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UPOTREBA SOFTVERA ZA PRAĆENJE REZULTATA RADA ZAPOSLENIH I OTKAZ UGOVORA O RADU**

SAŽETAK: Široka upotreba informacionih tehnologija bitno je promenila život i rad čoveka. Savremeni produkcioni odnosi danas se ne mogu zamisliti bez prisustva različitih informatičko-tehnoloških rešenja u procesu rada. Njihova glavna odlika jeste da ubrzavaju i olakšavaju sam proces rada, čineći ga produktivnijim. Međutim upotreba ovakve tehnologije otvara i različita pitanja pravne prirode. Jedno od njih tiče se primene različitih softverskih rešenja zahvaljujući kojima poslodavac prati rezultate rada zaposlenih. Podaci do kojih poslodavac dođe korišćenjem ovakvih softverskih rešenja mogu da dovedu i do prestanka radnog odnosa. Ovim istraživanjem nastojali smo da ukažemo na ključne radnopravne probleme prilikom otkazivanja ugovora o radu usled upotrebe različitih softvera za praćenje rezultata rada zaposlenih, kao i da ponudimo odgovore za njihovo prevazilaženje.

Ključne reči: otkaz ugovora o radu, softveri za praćenje rezultata rada, nadzor nad radom zaposlenih

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UVODNE NAPOMENE

Razvoj informacionih tehnologija doveo je do značajnih promena u pogledu načina na koji živimo i radimo. Savremeni produkcioni odnosi u bitnoj meri zasnovni su na upotrebi različitih digitalnih rešenja. Iako takva rešenja prevashodno olakšavaju i ubrzavaju proces rada, njihova upotreba ne dolazi bez određenih (pravnih) rizika. Deo tih rizika odnosi se na ostvarivanje i zaštitu prava zaposlenih po osnovu rada. Štaviše, u teoriji radnog prava ističe se kako se sa digitalizacijom u produkcionim odnosima menja ekonomski i organizacioni ambijent funkcionisanja radnog odnosa, a novonastale društveno-ekonomske okolnosti imaju za posledicu između ostalog i destabilizaciju koncepta radnog odnosa.[1] Nijedan od instituta radnog odnosa nije ostao imun na probleme koje sa sobom nosi primena informacionih tehnologija u procesu rada, te izuzetak nije ni institut prestanka radnog odnosa. Pitanje prestanka radnog odnosa jedno je od najznačajnijih u sferi radnog prava. Uostalom, identitet radnog prava kao grane prava ogleda se u pravnom režimu prestanka radnog odnosa, jer jedan od integralnih elemenata prava na rad jeste stabilnost zaposlenja, uz uvažavanje poslovnih interesa poslodavca.[2] S tim u vezi najpre ćemo sagledati ključne aspekte prestanka radnog odnosa u pravnom sistemu Republike Srbije, a potom ćemo se bliže upoznati sa upotrebom različitih softverskih rešenja pomoću kojih poslodavac prati rezultate rada zaposlenih. Nakon toga, ukazaćemo na pravne probleme koje uzrokuje upotreba takvih softvera u našem pravu, a u vezi sa otkazom ugovora o radu od strane poslodavca.

O PRESTANKU RADNOG ODNOSA

Radni odnos može prestati samo ako nastupe činjenice za koje pravni sistem vezuje mogućnost ili neminovnost okončanja radnog odnosa.[3] U Republici Srbiji pravni režim prestanka radnog odnosa uređen je Zakonom o radu (u daljem teksu: Zakon).[4] To znači da su svi razlozi, odnosno slučajevi u kojima može prestati radni odnos, predviđeni Zakonom.[5] Jedan krug tih razloga za

[1] Jašarević, S. (2013). Radni odnos – tendencije u praksi i regulativi. *Zbornik radova Pravnog fakulteta u Novom Sadu,* XLVII (3), 243.

[2] Lubarda, B. (2012). *Radno pravo: Rasprava o dostojanstvu na radu i socijalnom dijalogu.* Beograd: Pravni fakultet Univerziteta u Beogradu, 718.

