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# Crucial Point: Several Issues of the Termination of Employment

Abstract

Although the rules of termination of employment have not changed fundamentally in the Hungarian Labour Code of 2012, the provisions of the Act imposed a number of slight changes which gave rise to numerous dilemmas. In this paper, I analyse them as crucial points in the Hungarian system of termination of employment. First, I present the general framework of the termination of employment in the Hungarian Labour Code, then I examine the interpretative framework of the requirement of equitable assessment. In the remainder of the study, I aim to find solutions to the problems regarding the dismissal of indefinite and fixed-term employees, dismissal based on the cessation of the temporary work agency assignment, and questions related to dismissal prohibitions and restrictions.

Keywords: dismissal, dismissal prohibition, dismissal restriction, fixed-term employment, temporary agency work, termination of employment

## I Motivations and Objectives – The Regulation of Termination of Employment

The thought of preparing a new labour law code was brought up in October 2006, as a result of which the experts assigned by the Ministry of Social Affairs and Labour completed a draft by the spring of 2007. The so-called *Theses* served as the basis of the regulation concept and were published at the end of 2008;[1] however, after that, the codification work within the ministry came to a halt, therefore the experts originally assigned– then as a private organisation – started to prepare the act. The legislative work gained momentum

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[1] Berke Gyula, Kiss György, Lőrincz György, Pál Lajos, Pethő Róbert, Horváth István, 'Tézisek az új Munka Törvénykönyve szabályozási koncepciójához' (2009) 3 Pécsi Munkajogi Közlemények, 147–160, 154–155.

again in June 2011, after the government had published the document titled *Hungarian Labour Plan*, prepared in the frameworks of the *Széll Kálmán Plan*,[2] which proposed the transformation of employment relations, including the creation of the new labour code. The bill was developed along the lines of the objectives specified in the Hungarian Labour Plan. The main objectives included making the regulation flexible, as well as changing the characteristic of the rules ensuring the protection of employees.[3]

According to the legislator, the primary reason for the changes concerning the system of termination of employment lay in avoiding the discrepancies occurring in the application of the law, and in satisfying the needs emerging in practice.[4] Act I of 2012 on the Labour Code (hereinafter referred to as Labour Code) – which entered into effect as of 1st July 2012 – brought about the most significant change regarding this matter in respect of the legal consequences of unlawful termination of employment. In this respect, the primary objective was to eliminate practices which unreasonably increased the burdens of employers, as well as to reduce the number of labour conflicts and employment litigation. The basis of the motivation was that the provisions of Act XXII of 1992 on the Labour Code (hereinafter referred to as 1992 Labour Code) placed the risk of prolonged labour lawsuits essentially entirely onto employers without justification – according to the legislator. As a result, the legal consequences of unlawful termination of employment underwent a serious change.[5] However, the present study does not wish to analyse these amendments; it intends to examine just some provisions of the relevant legislation that are innovative or entail dilemmas.[6]

## II The Changes of the Termination System in General

All in all, the Labour Code did not change the bases of the legal instruments connected to the termination of employment, or their essential regulatory character. Therefore, the imperative character of the legal grounds of termination had not changed either,[7] although now the act allowed the parties to agree to suspend the right to dismissal for up to one year calculated from

[2] 'Széll Kálmán Terv. Magyar Munka Terv' (2011) <mcdsz.hu/1_doksik/Nemzetimunkaterv.pdf> accessed 20 February 2020.

[3] Ibid, 146.

[4] General reasoning of the Labour Code, 18.

[5] For the analysis of the rules governing the legal consequences of the unlawful termination of the employment relationship, see Petrovics Zoltán, 'A jogellenes munkajogviszony-megszüntetés jogkövetkezményeinek margójára' in Horváth István (ed), *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára* (ELTE Eötvös 2015, Budapest) 367–380.

[6] For the regulation and practice of termination, see Kulisity Mária, *A munkaviszony megszűnése és megszüntetése* (Wolters Kluwer 2014, Budapest), Lőrincz György, *A munkaviszony megszűnése és megszüntetése* (HVG-ORAC 2017, Budapest).

[7] Labour Code pt II ch X s 85 para 1 item *a)* and *b).*

the commencement of employment.[8] The formal requirement applicable to the termination of employment – the requirement of its written form – persisted as well, such as the rule that the – unilateral – legal statement regarding the termination of the employment shall include notification of the manner of enforcing the claim and the deadline for its enforcement.[9]

However, renaming the legal grounds for termination brought an obvious terminology innovation. The Labour Code replaced the name ordinary dismissal with dismissal,[10] while it changed the name extraordinary (summary) dismissal to dismissal with immediate effect.[11] The reason for this is not completely clear, not even if dismissal with immediate effect covers not only the legal statement retaining the function of the extraordinary dismissal since, according to the new rules, there are three forms of dismissal with immediate effect: dismissal with immediate effect subject to reasoning,[12] dismissal of employment during the probationary period,[13] and premature dismissal of fixed-term employment with immediate effect.[14] However, termination with immediate effect of a legal relationship based on an invalid agreement was still not specified among the cases in the Labour Code[15] – similar to the 1992 Labour Code – although it would have been justified to insert a reference clause in Chapter X of the Labour Code regulating termination, in order to facilitate the application of the law. Unlike the previous regulation, the Labour Code allowed fixed-term employment to be terminated through dismissal and specified partly separate grounds for it. In addition – returning to the solution used before the Second World War – the Labour Code provided the right to withdrawal to both parties during the period between the conclusion of an employment contract and its commencement, although this legal ground is not included in the chapter regulating terminations either.[16]

The Labour Code modified the rules of severance pay in several respects as well. Therefore, for example, deviation from the statutory provisions to the disadvantage of the employee is allowed in collective agreements or works council agreements of normative effect. The reference point of the right to severance pay was changed as well; now the communication of dismissal shall be taken into account in this respect, and not the expiry of the notice period. The base of the severance pay was changed as well and, instead of the previous average wage, the narrower – and practically lower – absentee pay became the basis of the calculation. In the case of dismissal for reasons related to the conduct of the employee and not to the employee's

[8] Labour Code pt II ch X s 65 para 2.

