

*Kristina Balnožan**
Student doktorskih studija
Pravnog fakulteta Univerziteta u Beogradu
ORCID: 0000-0003-2953-3401

POSEBNA ZAŠTITA ZAPOSLENIH S PORODIČNIM DUŽNOSTIMA OD OTKAZA UGOVORA O RADU**

SAŽETAK: Gubitak zaposlenja jedan je od najstresnijih životnih događaja svih, a posebno zaposlenih s porodičnim dužnostima. Zaposlena majka, sve češće i otac, vrše porodične dužnosti prema deci, a neretko ih vrši i samo jedan, tzv. samohrani roditelj usled dekompozicije porodice. Porodične dužnosti prema deci nisu, međutim, jedine već bitnu sadržinu obaveza radno aktivnog stanovništva čine i pomoć i nega starih i/ili bolesnih srodnika i/ili supružnika. U radu će se, najpre, ukazati da zaposleni s porodičnim dužnostima nisu jedinstvena pravna kategorija. Porodične dužnosti zaposlenih ne smeju, kao takve, predstavljati valjan razlog prestanka radnog odnosa u smislu međunarodnih standarda. Istraživanje u nastavku, stoga, teži da prikaže posebnu zaštitu od otkaza ugovora o radu različitim kategorija zaposlenih s obavezama prema deci, te da proveri da li je i na koji način ovakva zaštita obezbeđena zaposlenima s obavezama prema drugim članovima porodice, jer se posebna zaštita od otkaza ugovora o radu u nacionalnom pravu eksplicitno jemči zaposlenima samo za vreme trudnoće, odsustva s rada radi posebne nege / nege deteta. S tim u vezi, razmatraju se međunarodni

* kristinabalnozan@yahoo.com

** Rad je primljen 28. 8. 2020, izmenjena verzija rada dostavljena je 8. 10. 2020, rad je prihvaćen za objavljivanje 9. 10. 2020. godine.

standardi značajni za predmet istraživanja, te pojedini strani sistemi koji drugačije uvažavaju porodičnu situaciju zaposlenih, primenom prevashodno normativnog, uporednopravnog metoda.

Ključne reči: otkaz ugovora o radu, posebna zaštita, neopravdani otkazni razlozi, zaposleni s porodičnim dužnostima, trudnoća, nega deteta, nega i pomoć članova porodice

UVOD

Tradicionalna organizacija radnog mesta polazi od „idealnog“ zaposlenog spremnog da svoje vreme podredi profesionalnim dužnostima, radi 40 sati nedeljno, prekovremno, sa (ni)malo odsustava s rada. Porodične dužnosti zaposlenih, ipak, zahtevaju slobodno vreme, odsustva s rada i prekide u karijeri radi postizanja punog kvaliteta porodičnog života, pa su zaposleni s porodičnim dužnostima daleko od kategorije „idealnih“. Osim obaveza prema deci, usled tendencija produženja ljudskog veka i starenja stanovništva, bitnu sadržinu obaveza zaposlenih, čine i one prema starim, bolesnim i/ili članovima porodice s invaliditetom.¹ Otkaz ugovora o radu² svrstava se u najstresnije životne situacije svih, naročito onih koji imaju porodične dužnosti prema drugima. Da je otkaz ugovora o radu među najstresnijim životnim situacijama svih proističe iz činjenice da na osnovu rada većina ljudi obezbeđuje isključiva ili osnovna sredstva za svoje, ali i izdržavanje svoje porodice.³ Pored ekonomske i psihološke dimenzije po samog otpuštenog, negativne posledice otkaza odražavaju se i na njegovu porodicu, ekonomsko blagostanje dece i mogućnosti pružanja podrške drugim srodnicima koji od njega zavise. Posledice otkaza trudnica, porodilja, još su veće, jer se u vreme trudnoće i neposredno nakon porođaja žena nalazi u vulnerabilnom položaju i teško se uključuje u radni odnos. Jedan od glavnih ciljeva radnog prava u njegovoj humanojoj, etičkoj dimenziji jeste

¹ Tokom 2018. godine, svaka treća osoba u Evropi (EU-28) uzrasta 18–64 godine života imala je određene porodične dužnosti (34,4%), većina ih ima obaveze prema deci mlađoj od 15 godina života (28,9%), 4,1% ih se stara o drugim članovima porodice, a 2% lica ima obaveze i prema deci i prema starijima. Videti: *Reconciliation of work and family life – statistics*. Dostupno na: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Reconciliation_of_work_and_family_life_-_statistics#Background.

² Gubitak posla je jedan od deset najstresnijih događaja prema *Holms-Rahel* skali. Zanimljivo je da se na istoj nalaze i trudnoća, bolest, smrt, rođenje novog člana porodice, tj. događaji s kojima se suočavaju zaposleni s porodičnim dužnostima. Videti: <https://www.stress.org/holmes-rahe-stress-inventory>.

³ Kovačević, L.J. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet, 46.

zaštita od nezakonitog prestanka radnog odnosa zaposlenih, tj. subordinirane i ekonomski slabije strane u radnopravnom odnosu. Ukazaćemo, najpre, da je pojam zaposlenih s porodičnim dužnostima nejedinstven u cilju prikaza da, sem porodičnih dužnosti prema deci priznatih u nacionalnom pravu u pogledu posebne zaštite od otkaza ugovora o radu, zaposleni vrše porodične dužnosti i prema drugim članovima porodice, kojima je njihova nega i pomoć potrebna, a čiju stabilnost zaposlenja je nužno, takođe, posebno zaštititi.

POJAM ZAPOSLENIH S PORODIČNIM DUŽNOSTIMA

Definisanje zaposlenih s porodičnim dužnostima uslovljeno je shvaćanjem porodice koje je, pak, različito u svakoj državi, zavisno od vremena, kulture. Temelj definisanja ove kategorije daju međunarodni radnopravni standardi. Naime, u smislu standarda Međunarodne organizacije rada⁴ zaposleni s porodičnim dužnostima su zaposleni oba pola, bez obzira na privrednu delatnost i kategoriju, s obavezama prema deci koju izdržavaju (po pravilu zaposleni roditelji), ali i oni s obavezama prema drugim članovima uže porodice kojima je nesumnjivo potrebna njihova nega ili pomoć (zaposleni negovatelji), ukoliko su te obaveze takve prirode da im ograničavaju mogućnost da se pripreme za ekonomsku aktivnost, uključujući u nju, učestvuju u njoj ili napreduju u karijeri.⁵ Po uzoru na standarde MOR-a, ova kategorija je slično definisana standardima Saveta Evrope, tj. Revidiranom evropskom socijalnom poveljom.⁶ Sadržina pokrivenog porodičnog odnosa, tj. „pojam izdržavanog deteta“ i „drugih članova porodice kojima je nesumnjivo potrebna nega i pomoć“ nije definisana ovim standardima, već je to prepušteno nacionalnim državama. Pravo Evropske unije priznaje, takođe, da zaposleni s porodičnim obavezama nisu jedinstvena kategorija, da su to i žene i muškarci u radnom odnosu, a koji imaju porodične dužnosti nege u vezi sa rođenjem, usvojenjem i brigom o detetu (po pravilu zaposleni roditelji, usvojitelji), ali i oni koji imaju dužnosti pomoći i nege u slučaju teške bolesti ili funkcionalne zavisnosti – sinova, kćeri, majki,

⁴ Međunarodna organizacija rada (u daljem radu: MOR), specijalizovana je agencija Ujedinjenih nacija, (udaljem radu: OUN) osnovana 1919. godine, koja promoviše radna i socijalna prava.

⁵ V.: čl. 1. Zakona o ratifikaciji Konvencije MOR-a br. 156 o jednakim mogućnostima i tretmanu za radnike s porodičnim dužnostima, *Službeni list SFRJ, Međunarodni ugovori 7/87*, (u daljem radu: Konvencija MOR-a br. 156).

⁶ V.: Deo II čl. 27. Zakona o potvrđivanju Revidirane evropske socijalne povelje, *Službeni glasnik RS – Međunarodni ugovori* br. 42/09, (u daljem radu: RESP). Za razliku od standarda MOR-a, Saveta Evrope i prava Evropske unije definicije razmatrane kategorije nema u aktima OUN.

očeva, supružnika ili partnera u civilnom partnerstvu ako su takva partnerstva predviđena nacionalnim pravom (zaposleni negovateljji).⁷

Zaposleni s porodičnim dužnostima prema deci u nacionalnom pravu

Porodične dužnosti prema deci nastaju usled rođenja, kada ih po pravilu vrši majka, tj. zaposlena *trudnica*, *porodilja* ili *dojilja*, ali i usled nege deteta, kada ih osim majke, može vršiti i *otac*. Roditeljsko pravo i dužnost po pravilu traje do punoletstva deteta, koje se u našoj i većini država, shodno Konvenciji OUN o pravima deteta vezuje za navršenu 18 godinu.⁸ Međutim, roditelji imaju dužnost izdržavanja i punoletnog deteta na školovanju,⁹ radno nesposobnog deteta pod zakonskim uslovima.¹⁰ Usled porasta stope divorcijaliteta dužnosti prema deci, neretko vrši i *samohrani roditelj*, najčešće majka. Porodične dužnosti roditelja mogu biti delegirane na *usvojitelje*, *hranitelje*, *staratelje*¹¹ čije mogućnosti uključivanja, zadržavanja ili napredovanja na tržištu rada usled ovih obaveza mogu biti, takođe, ograničene. Prema tome, dâ se zaključiti da obaveze prema deci sem *zaposlene trudnice*, *porodilje*, *dojilje*, ima i *muškarac*, neretko *samohrani roditelj*, ali i *drugi vršioci roditeljskog prava*.

Zaposleni s porodičnim dužnostima prema drugim članovima porodice u nacionalnom pravu

Porodične dužnosti prema drugim članovima porodice nastaju po osnovu potrebe za tuđom pomoći i negom usled funkcionalne zavisnosti ili nedovoljnosti sredstava za život. Zaposleni, kao članovi porodice, imaju dužnost pomaganja i izdržavanja supružnika,¹² vanbračnog partnera,¹³ ali i za-

⁷ Article 3 European Parliament, Council of the European Union. *Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU*, Brussels, 2019. (u daljem radu: Direktiva EU 2019/1158).

⁸ V.: čl. 1. Zakona o ratifikaciji Konvencije OUN o pravima deteta, *Službeni list SFRJ – Međunarodni ugovori*, br. 15/90, 4/96. i 2/97; čl. 11. st. 1. Porodičnog zakona, *Službeni glasnik RS*, br. 18/2005, 72/2011. – dr. zakon i 6/2015, (u daljem radu: PZ).

⁹ V.: čl. 155. st. 2. PZ.

¹⁰ V.: čl. 155. st. 1. PZ.

¹¹ V.: čl. 104. PZ.

¹² V.: čl. 25; čl. 151. u vezi sa čl. 8, 28. PZ.

¹³ V.: čl. 4. u vezi čl. 25; čl. 152. u vezi sa čl. 4, 8, 28. PZ.

konsku obavezu izdržavanja roditelja,¹⁴ adoptivnih srodnika,¹⁵ braće, sestara¹⁶ i tazbinskih srodnika.¹⁷ U tradicionalnim društvima, poput našeg, osnov pružanja pomoći članovima porodice zasniva se na moralnoj tradiciji i osećaju zajedništva porodice. Prema tome, osim obaveza prema deci, zaposleni imaju i moralnu obavezu pomoći i nege starih, bolesnih srodnika, zakonsku obavezu pomaganja supružnika, ali i njihovog izdržavanja. Usled kasnijeg zasnivanja porodice sve veći broj zaposlenih, danas, ima porodične dužnosti i prema deci i prema drugim članovima porodice, pa se u literaturi, neretko, govori o tzv. „sendvič generaciji“¹⁸ zaposlenih.

POSEBNA ZAŠTITA OD OTKAZA UGOVORA O RADU

Otkaz ugovora o radu ključni je radnopravni institut, a uprkos brojnim istraživanjima i dalje jedan od najkontroverznijih, a sadrži niz prava i obaveza različitih aktera, ne samo zaposlenog i poslodavca, ali i niz pravila,¹⁹ između ostalih i pravila o posebnoj zaštiti od otkaza. Potreba radnog prava da zaštiti zaposlenog, ekonomski slabiju i pravno podređenu stranu u vezi sa otkazom,²⁰ može se zadovoljiti na više načina. Osim utvrđivanjem valjanih razloga za otkaz i zabranom iniciranja prestanka radnog odnosa iz određenih razloga, zaštita stabilnosti zaposlenja postiže se i posebnom zaštitom određenih kategorija zaposlenih, prethodnom saglasnošću na otkaz određenih tela (sindikata, inspekcija), samo pojedinim dopuštenim otkaznim razlozima u zaštićenim periodima, suspenzijom otkaznog roka tokom posebno zaštićenih perioda.²¹

¹⁴ V.: čl. 156. u vezi sa čl. 8. PZ.

¹⁵ V.: čl. 158. PZ.

¹⁶ V.: čl. 157. u vezi sa čl. 8. PZ.

¹⁷ V.: čl. 159. u vezi sa čl. 8. PZ.

¹⁸ Termin „sendvič generacija“ teži da prikaže teškoće balansiranja između rada i porodice zaposlenih s dužnostima prema deci i starim roditeljima. Prvi put je uporebljen još početkom osamdesetih godina. V.: Burke, R. (2017). *The sandwich generation: individual, family, organizational and societal challenges and opportunities*. Dostupno na: <https://pdfs.semanticscholar.org/ce08/d55af264981708017e633d8f6270c90eb3a8.pdf>.

¹⁹ Aleksynska, M. (2020). *Policy brief – Employment protection throughout the world: A roundup of a decade of reforms (2009–2019)*. Dostupno na: https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_749640/lang--en/index.htm.

²⁰ Kovačević, Lj. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet, 492.

²¹ Kresal, B. (2007). *Termination of Employment Relationships Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*. Ljubljana: European Commission, 5.