[3] Šunderić, B., Kovačević, LJ. (2017). *Radno pravo: Priručnik za polaganje pravosudnog ispita*. Beograd: Službeni glasnik, 355.

[4] 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.

[5] Čl. 175. Zakona.

koje naš pravni sistem vezuje mogućnost prestanka radnog odnosa jeste i volja njegovih subjekata. Kako je radni odnos pre svega dobrovoljni odnos, logično je da trajanje tog odnosa zavisi pre svega od volje subjekata tog odnosa.[6] Tako se saglasnost volja zaposlenog i poslodavca javlja kao najlogičniji način prestanka radnog odnosa, jer je na isti takav način radni odnos i nastao.[7] Pored saglasnosti volja subjekata radnog odnosa i jednostrana izjava volje njegovih subjekata može dovesti do prestanka radnog odnosa. Ovde je naravno reč o otkazu ugovora o radu. Volju u pravcu prestanka radnog odnosa mogu izraziti i zaposleni i poslodavac. Ipak, skrećemo pažnju da jednostrano izražena volja nije apsolutna, tj. da samom njenom izjavom u pravcu prestanka radnog odnosa ona sama po sebi neće i dovesti do njegovog prestanka. Da bi izjava volje jedne strane zaista dovela do prestanka radnog odnosa neophodno je da s tim u vezi budu ispunjeni uslovi predviđeni Zakonom. Na ovom polju prisutna je svojevrsna asimetrija ovlašćenja subjekta radnog odnosa.[8] Uslovi pravnog dejstva otkaza ugovora o radu od strane zaposlenog postavljeni su vrlo skromno.[9] Sa druge strane, u Zakonu su prisutna detaljna pravila kako materijalnog, tako i procesnog karaktera,[10] čije poštovanje je neophodan uslov zakonitog otkaza ugovora o radu od strane poslodavca. Uostalom, ovaj vid otkaza ugovora o radu predstavlja jedno od najsloženijih pitanja radnog prava. O tome slikovito svedoči nekoliko činjenica. Najpre, međunarodni standardi u vezi sa prestankom radnog odnosa usvojeni tek 1982. godine u vidu Konvencije MOR br. 158 o prestanku radnog odnosa na inicijativu poslodavca (u daljem tekstu: Konvencija MOR br. 158).[11] Ne samo da je pomenuta konvencija usvojena

[6] Jovanović, P. (2012). *Radno pravo*. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu, 314.

[7] Sporazumni prestanak radnog odnosa regulisan je čl. 177. Zakona.

[8] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Pravni fakultet Univeziteta u Beogradu, 133.

[9] Shodno čl. 178. Zakona, da bi otkaz zaposlenog bio punovažan potrebno je da on svoju izjavu o otkazu ugovora o radu dostavi poslodavcu u pisanom obliku i da ispoštuje otkazni rok, koji podrazumeva da nakon dostavljanja otkaza nastavi da obavlja poslove predviđene ugovorom o radu još najmanje 15, a najviše 30 dana od dana dostavljanja otkaza, u zavisnosti od toga kako je određena dužina trajanja otkaznog roka opštim aktom ili ugovorom o radu.

[10] Otkaz ugovora o radu od strane poslodavca regulisan je članovima od 179. do 191. Zakona. Kada se govori o materijalnim pravilima tu se u prvom redu misli na pravila o opravdanosti konkretnog otkaznog razloga, odnosno osnova za otkaz ugovora o radu, dok kada govorimo o procesnim pravilima, reč je o radnjama koje poslodavac mora da preduzme u cilju zakonitog utvrđivanja postojanja otkaznog razloga.