[9] Labour Code pt I ch II s 15 para 4, s 22 para 5. The case-law analysis group of the Curia of Hungary held that the previous regulation in respect of the general issues could be upheld. See Kúria, 'A felmondások és az azonnali hatályú felmondások gyakorlata' (2014) <http://www.lb.hu/sites/default/files/joggyak/a_felmondasok_es_azonnali_hatalyu_felmondasok_gyakorlata_-_osszefoglalo_jelentes.pdf> accessed 20 February 2020.

[10] Labour Code pt II ch X s 65–67.

[11] Experience shows that labour practices still often use the terms rooted in the last 20 years.

[12] Labour Code pt II ch X s 78.

[13] Labour Code pt II ch X s 79 para 1 item *a)*.

[14] Labour Code pt II ch X s 79 para 1 item *b)* and s 2.

[15] Labour Code pt I ch IV s 29 para 1.

[16] Labour Code pt I ch II s 15 para 2; ch VII s 49 para 2.

abilities related to health factors, after July 2012, the employee is no longer entitled to severance pay, while in the case of employment relationships established with publicly owned employers, neither the collective agreement, nor the agreement of the parties may deviate from the rules applicable to severance pay.[17]

In respect of temporary agency work – unlike the 1992 Labour Code – the Labour Code stipulates the payment of the severance pay, although in practice, due to the short terms of employment, and the eligibility conditions, severance pay is paid very rarely. The condition of eligibility for severance pay is not connected to the duration of employment but to the duration of the last temporary agency work, which, according to certain opinions, makes a distinction between those with employment for temporary agency work and those who are employed in typical employment without a sensible reason.[18] As *István Horváth* noted, through this rules the Labour Code 'depreciated' the time spent in employment necessary for severance pay since, in order to avoid paying severance pay, one just has to assign the employee to another user undertaking for several days before the dismissal of the temporary work agency.[19]

The minimum duration of the notice period in case of dismissal by the employer is thirty days, which – similarly to the provisions of the 1992 Labour Code – increases gradually depending on the length of that employment. Unlike the previous regulation, in the case of dismissal of the employee, the notice period does not increase together with the duration of the employment, since it is uniformly thirty days. However, with regard to temporary agency work, the notice period was uniformly reduced to fifteen days.[20] However, the parties may agree that the notice period may be up to six months, while collective agreements may stipulate any notice period without express statutory limitation. Contrary to the above, with regard to public employers, neither the collective agreement, nor the agreement of the parties may deviate from the duration of the notice period specified in the Labour Code.[21]

Another important rule is that, in the employment contract of executive employees, the parties may essentially 'opt out' from the termination system of the Labour Code, except for certain dismissal prohibitions.[22]

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[17] Labour Code pt II ch X s 77; pt II ch VX s 205 para 1 item *b)*.

[18] Labour Code pt II ch VX s 222 para 5. See Kártyás Gábor, *Munkaerő-kölcsönzés Magyarországon és az Európai Unióban* (Wolters Kluwer 2015, Budapest) 320.

[19] Horváth István, *Hazai kölcsönzés – európai szemmel. A munkaerő-kölcsönzés magyar szabályozása – európai összehasonlításban, figyelemmel a 2008/104/EK irányelv jogharmonizációs követelményeire* (2013, Budapest) 193.

[20] Labour Code pt II ch X s 69 para 1 and 2; pt II ch VX s 220 para 2. For the critics of this provision, see Kártyás (n 18) 319.

[21] Labour Code pt II ch X s 69–70; pt II ch VX s 205 para 1 item *a)* and para 2 item *a)*.

[22] Labour Code pt II ch VX s 209 para 2. The parallel can also be drawn with some recent developments in English law. See Jeremias Prassl, 'Employee Shareholder 'Status': Dismantling the Contract of Employment?' (2013) 42 (4) Industrial Law Journal, 307–337 DOI: https://doi.org/10.1093/indlaw/dwt018; Jeremias Prassl, '"Mindannyiunkat egyformán érint?" Az Egyesült Királyság koalíciós kormányának munkaerő-piaci reformja' (2014) 1 Magyar Munkajog e-folyóirat, 30–31 <hllj.hu/letolt/2014_1/02.pdf> accessed 20 February 2020; Astrid Sanders, 'The changing face of "flexicurity" in times of austerity?' in Nicola Countouris, Mark Freedland (eds),

## III Dilemmas Related to Dismissal

### 1 The Equitable Assessment Requirement and Dismissal by the Employer

The Labour Code introduced principles and requirements of conduct to labour law which had previously been unknown in the Hungarian regulations. Such a provision was the equitable assessment requirement, according to which employers shall take into account the interests of employees under the principle of equitable assessment; where the manner of performance is defined by a unilateral act, it shall be done so as not to cause unreasonable disadvantage to the employee.[23] According to the intentions of the legislator, it intended to transpose the restriction of the definition of unilateral performance known in German law into Hungarian labour law.[24] After the Labour Code had entered into effect, the question arose as to whether the equitable assessment requirement shall govern in the assessment of the lawfulness of the termination of employment by the employer. Considering the grammatical and logical interpretation, as well as the taxonomical position of the equitable assessment requirement, in theory it was possible that the equitable assessment requirement, as a general expectation for measures taken within the discretion of the employer. was expanded by the judicial practice beyond a scope wider than the unilateral performance definition, and the scope of enforcement thereof was thereby expanded.