Većina zakonodavstava pruža posebnu zaštitu od otkaza *određenim kategorijama zaposlenih*. Razlike postoje u pogledu liste zaposlenih koji takvu zaštitu uživaju, dok razlika nema u pogledu pojedinih kategorija, poput trudnica.²² Tipične kategorije koje uživaju posebnu zaštitu, uz radničke predstavnike, jesu trudnice, zaposleni s porodičnim dužnostima, ali i lica s invaliditetom i stariji²³ prema kojima zaposleni, neretko, vrše porodične dužnosti. Zaštita od otkaza iz *zabranjenih razloga* danas je obezbeđena u velikoj većini država.²⁴ U nekim državama razvoj zaštite je išao, najpre, u smeru utvrđivanja liste zaposlenih koji ne mogu biti otpušteni iz neopravdanih otkaznih razloga, a tek kasnije, u nacionalnim pravilima utvrđeni su tzv. „opravdani razlozi“ za otkaz ugovora o radu.²⁵ Na početku XX veka tipični nedopušteni razlozi za otkaz, uz vojnu službu, bili su trudnoća i bolest i/ili povreda,²⁶ dok je prva država koja je ove razloge uvela bila Francuska.²⁷ Poslednjih decenija došlo je do snažnih reformi instituta otkaza ugovora o radu.²⁸ Nekoliko država snažniju zaštitu od otkaza obezbedila je tako što je proširila katalog zabranjenih otkaznih razloga.²⁹ Razlika između statusa zaposlenog koji uživa posebnu zaštitu i nedopuštenih osnova za otkaz, može se reći, ima naročit praktičan značaj, jer je obim zaštite posebno zaštićenog zaposlenog veći. Naime, ako je *trudnoća* propisana kao nedopušteni razlog prestanka radnog odnosa, to znači da žena ne može biti otpuštena zbog trudnoće, ali da može biti otpuštena iz drugih opravdanih razloga. Nasuprot tome, ukoliko *trudnica* uživa posebnu zaštitu, to znači da trudnica ne može u trudnoći biti otpuštena zbog trudnoće, a ni zbog drugih razloga.³⁰ Čak i u državama koje ne propisuju opravdane razloge za otkaz, to

²² Preko 80 % nacionalnih jurisdikcija obuhvaćenih bazom podataka MOR-a za EPLh indikatore, pruža posebnu zaštitu od prestanka radnog odnosa trudnicama, dostupno na <https://eplex.ilo.org/workers-enjoying-special-protection-against-dismissal/>.

²³ Aleksynska, M., Schmidt, A. (2014). *A chronology of employment protection legislation in some selected European countries*. Geneva: International Labour Office, 5.

²⁴ Kovačević, L.J. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet, 492.

²⁵ *Ibid.* 491; i Aleksynska, M., Schmidt, A. (2014). *Op. cit.*, 2.

²⁶ *Ibid.*, 9.

²⁷ *Ibid.*, 2.

²⁸ Aleksynska, M., Eberlein, F. (2016). *Coverage of employment protection legislation (EPL)*. Geneva: International Labour Office, 1.

²⁹ Aleksynska, M., *Policy brief – Employment protection throughout the world: A roundup of a decade of reforms (2009–2019)*. Dostupno na: https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_749640/lang--en/index.html, 3. Prema istom autoru, države koje su uvele sveobuhvatniju zaštitu od otkaza ugovora o radu predviđanjem novih nedopuštenih otkaznih razloga su Kanada, Čile, Komori, Francuska, Japan, Meksiko, Crna Gora, Nigerija, Filipini, Slovačka, SAD.

³⁰ Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*. Geneva: International Labour Office, 15.

ne znači da poslodavac može slobodno i arbiterno da otkáže ugovor o radu, već se zaštita zaposlenih postiže s pozivom na pravila o *zabrani diskriminacije prilikom prestanka radnog odnosa*. Premda njena primena ima ograničeno dejstvo i samo posredstvom nje ne može se obezbediti celovita niti odgovarajuća zaštita zaposlenih u slučaju otkaza, zabrana diskriminacije može predstavljati i moćno sredstvo za sprečavanje zloupotreba poslodavčevog prava na otkaz.³¹ Fokus istraživanja u nastavku rada biće na ova tri različita aspekta posebne zaštite, najpre na međunarodnom, a zatim i uporednom i nacionalnom nivou kojom se postiže zaštita stabilnosti zaposlenja u radu razmatranih kategorija.

MEĐUNARODNI PRAVNI OKVIR ZNAČAJAN ZA POSEBNU ZAŠTITU ZAPOSLENIH S PORODIČNIM DUŽNOSTIMA OD OTKAZA UGOVORA O RADU

Akti Organizacije ujedinjenih nacija

Opšteprihvāčena pravila međunarodnog prava i potvrđeni međunarodni ugovori sastavni su deo pravnog poretka Republike Srbije i neposredno se primenjuju.³² Srbija je članica OUN i prihvatila je njene ciljeve i prioritete.³³ U nizu akata Organizacije, za potrebe rada najznačajnija je Konvencija OUN o eliminaciji svih oblika diskriminacije žena, budući da je u cilju ostvarivanja stvarnog prava na rad žena, pod pretnjom preduzimanja sankcija, zabranila davanje otkaza zbog *trudnoće* ili *porodiljskog odsustva* i diskriminaciju prilikom otpuštanja zbog bračnog stanja.³⁴ Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima,³⁵ međutim, ne pominje zaštitu od otkaza ugovora o radu žena za vreme porodiljskog odsustva.³⁶ U aktima Organizacije nema neposredne zaštite zaposlenih s porodičnim dužnostima prema drugim članovima porodice, tj. zaposlenih negovatelja. Njihova zaštita posmatra se posredno

³¹ Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet, 494.

³² Videti: čl. 16. Ustava Republike Srbije, *Službeni list RS*, br. 98/2006.

³³ OUN je univerzalna, međunarodna organizacija osnovana potpisivanjem Povelje Ujedinjenih nacija u San Francisku 1945. godine, a Savezna Federativna Republika Jugoslavija jedan je od njenih osnivača.

³⁴ V.: čl. 11. Zakona o ratifikaciji Konvencije Ujedinjenih nacija o eliminaciji svih oblika diskriminacije žena, *Službeni list SFRJ* br. 11/81.

³⁵ V.: čl. 10. Zakona o ratifikaciji Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima, *Službeni list SFRJ Međunarodni ugovori* br. 7/71, (u daljem radu: MPESKP).

³⁶ Betten, L. (1993). *International Labour Law*. Deventer: Kluwer Law and Taxation Publishers, 257.

kroz pravila o zaštiti porodice, materinstva i pravila o zaštiti starih i invalidnih lica kao njih samih.³⁷ Ukoliko posmatramo pravila o zabrani diskriminacije, u smislu akata OUN, svi su pred zakonom jednaki i imaju pravo bez ikakve razlike na podjednaku zaštitu zakona.³⁸ Iako nema eksplicitne zabrane diskriminacije po osnovu *porodičnih obaveza ili statusa*, akti Organizacije jemče da se garantije ustanovljene opštim aktima izvršavaju bez diskriminacije po eksplicitno navedenim nedopuštenim osnovima, ali sadrže i generalnu klauzulu zabrane diskriminacije po „drugom statusu“,³⁹ pod kojom se porodični status *implicite* svrstava.

Standardi Međunarodne organizacije rada

Zaštita od otkaza ugovora o radu kao bitan deo sadržine prava na rad u fokusu je i MOR-a, a jedan od njenih osnivača i članica je i naša država. Međunarodni radnopravni standardi Organizacije, takođe, daju smernice koji razlozi se ne mogu smatrati opravdanim razlogom za prestanak radnog odnosa. Ovi standardi uključuju standarde o fundamentalnim principima i pravima, tzv. „tvrdo jezgro“ Organizacije, specijalne međunarodne standarde koji se odnose na prestanak radnog odnosa, druge međunarodne radne standarde čija se sadržina odnosi, između ostalog, i na prestanak radnog odnosa.⁴⁰ U smislu „tvrdog jezgra“⁴¹ Organizacije, Konvencije MOR-a br. 111 koja se odnosi na diskriminaciju u pogledu zapošljavanja i zanimanja,⁴² nedopušteno je svako pravljenje razlika, isključivanje ili davanje prioriteta zasnovanog na nedopuštenim osnovima koje ima za posledicu narušavanje/ukidanje jednakih mogućnosti ili jednakog postupanja pri zapošljavanju ili izboru zanimanja.⁴³ Nalik aktima OUN, *porodične obaveze*, nisu ovom konvencijom eksplicitno

³⁷ Hoskins, I. (1996). *Combining work with elder care a challenge for now and the future*. Geneva: International Labour Office.

³⁸ Article 7 United Nations General Assembly, *Universal Declaration of human rights*. Paris, 1948.

³⁹ V.: čl. 2. st. 2. MPESKP i čl. 26. Zakona o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima, *Službeni list Međunarodni ugovori SFRJ* br. 7/71 (u daljem radu: MPPGP).

⁴⁰ Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*. Geneva: International Labour Office, 11.

⁴¹ Tzv. „tvrdo jezgro“ Organizacije čine fundamentalne konvencije MOR-a, obuhvaćene Deklaracijom o temeljnim principima i pravima na radu donete 1998. godine.

⁴² Uredba o ratifikaciji Međunarodne konvencije MOR-a br. 111, koja se odnosi na diskriminaciju u pogledu zapošljavanja i zanimanja, *Službeni list FNRJ* br. 3/61 (u daljem radu Konvencija MOR-a br. 111).

⁴³ V.: čl. 1. Konvencije MOR-a br. 111.

predviđen nedopušten osnov razlikovanja. Državama je dopušteno, međutim, da ovaj osnov definišu kroz posebne mere radi zadovoljavanja zahteva posebnih kategorija kojima je potrebna zaštita ili pomoć,⁴⁴ između ostalog i u smislu nezakonitog prestanka radnog odnosa.⁴⁵ U smislu specijalne Konvencije MOR-a br. 158 o prestanku radnog odnosa na inicijativu poslodavca,⁴⁶ propisano je da radni odnos zaposlenog neće prestati ako za takav prestanak ne postoji valjan razlog vezan za sposobnost/ponašanje zaposlenog, operativne potrebe poslodavca.⁴⁷ Konvecijom se predviđaju i razlozi koji se naročito neće smatrati valjanim osnovom za prestanak radnog odnosa, između ostalih *bračno stanje, porodične obaveze, privremeno odsustvo s posla zbog bolesti ili povrede*.⁴⁸

U smislu tzv. drugih standarda Organizacije, uslovljeno istraživačkom temom, nužno je da se razmatraju standardi koji se odnose na posebnu zaštitu materinstva⁴⁹ i jednakost zaposlenih s porodičnim dužnostima. U smislu Konvencije MOR-a br. 3 o zapošljavanju žena pre i posle porođaja⁵⁰ i Konvencije br. 103 o zaštiti materinstva⁵¹ kojom je izvršena njena revizija, nezakonitim osnovima prestanka radnog odnosa smatraju se *porodiljsko odsustvo* i *odsustvo s rada usled bolesti, komplikacija u trudnoći*.⁵² Ovim konvencijama trudnoća

⁴⁴ V.: čl. 5. Konvencije MOR-a br. 111.

⁴⁵ Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*. Geneva: International Labour Office, 11.

⁴⁶ Zakon o ratifikaciji Konvencije MOR-a br. 158 o prestanku radnog ondosa na inicijativu poslodavca, *Sl. list SFRJ Međunarodni ugovori*, br. 4/84 i 7/91, (u daljem radu Konvencija MOR-a br. 158).

⁴⁷ V.: čl. 4. Konvencije MOR-a br. 158.

⁴⁸ V.: čl. 5. i 6. u vezi sa čl. 4. Konvencije MOR-a br. 158.

⁴⁹ Jedan od razloga zašto su žene (naročito mlade) neatraktivni kandidat za zasnivanje radnog odnosa za poslodavce, leži upravo u činjenici da je verovatnije da će žena prekinuti karijeru radi rađanja deteta, što ne mora nužno da znači da žena neće prekinuti karijeru i zbog npr. dugotrajnije bolesti, ali ovom razlogu poslodavci posvećuju manje pažnje, nego mogućnosti da žene odsustvuju s rada usled rođenja deteta. Zbog toga postoji potreba za posebnom zaštitom od nezakonitog prestanka radnog odnosa zaposlene žene koja je posvećena biološkoj ulozi. Navedeno prema: Betten, L. (1993), *International Labour Law*. Deventer: Kluwer Law and Taxation Publishers, 255.

⁵⁰ Zakon o konvencijama – projekat Konvencije MOR-a br. 3 o zapošljavanju žena pre i posle porođaja, *Službene novine Kraljevine Srba, Hrvata i Slovenaca*, br. 95-XXII/27, (Konvencija MOR-a br. 3).

⁵¹ Zakon o potvrđivanju Konvencije MOR-a br. 103, *Službeni list FNRJ*, br. 9/55 (u daljem radu Konvencija MOR-a br. 103).