[11] Naša država ratifikovala je ovu konvenciju: Zakon o ratifikaciji Konvencije Međunarodne organizacije rada br. 158 o prestanku radnog odnosa na inicijativu poslodavca, *Službeni list SFRJ* – Međunarodni ugovori, br. 4/1984.

relativno kasno,[12] već do današnjeg dana ne uživa veliki broj ratifikacija.[13] Uzrok pomenute asimetrije leži u nejednakom položaju subjekata radnog odnosa, te predstavlja svojevrsno ograničenje (nad)moći poslodavca u radnom odnosu. Pre svega reč je o ekonomskoj nejednakosti, jer poslodavac u radni odnos unosi kapital (u vidu sredstava za rad) koji na tržištu rada i kapitala predstavlja deficitarni faktor proizvodnje, pri čemu radni odnos za poslodavca predstavlja samo jedan od načina za oplodnju tog kapitala. Sa druge strane, radni odnos za zaposlenog jeste glavni izvor za obezbeđivanje sredstava za egzistenciju.[14] Ova ekonomska nejednakost subjekata radnog odnosa ima i svoju pravnu manifestaciju u vidu jednog od bitnih elemenata radnog odnosa – subordinacije. U biti ovog elementa radnog odnosa jeste vršenje rada zaposlenog pod vlašću poslodavca, dok se njegova sadržina ispoljava kroz različita pravom priznata ovlašćenja poslodavca koja se određuju kao njegova normativna, upravljačka i disciplinska vlast.[15]

O SOFTVERIMA ZA PRAĆENJE REZULTATA RADA ZAPOSLENIH

Upravljačka vlast poslodavca podrazumeva skup ovlašćenja za izdavanje naloga i uputstava za rad zaposlenima. Bitan segment upravljačke vlasti poslodavca čine i njegova nadzorna ovlašćenja. Ona omogućavaju poslodavcu da obezbedi kontrolu nad procesom rada. Ali, ono za šta je poslodavac naročito zainteresovan jeste ishod tog procesa, odnosno, rezultati rada. Jer što su bolji rezultati rada, to znači da je bolja produktivnost zaposlenih, a samim tim i da je veći profit poslodavca.

[12] Prvi dokument u vezi sa prestankom radnog odnosa usvojen pod okriljem MOR bila je Preporuka br. 119 o otkazu radnog odnosa iz 1963. godine. Tek skoro dvadeset godina kasnije, regulisanje međunarodnih standarda na polju prestanka radnog odnosa zaokruženo je usvajanjem navedene Konvencije br. 158 i istoimene Preporuke br. 166 kao rezultat uvažavanja savremenih okolnosti na polju zaoštrene globalne konkurencije i ekonomskih aspekata koji su negativno uticali na nestabilnost zaposlenja. Prema *Employment protection legislation: Summary indicators in the area of terminating regular contracts-individual dismissals* (2015). ILO, 1. O nastanku ovih dokumenata MOR v.: Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Pravni fakultet Univeziteta u Beogradu, 203–215.

[13] Do dana 28. septembra 2021. godine ukupno 36 država članica MOR je ratifikovalo Konvenciju br. 158.

[14] Jovanović, P. (2013). Interesni sukobi i socijalna stabilnost u sferi radnih odnosa. *Radno i socijalno pravo*, (1), 38.

[15] Upravo se podređivanje zaposlenog normativnim, upravljačkim i disciplinskim ovlašćenjima poslodavca smatra suštinskim obeležjem pravne subordinacije, prema: Kovačević, LJ. (2013). *Pravna subordinacija u radnom odnosu i njene granice*. Beograd: Pravni fakultet Univerziteta u Beogradu, 92 i 135.

U svrhu praćenja produktivnosti, odnosno rezultata rada zaposlenih, danas postoje brojna softverska rešenja, koja koriste različite kriterijume za računanje produktivnosti. Neka od tih rešenja polaze od tradicionalnog shvatanja da je vreme novac, te tako vreme vršenja rada predstavlja glavni kriterijum za računanje produktivnosti (time tracking software).[16] Ovi softveri funkcionišu po principu da beleže koliko je vremena zaposleni proveo na svakom pojedinačnom radnom zadatku.[17] Na osnovu toga, softver poslodavcu nudi veliki broj mogućnosti u smislu različitih kratkoročnih i/ili dugoročnih analiza odnosa vremena provedenog na radu i rezultata rada. Drugi tip softverskih rešenja za praćenje produktivnosti rada zasnovan je na prikupljanju podataka o tome koliko puta i u koje vreme zaposleni pristupaju informatičkim alatima (programima) pomoću kojih izvršavaju svoje radne zadatke.[18] S obzirom da se na ovaj način prikuplja veći broj različitih podataka,[19] samim tim je veći i broj njihovih ukrštanja, te je spektar mogućnosti za analizu produktivnosti zaposlenih još širi nego što je to slučaj kod softvera koji vode brigu (samo) o vremenu rada.[20]