Based on grammatical analysis, it can be established that the provisions is made up of two clauses: on the one hand, it stipulates that the employer shall take into account the interests of employees under the principle of equitable assessment, while on the other hand the provision stipulates that the unilateral definition of the manner of performance shall not cause unreasonable disadvantage to the employee. The logical interpretation provides two interpretations. According to the firs, the second clause merely clarifies, explains or amends the first clause, thus the employer is obliged to take into account the interests of employees under the principle of equitable assessment only in the course of its unilateral definition of the manner of performance. Pursuant to the second interpretation, the two clauses contain two separate statements; namely that the employer shall take into account

*Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013, New York) 314–332, 327–328 DOI: https://doi.org/10.1017/CBO9781107300736.019.

[23] Labour Code pt I ch II s 6 para 3.

[24] According to this principle of the German private law, if the performance is defined by one of the contracting parties then, if there is any doubt, it shall be presumed that the definition of the performance shall comply with the requirement of equitable assessment. The other party is bound by such performance definition only if that complied with that the requirement of equitable assessment – in the absence thereof, performance shall be established judicially. See Bürgerliches Gesetzbuch s 315 para 1 and 3: 'Soll die Leistung durch einen der Vertragschließenden bestimmt werden, so ist im Zweifel anzunehmen, dass die Bestimmung nach billigem Ermessen zu treffen ist.' 'Soll die Bestimmung nach billigem Ermessen erfolgen, so ist die getroffene Bestimmung für den anderen Teil nur verbindlich, wenn sie der Billigkeit entspricht. Entspricht sie nicht der Billigkeit, so wird die Bestimmung durch Urteil getroffen; das Gleiche gilt, wenn die Bestimmung verzögert wird.'

the interests of employees under the principle of equitable assessment in general and, in addition, the unilateral definition of the manner of performance shall not cause unreasonable disadvantage to the employee. Based on a systematic interpretation, it can be established that the provision is located in Part One of the Labour Code *(General provisions)*, and within that in the chapter titled *'Common rules of conduct'*, which undoubtedly provides guidance that it is a general rule. The general character of the provisions is also supported by the finding of *György Lőrincz*, according to whom the Labour Code 'elevates this principle to the general level, thus the Labour Code considers it a prevailing requirement for all unilateral measures to be taken by the employer'.[25]

If the second interpretation specified above is correct, it could be possible that the equitable assessment requirement would also have to be applied with regard to the termination of the employment by the employer. Based on all this, it was also questionable whether the requirement should be applied in cases of redundancy and, consequently, whether the interests of the employees shall be taken into account when selecting the employments to be terminated and, if yes, whether a dismissal violating this requirement could be unlawful.[26] Undoubtedly, during the preparatory work, the issue of strengthening the protection of employees arose – in particular in connection with group redundancies – and the idea of so-called socially justified dismissal by the employer (which could also be interpreted as a kind of equity requirement), according to which the employees affected should have been selected by taking their social circumstances into consideration as well (for example, length of service, age, support obligations and financial situation).[27]

However, it seems like that the case-law analysis group of the Curia of Hungary put an end to the debate since, after roughly presenting its opinions, it held that although the wording of the Labour Code is unfortunate, the narrower interpretation shall prevail among the possible interpretations. The equitable assessment requirement may be answered by taking the purpose of the act and the common rules of conduct into consideration. Pursuant to these, the equitable assessment requirement, the prohibition of causing unreasonable damage shall prevail in respect of only those unilateral employer's measures which affected the fulfilment of the employee's obligations arising from the employment. However – as the case-law analysis group of the Curia of Hungary continued – it does not preclude that collective agreements stipulate their wider application (for example, in the case of redundancies).[28]

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[25] Lőrincz György, 'Általános rendelkezések' in Kardkovács Kolos (ed), *Az új munka törvénykönyvének magyarázata* (HVG-ORAC 2012, Budapest) 29.

[26] Petrovics Zoltán, 'A munkaviszony megszűnése és megszüntetése' in Gyulavári Tamás (ed), *Munkajog* (ELTE Eötvös 2012, Budapest) 200–201. See also Bankó Zoltán, Berke Gyula, Kajtár Edit, Kiss György, Kovács Erika, *Kommentár a munka törvénykönyvéhez* (Wolters Kluwer 2014, Budapest) 311.

[27] Berke, Kiss, Lőrincz, Pál, Pethő, Horváth (n 1) 154.

[28] Kúria (n 9) 21.

## 2 Ideas Related to the Dismissal of Indefinite Term Employment

The regulation of dismissal from indefinite term employment had not changed fundamentally compared to the 1992 Labour Code. The right to dismissal specified in the Labour Code may be exercised on the same grounds (the conduct or ability of the employee related to the employment of the employee, and reasons related to the operation of the employer),[29] and with the same content and quality requirements (true, clear and substantiated reasoning) as specified by the 1992 Labour Code for ordinary dismissal.[30] Consequently, the case-law analysis group of the Curia of Hungary held that Opinion No. 95 of the Labour Law Division of the Supreme Court may continue to be considered as governing, and the previous judicial practice in this respect may be maintained.[31]

In this regard, we shall note the dismissal by the employer of the indefinite term employment of employees considered as pensioners, for which the employer – similarly to the 1992 Labour Code – is not obliged to provide a statement of reasons.[32] The traditional legal policy reason behind setting aside the reasoning is that, in these cases, the employee is not left 'without allowance'; the existential need for protection of the employee is essentially bypassed considering their pension. Despite the lack of obligation to provide reasoning, the employee may seek legal remedies against this employer's legal statement as well, based on the requirement of equal treatment or proper application of the law, as the case may be. Thus, although the regulation does not leave the employee to his own resources completely, protection against arbitrary termination may be enforced through these legal instruments with significantly lower effectiveness. There is some cause for concern that the relevant provisions considered those employees as pensioners as well – and thereby render essentially defenceless – who actually receive no pension allowance at all, but only fulfilled certain eligibility criteria for it, i.e. who are not actually 'beneficiaries'.[33] The legislator did not connect the lack of reasoning to any employment policy, labour market or vocational training objective,[34] although, according to Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation, differences of treatment on the grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary.[35] If the dismissal on the grounds of being considered a pensioner and communicated without reasoning causes long-

[29] Labour Code pt II ch X s 66 para 2.