⁵² General Conference of the International Labour Organization, *Maternity protection recommendation no. 191*, Geneva, 2000. Ovaj instrument poziva države članice da se garantije zaštite materinstva primene i na druge zaposlene s dužnostima prema deci, ne samo na majku, već i na oca, usvojioce.

nije bila stipulisana kao nezakoniti osnov prestanka radnog odnosa.⁵³ Porodiljsko odsustvo u trajanju do šest nedelja po porođaju, a na osnovu uverenja lekara i šest nedelja pre porođaja, kao i odsustvo s rada zbog bolesti, kao posledice trudnoće ili porođaja, dokazane lekarskim uverenjem, nezakoniti su osnovi prestanka radnog odnosa, u smislu navedenih konvencija.⁵⁴ Ovim aktima izričito je propisano da se nezakonitim smatra i ako poslodavac otpusti ženu tako da otkazni rok nastupi za vreme dok ova odsustva traju, a namera „međunarodnog zakonodavca“ je da se ženi koja ide na porodiljsko odsustvo pruži zaštita zaposlenja i kratko vreme pre nego što će prekinuti rad usled rođenja deteta.⁵⁵ Konvencija MOR-a br. 183 o zaštiti materinstva,⁵⁶ kojom je izvršena revizija Konvencije MOR-a br. 103 obezbeđena je snažnija zaštita od prestanka radnog odnosa. Naime, ovom konvencijom propisano je da se otpuštanje žena s posla za vreme *porodiljskog odsustva, odsustva s rada usled bolesti i komplikacija u trudnoći*, ali i *usled trudnoće* i *u periodu nakon njenog povratka na posao*⁵⁷ propisanog domaćim zakonom ili propisima smatra nezakonitim, osim iz razloga koji nemaju veze sa trudnoćom, porođajem ili dojenjem.⁵⁸

Standardi Organizacije, koji daju utemeljenje posebnoj zaštiti od otkaza ugovora o radu zaposlenih negovatelja s porodičnim dužnostima, sem zaposlenih s obavezama prema deci, su oni koji se odnose na pravo na jednakost zaposlenih s porodičnim dužnostima. Usled snažnijeg uključivanja žene na tržište rada nakon Drugog svetskog rata i stvaranja modela „dvostrukog hranioca porodice“, priznato je da se jednakost žena i muškaraca može postići jedino uz veću podelu porodičnih dužnosti između muškaraca i žena,⁵⁹ da je zaštita samo zaposlenih žena nedovoljna, pa je osamdesetih godina usvojena Konvencija MOR-a br. 156.⁶⁰ Ovim instrumentom propisano je da *porodične*

⁵³ Behari, A. (2017). *The reconciliation of work and care – a comparative analysis of South African labour laws aimed at providing working parents with time off to care*. Pietermaritzburg: (unpublished doctoral dissertation), 101.

⁵⁴ V.: čl. 4. u vezi sa čl. 3. Konvencije MOR-a br. 3.

⁵⁵ Betten, L. (1993). *International Labour Lawlaw – selected issues*. Deventer: Kluwer Law and Taxation Publishers, 256.

⁵⁶ Zakon o potvrđivanju Konvencije MOR-a br. 183, *Službeni glasnik RS*, br. 1/2010, (u daljem radu Konvencija MOR-a br. 183).

⁵⁷ V.: čl. 8. u vezi sa čl. 4. i 5. Konvencije MOR-a br. 183.

⁵⁸ General Conference of the International Labour Organization, *Maternity protection recommendation no. 95*, Geneva, 1952. Ovim aktom proširena je posebna zaštita, utoliko što je propisano da je nezakonito otpustiti ženu od trenutka kada je obavestila poslodavca o trudnoći i o tome dostavila izeštaj lekara, do mesec dana po isteku porodiljskog odsustva.

⁵⁹ Betten, L. (1993). *Op. cit.*, 256.

⁶⁰ Danas većina žena teži i zaposlenju i zasnivanju porodice, a „redi su primeri žena domaćica koja će svoju socijalnu sigurnost obezbediti posredstvom supruga hranitelja porodice“. V.: Bojić, F. (2015). Položaj žena na tržištu rada i u sistemima socijalne sigurnosti – istorijsko-komparativna analiza. *Radno i socijalno pravo*, 19 (2), 119–137.

dužnosti kao takve ne smeju biti valjan razlog prestanka radnog odnosa,⁶¹ a Preporukom br. 165⁶² odredbe konvencije su precizirane tako da *bračni status*, *porodične dužnosti* i *porodična situacija* zaposlenog, ne smeju kao takve predstavljati valjan razlog prestanka radnog odnosa.

Standardi Saveta Evrope

Republika Srbija članica je i Saveta Evrope, a posebna zaštita od otkaza ugovora o radu razvijala se i u evropskom nekomunitarnom pravu, tj. standardima ove organizacije. U Evropskoj socijalnoj povelji, kao važan segment prava na zaštitu materinstva, zabranjen je otkaz za vreme porodijskog odsustva, kao i otkaz pri kome bi otkazni rok istekao za vreme dok zaposlena koristi pravo na odsustvo.⁶³ Zaštitu od otkaza ugovora o radu RESP koncipira na način kao u Konvenciji MOR-a 158.⁶⁴ Između ostalog, RESP predviđa da *porodične odgovornosti*, *bračni status*, *trudnoća*, *roditeljsko odsustvo*, *privremeno odsustvo s posla usled bolesti ili povrede*, uz druge poveljom određene razloge, nisu opravdani razlog prestanka radnog odnosa.⁶⁵ *Porodijsko odsustvo* nedopušten je osnov prestanka radnog odnosa, po slovu RESP-a, u smislu odredbi o zaštiti materinstva, kojima su se ugovornice obavezale da nezakonitim smatraju ako poslodavac ženi uruči obaveštenje o otkazu u periodu od kada je obavestila poslodavca da je u drugom stanju do isteka njenog porodijskog odsustva, ili ukoliko joj uruči obaveštenje o otkazu uz otkazni rok koji ističe za vreme takvog odsustva.⁶⁶ RESP-om su, prema tome, vremenske koordinate zabrane istaknute u ESP proširene, istina uz mogućnost da porodilja bude otpuštena zbog skrivljene teže povrede radne obaveze, prestanka njenog poslodavca i isteka perioda na koji je zasnovan radni odnos.⁶⁷ U dokumentima SE, priznato je da je porodica primarno okruženje za zaštitu starih i bolesnih članova porodice i da ima prvenstvo u odnosu na druge vidove zaštite ovih lica, a *porodične obaveze*, kao takve, po uzoru na standarde MOR-a, u smislu odredbi o jednakosti zaposlenih s porodičnim dužnostima, ne predstavljaju va-

⁶¹ V.: čl. 8. Konvencije MOR-a br. 156.

⁶² V.: čl. 16. Preporuke MOR-a br. 165.

⁶³ Article 8 Council of Europe, European Social Charter, Torino, 1961.; Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet, 492.

⁶⁴ Lubarda, B. (2009). *Revidirana evropska socijalna povelja obaveze države i uloga socijalnih partnera posle ratifikacije*, Beograd: Socijalno-ekonomski savet Republike Srbije, Swiss labour assistance, 7.

⁶⁵ V.: Deo II čl. 8. st. 2. Dodatka RESP.

⁶⁶ *Ibid.*

⁶⁷ Kovačević, LJ. (2016). *Op. cit.*, 493.

ljan razlog prestanka radnog odnosa ni u smislu RESP-a.⁶⁸ Ostvarivanje prava previđenih Poveljom, obezbeđuje se bez ikakve diskriminacije po osnovu nedopuštenih osnova.⁶⁹ Porodični status, međutim, nalik aktima OUN i MOR-a, samo *implicite* je nedopušten osnov razlikovanja, budući da se u listu nedopuštenih osnova može uvrstiti na osnovu generalne klauzule „drugog statusa“, kao uostalom i u Evropskoj konvenciji o zaštiti ljudskih prava i sloboda,⁷⁰ kao najznačajnijem dokumentu ove regionalne organizacije, uz RESP.

Pravo Evropske unije

Ključni strateški cilj naše države je pristupanje Evropskoj uniji, a tekovina komunitarnog prava može biti značajna za osnaživanje stabilnosti zaposlenja zaposlenih s porodičnim dužnostima. Zaštita od nezakonitog prestanka radnog odnosa priznata je i u primarnom pravu zajednice, Povelji Evropske unije o osnovnim pravima, a u cilju usklađivanja porodičnog i profesionalnog života,⁷¹ osnivačkim sporazumima, ali i u sekundarnom zakonodavstvu, naročito direktivama. Temelj zabrane otpuštanja zaposlenih zbog *trudnoće* na komunitarnom nivou bio je postavljen Direktivom Saveta 76/207/EEZ o jednakom postupanju prema muškarcima i ženama u oblasti zaposlenja.⁷² Za razliku od direktiva o zabrani diskriminacije, kojima je *trudnoća* kvalifikovana kao zabranjeni otkazni razlog,⁷³ Direktiva Saveta 92/85 o uvođenju mera za podsticanje poboljšanja sigurnosti i zdravlja na radu trudnica, radnica koje su nedavno rodile ili doje, uvodi pravilo o privremenoj obustavi vršenja poslodavčevog prava na otkaz, i to u cilju zaštite zdravlja trudnica, porodilja i dojilja,⁷⁴ a na državama članicama je da obezbede zabranu otkaza ugovora o radu od početka *trudnoće* do kraja *porodiljskog odsustva*.⁷⁵ Snažan doprinos

⁶⁸ V.: čl. 27. RESP-a.

⁶⁹ V.: Deo V član E RESP-a i preambulu ESP-a.

⁷⁰ V.: čl. 14. Zakona o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, *Službeni list SCG – Međunarodni ugovori*, br. 9/2003, 5/2005 i 7/2005. – ispr. i *Službeni glasnik RS – Međunarodni ugovori*, br. 12/2010 i 10/2015.

⁷¹ Article 30 Council of Europe, European social charter, Nica, 2000.

⁷² Kovačević, LJ., Novaković, U. (2018). Mirmo rešavanje sporova povodom diskriminacije zaposlenih na osnovu porodičnih dužnosti. *Pravo i privreda*, 56 (7–9), 431–461.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Direktiva 06/54/EZ o sprovođenju načela jednakosti i jednakih mogućnosti muškaraca i žena u pitanjima zapošljavanja i zanimanja, poziva države da preduzmu mere da zaštite zaposlene očeve i usvojioce koji koriste očinsko odsustvo, odnosno odsustvo s rada usled usvojenja od nezakonitog prestanka radnog odnosa.

zaštiti stabilnosti ne samo zaposlenih s dužnostima prema deci,⁷⁶ nego i prema starim i bolesnim članovima porodice, ostvaren je usvajanjem Direktive EU 2019/1158. Naime, ovim aktom, države članice obavezuju se da moraju preduzeti mere kako bi zabranile otkaz, ali i sve pripreme za otkaz po osnovu *traženja ili korišćenja očinskog odsustva, roditeljskog odsustva, odsustva s rada za negovatelje*, ali traženja ili *ostvarivanja fleksibilnih uslova rada*.⁷⁷ Nalik standardima MOR-a ovom direktivom postavljeni su temelji zaštite zaposlenih s dužnostima prema deci, ali i zaposlenih negovatelja s dužnostima prema drugim članovima porodice.

POSEBNA ZAŠTITA ZAPOSLENIH S PORODIČNIM DUŽNOSTIMA OD OTKAZA UGOVORA O RADU U POJEDINIM STRANIM PRAVIMA

Zaštita *trudnica* od otkaza ugovora o radu obezbeđena je u većini država. Tako, na primer, u bugarskom, letonskom, litvanskom, malteškom,⁷⁸ belgijskom, grčkom, danskom, francuskom, finskom, holandskom pravu⁷⁹ trudnoća ne može voditi zakonitom otkazu. U državama poput Kipra, Mađarske, Češke, Rumunije i Slovačke, iako trudnoća nije zabranjeni otkazni razlog, zaštita trudnica postiže se zabranom otkaza za vreme trudnoće,⁸⁰ koji se smatra

⁷⁶ V.: klauzula 5. st. 4. Evropska unija, *Direktiva 2010/18 EU o sprovođenju reviziranog Okvirnog sporazuma o roditeljskom odsustvu koji su sklopili USINESSEUROPE, UEAPME, CEEP i ETUC* – Brussels, 2010. Zaštita od otkaza ugovora o radu po osnovu zahtevanja/korišćenja roditeljskog odsustva bila je, desetak godina ranije, istaknuta i u Direktivi EU 2010/18 o roditeljskom odsustvu, iako nisu navedeni detaljni uslovi zaštite, pa je Direktiva EU 2019/1158 u tom smislu zaštitu od prestanka radnog odnosa unapredila.

⁷⁷ V.: čl. 12. u vezi sa čl. 4, 5, 6. i 9. Direktive EU 2019/1158. Očinsko odsustvo pravo je očeva na minimalno odsustvo s rada od 10 radnih dana povodom rođenja deteta, roditeljsko odsustvo pravo je roditelja na minimalno pojedinačno pravo na odsustvo u trajanju od 4 meseca koje se mora koristiti do određene dobi deteta, a najmanje do 12 godine života, a odsustvo za negovatelje pravo je negovatelja članova porodice na odsustvo s rada od najmanje 5 radnih dana godišnje po radniku. Zaposleni roditelji s decom do određene dobi, najmanje 12 godina života i zaposleni negovatelji, imaju pravo na zahtevanje fleksibilnih oblika rada.

⁷⁸ Kresal, B., (2007). *Termination of Employment Relationships: Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*, Ljubljana: European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 56 i dalje.

⁷⁹ Aliprantis, N., et al., (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*, European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 47 i dalje.

⁸⁰ Kresal, B., (2007). *Termination of employment relationships legal situation in the following member states of the European Union: Bulgaria, Cyprus, the Czech Republic,*

„zaštićenim periodom“. Snažnija zaštita trudnica postoji u Austriji gde je njen otkaz uslovljen saglasnošću suda.⁸¹ U slovenačkom pravu trudnica je posebno zaštićena kategorija zaposlenih.⁸² Visoka zaštita zaposlenih s obavezama prema deci postoji u Španiji, budući da je nedopušteno otkazati ugovor o radu ne samo trudnici, već i *dojilji* koja koristi pravo na odsustvo / skraćeno radno vreme radi dojenja deteta.⁸³ Zaštita *porodilja*, postiže se tako što su porodiljsko i odsustvo radi nege deteta zabranjeni otkazni razlozi u većini država, dok npr. češko, estonsko, litvansko, rumunsko, slovačko⁸⁴ pravo zabranjuju otkaz ugovora o radu za vreme ovih odsustava. U mađarskom pravu ugovor o radu se ne može otkazati ni za vreme medicinskih tretmana biomedicinski potpomognute oplodnje, ali ni odsustva s rada bez naknade zbog nege deteta.⁸⁵ U ruskom pravu, osim ženi s detetom do 3 godine, i *samohranjoj majci* koje se stara o detetu do 14. godine (do 18. ako je dete s invaliditetom) može biti otkazan ugovor o radu samo usled povrede radne discipline.⁸⁶ Zaštita drugih vršilaca roditeljskog prava, priznata je u britanskom i španskom pravu koja i eksplicitno jemče posebnu zaštitu *usvojlaca*.⁸⁷ Da i muškarci vrše obaveze prema deci, priznaje mađarsko pravo, pa je tako *očinstvo* nedopušten osnov razlikovanja pri prestanku radnog odnosa.