ZAKONITOST I LEGITIMITET UPOTREBE SOFTVERA ZA PRAĆENJE REZULTATA RADA ZAPOSLENIH

Težnja za implementacijom savremenih softverskih rešenja koja omogućavaju detaljan nadzor nad radom zaposlenih zasnovana je na legitimnom interesu poslodavca koji se tiče povećanja produktivnosti. Kako smo istakli, sa većom produktivnošću veći je i profit poslodavca, što je ujedno i glavni razlog zbog kojeg on stupa u radni odnos sa zaposlenim. Međutim, ovde je legitiman interes poslodavca ograničen podjednako legitimnim interesom zaposlenog

[16] Primeri takvih softvera su: Proofhub (www.proofhub.com), DeskTime (www.desktime.com), Toggl (www.toggl.com).

[17] Na primer koliko minuta (kao i tačno vreme) u toku radnog dana je zaposleni koristio program za elektronsku poštu, koliko minuta je koristio program za obrađivanje fotografija, zvuka, pisanje teksta itd.

[18] Primeri takvih softvera su: Teramind (www.teramind.co), ili Transparentbusiness (www.transparentbusiness.com).

[19] Prikupljaju se podaci kao što su: koliko puta i u koje vreme je zaposleni pristupio određenoj aplikaciji ili dokumentu; podaci o kretanju određenog dokumenta kroz informacioni sistem poslodavca, kao i upotreba dokumenta kroz prenosive uređaje (USB); podaci o štampanju ili pokušaju štampanja konkretnih dokumenata; način upotrebe programa elektronske pošte; broj otkucaja na tastaturi ili mišu u postavljenoj jedinici vremena itd.

[20] Na osnovu svih ovih podataka softver pravi različite kalkulacije o produktivnosti zaposlenih, uočava obrasce ponašanja kod pojedinačnih ili grupe zaposlenih i daje predloge kako kod kojeg zaposlenog povećati produktivnost.

za poštovanjem njegovih ljudskih prava na radnom mestu.[21] Upravo s tim u vezi vidimo poseban značaj uloge radnog prava. Ta uloga ogleda se u tome da između dva legitimna interesa prisutna u radnom odnosu, a koji su međusobno suprotstavljeni, svojim pravilima uspostave funkcionalnu ravnotežu tog odnosa.[22] U konkretnom slučaju reč je o postojanju pravila kojima se ograničavaju nadzorna ovlašćenja poslodavca. Pomoću tih pravila potrebno je obezbediti primenu principa transparentnosti,[23] kao i principa proporcionalnosti,[24] prilikom upotrebe različitih softverskih rešenja u svrhu nadzora nad radom zaposlenog. Sve to u cilju zaštite fundamentalnih ljudskih prava na radnom mestu, u prvom redu prava na privatnost. Uporednopravno posmatrano, na nacionalnom nivou izostaju kogentna pravila kojima se precizno uređuje pitanje nadzora nad radom zaposlenih,[25] a izuzetak nije prisutan ni u našoj zemlji.[26]

U odsustvu kogentnih propisa na predmetno pitanje, skrenuli bismo pažnju na značaj prakse Evropskog suda za ljudska prava (u daljem tekstu: Sud). Ovaj Sud je nekoliko puta odlučivao u vezi sa ograničavanjem nadzornih ovlašćenja poslodavca i to u kontekstu povrede čl. 8. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (u daljem tekstu Evropska konvencija).[27] Čl. 8. Evropske konvencije zagarantovano je poštovanje privatnog i porodičnog života pojedinca. Sud je najpre u jednom od predmeta vođenih u vezi sa povredom čl. 8. konvencije istakao kako se ovaj član odnosi i na

[21] Kovačević, LJ. (2013). Radnopravna zaštita građanskih sloboda i prava zaposlenih na mestu rada – prodor demokratskih vrednosti u svet rada ili kompenzacija za veću nesigurnost zaposlenja?. *Teme*, XXXVII (4), 1595–1596.