[30] Labour Code pt II ch X s 64 para 2 s 66 para 2.

[31] Kúria (n 9) 16, 18 and 49.

[32] Labour Code pt II ch X s 66 para 9, pt V s 294 para 1 item *ga)*.

[33] Kiss György, 'A Domnica Petersen ügy tanulságai a kor szerinti diszkrimináció versus igazolt nem egyenlő bánásmód körében – hazai összefüggésekkel' (2010) 1 Pécsi Munkajogi Közlemények, 105–118, 118.

[34] Ibid.

[35] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, art 6 para 1.

term and substantial loss of income to the employee, without however becoming entitled to a reasonable amount of pension (i.e. the amount of the pension does not cover the apparent needs of the pensioner), then the different treatment can hardly be justified.[36] Considering all of the above, the compliance of the rule with European Union law is doubtful.

Neither in respect of the dismissal, nor in respect of the dismissal with immediate effect does the Labour Code contain the provisions according to which the employee should be given an opportunity in certain cases to defend himself against the objections raised against him. According to the General reasoning of the Labour Code, the employee was often not heard by the employer because the employer was afraid that the employee would become incapacitated for work during the period between the hearing and the communication of the legal statement of termination, and the employee would thereby become subject to prohibition of dismissal. In addition, the legislator also mentioned that, in labour lawsuits, the lack of hearing had not been considered as a material fault that would have resulted in unlawful termination anyway. It is evident that the argument referred to actual infringements by the employer, as well as to the judicial practice which did not sanction it, in order to support the lack of the important rule which otherwise served as a guarantee for fair proceedings, albeit the right to defence of the employee may be considered as one of the minimum and also substantive elements of protection against dismissal.[37]

## 3 Certain Issues Related to the Dismissal of Fixed-term Employment

With regard to fixed-term employment, the grounds for dismissal specified by the Labour Code are partially different to those of indefinite term employment. The employer may terminate fixed-term employment by notice on grounds based on the abilities of the employee, if the employer is undergoing compulsory liquidation or bankruptcy proceedings, or if it is impossible to maintain the employment for any unavoidable external reason.[38] While the first case is connected to the person of the employee and is identical to the ground for dismissal regarding indefinite term employment, the second case belongs to the sphere of interest of the employer, and the third case may be traced back to circumstances which are beyond the employer. In the following, I will analyse the latter two reasons.

Dismissal during the period of compulsory liquidation or bankruptcy proceedings has a unique place in the systems of grounds for dismissal. Namely, this is a special ground for termination, which may be traced back to an objective reason connected to the operation of the

[36] Case C-499/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark,* EU:C:2010:600, Case C-515/13 *Ingeniørforeningen i Danmark acting on behalf of Poul Landin v Tekniq acting on behalf of ENCO A/S – VVS,* EU:C:2015:115. See Hős Nikolett, 'Igazolhatja-e a nyugdíjra való jogosultság a végkielégítés megvonását nyugdíjas munkavállaló esetén? A C-515/13 sz. Landin-ügy elemzése' (2015) 5 Pázmány Law Working Papers, 6–7 <https://plwp.eu/docs/wp/2015/2015-05_Hos.pdf> accessed 20 February 2020.

[37] *K. M. C. v. Hungary,* no. 19554/11. ECHR, 10 July 2012.

[38] Labour Code pt II ch X s 66 para 8.

employer. There is essentially no opportunity to examine substantiality in this respect, and it may be understood as if the Labour Code did not specify the actual ground for dismissal, but the time frames applicable to communicating the dismissal. Since the Labour Code does not stipulate further content requirements for this ground for dismissal, it is sufficient to merely refer to the fact of the compulsory liquidation or bankruptcy proceedings in the dismissal.

The impossibility of maintaining employment for unavoidable external reasons raises multiple questions. Based on the grammatical interpretation of the provisions, it can be established that the impossibility shall be created by any objectively unavoidable circumstance beyond the employer, which makes it impossible for the employee to fulfil their employment. Unavoidable external reason may be any event or circumstance beyond the person of the employer which the employer cannot foresee, and which the employer is unable to influence or prevent for objective reasons. In my opinion, it is possible that these circumstances also include those which may be considered as inherent in the person of employee, regardless of whether those are attributable to the employee or not. Therefore, it begs the question whether a circumstance which may actually be traced back to the conduct of the employee could also provide ground for their dismissal.