U slovenačnom, rumunskom pravu, a uzorom na standarde MOR-a i SE, prepoznate su porodične dužnosti kao nevaljan razlog prestanka radnog odnosa,⁸⁸ dok je u portugalskom pravu⁸⁹ otkaz ugovora o radu zasnovan na *porodičnoj situaciji* ne samo zabranjen, već i kažnjiv određenim novčanim iznosom.⁹⁰ Pojedine države prepoznale su negu i pomoć starih i bolesnih i u

Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. Ljubljana: European Commission, 56 i dalje.

⁸¹ Aliprantis, N., et al., (2006). *Termination of employment relationships: legal situation in the member states of the European Union.* Brussels: European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 47.

⁸² Kresal, B., (2007). *Op. cit.*, 59.

⁸³ Aliprantis, N., et al., (2006). *Op. cit.*, 49.

⁸⁴ Kresal, B., (2007). *Op. cit.*, 56 i dalje.

⁸⁵ *Ibid.*, 57.

⁸⁶ Gorbacheva, Z. (2013). *Labour law in Russia.* The Hague: Wolters Kluwer, 133.

⁸⁷ Aliprantis, N., et al., (2006). *Op. cit.*, 49 i dalje.

⁸⁸ Kresal, B., (2007). *Op. cit.*, 58 i dalje.

⁸⁹ Aliprantis, N., et al., (2006). *Op. cit.*, 54.

⁹⁰ Island je u skladu sa standardima MOR-a, štaviše, doneo Zakon o zabrani otkaza ugovora o radu usled porodičnih dužnosti br. 27/2000, a porodične dužnosti prema slovu ovog zakona definisane su kao obaveze prema deci, supružniku, bliskim srođnicima koji žive u zajedničkom domaćinstvu sa zaposlenim i kojima je potrebna njegova nega i pomoć npr. usled bolesti ili invalidnosti. Dostupno na: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/16012012_Prohibition-on-termination-of-employment-due-to-family-responsibility-Act-No-27-2000.pdf

postupku prestanka radnog odnosa. *Odsustvo s rada zbog nege zavisnih lica* nedopušten je osnov otkaza ugovora o radu u letonskom i španskom pravu.⁹¹ Slično je i u britanskom pravu, budući da odsustva s rada usled porodičnih dužnosti, između ostalih i zbog nege drugih članova porodice, vode nepravičnom otkazu.⁹² Zaposleni vrše porodične dužnosti prema starim i članovima porodice s invaliditetom, pa njihova zaštita zaposlenja ima značaj i za zaposlene koji dužnosti prema njima vrše. U državama poput Kipra, Letonije, Rumunije, Slovenije,⁹³ Belgije, Finske, Švedske,⁹⁴ *invalidnost* se vidi kao nezakonit osnov prestanka radnog odnosa. U mađarskom pravu otkaz ugovora o radu *starijeg zaposlenog* s manje od 5 godina do ostvarivanja prava na penziju dopušten je samo izuzetno, dok se u slovenačkom pravu stariji zaposleni nalaze na listi posebno zaštićenih kategorija.

POSEBNA ZAŠTITA ZAPOSLENIH S PORODIČNIM DUŽNOSTIMA OD OTKAZA UGOVORA O RADU U PRAVU REPUBLIKE SRBIJE

Reformom radnopravnog zakonodavstva unapređena je posebna zaštita od otkaza ugovora o radu u Srbiji. Porodica, majka, samohrani roditelji uživaju posebnu zaštitu u skladu sa zakonom.⁹⁵ Ovo ustavno načelo u pogledu prestanka radnog odnosa delimično je konkretizovano Zakonom o radu.⁹⁶ Naime, u smislu odredbi ZOR-a za vreme trudnoće, porodijskog odsustva, odsustva s rada radi nege deteta ili radi posebne nege *deteta*, poslodavac ne može zaposlenom otkazati ugovor o radu.⁹⁷ Zakonska regulativa uvažava položaj zaposlene trudnice, porodilje s dužnostima prema deci, ali i oca, usvojioca, staratelja, hranitelja deteta ovlašćenih da koriste odsustvo radi nege deteta ili

⁹¹ Kresal, B., (2007). *Termination of employment relationships legal situation in the following member states of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*. Ljubljana: European Commission, 57.

⁹² Aliprantis, N., et al., (2006). *Termination of employment relationships: legal situation in the member states of the European Union*. Brussels: European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 49 i dalje.

⁹³ Kresal, B., (2007). *Op. cit.*, 56 i dalje.

⁹⁴ Aliprantis, N., et al., (2006). *Op. cit.*, 47 i dalje.

⁹⁵ V.: čl. 66. st. 1. Ustava RS.

⁹⁶ Zakon o radu, *Službeni glasnik RS*, br. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017. – odluka US, 113/2017. i 95/2018. – autentično tumačenje (u daljem radu: ZOR).

⁹⁷ V.: čl. 187. ZOR-a, presudu Vrhovnog kasacionog suda, Rev. 2 2580/16. od 16. 6. 2017. godine, presudu Vrhovnog kasacionog suda, Rev. 2 2655/18. od 13. 6. 2019. godine.

radi posebne nege deteta.⁹⁸ Međutim, potpune konkretizacije načela nema u pogledu posebne zaštite porodice kao celine, tj. svih zaposlenih s obavezama prema deci. Naime, uprkos posebnoj ustavnoj zaštiti, samohrani roditelj ne uživa posebnu zakonsku zaštitu od otkaza ugovora o radu u nacionalnom pravu, a nema ni posebne zaštite dojlja, ali ni zaštite žene u drugim vulnerabilnim periodima, npr. tretmana biomedicinski potpomognute oplodnje, kao u pojedinim stranim sistemima. Osim posebne zaštite od otkaza ugovora o radu određenih kategorija zaposlenih, ZOR-u propisuje i neopravdane razloge za prestanak radnog odnosa. Privremena sprečenost za rad usled bolesti, nesreće na radu ili profesionalnog oboljenja, korišćenje porodiljskog osustva, odsustva s rada radi nege deteta ili radi posebne nege deteta,⁹⁹ ne smatraju se, između ostalih propisanih razloga, opravdanim razlogom za otkaz ugovora o radu. Međutim, za razliku od pojedinih sistema opisanih u prethodnom delu rada, ali i tekovina sekundarnog evropskog zakonodavstva, u nacionalnom pravu nema eksplicitne posebne zaštite zaposlenih s dužnostima prema starim, bolesnim i članovima porodice s invaliditetom (zaposleni negovatelji),¹⁰⁰ niti neopravdanih otkaznih razloga uslovljenih pomoći bliskim licima. S obzirom da ZOR-u zabranjuje diskriminaciju i u pogledu prestanka radnog odnosa,¹⁰¹ između ostalog i po osnovu porodičnih dužnosti, ali i starosti i invalidnosti,¹⁰² posebna zaštita ovih kategorija mogla bi se ostvariti s pozivom na pravna pravila o zabrani diskriminacije,¹⁰³ ali i standarde MOR-a koji obavezuju našu državu.¹⁰⁴ Ukoliko se nacionalno pravo posmatra spram RESP-a, zanimljivo je da je Republika Srbija prihvatila gotovo sva prava predviđena RESP, osim prava na stanovanje (čl. 31) i prava

⁹⁸ V.: čl. 94. st. 5. u vezi st. 3. istog člana, st. 5. u vezi st. 4. istog člana; i 96 st. 1. ZOR-a.

⁹⁹ V.: čl. 183. st. 1. t. 1. i 2. ZOR-a.

¹⁰⁰ Iako odsustvo radi posebne nege podrazumeva negu deteta ili drugih osoba (čl. 96. ZOR-a), posebna zaštita od otkaza ugovora o radu (čl. 187) odnosi se isključivo na zaposlene za vreme odsustva s rada zbog nege deteta, a ne i odsustva s rada zbog nege drugih osoba.

¹⁰¹ V.: čl. 18. ZOR-a.

¹⁰² V.: Mišljenje Ministarstva za rad, zapošljavanje, boračka i socijalna pitanja, Sektor za rad br. 117-00-113/2017-02 od 16. 3. 2017. godine.

¹⁰³ V.: čl. 2. Zakon o zabrani diskriminacije, *Službeni glasnik RS*, br. 22/2009. koji takođe u listu nedopuštenih osnova diskriminatorskog postupanja, slično Zakonu o radu, uvrštava i porodični status, ali i zdravstveno stanje, invaliditet i starosnu dob i druga stvarna ili pretpostavljena svojstva.

¹⁰⁴ Da se zabrana diskriminacija po osnovu invalidnosti ne odnosi samo na lice koje spada u kategoriju lica s invaliditetom, već se prostire i na lice koje ne spada u kategoriju lica s invaliditetom, ali je diskriminisan i uznemirivan zbog invaliditeta bliskog lica koje ne guje, stanovište je i Evropskog suda pravde. V.: Judgment of 17 July 2008 in case C-303/06, *Coleman v. Attridge Law*, para. 27. Navedeno prema: Kovačević, L.J. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet, 495.

zaposlenih s porodičnim obavezama na jednake mogućnosti i jednak tretman (čl. 27), koji je značajan za potrebe ovog rada. Mogući razlog neratifikacije čl. 27. RESP-a¹⁰⁵ je obaveza države da „razvije ili da unapredi usluge, javne ili privatne, posebno u domenu čuvanja dece ili drugih oblika dečije zaštite”,¹⁰⁶ utemeljena ovim članom ili neprilagođenost društveno-ekonomskih uslova zahtevima RESP-a.¹⁰⁷ Budući da se čl. 27. RESP-a, između ostalih garantija, ističe i da porodične dužnosti kao takve ne mogu biti valjan razlog prestanka radnog odnosa, ali i pravo zaposlenih s porodičnim obavezama da zasnuju radni odnos, ali i da ostanu u njemu, kao i da ponovo zasnuju radni odnos posle odsustava zbog porodičnih dužnosti, neobuhvatanje ratifikacionim aktom države i navedenog člana, negativno se odražava na ostvarivanje veće efektivne jednakosti ove kategorije zaposlenih, ali i na stabilnost njihovog zaposlenja kod nas.

ZAKLJUČAK

Zaposleni s porodičnim dužnostima nejedinstvena su kategorija, a gubitak posla, sem na otpuštenog, odražava se i na članove njegove porodice. Zaštita stabilnosti zaposlenja zaposlene trudnice, porodilje, a delom i oca i drugih vršilaca roditeljskog prava koji imaju porodične dužnosti prema deci, obezbeđena je i u našoj državi. S obzirom na vulnerabilnost položaja samohranih roditelja koji se otežano zadržavaju na tržištu rada, budućih roditelja podvrgnutih asistiranju reprodukciji, ali i dojičija koje su i same u vulnerabilnom položaju, uporednopravna rešenja daju prostora da se i u nacionalnom pravu promisli o njihovoj posebnoj zaštiti od otkaza ugovora o radu. Međutim, zaštita zaposlenih negovatelja, ali i starih i lica s invaliditetom kao njih samih priznata je u nacionalnom pravu jedino kroz pravila o zabrani diskrimi-

¹⁰⁵ Sadržinski obaveze iz čl. 27. RESP-a, suštinski odgovaraju obavezama koje je naša država već ranije preuzela ratifikacijom Konvencije MOR-a br. 156. Up: čl. 27. RESP-a i čl. 3. Konvencije MOR-a 156; čl. 27. st. 1. tač. a) sa čl. 7; čl. 27. st. 1. tač. b) sa čl. 4. tač. b); čl. 27. st. 1. c) sa čl. 5. tač. b); čl. 27. st. 3. sa čl. 8. Konvencije. Za razliku od RESP-a, obaveza unapređivanja ustanova u domenu brige o deci i porodice, uslovljava se „nacionalnim uslovima i mogućnostima“, dok takve odrednice nema u slučaju RESP-a.

¹⁰⁶ Lubarda, B. (2009). *Revidirana evropska socijalna povelja obaveze države i uloga socijalnih partnera posle ratifikacije*, Beograd: Socijalno-ekonomski savet Republike Srbije, Swiss labour assistance, 34. Nepristupačna dečja zaštita, nedovoljna razvijenost mreže ustanova brige o deci, neusklađenost radnog vremena ustanova sa radnim vremenom zaposlenih roditelja i dalje su aktuelni problemi kod nas, a finansijske mogućnosti države u tom pogledu su ograničene.

¹⁰⁷ V.: Zapisnik Osme sednice Odbora za rad, socijalna pitanja, društvenu uključenost i smanjenje siromaštva održane 6. novembra 2012. godine, Dostupno na: http://www.parlament.gov.rs/upload/archive/files/lat/doc/zapisnik_odbori/zapisnik8w2012NS%20LAT.doc

nacije prilikom prestanka radnog odnosa. Iako „moćno“ sredstvo, zaštita od diskriminacije ne može obezbediti celovitu zaštitu u slučaju otkaza zaposlenih negovatelja, pa s obzirom na strane sisteme koji sadrže nedopuštene otkazne razloge u vezi sa negom i pomoći zavisnih lica i posebno prepoznaju status zaposlenog negovatelja, obim njihove zaštite mogao bi biti unapređen i u nacionalnom pravu, a u cilju veće sigurnosti svih, a naročito onih zaposlenih iz „sendvič generacije“ suočenih s obavezama i prema deci i prema starim i bolesnim članovima porodice, čiji broj raste i u Evropi i kod nas. Boljoj nominalnoj zaštiti stabilnosti zaposlenja zaposlenih s porodičnim dužnostima u Republici Srbiji, moglo bi doprineti i formanojnopravno prihvatanje obaveza države kao članice Saveta Evrope iz čl. 27. RESP-a, sada neobuhvaćenog ratifikacionim aktom.

