reimbursements mandated by law, payment of severance

[1] The analysis of court decisions from the basic courts from the territory of Novi Sad, Subotica, Zrenjanin, and Sremska Mitrovica allows an insight into the court practice in all the APV regions (Bačka, Banat, and Srem). The protection of the rights of employees before commercial courts in bankruptcy proceedings, where they have the status of creditor, will be the subject of another research by the same authors.

pay upon retirement, jubilee award and other benefits mandated by law. Individual labour disputes also include disputes concerning discrimination and abuse at work.

Labour disputes are resolved in litigation governed by the specific rules of the Labour Law, the *lex specialis* rules for certain types of work, and the specific rules of the Law on Civil Procedure (National Assembly of the Republic of Serbia, 2011, Art. 436–441). The general rules of civil procedure, however, are applied to disputes brought by the employer.

The jurisdiction of courts to resolve labour disputes is regulated by the Law on Civil Procedure and the Law on the Organization of Courts (National Assembly of the Republic of Serbia, 2023). As a rule, courts of first instance are basic courts, except for disputes concerning protection against discrimination and abuse at work, where higher courts take jurisdiction. Higher courts also take jurisdiction in disputes concerning strikes, collective agreement if the dispute is not settled before arbitration, and mandatory social insurance contributions if the Administrative Court is not competent. Basic courts in the first instance try disputes that concern the establishment, existence, and termination of the employment relationship, the rights, obligations, and responsibilities from the employment relationship, compensation for damage suffered by the employee at work or in work-related circumstances, as well as disputes concerning housing allowances. In the second instance, the appellate court tries the appeal.

The official annual reports on the work of the courts of general jurisdiction in Serbia state that the P1 category (i.e., labour disputes) is constantly increasing, resulting in the courts of general jurisdiction becoming overloaded with new cases and the total number of pending cases. Another consequence of this situation is the increasing number of cases that remain unresolved at the end of the calendar year (Statistics on the work of courts of general jurisdiction in the Republic of Serbia 2021-2012). Therefore, establishing special courts for labour disputes is an idea that merits further consideration (Reljanović & Misailović, 2021, pp. 135–136).

The investigation into the work of the basic courts in the seats that are the centers of the South Bačka, North Bačka, Middle Banat, and Srem districts has confirmed the presence of the issues mentioned

above. The number of pending cases in the Novi Sad Basic Court at the end of 2021 was 2,392, while only a year earlier it was 1,495, approximately the same amount as in previous years. At the end of 2021, there were a total of 593 pending cases in the Basic Court in Sremska Mitrovica and 285 in 2020. In the Basic Court in Subotica, the number of pending cases from 2018 to 2021 increased dramatically, amounting to 1,000, whereas in 2016 and 2017 it was considerably smaller (148 and 187).

According to the data obtained from the Basic Court in Novi Sad, despite the increased number of cases, labour disputes were typically resolved in a period ranging from eight to twelve months. The 2021 data is especially interesting, as the average duration of disputes was only 227 days, which is the best result in the past six years. However, in the Basic Court in Sremska Mitrovica, the duration of labour disputes ranged from 211 to 538 days (2021 data). In the Basic Court in Subotica, disputes were typically resolved in five to twelve months, with the longest dispute lasting 359 days in 2021.

Disputes concerning the establishment, existence, and termination of the employment relationship

Examining the employment disputes tried by certain basic courts in the APV in the past six years, we will first focus on cases concerning the violation of the rights of employees in terms of establishment, existence, and termination of employment. Although the LL does not contain a specific provision that would provide for protection regarding the establishment of an employment relationship, the Constitution is a guarantee against the violation or denial of the right of every individual to any job available under equal conditions (National Assembly of the Republic of Serbia, 2006). Therefore, an individual can initiate legal action upon starting work without concluding an employment contract or concerning violations of their rights during the recruitment and selection process (Reljanović & Misailović, 2021, p. 73).

The research shows a relatively low number of disputes related to the establishment of an employment relationship. From 2016 to 2021, only five cases were tried in all four courts. This indicates that

the incidence of undeclared work, i.e. work without a contract, is in decline. Employers have often resorted to this in order to reduce expenses; however, employees are denied the right to work, while the basic principles of social justice and solidarity, and trust in the legal system are violated (Kovačević, 2019, p 268). For the most part, undeclared work has been effectively reduced with the help of legislation such as the equalization of actual work with an employment relationship[2], the employer's obligation to keep the employment contract or other contracts, which facilitates the inspection supervision (Lipovčić, 2019, p. 109).