In respect of the ground for *dismissal*, a unique comparison can be made with the *frustration* (impossibility) concept of English law, which legal instrument is similar in multiple respects to this solution of the Hungarian labour law, despite the fact that frustration is not a ground for dismissal but a legal ground resulting in cessation of the employment. According to the English law, the employer may refer to frustration if the employee, for no fault of his own, is unable to fulfil his or her obligations arising from the employment due to any unforeseeable event which causes substantial changes in the conditions of fulfilling the employment contract.[39] In the judicial practice – depending on all circumstances of the case – among others the permanent, long illness of the employee, the imprisonment of the employee, or any unforeseeable situation (for example, natural disaster) may serve – among others – as a basis for this legal ground of cessation. Since the burden of proof is borne by the employer, in this respect it is very important – for example – how long the employee is entitled to paid sick leave if there is reference to permanent illness, since frustration cannot be cited during that period. As the case may be, the job function of the employee may also be relevant since, if the employee is employed in an especially key position, there is a higher chance that frustration shall be established. Upon the adjudication of frustration, the judicial practice takes into account the nature of the illness or the health-related damage, the duration of the absence and the chances of recovery, as well as the duration of the employment at the employer. In the case of the employee's imprisonment – for example –

[39] Gwyneth Pitt, *Employment Law* (Sweet and Maxwell 1993, London) 143–145; Simon Honeyball, John Bowers, *Textbook on Labour Law* (Oxford University Press 2004, Oxford, New York) 86.

the duration of the absence is examined, and the economic interest of the employer is also considered, as well as if the employee could be substituted during his/her absence.[40]

In my opinion, the solution of the English law may offer a lot of lessons to be learned by Hungarian practice as well. In theory, the cases of frustration developed by the English law may be inserted in the subject matter specified by the Labour Code. Such cases may be if the employee is employed in the framework of any activity subject to an administrative permit, but the permit is withdrawn during the employment for any reason beyond the employer. In theory, it may also result in impossibility if the employee is unable to fulfil his obligations arising from the employment for any unforeseeable reason which the employee cannot avert (for example, the employee is taken into pre-trail detention, sentenced to imprisonment, or suffers from any permanent illness which makes it impossible to maintain the employment further). However, the question remains that, since the Labour Code stipulated unavoidable external reason, is the employer obliged to – using the standard of reasonably expected conduct under the given circumstances[41] – take all measures resulting from this in order to avoid the dismissal? Essentially, can the employer be expected to preserve the employment of the employee who is permanently ill or in pre-trial detention and employ a substitute worker? If it can be expected, how long is the period which the employer is bound by within the reasonably expected frameworks? In my opinion, as general rule of conduct, the employer is bound by the requirement of reasonably expected conduct under the given circumstances in such case as well. The duration of the obligation depends on other circumstances, such as those English law considers when adjudicating *frustration*. At the same time, undoubtedly, these questions await answers from the judicial practice.

It is necessary to raise another issue related to the grounds for dismissal. Namely, it is important to make the distinction the phrasing of this subject matter and the phrasing of the dismissal with immediate effect based on objective impossibility.[42] Namely, the latter is similar in multiple respects to the above-mentioned ground for the dismissal of the fixed-term employee. Dismissal with immediate effect is possible in cases of conduct which makes it impossible to maintain the employment relationship. Upon first glance, it could be an obvious basis for the distinction that, in the case of dismissal with immediate effect, only the employee's conduct may substantiate the termination, while in case of dismissal of fixed-term employment, all circumstances beyond the control of the employer may appear as grounds for dismissal as well. Consequently, the dismissal of the fixed-term employee may prevail in

[40] John McMullen, 'Frustration of the Contract of Employment and Statutory Labour Law' (1986) 6 The Modern Law Review, 785–790; Honeyball, Bowers (n 39) 86–88, Deborah J. Lockton, *Employment Law* (Palgrave Macmillan 2006, Houndmills, Basingstoke and New York) 239–241; Simon Deakin, Gillian S. Morris, *Labour Law* (Hart Publishing 2009, Oxford and Portland, Oregon) 418–420, Hugh Collins, Keith D. Ewing, Aileen McColgan, *Labour Law* (Cambridge University Press 2012, New York) 812–815 DOI: https://doi.org/10.1017/CBO9781139227094.025; Richard W. Painter, Ann E. M. Holmes, *Cases and Materials on Employment Law* (Oxford University Press 2012, Oxford) 337–340.

[41] Labour Code pt I ch II s 6 para 1.

[42] Labour Code pt II ch X s 78 para 1 item *b)*.

a wider scope compared to the case of dismissal with immediate effect related to objective impossibility. However, this finding in itself does not provide a satisfactory answer to the legitimate expectation that the two cases shall show that one of them allows the special, but still more traditional way of cancelling – i.e. dismissal –employment, while the other is a more strict, sanction-like legal ground for termination, which is enforced with immediate effect. Consequently, the basis of dismissal with immediate effect related to objective impossibility shall only be a situation that is related to the conduct of the employee, which causes the 'impossibility' of maintaining the employment with 'instant' effect.

## 4 The Cessation of a Temporary Work Agency Assignment as Ground for Dismissal

In the case of employment for temporary agency work, the Labour Code discarded the previous, separate legal grounds for cancellation and grounds for termination, and also no longer used the rules specifying the unique legal consequence of unlawful termination. However, a special ground for dismissal is still included; namely that the Labour Code considers the termination of the employee's assignment as a reason related to the operation of the temporary work agency.[43] This provision brought significant change compared to the previous legal provision and the judicial practice, since if the user undertaking did not request a new or additional workforce, this was not considered previously as a reason related to the operation of the temporary work agency, and employment could only be terminated after a thirty-day period on this ground.[44]

In practice, the cessation of the assignment and ground for dismissal means the end of employment for temporary agency work as well in most cases, while simplifying the reasoning obligation of the employer to the bare minimum. Since, if the ground for the dismissal is the cessation of the assignment, the employer does not have to reveal the actual supporting motivation or actual reason for dismissal, and the court cannot review it either.[45] Consequently, the temporary agency worker may dispute the dismissal on the merits only if the assignment did not actually cease, or if the termination violates any of the principles (for example, the requirement of equal treatment, or the prohibition of abuse of rights). As *Gábor Kártyás* pointed out, the cessation of the assignment may be induced by the temporary work agency itself, for example, by dismissing the employee or by terminating the temporary agency work contract with the user undertaking.[46] It also follows from the above that 'with the appropriate cooperation' of the temporary work agency and the user

[43] Labour Code pt II ch XVI s 220 para 1.