LITERATURA

- Aleksynska, M., Eberlein, F. (2016). *Coverage of employment protection legislation (EPL)*. Geneva: International Labour Office.
- Aleksynska, M., Schmidt, A. (2014). *A chronology of employment protection legislation in some selected European countries*. Geneva: International Labour Office.
- Aliprantis, N., et al., (2006). *Termination of employment relationships: legal situation in the member states of the European Union*. Brussels: European Commission Directorate General Employment, Social Affairs and Equal Opportunities.
- Betten, L. (1993). *International labour law – selected issues*. Deventer: Kluwer Law and Taxation Publishers.
- Behari, A. (2017). *The reconciliation of work and care – a comparative analysis of South African labour laws aimed at providing working parents with time off to care*. Pietermaritzburg: (unpublished doctoral dissertation).
- Bojić, F. (2015). Položaj žena na tržištu rada i u sistemima socijalne sigurnosti – istorijsko komparativna analiza. *Radno i socijalno pravo*, 19 (2).
- Gorbacheva, Z. (2013). *Labour law in Russia*. The Hague: Wolters Kluwer.
- Guide on Article 8 of the European Convention on human rights – Right to respect for private and family life*. (2019). Strasbourg: Council of Europe/European Court of Human Rights.
- Hoskins, I. (1996). *Combining work with elder care a challenge for now and the future*. Geneva: International Labour Office.
- Kovačević, LJ., Novaković, U. (2018). Mirno rešavanje sporova povodom diskriminacije zaposlenih na osnovu porodičnih dužnosti. *Pravo i privreda*, 56 (7–9).
- Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Univerzitet u Beogradu – Pravni fakultet.
- Kresal, B., (2007). *Termination of employment relationships legal situation in the following member states of the European Union: Bulgaria, Cyprus, the Czech Repu-*

blic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. Ljubljana: European Commission.

- Lubarda, B. (2009). *Revidirana evropska socijalna povelja obaveze države i uloga socijalnih partnera posle ratifikacije.* Beograd: Socijalno-ekonomski savet Republike Srbije, Swiss labour assistance.
- Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals).* Geneva: International Labour Office.
- Perović, S. (2018). *Besede sa Kopaonika.* Beograd: Kopaonička škola prirodnog prava.

Internet izvori

- Reconciliation of work and family life – statistics.* Dostupno na: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Reconciliation_of_work_and_family_life_-_statistics#Background.
- <https://www.stress.org/holmes-rahe-stress-inventory>
- Burke, R. (2017). *The sandwich generation: individual, family, organizational and societal challenges and opportunities.* Dostupno na: <https://pdfs.semanticscholar.org/ce08/d55af264981708017e633d8f6270c90eb3a8.pdf>
- <https://eplex.ilo.org/workers-enjoying-special-protection-against-dismissal/>
- Aleksynska, M. (2020). Policy brief – Employment protection throughout the world: A roundup of a decade of reforms (2009–2019). Dostupno na: https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_749640/lang--en/index.htm.
- Aleksynska, M. (2014). Employment protection legislation: New approaches to measuring the institution. Dostupno na: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_442672.pdf
- Island, Ministry of Welfare, Prohibition on Termination of Employment due to Family Responsibilities Act, No. 27/2000. Available on: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/16012012_Prohibition-on-termination-of-employment-due-to-family-responsibility-Act-No-27-2000.pdf
- Zapisnik Osme sednice Odbora za rad, socijalna pitanja, društvenu uključenost i smanjenje siromaštva održane 6. novembra 2012. godine. Dostupno na: http://www.parlament.gov.rs/upload/archive/files/lat/doc/zapisnik_odbori/zapisnik8w2012NS%20LAT.doc.

Međunarodni, regionalni i domaći izvori prava

- Zakon o ratifikaciji Konvencije MOR-a br. 156 o jednakim mogućnostima i tretmanu za radnike i radnice s porodičnim dužnostima (radnici s porodičnim dužnostima), *Službeni list SFRJ* – Međunarodni ugovori, br. 7/87.
- Zakon o potvrđivanju Revidirane evropske socijalne povelje, *Službeni glasnik RS* – Međunarodni ugovori, br. 42/09.
- European Parliament, Council of the European Union. Directive (EU) 2019/1158 on work – life balance for parents and carers and repealing Council Directive 2010/18/EU. Brussels, 2019.
- Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta. *Službeni list SFRJ* – Međunarodni ugovori, br. 15/90 i *Službeni list SFRJ* – Međunarodni ugovori, br. 4/96 i 2/97.
- Porodični zakon, *Službeni glasnik RS*, br. 18/2005, 72/2011. – dr. zakon i 6/2015.
- Ustav Republike Srbije, *Službeni list RS*, br. 98/2006.
- Zakon o ratifikaciji Konvencije Ujedinjenih nacija o eliminaciji svih oblika diskriminacije žena, *Službeni list SFRJ*, br. 11/81.
- Zakon o ratifikaciji Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima, *Službeni list SFRJ* – Međunarodni ugovori, br. 7/71.
- United Nations General Assembly, The Universal declaration of human rights, Paris, 1948.
- Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima, *Službeni list – Međunarodni ugovori SFRJ*, br. 7/71.
- Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, *Službeni list SCG* – Međunarodni ugovori, br. 9/2003, 5/2005. i 7/2005. – ispr. i *Službeni glasnik RS* – Međunarodni ugovori, br. 12/2010. i 10/2015.
- Uredba o ratifikaciji Međunarodne konvencije MOR-a br. 111 koja se odnosi na diskriminaciju u pogledu zapošljavanja i zanimanja, *Službeni list FNRJ*, br. 3/61.
- Zakon o ratifikaciji Konvencije Međunarodne organizacije rada br. 158 o prestanku radnog odnosa na inicijativu poslodavca, *Službeni list SFRJ* – Međunarodni ugovori, br. 4/84 i 7/91.
- Zakon o konvencijama projekat Konvencije MOR-a br. 3 o zapošljavanju žena pre i posle porođaja, *Službene Novine KSHS*, br. 95-XXII/27.
- Zakon o potvrđivanju Konvencije MOR-a br. 103, *Službeni list FNRJ*, br. 9/55.
- General Conference of the International Labour Organization, Maternity protection recommendation no. 191, Geneva, 2000.
- Zakon o potvrđivanju Konvencije MOR-a br. 183, *Službeni glasnik RS*, br. 1/2010.
- General Conference of the International Labour Organization, Maternity protection recommendation no. 95, Geneva, 1952.
- Council of Europe, European Social Charter, Torino, 1961.
- Council of Europe, European social charter, Nica, 2000.

Zakon o radu, *Službeni glasnik RS*, br. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017. – odluka US, 113/2017. i 95/2018. – autentično tumačenje.

Zakon o zabrani diskriminacije, *Službeni glasnik RS*, br. 22/2009.

Pravna praksa Evropskog suda pravde

Judgment of 17 July 2008 in case C-303/06, *Coleman v. Attridge Law*, paragraph 27 .

Pravna praksa domaćih sudova, mišljenja organa državne uprave

Presuda Vrhovnog kasacionog suda, Rev. 2 2580/16. od 16. 6. 2017. godine.

Presuda Vrhovnog kasacionog suda, Rev. 2 2655/18. od 13. 6. 2019. godine.

Mišljenje Ministarstva za rad, zapošljavanje, boračka i socijalna pitanja, Sektor za rad
br. 117-00-113/2017-02. od 16. 3. 2017. godine

*Kristina Balnožan**

Ph.D. student, Faculty of Law, University of Belgrade
ORCID: 0000-0003-2953-3401

SPECIAL PROTECTIONS AGAINST EMPLOYMENT TERMINATION FOR WORKERS WITH FAMILY RESPONSIBILITIES*

ABSTRACT: Loss of employment is one of the most stressful life events for everyone, especially for those with families. An employed mother – and increasingly a father – have family responsibilities towards their children, and these duties are often taken on, due to the decomposition of the family unit, by so-called single parents. Family responsibilities towards children are not, however, the only ones: one important segment of the responsibilities of the working-age population is the care for elderly and/or sick relatives and/or spouses. In this paper, it will be demonstrated that employees with family responsibilities are not a unique legal category. Family responsibilities must not, as such, constitute a valid reason for the termination of employment. The research below, therefore, seeks to present special protections against the termination of employment contracts of different categories of employees with obligations toward children, and to check whether and in what way such protections are provided to employees with obligations to other family members, since special protections against the termination of the employment contracts is explicitly guaranteed in Serbian law to the

* kristinabalnozan@yahoo.com

** The paper was received on August 28, 2020, the revised version was delivered on October 8, 2020, and it was accepted for publishing on October 10, 2020. The translation of the original article into English is provided by the *Glasnik* of the Bar Association of Vojvodina.

employees only during pregnancy and absence from work due to special/child care. In this regard, international standards relevant to the subject of the research are considered, as well as certain foreign systems that differently take into account the family situation of employees, using primarily the normative, comparative law method.

Keywords: termination of an employment contract, special protection, unjustified reasons for dismissal, workers with family responsibilities, child care, pregnancy, care and support of family members

INTRODUCTION

The starting point of the traditional workplace arrangement is the “ideal” employee, willing to make professional obligations their primary focus – working 40 hours a week and overtime, with little to no absences. Yet, family responsibilities of workers require free time, absence from work, and gaps in their careers to achieve a full family life, which makes workers with family responsibilities less than “ideal”. Besides obligations towards their children, due to the trend of an increased lifespan and an aging population, many of the obligations of workers are towards the elderly, sick and/or family members with disabilities.¹ The termination of an employment contract² is counted amongst the most stressful events in life for any person, and especially so for those who have family responsibilities. The reason that the termination of an employment contract is among the most stressful events for all is based on the fact that, for most people, the work they do is the means by which they fulfil their basic needs, acquire property, and support their families.³ Besides the economic and psychological effects on the terminated employee, the negative consequences are reflected on their family, the economic welfare of the children, and the ability to give support to other relatives who depend on them. The conse-

¹ In 2018, every third person in Europe (EU-28) in the 18–64 age range had certain family responsibilities (34.4%), most in relation to children younger than 15 years of age (28.9%), 4.1% care for other family members, and 2% gave responsibilities both towards children and adults. See: Reconciliation of work and family life – statistics. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Reconciliation_of_work_and_family_life_-_statistics#Background.

² Loss of employment is one of the top 10 stressful life events according to the *Holms-Rahel* scale. It is interesting to note that pregnancy, illness, death, and birth are found on the same list, i.e. events which workers with family responsibilities face. See: <https://www.stress.org/holmes-rahe-stress-inventory>.

³ Kovačević, L.J. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: University of Belgrade – Faculty of Law, 46.

quences of termination are magnified for pregnant women and new mothers, as they are in a vulnerable position during pregnancy and shortly after giving birth, and it is hard for them to find employment. One of the main purposes of labour law in its humanist, ethical dimension, is the protection from unlawful termination of employment for workers, i.e. the subordinate and economically lesser party in the relationship. It will be demonstrated, initially, that the term workers with family responsibilities does not have only one meaning, with the aim of demonstrating that besides family obligations towards children, found in Serbian law as special protections against the termination of employment, workers have obligations towards other family members that need their care and support, and that their employment should also have special guarantees and protections.

The term workers with family responsibilities

Defining workers with family responsibilities is conditioned on the understanding of what the family is, which is different between countries and dependent on the age and culture. The foundation for defining this term is given by international legal employment standards. Namely, as it regards the standards of the International Labour Organization⁴, workers with family responsibilities are employed men and women, regardless of the branch of economic activity or category, with responsibilities in relation to dependent children (employed parents, as a rule), but also those with responsibilities in relation to other members of their immediate family who clearly need their care or support (employed caregivers), where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity.⁵ Modelled on the ILO standards, this category is similarly defined by the Council of Europe, i.e. the Revised European Social Charter.⁶ The scope of the family relationship, i.e. “dependent children” and “other

⁴ The International Labour Organization (hereinafter: ILO) is a specialized agency of the United Nations (hereinafter: UN) founded in 1919 that promotes worker and social rights.

⁵ See: art. 1 of the Law on the Ratification of the ILO Convention no.156 (hereinafter: ILO Convention no. 156) concerning equal opportunities and equal treatment for workers with family responsibilities, *Official Gazette of the SFRY, International treaties* no. 7/87.

⁶ See: Section II, art. 27 of the Law on the Ratification of the Revised European Social Charter (hereinafter: RESC), *Official Gazette of the RS – International treaties* no. 42/09. Unlike the ILO and Council of Europe standards, and European union law, UN acts contain no definition for of the stated category of workers.

members of their immediate family who clearly need their care or support”, is not defined in the Charter, but is left up to national legislatures. The law of the European Union also recognizes that workers with family responsibilities are not a unique category; that it can be both women and men who have responsibilities of care relating to birth, adoption, and caring for a child (as a rule, employed parents, adoptive parents), as well as those who have the duty of care in cases of severe illness or functional dependence – sons, daughters, mothers, fathers, spouses or partners in a civil partnership if such partnerships are in accordance with national laws (employed carers).⁷

Workers with family responsibilities in relation to dependent children in Serbian law

Family responsibilities towards children are the result of pregnancy, when, as a rule, they are taken on by the mother, i.e. a working *pregnant woman*, *puerperal woman*, or *nursing mother*, but also due to caring for the child, when they can be taken on by the *father*, besides the mother. Parental rights and responsibilities last until the child reaches the legal age of maturity, which is considered 18 in Serbia, as well as in most other states, in accordance with the UN Convention on the Rights of the Child.⁸ However, parents have the responsibility of parental care towards an adult child during regular schooling⁹ or a child unable to work¹⁰, under the conditions set by law. As a result of rising divorce rates, caring for children is often done by *single parents*, most commonly the mother. Parental responsibilities can be delegated to *adoptive parents*, *foster parents*, and *guardians*,¹¹ wherein those responsibilities can also limit their possibilities of entering, participating in or advancing in economic activity. Accordingly, it can be concluded that working *pregnant women*, *puerperal women*, *nursing mothers*, and also *men*, not uncommonly a single parent, but also other *persons who have legal custody*, have parental responsibilities in relation to children.

⁷ Article 3 of the European Parliament, Council of the European Union. *Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU*, Brussels, 2019. (hereinafter: EU Directive 2019/1158).