LL does not contain provisions on judicial protection of participants in the recruitment process, except for the right to protection against discrimination and priority when re-employing redundant workers. These legal gaps may be the likely reason for a low number of disputes regarding the establishment of an employment relationship in the APV, since the candidates in the recruitment process are often unaware of the possibility of protection based on the Constitution, even if they do not meet the conditions for the establishment of an employment relationship (Kovačević, 2020, pp. 264–265). In addition, LL does not recognize the two-stage decision-making process for the selection of prospective employees, except in cases of special selection processes, such as the one for civil servants. Therefore, some authors (Kovačević, 2020, p. 279; Jovanović, 2015, p. 198) propose *de lege ferenda* that the two-tier system should be reintroduced to the parent law. This amendment would guarantee the uniformity of protection for all participants in the recruitment and selection process (Kovačević, 2020, p. 279).

The next point of interest was the lawsuits concerning the exercise of employment rights and the return of an employee to work. In the Basic Court in Sremska Mitrovica from 2016 to 2021, ten such disputes were tried; in 2020, during the pandemic, there were two, while in 2021 there were none. The records of the Basic Court in Zrenjanin show that nineteen cases were tried; ten of these were tried in the last two research years. Only four lawsuits of this type were tried before the Basic Court in Subotica, while during and after the pandemic, there was

[2] This requires the willingness of both employer and employee.

not a single dispute regarding the exercise of employment rights. However, the Basic Court in Novi Sad tried as many as 129 of these disputes, especially during the pandemic, when their number rose significantly. The completed surveys show that the most common reason for initiating a lawsuit was work after the expiration of a fixed-term contract, work based on contracts for temporary and occasional jobs, and undeclared work.

The law stipulates that the employer may conclude one or more contracts on the basis of which the employment relationship with the same employee is established for a period of time that, with or without interruption, cannot exceed 24 months (National Assembly, 2005, Art. 37, Par. 2). However, due to the provision stating that "an interruption lasting less than 30 days is not considered an interruption", the employer is allowed to terminate the contract for 30 days after the two years have expired, and then renew it again, even several times. The employers often also use contracts on a temporary basis or contracts paid at the completion of a project. Unfortunately, courts in general fail to recognize this type of employers' behavior as a violation of the law, but as the absence of an intention to establish an employment relationship (Jašarević & Obradović, p. 2021).

Although temporary work is rare on the whole, the share of workers thus employed in APV is 20%, which is significantly higher than the average in EU countries. Precarity, as a form of disciplining workers, negatively affects the labour market in many ways (Bradaš, 2019, p. 44). During the pandemic, temporary employees, as well as those hired through agencies, were an extremely vulnerable category that mostly suffered in the second wave of layoffs. Future activities must therefore focus on the measures to prevent the abuses of legal provisions related to fixed-term employment, with the introduction of possible restrictions and prohibitions. In addition, any additional flexibilization of work must not negate the fact that a fixed-term contract is an exception, under justified short-term circumstances, without any possible legal extension of the period on which it can be based.

There are also frequent abuses of the provisions that regulate work on temporary and occasional jobs. This type of work may not last longer than 120 days a year, since it is mostly seasonal work. The law

also mandates this type of work if there is an increase in the volume of work or there is a lack of workers. It is not entirely clear whether the limit of 120 working days refers to the duration of one or all individual contracts, i.e., whether the employer can, after one contract expires, conclude the next one with the same person for a new period of 120 days, but for another temporary job. Since this type of engagement is far more convenient for employers, a person may spend several years performing tasks in this way. If there is a need for certain jobs to be performed for longer than 120 working days, they must be stipulated by the act on systematization, based on the employment relationship with a certain person. Otherwise, this is treated as the case of the so-called simulated contracts (Judgments of the Supreme Court of Cassation, Rev 2 601/2015 and Rev 2 2738/2019).

Protection against unlawful dismissal constitutes the essence of employment security; employers, however, see it as an obstacle to quickly responding to market changes and technological challenges (Misailović, 2019, 187). Unsurprisingly, based on the available data, in the previous six-year period most disputes concerned the termination of the employment relationship: the Basic Court in Novi Sad tried 92, Sremska Mitrovica 45, Zrenjanin as many as 174, and Subotica 59. The reasons were the annulment of the unlawful decision on dismissal due to the cessation of the need to perform the employee's duties due to economic and organizational changes or the employee's health problems. There was a significant increase in the number of lawsuits conducted due to unlawful dismissal in the Basic Court in Novi Sad during 2021, when their number doubled compared to 2016 and 2017, due to extraordinary circumstances on the labour market. In the basic courts in Sremska Mitrovica and Subotica, there was no significant increase in the number of these lawsuits. In Zrenjanin, however, the number of these disputes dropped during the pandemic. The main reasons for the judgment of unlawful dismissal were the lack of objectively justified and well-structured reasons as part of the dismissal decision, and inadequate application of affirmative and eliminatory criteria to solve the issue of technological, economic, or organizational redundancies.