[22] Jovanović, P. (1993). Sukobi interesa radnika i poslodavaca kao uzrok prava. *Zbornik Matice srpske za društvene nauke*, (95), 307–313.

[23] Princip transparentnosti nalaže da zaposleni budu upoznati sa postojanjem nadzora nad njihovim radom, kao i načinu upotrebe i trajanja nadzora. U tom smislu slično i kod Kovačević, LJ. (2010). Radni odnos i pravo na poštovanje privatnog života. *Zbornik radova sa savetovanja „Ostvarivanje i zaštita socijalnih prava"*, Zlatibor, 175.

[24] Princip proporcionalnosti nalaže da ograničenja nadzornih ovlašćenja budu srazmerna cilju koji se njima želi postići. V.: Davidov, G. (2012), The principle of proportionality in labor law and its impact on precarious workers. *Comparative Labor Law & Policy Journal*, 34 (1), 63–64.

[25] Ipak, pozitivni primeri prisutni su u Austriji, Ujedinjenom Kraljevstvu, Luksemburgu, Finskoj, Slovačkoj i Portugalu.

[26] Ipak, skrećemo pažnju na Pravilnik o pravilima ponašanja poslodavaca i zaposlenih u vezi sa prevencijom i zaštitom od zlostavljanja na radu (*Službeni glasnik RS*, br. 62/2010), gde su u čl. 12. t. 4. kao ponašanja od kojih se treba uzdržavati predviđeni: neopravdano prekomerno nadziranje rada (alineja 8) i neopravdana, neosnovana ili prekomerna upotreba kamera i drugih tehničkih sredstava kojima se omogućava kontrola zaposlenih (alineja 12).

[27] Naša država ratifikovala je ovu konvenciju Zakonom o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, *Službeni list Srbije i Crne Gore* – međunarodni ugovori, br. 9/2003.

zaštitu privatnosti na radnom mestu.[28] U svojoj praksi u pogledu primene čl. 8. Evropske konvencije, a u vezi sa zaštitom prava na privatnost zaposlenih u odnosu na nadzorna ovlašćenja poslodavca, Sud je razvio koncept „razumno očekivane privatnosti".[29] Reč je o stepenu privatnosti na koji zaposleni može da računa prema uobičajenim okolnostima na radnom mestu, pri čemu je dopuštenost nadzora zasnovana na dužnosti poslodavca da prethodno upozna zaposlenog sa činjenicom da će se njegov rad nadzirati.[30]

Za našu temu od krucijalnog značaja jeste predmet *Barbulesku protiv Rumunije*.[31] Ovo iz razloga što je Evropski sud u odluci u ovom predmetu suštinski ustanovio smernice za implementaciju sistema nadzora nad radom zaposlenih. Te smernice odnose se na skup mera koje treba preduzeti kako bi se obezbedili uslovi za uživanje prava na privatnost na radnom mestu. Te mere podrazumevaju: a) da zaposleni treba da budu obavešteni o mogućnosti da se njihov rad nadzire kao i o prirodi samog nadzora, pre nego što se u proces rada implementiraju bio kakve mere nadzora; b) da zaposleni budu obavešteni o obimu nadzora (npr. da li se nadziru samo vreme slanja/prijema poruka, ili se nadzire i njihov sadržaj); c) da se prethodno utvrdi postoje li opravdani razlozi koji poslodavcu dopuštaju uvođenje mera nadzora u proces rada; d) da se prethodno izvrši procena da li se cilj nadzora može ostvariti preduzimanjem mera kojima se manje zadire u privatnost zaposlenih; e) prethodno određivanje svrhe za koju se mogu koristiti podaci do kojih se dođe putem nadzornih mera; f) da se zaposlenima stave na raspolaganje odgovarajuće mere zaštite koje treba da obezbede da poslodavac ne može biti upoznat sa sadržajem komunikacije koju zaposleni obavlja na radnom mestu, osim ukoliko o toj mogućnosti nije prethodno obavešten.[32]

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[28] *Niemietz v. Germany (*App. no. 13710/88*),* 16. 12. 1992, para. 29.