⁸ See: art. 1 of the Law on the Ratification of the UN Convention on the Rights of the Child, *Official Gazette of the SFRY, International treaties*, no. 15/90, 4/96 and 2/97; art. 11, para. 1 of the Family Act (hereinafter: FA), *Official Gazette of the RS*, no. 18/2005, 72/2011- other law and 6/2015.

⁹ See: art. 155, para. 2 of the FA.

¹⁰ See: art 155, para. 1 of the FA.

¹¹ See: art. 104 of the FA.

Workers with family responsibilities in relation to other family members in Serbian law

Family responsibilities towards other family members are based on the need for custodial care and assistance due to functional dependence or due to a lack of a means of sustenance. Workers, as family members, have a responsibility to support spouses¹² and domestic partners (cohabitantes)¹³, but also have a legal obligation to support parents,¹⁴ adopted relatives,¹⁵ brothers and sisters,¹⁶ and in-laws¹⁷. In traditional societies, like Serbia is, the foundation for supporting family members is found in the moral tradition and the view of the family as a unit. Accordingly, besides responsibilities in relation to children, workers have a moral obligation to support and care for elderly, ill relatives and a legal obligation to support and care for spouses. Today, as a result of families being started later in life, a larger number of workers have family responsibilities both in relation to children and other family members, so the term “the sandwich generation”¹⁸ of workers can commonly be found in academic literature.

SPECIAL PROTECTIONS AGAINST THE TERMINATION OF AN EMPLOYMENT CONTRACT

Employment protection legislation is a key labour institution and, despite numerous studies and research conducted, still one of the most controversial ones. It contains a series of rights and obligations relating to different subjects – not only for employees and employers – but also a series of rules,¹⁹ including rules about special protections against the termination of an employment

¹² See: art. 25; art. 151 in relation to art. 8 of the FA.

¹³ See: art 4 in relation to art. 25; art. 152 in relation to arts. 4, 8, 28 of the FA.

¹⁴ See: art. 156 in relation to art. 8 of the FA.

¹⁵ See: art. 158 of the FA.

¹⁶ See: art. 157 in relation to art. 8 of the FA..

¹⁷ See: art. 159 in relation to art. 8 of the FA.

¹⁸ The term “sandwich generation” aims to present the difficulty of balancing work and family life of workers with responsibilities towards children and elderly parents. In was first used at the beginning of the 1980s. See: Burke, R. (2017). *The sandwich generation: individual, family, organizational and societal challenges and opportunities*. Available at: <https://pdfs.semanticscholar.org/ce08/d55af264981708017e633d8f6270c90eb3a8.pdf>.

¹⁹ Aleksynska, M. (2020). *Policy brief – Employment protection throughout the world: A roundup of a decade of reforms (2009–2019)*. Available at: https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_749640/lang--en/index.htm.

contract. The need of labour law to protect the employee, the economically lesser and legally subordinate party in relation to dismissal,²⁰ can be fulfilled in multiple ways. Besides establishing valid reasons for dismissal and prohibiting specific grounds as the cause of dismissal, the protection of employment is also achieved through special protections provided to specific categories of workers, requiring consent from certain bodies (unions, labour inspectorates) prior to the dismissal, limiting valid grounds for dismissal during protected time periods, and suspending the expiry of the period of the notice of termination during protected periods.²¹ Most legislatures provide special protections from dismissal to *specific categories of workers*. There are differences in the categories of employees who enjoy such protections, while certain categories are consistently protected, such as pregnant women.²² Typical categories of workers who receive special protections are, besides worker representatives, pregnant women and workers with family responsibilities, as well as persons with disabilities and the elderly²³, in relation to whom workers, commonly, have family responsibilities. Protection against dismissal on *prohibited grounds* is currently provided by a large majority of countries.²⁴ In some countries, the protections initially developed from determining the categories of employees that cannot be dismissed and the prohibited grounds for dismissal, and only later national legislatures specified so-called “valid grounds” for terminating an employment contract.²⁵ At the start of the 20th century, prohibited grounds for dismissal were, typically, alongside military service, pregnancy and illness and/or accident,²⁶ and the first country that instituted these prohibitions was France.²⁷ In recent decades, the institution of employment protection legislation has undergone substantial reforms.²⁸ Several countries

²⁰ Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: University of Belgrade – Faculty of Law, 492.

²¹ Kresal, B. (2007). *Termination of Employment Relationships Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*. Ljubljana: European Commission, 5.

²² Over 80 % of national jurisdictions contained in the ILO database for EPLex indicators provide special protections against dismissal for pregnant women. Available at: <https://eplex.ilo.org/workers-enjoying-special-protection-against-dismissal/>.

²³ Aleksynska, M., Schmidt, A. (2014). *A chronology of employment protection legislation in some selected European countries*. Geneva: International Labour Office, 5.

²⁴ Kovačević LJ. (2016). *Op. cit.*, 492.

²⁵ *Ibid.* 491; and Aleksynska, M., Schmidt, A. (2014). *Op. cit.*, 2;

²⁶ Aleksynska, M., Schmidt, A. (2014). *Op. cit.*, 9.

²⁷ *Ibid.*, 2.

²⁸ Aleksynska, M., Eberlein, F. (2016). *Coverage of employment protection legislation (EPL)*. Geneva: International Labour Office, 1.

have strengthened protections by expanding the list of prohibited grounds for dismissal.²⁹ The difference between the status of a worker that enjoys special protections and prohibited grounds for dismissal has practical significance, as the scope of protections provided to the workers with a special status is wider. Namely, if *pregnancy* is a prohibited reason for dismissal, a woman cannot be fired due to pregnancy, but she could be fired for another valid reason. In contrast, if a *pregnant woman* enjoys special protections, she cannot be fired during the pregnancy, either because of it or on any other grounds.³⁰ In countries that do not prescribe valid grounds for dismissal, an employer still cannot freely and arbitrarily terminate an employment contract; employment protection is achieved through rules about *protection from discrimination in the termination of an employment relationship*. Even though the application of protections from discrimination is limited and cannot provide comprehensive nor appropriate protections against dismissal on its own, it can be a powerful tool in preventing misuse of an employer's right to issue dismissals.³¹ The focus of the rest of the paper will be on these three separate aspects of special protections in relation to the given categories of workers, first on an international level, followed by a comparative and national level.

THE INTERNATIONAL FRAMEWORK RELEVANT TO SPECIAL PROTECTIONS AGAINST THE TERMINATION OF AN EMPLOYMENT CONTRACT FOR WORKERS WITH FAMILY RESPONSIBILITIES

Acts of the United Nations

Generally accepted rules of international law and ratified international agreements are an integral component of the legislature of the Republic of

²⁹ Aleksynska, M. (2020). *Policy brief – Employment protection throughout the world: A roundup of a decade of reforms (2009–2019)*. Available at: https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_749640/lang--en/index.htm, 3. According to the same author, countries that have introduced wider protections against the termination of an employment contract by prescribing new prohibited grounds for dismissal are Canada, Chile, the Comoros, France, Japan, Mexico, Montenegro, Nigeria, the Philippines, Slovakia, and the USA.

³⁰ Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*. Geneva: International Labour Office, 15.

³¹ Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: University of Belgrade – Faculty of Law, 494.

Serbia and are directly implemented.³² As a member of the UN, Serbia has accepted its aims and priorities.³³ Out of all the acts of the UN, the most important one in relation to labour is the UN Convention on the Elimination of All Forms of Discrimination against Women. With the aim of realizing the actual labour rights of women, the Convention, under threat of sanctions, prohibits dismissal due to *pregnancy* or *maternity leave* and discrimination in dismissal due to marital status.³⁴ The International Covenant on Economic, Social, and Cultural Rights,³⁵ however, does not mention protections against the termination of an employment contract for women during maternity leave.³⁶ Acts of the UN do not include immediate protections for workers with family responsibilities towards other family members, i.e. working caregivers. Protections provided to them are indirect, through rules for protecting the family and maternity, and through rules for protecting the elderly and persons with disabilities in their personhood.³⁷ If we view the rules against discrimination in the context of UN legislation, all are equal before the law and are entitled to equal protection of the law.³⁸ Regardless of the fact that there is no prohibition on discrimination on the ground of *family responsibilities or status*, acts of the Organization guarantee that assurances established by the general acts are executed without discrimination on expressly prohibited grounds, but also include a general clause about protection from discrimination on “other” grounds,³⁹ which implicitly includes family status.

³² See: art. 16 of the Constitution of the Republic of Serbia, *Official Gazette*, no 98/2006.

³³ The UN is a universal, international organization founded by the signing of the Charter of the United Nations in San Francisco in 1945, and the Federal Republic of Yugoslavia was one of the founding members.

³⁴ See: art. 11 of the Law on the Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, *Official Gazette of the SFRY*, no. 11/81.

³⁵ See: art. 10 of the Law on the Ratification of the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR), *Official Gazette of the SFRY International Treaties*, no. 7/71.

³⁶ Betten, L. (1993). *International Labour Law*. Deventer: Kluwer Law and Taxation Publishers, 257.

³⁷ Hoskins, I. (1996). *Combining work with elder care a challenge for now and the future*. Geneva: ILO.

³⁸ Article 7 of the United Nations General Assembly, *Universal Declaration of Human Rights*, Paris, 1948.

³⁹ See: art. 2 of the ICESCR and art. 26 of the Law on the Ratification of the International Covenant on Civil and Political Rights (hereinafter: ICCPR), *Official Gazette of the SFRY International Treaties*, no. 7/71.

Standards of the International Labour Organization

Protection against the termination of an employment contract, as a fundamental element of the right to work, is an area of focus for the ILO, and the Republic of Serbia is one of its founders and members. International labour standards of the organization also give guidance on which grounds cannot be considered valid for the termination of employment. These include standards on the fundamental principles and rules, the so-called “core” of the organization, specific international standards governing the termination of employment, and other international labour standards that contain, among other elements, references to termination of employment.⁴⁰ In accordance with the “core”⁴¹ of the organization, ILO Convention No. 111, that references discrimination in relation to employment and occupation,⁴² any distinction, exclusion, or preference which has the effect of impairing or nullifying equality of opportunity or treatment in employment or occupation is prohibited if it is based on invalid grounds.⁴³ Similar to the Acts of the UN, according to this Convention, *family responsibilities* are not explicitly prohibited grounds for discrimination. However, members are allowed to define the grounds for providing special protection, in order to meet the particular requirements of specific categories that need special protection or assistance,⁴⁴ including protection from an unlawful termination of employment.⁴⁵ ILO Convention No. 158 on the termination of employment⁴⁶ prescribes that the employment of a worker shall not be terminated unless there is a valid reason related to the capacity/conduct of the worker, or related to the operational requirements of the employer.⁴⁷ The Convention also prescribes reasons which shall specifically not be considered

⁴⁰ Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*. Geneva: International Labour Office, 11.

⁴¹ The so-called “core” of the Organization is made up of the fundamental conventions of the ILO, encompassed by the Declaration on Fundamental Principles and Right at Work, instituted in 1998.

⁴² Regulation on the Ratification of the International Convention of the ILO no. 111 (hereinafter: ILO Convention no. 111) on discrimination in relation to employment and occupation, *Official Gazette of the Federal People's Republic of Yugoslavia*, no. 3/61.

⁴³ See: art. 1 of the ILO Convention no. 111.

⁴⁴ See: art. 5 of the ILO Convention no. 111.

⁴⁵ Marcadent, F. (2015). *Op. cit.*, 11.

⁴⁶ Law on the Ratification of the ILO Convention no. 158 on the termination of employment (hereinafter: ILO Convention no. 158), *Official Gazette of the SFRY International Treaties* no. 4/84 and 7/91.

⁴⁷ See: art 4. of ILO Convention no. 158.

valid for the termination of employment, including *marital status, family responsibilities, and temporary absence from work because of illness or injury*.⁴⁸

Conditioned by the topic of this paper, it is necessary to consider other standards of the Organization that relate to special protections for maternity⁴⁹ and the equality of workers with family responsibilities. In accordance with ILO Convention No.3 concerning the employment of women before and after childbirth⁵⁰ and Convention No. 103 concerning maternity protection⁵¹, which revised the previous convention, unlawful grounds for the termination of employment are *maternity leave* and *leave because of illness or complications arising out of pregnancy*.⁵² These conventions did not proscribe pregnancy as unlawful grounds for the termination of employment.⁵³ According to these conventions, maternity leave in the duration of six weeks after birth and, based on a medical certificate that the birth will take place within six weeks, six weeks before birth, as well as absence due to illness arising out of pregnancy or birth, certified by a medical professional, are unlawful grounds for terminating employment.⁵⁴ These acts expressly prescribe that it is also unlawful for employers to terminate the employment of a woman in such a manner that the notice period starts during these absences; the intentions of international legislators was to provide a woman who is going on maternity leave employment protections for a short time span before she will stop working because the

⁴⁸ See: arts. 5 and 6 in relation to art 4. of the ILO Convention no. 158.

⁴⁹ One of the reasons that women (especially young women) are an unattractive candidate for employment for employers lies in the fact that it is more possible that a woman will end her career to give birth, which does not mean that a woman will not end her career for other reasons, e.g. lingering illness, but employers pay these reasons less heed than the possibility of a woman being absent from work due to the birth of a child. This is why special protections need to exist for unlawful terminations of employment contracts for a woman dedicated to her biological role. Quoted according to: Betten, L. (1993). *International Labour Law*. Deventer: Kluwer Law and Taxation Publishers, 255.

⁵⁰ The Law on Conventions – the Project for ILO Convention no. 3 with regard to women's employment before and after childbirth (hereinafter: ILO Convention no.3), *Službene Novine of the Kingdom of Serbs, Croats and Slovenes* no. 95-XXII/27.

⁵¹ Law on the Confirmation of ILO Convention no. 103 (hereinafter: ILO Convention no. 103), *Official Gazette of the FPRY*, no. 9/55.

⁵² General Conference of the International Labour Organization, Maternity protection recommendation no. 191, Geneva, 2000. This instrument calls on member states that the guarantees of motherhood should also be applied to other workers with responsibilities towards children, not only regarding the mother, but the father and adoptive parents.