The 2014 amendments to the Labour Law aimed to reduce the number of lawsuits. These amendments stipulate a single litigation

process against the employer's decision to terminate the employment contract with three components: cancellation of the decision, return to work, and compensation for damages. However, this can cause certain procedural problems; the expert examination for damages claim, for instance, is a particularly complex one (Simović, 2017, p. 78).

Disputes concerning rights, obligations, and responsibilities arising from the employment relationship

Due to their nature and complexity, it is impossible to make a comprehensive list of labour-based rights violations. In the course of the research, the authors tried to record and process only the most common violations that were the subject of disputes in the basic courts in Novi Sad, Subotica, Zrenjanin, and Sremska Mitrovica.

The P1 category disputes in the basic courts are for the most part instigated for the payment of a certain claim of the employee against the employer. These most commonly include unpaid wages, increased wages for overtime work, work on public holidays, severance pay, jubilee awards, and meal, holiday, and transport allowances. Next are disputes concerning the determination of certain rights from the employment relationship (determination of the transformation of a fixed-term employment relationship into an indefinite-term employment relationship, compensation for damages due to unused vacation leave, unpaid contributions and benefits, etc.). Lastly, there are disputes concerning termination of employment and return to work.

In the absence of a legal distinction between special types of labour disputes regarding rights, obligations, and responsibilities from labour relations, the data are presented using the system provided by the Court Rules (National Assembly of the Republic of Serbia, 2009) and in accordance with the records kept in court registers.

Disputes concerning specific rights arising from the employment relationship

The research results show that the disputes concerning specific rights arising from the employment relationship are relatively infrequent in the total number of labour disputes. Almost all courts have recorded

a single-digit number of these cases yearly, with the exception of the Basic Court in Novi Sad, where their number ranged from 296 (2016) to 119 (2021).

The most common claims filed by employees concerned the right to payment of contributions, the right to a jubilee award, the right to compensation for damages due to non-use of annual leave, as well as the request to determine the nullity of the concluded employment contract. These claims also include restoring the title, erasing disciplinary punishment from personnel records and recognition of beneficial service (Basic Court of Sremska Mitrovica), determining the transformation of a fixed-term employment relationship into a permanent employment relationship (Basic Court of Subotica), and the right to payment of joint aid (Basic Court Zrenjanin).

Due to the unclear normative distinction of labour disputes, there are dilemmas concerning their classification, which are evident in the court registries and judges' internal records, and in the surveys that they completed. Therefore, the data obtained for this group of cases should be taken with a grain of salt.

Disputes concerning return to work

At the employee's request, the court may determine that his or her employment has been unlawfully terminated. In this case, the court will bring the judgment of reinstatement, payment of damages, and payment of the corresponding contributions for mandatory social insurance for the period in which the employee was out of work (National Assembly, 2005, Art. 191, Par. 1). If the employee does not insist on returning to work, the court will order the employer to compensate the employee for damages in the amount of a maximum of 18 wages, depending on the time spent in the employment relationship with the employer, age, and the number of dependent family members (National Parliament, 2005, Art. 191, Par. 5).

The disputes concerning return to work make up roughly 1-2% of total P1 category cases. During the period of intensive anti-Covid measures, no significant increase was recorded. The number of these disputes in the Basic Court in Novi Sad ranged from 14 (2018) to 28

(2020). In the other basic courts, the figures are similar: in Subotica, there were 4 (in 2020 and in 2021) and as many as 21 in 2016, and in Zrenjanin, 4 in 2021 and 20 in 2019. In Sremska Mitrovica, there were almost no disputes of this type during the research period – only 1 dispute in 2017, 2020, and 2021 respectively.

Disputes concerning payments

Disputes concerning the payment of a certain amount of money for work make up the largest part of the P1 category in basic courts and include more than 90% of total labour law cases. Most often, these include lawsuits for unpaid wages, increased wages, compensation for wages, meal, transport, and holiday allowances, compensation for overtime work, night work, work on a public holiday, jubilee bonus, and severance pay. During the research period, a constant increase in these lawsuits was recorded. Thus, in the Basic Court in Novi Sad in 2021, the number of such disputes amounted to 2,323, while only a year earlier it was 1,086, which was the average in the previous period. In 2021, the Basic Court in Sremska Mitrovica also recorded the highest number of disputes for the payment of monetary claims from the employment relationship for the past six years, as many as 338 (previously, the number was usually around 100). Data from the Basic Court in Subotica also indicate an increase in the number of these disputes, from 135 in 2016 to 922 in 2021. The Basic Court in Zrenjanin records show that there were as many as 1,032 disputes in 2020 and 1,006 in 2021, whereas in 2016 there were only 182.