[44] Supreme Court Mfv.I.10.035/2007/4. See Kártyás (n 18) 317.

[45] Budapest-Capital Labour Court 4.M.503/2013/9. See Kovács Szabolcs, 'A kikölcsönzés megszűnése mint felmondási indok – egy bírósági ítélet tükrében' (2014) 5 HR & Munkajog, 27–28.

[46] Kártyás (n 18) 318.

undertaking, termination with essentially any background 'is feasible' through the cessation of the assignment.[47]

In the opinion of *Kártyás*, regulating the cessation of the assignment as a ground for termination essentially results in termination without reasoning.[48] In this respect, *Kártyás* makes a comparison between the former rules of dismissal of public servants without giving reasons, which was held unconstitutional by the Constitutional Court in several respects.[49] In its resolutions, in connection with public service, the Constitutional Court held that the obligation to provide reasoning for the unilateral termination by the employer has constitutional relevance, and – deduced from the right to work – it belongs to the obligation of the state to protect the institutions. In my opinion, since these arguments of the Constitutional Court are 'industry-neutral', the protection against arbitrary termination shall prevail in both public service and private labour law, and in respect of both typical and atypical employments. If the employer is allowed to terminate the employment for work performed in subordination without providing reasons, then it violated the right to work, as well as the protection against arbitrary and unlawful termination.[50] Without reasoning, effective legal protection cannot be ensured either, therefore such a regulation unreasonably restricts the right to judicial legal protection. Meanwhile, due to the lack of reasoning, the subsistence of the employer and the family of the employee may be jeopardised in an unpredictable way, which creates absolute subordination and dependency for the workers, which contradicts human dignity.[51]

Contrary to the above, the Curia of Hungary stated in a recent case that 'the reasonableness and validity of the dismissal based on the operation of the employer cannot be examined',[52] so the cessation of the assignment as a ground for dismissal by the temporary work agency is an objectively justified reason. The temporary work agency cannot influence the economic and organisational decisions of the user undertaking, including the intention to cease the assignment, so the temporary work agency shall not be liable for these decisions.

## 5 Questions Related to the Dismissal Prohibitions

The Labour Code brought numerous modifications to the system of dismissal prohibitions and restrictions. Multiple dismissal prohibitions disappeared compared to the previous

[47] Horváth (n 19) 201.

[48] According to Jácint Ferencz this provision of the Hungarian Labour Code is a 'lifelike' solution. See Ferencz Jácint, *Atipikus foglalkoztatási formák* (Dialóg Campus 2015, Budapest–Pécs) 122.

[49] See Decision 8/2011. (II. 18.) of the Constitutional Court of Republic of Hungary, ABH 2011., 49., Decision 29/2011. (IV. 7.) of the Constitutional Court of Republic of Hungary, ABH 2011, 181.

[50] See Petrovics Zoltán, 'Miért kell védeni? A munkajogviszony munkáltató általi megszüntetésével szembeni védelem egyes kérdéseiről' (2017) 1 Munkajog, 4–11.

[51] See Decision 22/2004. (VI. 19.) of the Constitutional Court of Republic of Hungary, ABH 2004., 367, 374–375., Decision 8/2011. (II. 18.) of the Constitutional Court of Hungary, ABH 2011., 49, 74., Decision 29/2011. (IV. 7.) of the Constitutional Court of Hungary, ABH 2011, 181, 192.

[52] Curia of Hungary Mfv.X.10.103/2020.

regulation, while others survived as dismissal restrictions; moreover, a new type of protection against dismissal also appeared, which had not previously been regulated in Hungarian labour law.[53] The regulations continues to allow collective agreement (works council agreements of normative effect) and the agreements of the parties to specify additional prohibitions and restrictions.[54]

In certain cases of dismissal prohibitions (pregnancy, maternity leave, leave of absence without pay taken for the purpose caring for children,[55] any period of actual reserve military service, as well as women while receiving treatment related to a human reproduction procedure, for up to six months from the beginning of such treatment) the employer cannot lawfully terminate their employment by notice.[56] In addition to the reduction of the duration of protection, it is a significant change related to human reproduction procedure that – unlike the 1992 Labour Code – the dismissal prohibition extends to women exclusively, despite the fact that men may undergo such treatment as well. The regulation is cause for concern, and it qualifies as direct sex-based discrimination, it makes a distinction between men and women without objective and reasonable reason, based merely on their sex.[57] Although the Labour Code reduced the number of prohibitions compared to the previous legislation, the Labour Code extended those to pensioner employees as well. The dismissal prohibition based on leave of absence without pay taken for the purpose of caring for children includes two cases. The employee is entitled to leave of absence without pay until the child reaches the age of three, and until the child reaches the age of ten – for the duration of being paid childcare allowance.[58] The employee may be entitled to protection regardless of his or her sex; however, if both parents use the leave of absence without pay taken for the purpose of caring for children, then only the mother shall be entitled to the protection. In my opinion, this rule violates the requirement of equal treatment, since it makes a distinction between the mother and the father based on the sex of the employee, without any objective and logical reason.[59]

Although part of the prohibitions continued to retain their absolute character, according to the wording of the Labour Code entered into effect on 1st July 2012, the employee could only refer to the protection existing based on pregnancy and treatment related to a human reproduction procedure if the employee had notified the employer of this prior to the communication of the dismissal.[60] It followed from this that if the employee had no

[53] See the so-called relative dismissal prohibition.
[54] Labour Code pt II ch X s 85 para 2 item *b)*.
[55] Labour Code pt II ch X s 65 para 3 item *c)*.
[56] Labour Code pt II ch X s 65 para 3.
[57] See Göndör Éva, 'A nőket érintő felmondási tilalmak munkajogi fejlődéstörténete' in Horváth (n 5) 101–117, 112.
[58] Labour Code pt II ch XI s 128 and 130.
[59] See Göndör Éva, A családi és a munkahelyi feladatok összehangolását segítő és gátló jogintézmények a munkajogban (Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola 2012, Győr) 150.
[60] Labour Code pt II ch X s 65 para 5.

knowledge of her pregnancy, and the employer terminated her employment, the employee could not subsequently claim the existence of prohibition of dismissal.