⁵³ Behari, A. (2017). *The reconciliation of work and care – a comparative analysis of South African labour laws aimed at providing working parents with time off to care*, Pietermaritzburg: (unpublished doctoral dissertation), 101.

⁵⁴ See: art. 4 in relation to art. 3 of the ILO Convention no. 3.

birth of a child.⁵⁵ ILO Convention No. 183 concerning maternity protection,⁵⁶ which revises ILO Convention No. 103, provides stronger protections regarding the termination of employment. Namely, this Convention prescribes that the dismissal of a woman during *maternity leave, leave in the case of illness or complications arising out of pregnancy*, and during *pregnancy*, and during the *period following her return to work*⁵⁷ as it is prescribed by national laws and regulations, shall be unlawful, unless the termination is based on grounds unrelated to the pregnancy, birth, or nursing.⁵⁸

The standards of the Organization, which are the foundation for the special protections against employment termination for working caregivers with family responsibilities, besides workers with responsibilities in relation to children, are those standards that concern the equality of workers with family responsibilities. As a result of women joining the workforce in larger numbers after the Second World War and the establishment of the “dual-breadwinner” model, it was recognized that equality of men and women can only be achieved by a different division of family responsibilities⁵⁹ and that protections provided only to working women was insufficient, thus ILO Convention No. 156 was adopted in the 1980s.⁶⁰ This Convention prescribes that *family responsibilities* may not be valid grounds for the termination of employment.⁶¹ Recommendation No. 165⁶² further clarifies the articles of the Convention, expressing that *marital status, family responsibilities and the family situation* of the worker may not be valid grounds for the termination of employment.

⁵⁵ Betten, L. (1993). *International Labour Law*. Deventer: Kluwer Law and Taxation Publishers, 256.

⁵⁶ Law on the Ratification of ILO Convention no. 183 (hereinafter: ILO Convention no. 183), *Official Gazette of the RS* no. 1/2020.

⁵⁷ See: art. 8 in relation to arts. 4 and 5 of ILO Convention no. 183.

⁵⁸ General Conference of the International Labour Organization, Maternity protection recommendation no. 95, Geneva, 1952. This act widens the scope of the special protections, by prescribing that it is unlawful to dismiss a woman from the moment she notifies the employer on the pregnancy and delivered a doctor’s report, to a month after maternity leave is over.

⁵⁹ Betten, L.(1993). *Op. cit.*, 256.

⁶⁰ Today, most women tend to both work and start a family, and “rarer are the examples of women housekeepers who will realize their social security via their breadwinner husband”, See: Bojić, F. (2015). Položaj žena na tržištu rada i u sistemima socijalne sigurnosti – istorijsko komparativna analiza. *Radno i socijalno pravo*, 19 (2), 119–137.

⁶¹ See: art. 8 of ILO Convention no. 156.

⁶² See: art. 8 of ILO Recommendation no. 165.

Standards of the Council of Europe

The Republic of Serbia is a member of the Council of Europe and special protections against the termination of an employment contract did not developed within European Union law, i.e. they developed within the standards of this organization. In accordance with the European Social Charter, as an important component of maternity protections, dismissal during maternity leave is prohibited, as well as dismissal wherein the notice of termination would expire during such an absence.⁶³ Protections against employment termination are similar in the Revised European Social Charter (hereinafter: RESC) to those in ILO Convention No.158.⁶⁴ Among others, the RESC prescribes that *family responsibilities, marital status, pregnancy, parental leave, and temporary absence from work due to illness or accident*, among others, are not valid grounds for the termination of employment.⁶⁵ According to the RESC, *maternity leave* is an invalid grounds for the termination of employment, in the sense that the contractual parties have agreed to make it unlawful for an employer to give a woman a notice of termination from the time that she notifies the employer that she is pregnant until the end of her maternity leave or for the employer to give a notice of termination at such a time that the notice would expire during such leave.⁶⁶ Thus, the time frame of the prohibitions found in the European Social Charter is expanded in the RESC, with the caveat, however, that a new mother can be dismissed for a severe breach of the employment contract, her employer stopping operations, and an expiration of the period during which she was initially contracted.⁶⁷ The documents of the Council of Europe recognize that family is the primary source of protection for the elderly and sick members and that it should enjoy primacy in relation to other protections provided to these persons. The RESC states that *family responsibilities*, modelled upon ILO standards in relation to the equality of workers with family responsibilities, are not valid grounds for the termination of employment.⁶⁸ The rights prescribed by the Charter are to be realized without discrimination on prohibited grounds.⁶⁹ However, similar to other UN and

⁶³ Article 8 Council of Europe, European Social Charter, Torino, 1961.; Kovačević, L.J. (2016). *Valjani razlozi za otkaz ugovora o radu*, 492.

⁶⁴ Lubarda, B. (2009). *Revidirana evropska socijalna povelja obaveze države i uloga solijalnih partnera posle ratifikacije*. Belgrade: Social and Economic Council of the Republic of Serbia, Swiss labour assistance, 7.

⁶⁵ See: chapter II, art. 8, para. 2 of the Amendment to the RESC.

⁶⁶ *Ibid.*

⁶⁷ Kovačević, L.J. (2016). *Op. cit.*, 493.

⁶⁸ See: art. 27 of the RESC.

⁶⁹ See: chapter V, art. E of the RESC and the preamble the ESC.

ILO acts, family status is only implicitly prohibited grounds for termination, as it can be included based on the general clause of “other status”; among others, it is done so in the European Convention for the Protection Human Rights and Fundamental Freedoms,⁷⁰ as the most important document of this regional organization, alongside the RESC.

European Union Law

Joining the European community is a key strategic goal for Serbia and the influence of European Union law can be important to strengthening the protections for workers with family responsibilities. Protection against unlawful termination of employment is contained within the primary law of the community, the Charter of Fundamental Rights, with the aim of maintaining a work-life balance,⁷¹ and within founding agreements and also secondary law, primarily directives. The foundation for the prohibition of dismissal due to *pregnancy* in European Union law was set by Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.⁷² Unlike directives against discrimination wherein *pregnancy* is qualified as prohibited grounds for dismissal,⁷³ Council Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, institutes a rule on the temporary prohibition of the employer’s right to dismissal, with the aim of protecting pregnant women, puerperal women, and nursing mothers,⁷⁴ and it is up to the member states to provide those protections from the start of the *pregnancy* to the end of *maternity leave*.⁷⁵ Directive (EU) 2019/1158 substantially contributes

⁷⁰ See: art. 14 of the Law on the Ratification of the European Convention on the protection of human rights and fundamental freedoms, *Official Gazette of Serbia and Montenegro – International Treaties*, no. 9/2003, 5/2005 and 7/2005-amd. and *Official Gazette of the RS – International Treaties*, no. 12/2010 and 10/2015.

⁷¹ See: art. 14 of the Law on the Ratification of the European Convention on the protection of human rights and fundamental freedoms, *Official Gazette of Serbia and Montenegro – International Treaties*, no. 9/2003, 5/2005 and 7/2005-amd. and *Official Gazette of the RS – International Treaties*, no. 12/2010 and 10.

⁷² Kovačević, L.J., Novaković, U. (2018). Mirno rešavanje sporova povodom diskriminacije zaposlenih na osnovu porodičnih dužnosti. *Pravo i privreda* (7–9), 431–461.

⁷³ *Ibid*, 431–461.

⁷⁴ *Ibid*.

⁷⁵ Directive 06/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, calls on member state to take action to protect working fathers and adoptive parents who utilize

to employment protections not only for workers with responsibilities in relation to children,⁷⁶ but also in relation to elderly and disabled family members. Namely, this act binds member states to implement measures that prohibit dismissal and any and all preparations for dismissal on the basis of *requesting or using paternity leave, parental leave, and carer's leave*, but also on the basis of *requesting or utilizing flexible working arrangements*.⁷⁷ Similar to ILO standards, this directive sets the foundation for employment protections for workers with responsibilities towards children and working carers with responsibilities towards other family members.

SPECIAL PROTECTIONS FOR WORKERS WITH FAMILY RESPONSIBILITIES FROM THE TERMINATION OF AN EMPLOYMENT CONTRACT IN OTHER SELECTED LEGISLATURES

Most countries have employment protections for *pregnant women*. For example, in Bulgarian, Latvian, Lithuanian, Maltese,⁷⁸ Belgian, Greek, Danish, French, Finnish, and Dutch law,⁷⁹ pregnancy cannot be valid grounds for

paternal leave, that is, absence from work due to adoption, from unlawful termination of employment.

⁷⁶ See: clause 5, para. 4 of the European Union *Directive 2010/18 EU on implementing the Revised Framework agreement on parental leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC* – Brussels, 2010. Protection from dismissal based on requesting/using parental leave was, about a decade earlier, found in EU Directive 2010/18 on parental leave, even though detailed conditions of the protection were not listed, so EU Directive 2019/1158 upgraded the protection from dismissal in that sense.

⁷⁷ See: art. 12 in relation to arts. 4, 5, 6, and 9 of EU Directive 2019/1158. Paternity leave is the right of fathers to take a minimal leave of absence in the length of 10 working days because of the birth of a child, and parental leave is the right of each parent to a leave in the duration of 4 months which must be taken before the child reaches a specific age, up to the age of 12, and carer's leave the right of carers to take a leave of absence in the duration of at least 5 working days per year per worker. Working parents with children up to a certain age, up to 12 years old, and working carers have the right to request flexible working arrangements.

⁷⁸ Kresal, B., (2007). *Termination of Employment Relationships: Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*, Ljubljana: European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 56 и даље.

⁷⁹ Aliprantis, N., et al., (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*, European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 47 and further.

lawful dismissal. In countries like Cyprus, Hungary, Czechia, Romania, and Slovakia, while pregnancy is not prohibited grounds for dismissal, employment protections for pregnant women are achieved through prohibitions on dismissal during pregnancy,⁸⁰ which is considered a “protected period”. Austria has stronger protections for pregnant women, as dismissal is conditioned on a court ruling.⁸¹ In Slovakian law, pregnant women are a special category of protected workers.⁸² Strong protections for workers with responsibilities in relation to children exist in Spain, as it is prohibited to dismiss not only a pregnant woman, but a *nursing mother* that utilizes the right to work leave/shortened work hours in order to breastfeed.⁸³ In most countries, protections for *new mothers* are achieved by making maternity leave and leave to care for a child prohibited grounds for dismissal, while, for example, Czech, Estonian, Lithuanian, Romanian, and Slovakian law,⁸⁴ proscribe dismissal during such absences. In Hungarian law, an employment contract also cannot be terminated during ongoing medical treatments relating to assisted reproduction, nor during unpaid leave with the purpose of caring for a child.⁸⁵ In Russian law, besides a woman with a child of up to 3 years, employment cannot be terminated for *single mothers* that are caring for children up to the age of 14 (18, if the child has a disability), unless there was a breach of the employment contract.⁸⁶ British and Spanish law has protections for other persons who have legal custody of a child, as special protections are guaranteed for *adoptive parents*.⁸⁷ Hungarian law recognizes that fathers have parental responsibilities and so *paternity* is prohibited grounds for discrimination as it relates to the termination of employment.

Slovakian and Romanian law, modelled on ILO and Council of Europe standards, recognizes family responsibilities as invalid grounds for employment termination.⁸⁸ In Portuguese law,⁸⁹ employment termination based on the

⁸⁰ Kresal, B., (2007). *Termination of Employment Relationships: Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*, Ljubljana: European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 56 and further.

⁸¹ Aliprantis, N., et al., (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*, European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 47.

⁸² Kresal, B., (2007). *Op. cit.*, 59.

⁸³ Aliprantis, N., et al., (2006). *Op. cit.*, 49.

⁸⁴ Kresal, B., (2007). *Op. cit.*, 56 and further.

⁸⁵ *Ibid.*, 57.

⁸⁶ Gorbacheva, Z. (2013). *Labour law in Russia*. The Hague: Wolters Kluwer, 133.

⁸⁷ Aliprantis, N., et al., (2006). *Op. cit.*, 49 and further.

⁸⁸ Kresal, B., (2007). *Op. cit.*, 58 and further.

⁸⁹ Aliprantis, N., et al., (2006). *Op. cit.*, 54.

family status of a worker is not only prohibited, but penalized with a monetary fine.⁹⁰ Certain countries recognize care for the sick and elderly as an important factor when it comes to the termination of employment. *Absence from work due to care for dependants* is prohibited grounds for employment termination in Latvian and Spanish law.⁹¹ British law contains similar stipulations; dismissal on the basis of absence from work due to family responsibilities, including caring for other family members, is unlawful.⁹² Workers have responsibilities towards elderly family members and those with disabilities, thus employment protections for these categories also benefit them. In countries like Cyprus, Latvia, Romania, Slovenia,⁹³ Belgium, Finland, and Sweden,⁹⁴ *disability* is unlawful grounds for the termination of employment. In Hungarian law, dismissal of *elderly workers* who are less than 5 years removed from retirement and a pension can only be done under exceptional circumstances, while elderly workers are a specially protected group in Slovenian law.

SPECIAL PROTECTIONS FOR WORKERS WITH FAMILY RESPONSIBILITIES AGAINST TERMINATION OF EMPLOYMENT IN SERBIAN LEGISLATURE

Labour legislation reforms improved protections against the termination of employment. In accordance with the law, the family, mothers, and single parents enjoy special protections.⁹⁵ This constitutional principle regarding

⁹⁰ Furthermore, Iceland has, in accordance with ILO standards, passed the Prohibition on termination of employment due to family responsibility act no. 27, and according to the letter of the law, family responsibilities are defined as responsibilities towards children, spouses, close relatives that live in a joint household with the workers and that need their care and assistance, because of illness or disability for example. Available at: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/16012012_Prohibition-on-termination-of-employment-due-to-family-responsibility-Act-No-27-2000.pdf.

⁹¹ Kresal, B., (2007). *Termination of Employment Relationships: Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*, Ljubljana: European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 57.

⁹² Aliprantis, N., et al., (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*, European Commission Directorate General Employment, Social Affairs and Equal Opportunities, 49 and further.

⁹³ Kresal, B., (2007). *Op. cit.*, 56 and further.