Other disputes

Other disputes not mentioned in the previous discussion include disputes regarding compensation for damages due to an injury at work, which is paid according to the general rules of the Law of Contract and Torts. The practice has shown that in court proceedings, the employer may raise the objection that the injury at work was caused by the employee's own fault. In such cases, the court may rule that the work injury is a shared or even sole responsibility of the employee. Based on this ruling, an interim judgment on the grounds can first be delivered,

and then the percentage of responsibility and the amount of damage can be determined (Šarkić, Vavan, 2020, p. 73).

Conclusion

Since the parent law that regulates rights, obligations, and responsibilities in the field of work does not regulate the concept or types of disputes that arise based on the employment relationship, the authors presented their research and results as classified and recorded by the courts. Therefore, the data collected should be taken with a grain of salt. Due to the aforementioned legal gaps, the authors advocate for revising and improving the legislation that regulates disputes regarding the protection of rights from the employment relationship. The legislation should include more specific and precise definitions and regulations of numerous important issues in this area.

The frequency and characteristics of labour disputes regarding the establishment, existence, and termination of an employment relationship before the basic courts in the APV indicate that some LL provisions are challenging to apply. On the other hand, they imply that the subsequent amendments and additions to the LL brought certain improvements. The proof of this is the low number of lawsuits initiated due to the absence of an employment contract. However, the authors have suggested making further amendments to the current text, such as adding the provision on judicial protection of participants in the recruitment and selection process and on the general two-stage decision-making process for candidate selection.

The P1 category disputes concerning rights, obligations, and responsibilities arising from the employment relationship are the most frequent and are usually initiated for the payment of a specific monetary claim. Next are the lawsuits regarding the determination of individual rights from the employment relationship, the return of employees to work, and compensation for damages due to an injury at work. Frequent lawsuits concerning flexible forms of work and unlawful dismissal are proof that current legislation is still slow to respond to changes in the world of work, caused by globalization, economic crisis, and digitalization, especially after the pandemic. In conclusion, it can be said

that the number of unresolved disputes is constantly increasing; however, this trend has been present for some time now and has not been much affected by the pandemic. The labour disputes regarding the payment of an employee's monetary claim against the employer are undoubtedly predominant, evidenced by the fact that only these disputes significantly rose in number even during the pandemic, i.e., in 2020 and 2021.

Remark: This article presents a part of the research results obtained within a short-term project of special interest for the sustainable development of the APV in 2022 entitled "Judicial protection of rights from the employment relationship during the Covid pandemic in the APV – challenges in the EU accession process" (Decision No. 42–451–2027/2022-01/01).

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Sudska zaštita prava iz radnog odnosa tokom Kovid pandemije na teritoriji Autonomne pokrajine Vojvodine

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Sažetak

Na osnovu prikupljene sudske prakse osnovnih sudova u APV u periodu od 2016. do 2022. godine autori sagledavaju učestalost i analiziraju razloge pokretanja sporova iz radnog odnosa, posebno tokom pandemije, ocenjujući u kolikoj se meri ona negativno odrazila na svet rada i stepen kršenja prava zaposlenih. Ujedno su dati predlozi za unapređenje i dopunu postojećeg radnopravnog okvira u kojem postoje brojne pravne praznine, među kojima je dominanatno odsustvo određenja pojma i vrste sporova koji nastaju po osnovu radnog odnosa, ali i značajan prostor za zloupotrebe, naročito kada su u pitanju fleksibilne forme zapošljavanja i generalno česte slučajeve nezakonitog otkaza od strane poslodavca. Istraživanje potvrđuje konstantnu opterećenost sudova opšte nadležnosti sporovima iz radnog odnosa, uz potrebu daljeg razmatranju ideje o formiranju posebnih osnovnih i apelacionih radnih sudova. Ipak, opšti zaključak autora, uz određene rezerve, je da pandemijski uslovi nisu prouzrokovali dodatan porast nerešenih predmeta u referadi radnih sporova, osim povodom isplate novčanog potraživanja zaposlenog prema poslodavcu koji predstavljaju najučestalije, dominantne i jedine sporove koji beleže značajnije uvećanje tokom 2020. i 2021. godine.

Ključne reči: sudska zaštita, radni sporovi, pandemija, APV, prava zaposlenih.