It is probably no coincidence that the Constitutional Court decision related to the Labour Code was related to the constitutional assessment of this notification obligation. In the matter of the prior notification obligation, the Constitutional Court based its opinion on that the intention to start a family, and the treatment related to a human reproduction procedure undertaken to this end, as well as the pregnancy – so far it has no external signs – belong to the private sphere and are excluded from any and all state intervention. Considering this, the statutory provision stipulating the mandatory provision of the data related thereto represents interfering with the private sphere in itself.[61]

In the opinion of the Constitutional Court, the notification obligation in itself is necessary in order to enforce the dismissal protection, and this would follow from the cooperation and notification obligation of the employee even without a separate provision. However, the Constitutional Court held that notification regarding data which belong to the private sphere is only necessary if any event relevant in terms of the enforcement of the dismissal protection occurs – i.e. the communication of the dismissal – but at least if the employer's intention to terminate the employment is apparent.[62] The rule stipulating the notification obligation before the communication of the dismissal obliges the woman intending to have children to notify the employer of circumstances within the private sphere of the employee, regardless of the communication of the dismissal. Consequently, the notification obligation is separated from the employer's intention to terminate the employment, thus the employee is forced to provide the employer with the notification prescribed by the disputed provision, on the day the human reproduction procedure is started, or immediately after becoming aware of her pregnancy;[63] however, this restricts the right of the party concerned to human dignity and private sphere without a constitutional reason.

The Constitutional Court explained that if the expectant woman herself does not know about her pregnancy then the violation of the private sphere is out of the question. However, the Labour Code prescribes a notification obligation prior to the communication of the dismissal in all cases, regardless of whether the employee had become aware of her condition giving rise to dismissal protection. Consequently, those women who are not aware of their pregnancy before the communication of the dismissal will not be able to enforce the dismissal protection later either. Through this provision, in respect of these employees, the legislator set an impossible condition for enforcing dismissal protection. In addition, by disregarding the individual aspects, the legislator made a distinction between expectant women in terms of the enforcement of the dismissal protection, for an illogical reason in

[61] Decision 17/2014. (V. 30.) of the Constitutional Court of Hungary, ABH 2014., 406.

[62] Ibid.

[63] See Bankó Zoltán, 'A munkáltatói hatalom korlátai a munkajogviszony megszüntetése során – a felmondási tilalmak és korlátozások a magyar munkajogban' (2015) 2 Jura, 5–10; Göndör (n 57) 110–111.

terms of objective consideration.[64] Considering all of the above, the Constitutional Court repealed the 'before the communication of the dismissal' wording.

In criticising this decision, it shall be noted that the interpretation of the Constitutional Court is incorrect, in that the regulation did not force the employee to notify the employer on the day the human reproduction procedure is started, or immediately after becoming aware of her pregnancy. In my opinion, it could only be deduced from the repealed regulation that it was sufficient for the employee to notify the employer of the subject matter substantiating protection, if – for example – the employee became aware that the employer intended to terminate her employment. Regardless of this, the employee was entitled to give their notification at another time as well, but the act could in no way be interpreted as obliging the employee to disclose these circumstances immediately. In addition to the above, in some cases, the employee is obliged to disclose the fact of pregnancy in accordance with the work safety rules, and – subject to the working conditions – in the interest of protecting her health and the health of the foetus.

Although the Constitutional Court referred to the relevant rules of the effect of the legal statement and the fulfilment of the notification obligation correctly, the Constitutional Court drew partially mistaken conclusions from those since, according to the Labour Code, unless any rule applicable to the employment provides otherwise, the notification shall be made at the time and in the manner that enables the right to be exercised and the obligation to be fulfilled.[65] In my opinion, until the amendment which entered into effect on 18th June 2016, the same result followed from the provision that remained after the Constitutional Court decision – which merely stipulated the employee's notification obligation – as during the period before the decision. Namely, if the employer gave its dismissal then that became effective by virtue of the communication. Thereafter, the eventual notification by the employee could not affect the termination of employment, since, according to the general rules, the employee shall make the notification at a time and in a manner which allows the employer to decide in awareness of the facts as to whether it exercises the right to termination or not. However, this is only conceivable if the employee's notification is given in advance. Although the employer could withdraw its legal statement, this required the consent of the employee; however, if there was no employee consent then the termination of employment would continue to be unlawful, and it could only be settled finally in a labour lawsuit.

According to the amendment of the Labour Code which entered into effect on 18th June 2016, within fifteen days of the employee's notification following the communication of the dismissal, the employer may withdraw the dismissal in writing. The rights acquired in the meantime are settled by the provision for the interim period, as well as stipulating the payment of unpaid wages and other benefits, and the compensation for damages.[66] The purpose of the amending provision is commendable; at the same time since, according to the amendment, it is in the sole discretion of the employer to withdraw the legal statement,

[64] Decision 17/2014. (V. 30.) of the Constitutional Court of Hungary, ABH 2014., 406, 412–413.
[65] Labour Code pt I ch II s 18 para 2.
[66] Labour Code pt II ch X s 65 para 5–6, s 83 para 2–4.

the amendment does not necessarily finally settle this situation for the employee. Namely, without the employer's legal statement of withdrawal, the employee may only obtain the same result after initiating a labour lawsuit. Maybe it would be more appropriate to eliminate the employer's right to discretion in order to protect the employee, and connect those legal effects mentioned above to the mere notification by the employee, pursuant to which the consequences related to the employer's legal statement on the termination would lapse by the power of the law. In such cases it would be justified to consider all interim periods as periods of employment in terms of labour law and social security law, in addition to the reimbursement of unpaid wages and possible damages.