⁹⁴ Aliprantis, N., et al., (2006). *Op. cit.*, 47 and further.

⁹⁵ See: art. 66, para. 1 of the Constitution of the RS.

the termination of employment is partially realized in the Employment Act.⁹⁶ Namely, as stipulated in the Employment Act, an employer cannot terminate the employment of a worker during pregnancy, maternity leave, or during a leave of absence for the special care/care of a child.⁹⁷ The law provides a pregnant woman and a new mother with responsibilities towards children, but also a father, adoptive parent, guardian, and foster parent, the right to take a leave of absence from work with the purpose of providing special care/care to a child.⁹⁸ However, the constitutional principle is not fully realized as it regards providing protections to the family as a unit, i.e. for all workers with responsibilities in relation to children. Namely, despite constitutional protections, single parents enjoy no special legal protections in regards to the termination of employment in Serbian law, nor are there special protections for nursing mothers or women in other vulnerable situations, e.g. undergoing assisted reproduction treatments, as exists in other legal systems. Besides special protections against employment termination for special categories of workers, the Employment Act prescribes prohibited grounds for dismissal. Among others, temporary impairment to work due to illness, accident at work, or occupational disease,⁹⁹ maternity leave, and absence with the purpose of providing special care/care to a child are not valid grounds for the termination of employment. However, unlike in some legal systems presented in the previous section as well as secondary European Union law, Serbian law contains no explicit special protections for workers with responsibilities towards elderly, ill, or disabled family members (working caregivers),¹⁰⁰ nor prohibited grounds for dismissal based on providing care and support to people they have a close relationship with. As the Employment Act proscribes discrimination in regards to employment termination,¹⁰¹ including on the grounds of family responsibilities, age, and disability,¹⁰² special protections

⁹⁶ The Employment Act (hereinafter: EA), *Official Gazette of the RS* no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – Judgment of the Constitutional Court 113/2017 and 95/2018 – authentic interpretation.

⁹⁷ See: art. 187 of the EA, judgement of the Supreme Court of Cassation, Rev. 2 2580/16 from 16/6/2017, judgement of the Supreme Court of Cassation, Rev. 2 2655/18 from 13/6/2019.

⁹⁸ See: art. 187 of the EA, judgement of the Supreme Court of Cassation, Rev. 2 2580/16 from 16/6/2017, judgement of the Supreme Court of Cassation, Rev. 2 2655/18 from 13/6/2019.

⁹⁹ See: art. 183, para. 1, points 1 and 2 of the EA.

¹⁰⁰ Even though a leave of absence for special care necessities caring for a child or other person (art. 96 of the EA), special protection from the termination of an employment contract (art. 187) refers exclusively to a leave of absence with the purpose of caring for a child and not other persons.

¹⁰¹ See: art. 18 of the EA.

¹⁰² See: Opinion of the Ministry of Labour, Employment, Veteran and Social Affairs, Sector for Labour and Employment no. 117-00-113/2017-02 on 16/3/2017.

for these categories could be achieved by referring to the legal rules against discrimination,¹⁰³ but also to ILO standards which Serbia is bound by.¹⁰⁴ If Serbian law is compared to the RESC, it is interesting to note that the Republic of Serbia has ratified almost all of the rules prescribed by it, except the right to housing (art. 31) and the right of workers with family responsibilities to equal opportunity and treatment (art. 27), which is significant for the aim of this paper. A possible reason for not ratifying art. 27 of the RESC¹⁰⁵ is the obligation of the state to “develop or improve public or private services, especially in the domain of child care or other forms of child protection”,¹⁰⁶ founded on this article; the other reason could be an incompatibility of the socio-economic conditions with the demands of the RESC.¹⁰⁷ As art. 27 of the RESC, among other guarantees, stipulates that family responsibilities cannot be valid grounds for the termination of employment and guarantees the right of persons with such responsibilities to engage in and maintain employment, as well as the right to engage in employment after leave due to such responsibilities, not ratifying this article negatively impacts the functional equality of this category of workers, as well as the stability of their employment, in Serbia.

¹⁰³ See: art. 2 of the Law on the Prohibition of Discrimination, *Official Gazette of the RS* no. 22/2009, which also lists family status, but also health status, disability, age, and other real or potential characteristics, as prohibited grounds for discrimination, similarly to the Employment Act.

¹⁰⁴ It is also the opinion of the European Court of Justice that discrimination on the basis of disability does not only refer to the disabled person, but also includes persons that are discriminated against and disturbed due to the disability of the person they are caring for. See: Judgment of 17 July 2008 in case C-303/06, *Coleman v. Attridge Law*, paragraph 27. Cited according to: Kovačević, Lj. (2016). *Valjani razlozi za otkaz ugovora o radu...*, 495.

¹⁰⁵ In content, the obligations from art. 27 of the RESC essentially correspond to the obligations that Serbia has accepted by ratifying ILO Convention no. 156. Cf.: art. 27 of the RESC and art. 3 of ILO Convention 156; art. 27, para. 1, point a) with art. 7; art. 27, para. 1, point, b) with art. 4, point b); art. 27, para. 1 c) with art. 5 point b); art. 27, para. 3 with art 8 of the Convention. The obligation to improve institutions in the area of childcare and care for the family is conditioned on “national conditions and abilities”, while the RESC contains no such provision.

¹⁰⁶ Lubarda, B. (2009). *Revidirana evropska socijalna ...*, 34. Hard-to-access child protection, an undeveloped network of childcare institutions, and the uncoordinated work hours of the institutions with the work hours of working parents, are still active problems in Serbia, and the financial abilities of the state are limited in that regard.

¹⁰⁷ See: Report from the Eighth Session of the Council for Labour, Social Affairs, Community Engagement and Poverty Reduction held on November 6, 2012. Available at: http://www.parlament.gov.rs/upload/archive/files/lat/doc/zapisnik_odbori/zapisnik8w2012NS%20LAT.doc

CONCLUSION

Workers with family responsibilities are not a monolithic category, and the loss of employment impacts both the worker and their family. Protections for the stability of employment of pregnant women and new mothers, and partially for fathers and legal guardians who have responsibilities in relation to children, are also provided by the Republic of Serbia. Considering the vulnerable position of single parents who have difficulties remaining in the job market, future parents engaging in assisted reproduction, as well as nursing mothers, the legal solutions of other countries provide the possibility to contemplate protections against the termination of employment for these categories in Serbia. However, protections for working caregivers, as well as the elderly and persons with disabilities, is achieved in Serbian law only via rules against discrimination during the termination of employment. Although it is a “powerful” tool, protection against discrimination cannot provide encompassing protections in cases of dismissal of working caregivers. Modelled on foreign legal systems which contain invalid grounds for dismissal in relation to caring for dependant persons and recognize the special status of a working caregiver, the scope of the protections provided could be expanded in Serbian law, with the aim of providing greater security to all, and especially to workers from the “sandwich generation”, who have responsibilities both towards children and ill and elderly family members, whose numbers are rising in Europe and in Serbia. Improved nominal protection of employment stability for workers with family responsibilities in Serbia could be achieved by formally and legally accepting the obligations Serbia has as a member of the Council of Europe in regards to article 27 of the RESC, which is, as of yet, not ratified.

BIBLIOGRAPHY

- Aleksynska, M., Eberlein, F. (2016). *Coverage of employment protection legislation (EPL)*. Geneva: International Labour Office.
- Aleksynska, M., Schmidt, A. (2014). *A chronology of employment protection legislation in some selected European countries*. Geneva: International Labour Office.
- Aliprantis, N., et al., (2006). *Termination of employment relationships: legal situation in the member states of the European Union*. Brussels: European Commission Directorate General Employment, Social Affairs and Equal Opportunities.
- Betten, L.(1993). *International labour law – selected issues*. Deventer: Kluwer Law and Taxation Publishers.
- Behari A., (2017). *The reconciliation of work and care – a comparative analysis of South African labour laws aimed at providing working parents with time off to care*. Pietermaritzburg: (unpublished doctoral dissertation).

- Bojić, F. (2015). Položaj žena na tržištu rada i u sistemima socijalne sigurnosti – istorijsko komparativna analiza. *Radno i socijalno pravo*, 19 (2).
- Gorbacheva, Z. (2013). *Labour law in Russia*. The Hague: Wolters Kluwer.
- Guide on Article 8 of the European Convention on human rights – Right to respect for private and family life*. (2019). Strasbourg: Council of Europe/European Court of Human Rights.
- Hoskins, I. (1996). *Combining work with elder care a challenge for now and the future*. Geneva: International Labour Office.
- Kovačević, LJ., Novaković, U. (2018). Mirno rešavanje sporova povodom diskriminacije zaposlenih na osnovu porodičnih dužnosti. *Pravo i privreda*, 56 (7–9).
- Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: University of Belgrade – Faculty of Law.
- Kresal B., (2007). *Termination of employment relationships legal situation in the following member states of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia*. Ljubljana: European Commission.
- Lubarda, B. (2009). *Revidirana evropska socijalna povelja obaveze države i uloga solidarnih partnera posle ratifikacije*. Belgrade: Social and Economic Council of the Republic of Serbia, Swiss labour assistance.
- Marcadent, F. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts (individual dismissals)*. Geneva: International Labour Office.
- Perović, S. (2018). *Besede sa Kopaonika*. Belgrade: Kopaonik School of Natural Law.

Online sources

- Reconciliation of work and family life – statistics*. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Reconciliation_of_work_and_family_life_-_statistics#Background.
- <https://www.stress.org/holmes-rahe-stress-inventory>
- Burke, R. (2017). *The sandwich generation: individual, family, organizational and societal challenges and opportunities*. Available at: <https://pdfs.semanticscholar.org/ce08/d55af264981708017e633d8f6270c90eb3a8.pdf>
- <https://eplex.ilo.org/workers-enjoying-special-protection-against-dismissal/>
- Aleksynska, M. (2020). *Policy brief - Employment protection throughout the world: A roundup of a decade of reforms (2009-2019)*. Available at: https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_749640/lang--en/index.htm.
- Aleksynska, M. (2014), *Employment protection legislation: New approaches to measuring the institution*. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_442672.pdf
- Island, Ministry of Welfare, Prohibition on Termination of Employment due to Family Responsibilities Act, No. 27/2000, Available at: <https://www.government.is/me->

dia/velferdarraduneyti-media/media/acrobat-enskar_sidur/16012012_Prohibition-on-termination-of-employment-due-to-family-responsibility-Act-No-27-2000.pdf
Report from the Eighth Session of the Council for Labour, Social Affairs, Community Engagement and Poverty Reduction held on November 6, 2012. Available at: http://www.parlament.gov.rs/upload/archive/files/lat/doc/zapisnik_odbori/zapisnik8w2012NS%20LAT.doc.

International, regional, and domestic law

- Law on the Ratification of ILO Convention no.156 concerning equal opportunities and equal treatment for workers with family responsibilities, *Official Gazette of the SFRY - International treaties* no. 7/87.
- Law on the Ratification of the Revised European Social Charter, *Official Gazette of the RS – International treaties* no. 42/09.
- European Parliament, Council of the European Union. Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, Brussels, 2019.
- Law on the Ratification of the UN Convention on the Rights of the Child, *Official Gazette of the SFRY, International treaties*, no. 15/90 and *Official Gazette of the SFRY – International treaties*, no. 4/96 and 2/97.
- Family Act, *Official Gazette of the RS*, no. 18/2005, 72/2011 – other law and 6/2015.
- Constitution of the Republic of Serbia, *Official Gazette*, no. 98/2006.
- Law on the Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, *Official Gazette of the SFRY*, no. 11/81.
- Law on the Ratification of the International Covenant on Economic, Social and Cultural Rights, *Official Gazette of the SFRY – International Treaties*, no. 7/71.
- United Nations General Assembly*, the Universal Declaration of Human Rights, Paris, 1948.
- Law on the Ratification of the International Covenant on Civil and Political Rights, *Official Gazette of the SFRY – International Treaties*, no. 7/71.
- Law on the Ratification of the European Convention on the protection of human rights and fundamental freedoms, *Official Gazette of Serbia and Montenegro – International Treaties*, no. 9/2003, 5/2005 and 7/2005-amd. and *Official Gazette of the RS – International Treaties*, no. 12/2010 and 10/2015.
- Regulation on the Ratification of the International Convention of the ILO no. 111 on discrimination in relation to employment and occupation, *Official Gazette of the Federal People's Republic of Yugoslavia*, no. 3/61.
- Law on the Ratification of the ILO Convention no. 158 on the termination of employment, *Official Gazette of the SFRY International Treaties* no. 4/84 and 7/91.
- The Law on Conventions – the Project for ILO Convention no. 3 with regard to women's employment before and after childbirth, *Službene Novine of the Kingdom of Serbs, Croats and Slovenes* no. 95-XXII/27.

- Law on the Confirmation of ILO Convention no. 103, *Official Gazette of the FPRY* no. 9/55.
- General Conference of the International Labour Organization, Maternity protection recommendation no. 191, Geneva, 2000.
- Law on the Ratification of ILO Convention no. 183, *Official Gazette of the RS* no. 1/2020.
- General Conference of the International Labour Organization, Maternity protection recommendation no. 95, Geneva, 1952.
- Council of Europe, European Social Charter, Torino, 1961.
- Council of Europe, European social charter, Nica, 2000.
- The Employment Act, *Official Gazette of the RS*, no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – Judgment of the Constitutional Court 113/2017 and 95/2018 – authentic interpretation.
- Law on the Prohibition of Discrimination, *Official Gazette of the RS*, no. 22/2009.

Case law of the European Court of Justice

Judgment of 17 July 2008 in case C-303/06, *Coleman v. Attridge Law*, paragraph 27.

Serbian case law, opinions of state institutions

- Judgement of the Supreme Court of Cassation, Rev. 2 2580/16 from 16/6/2017.
- Judgement of the Supreme Court of Cassation, Rev. 2 2655/18 from 13/6/2019.
- Opinion of the Ministry of Labour, Employment, Veteran and Social Affairs, Sector for Labour and Employment no. 117-00-113/2017-02 on 16/3/2017.