## 6 Questions Related to the Dismissal Restrictions

The Labour Code regulates three types of dismissal restrictions. In the first case, the employer may terminate the employment by notice only if the employer complies with the conditions and additional criteria specified in the relevant rules applicable to the employment. In the second case, the validity of the dismissal is subject to the consent of a third party.[67] The third case does not restrict the exercise of the right to dismissal, but it puts a time constraint on evoking the legal effects thereof by postponing the start of the notice period. The legal literature refers to these as exemption restrictions or relative dismissal prohibitions as well. The latter creates contrast with the absolute dismissal prohibitions, considering that the employment is terminated only after a specific prohibition period.[68] The point of this is that although the employer may communicate the dismissal even during certain protected periods, the notice period may however start only upon the expiry of such protected periods. Therefore, in reality, the incapacity to work due to illness, but no more than one year after the expiry of the sick leave, the duration of the absence from work for the purpose of caring for a sick child and the leave of absence without pay for providing home care for a close relative only provide relative protection, and do not affect the communication of the dismissal, only the effective date of its legal effects.[69]

With regard to employees of a so-called protected age – i.e. during the five-year period before the date when the employee reaches the age limit for old-age pension – the Labour Code introduced a completely new solution instead of the rule of special justification, which was difficult to interpret in practice and which provided hardly any protection. The personal scope of the dismissal restriction does not extend to fixed-term employees and those employees who are considered pensioners,[70] or to executive employees.[71] At the same time, based on

[67] Labour Code pt III ch XX s 260, s 269; ch XXI s 273.
[68] Bankó, Berke, Kajtár, Kiss, Kovács, (n 26) 309–310, 333.
[69] Labour Code pt II ch X s 68 para 2.
[70] Labour Code pt V s 294 para 1 item *g)*.
[71] Labour Code pt II ch X s 66 para 4; ch XV s 210 para 1 item *b)–c)*.

the arguments explained above,[72] it is doubtful whether this group of employees could be precluded from protection – in compliance with the requirements of equal treatment – based only on being considered a pensioner or on the fixed term of their employment.

Pursuant to the Labour Code, the extent and content of the dismissal restrictions related to the protected age depends on the reason based on which the employer wishes to terminate the indefinite term employment. If the employer intends to terminate the indefinite term employment of any employee of the protected age on the grounds of the employee's behaviour in relation to the employment relationship then the employer may do so only if the reason is so severe that it would substantiate dismissal with immediate effect subject to a statement of reasons (the former extraordinary termination) as well.[73] The higher criteria also mean that dismissal and dismissal with immediate effect are competing with each other, therefore choosing either one belongs to the power of discretion of the employer, as the case may be. This essentially leads to a duplication that is difficult to justify. However, in my opinion, this rule is questionable, not primarily for this reason, but because it overextends the limits of mandatory tolerance of the employer in respect of the problems related to the behaviour of the employee. This is because, in the case of any serious behavioural problem, which in itself is attributable to the employee but does not go beyond the threshold of the dismissal with immediate effect, it cannot be terminated by the employer unilaterally. In my opinion, this overshadows the enforcement of legitimate employer's interests without justification.

If dismissal becomes necessary for any reason related to the ability of the employee or the operation of the employer, then the employment of the employee of 'protected age' may be terminated only if the employer has no vacant position available at the workplace specified in the employment contract (or in the lack of one, the usual workplace of the employee) suitable for the employee affected in terms of skills, education and experience required for his or her previous job, or if the employee refuses the offer made for his or her employment in that job.[74] In my opinion, the obligation to offer a job is a progressive provision in terms of the job security of the employee, in particular in respect of the reasons related to the operation. The necessity for it is questionable only in case of dismissals based on the employee's abilities, where the employer would have to offer another suitable job to the employee who is unfit or less fit to fulfil his or her job function. However, such a job function shall be adjusted not to the actual abilities, qualifications and practice of the employee, but to the abilities, qualifications and practice necessary to fulfil the 'unsuccessfully' fulfilled job function.

[72] See above 3. Certain issues related to the dismissal of fixed-term employment.

[73] Labour Code pt II ch X s 66 and s 78 para 1.

[74] Labour Code pt II ch X s 66 para 5.

## Closing Remarks

It can be established in general that, apart from the legal consequences of unlawful termination, the Labour Code did not change the rules of the termination of employment fundamentally, thereby ensuring continuity between the old and the new provisions.

However, the new regulation did not completely realise the primary legislative objective – i.e. avoiding the discrepancies occurring in the application of the law – in all cases. On the one hand, the Labour Code does not contain the theoretical premises developed by the judicial practice, the establishment of which would have been justified as the case may be and would have promoted the application of the law. Therefore, for example, the more specific determination of the content requirements of true, clear and substantiated termination interpreted in Opinion No. 95 of the Labour Law Division of the Supreme Court, or – for instance – that the Labour Code does not refer to those defects of the termination by the employer which do not result in the unlawfulness of the termination of employment (for example, mistake in determining the notice period, failure to pay the severance pay or other allowances). On the other hand, the Labour Code gave rise to numerous dilemmas that the judicial practice is only expected to be able to settle at the cost of long years, and in certain cases, the intervention of the legislator would be necessary.