[29] Iako je ovaj koncept inicijalno razvijen u praksi američkih sudova, u Evropi on ima bitno drukčije značenje. O nastanku koncepta razumno očekivane privatnosti u sudskoj praksi SAD v.: Danilović, J. (2017). Pravo na privatnost zaposlenih. *Anali Pravnog fakulteta u Beogradu*, 65(2), 172–173. O razlici u pogledu na ovaj koncept u SAD i u Evropi v.: Dragićević, M. (2018). Savremene tehnologije i pravo zaposlenog na poštovanje privatnog života. *Zbornik radova Pravnog fakulteta u Nišu*, (80), 426–427; Evans, L. (2007). Monitoring Technology in the American Workplace: Would Adopting English Privacy Standards Better Balance Employee Privacy and Productivity. *California Law Review*, 95 (4), 1115–1149, 1140.

[30] V.: *Halford v. The United Kingdom* (App. no. 20605/92), 25. 6. 1997, paras. 43 i 45; *Copland v. The United Kingdom* (App. no. 62617/00), 3. 4. 2007, para. 42.

[31] *Bărbulescu v. Romania* (App. no. 61496/08), 5. 9. 2017.

[32] Para. 121. presude. O predmetu *Barbulesku protiv Rumunije* detaljno u: Božičić, D. (2018), Granice poslodavčevih nadzornih ovlašćenja u odnosu na zaštitu prava na privatnost zaposlenih. *Radno i socijalno pravo*, XXII (2), 100–102.

Dakle, usled odsustva kogentnih pravila o sprovođenju nadzora nad radom zaposlenih, poštovanje izloženih smernica iz predmeta *Barbulesku protiv Rumunije* vidimo kao uslov zakonitosti upotrebe softverskih rešenja za praćenje rezultata rada zaposlenih.

SOFTVERI ZA PRAĆENJE REZULTATA RADA ZAPOSLENIH I OTKAZNI RAZLOZI

U okviru prethodnog naslova videli smo na koji način je neophodno da poslodavac sprovodi nadzor nad radom zaposlenih kako bi podaci do kojih na taj način dolazi bili zakoniti. Ovde ćemo se usredsrediti na pitanje kako podaci do kojih poslodavac dolazi upotrebom softvera za praćenje rezultata rada zaposlenih mogu dovesti do otkaza ugovora o radu. Polazeći od čl. 179. Zakona kojim su određeni razlozi za otkaz od strane poslodavca, uviđamo dva slučaja kada može doći do otkaza ugovora o radu usled podataka do kojih poslodavac dođe upotrebom pomenutih softveskih rešenja. U pitanju su neostvarivanje rezultate rada, odnosno neposedovanje potrebnih znanja i sposobnosti za obavljanje poslova na kojima zaposleni radi iz čl. 179. st. 1. t. 1. Zakona i povreda radne obaveze odnosno nepoštovanje radne discipline iz čl. 179. st. 2. i 3. Zakona.

Otkaz ugovora o radu kada zaposleni ne ostvaruje rezultate rada ili nema potrebna znanja i sposobnosti za obavljanje poslova na kojima radi

U čl. 179. st. 1. t. 1. Zakona neostvarivanje rezultata rada i neposedovanje potrebnih znanja i sposobnosti za obavljanje poslova forumulisani su kao jedinstven otkazni razlog. Ipak, između ova dva razloga možemo povući liniju distinkcije. Glavna razlika jeste u tome što se potonji razlog ne može pripisati u krivicu zaposlenog. Dakle, zaposleni želi da radi, ali jednostavno, nema potrebne kvalifikacije za obavljanje poslova predviđenih ugovorom o radu. Sa druge strane, zaposleni poseduje potrebne veštine i znanja za rad, ali zbog svog odnosa prema radu ne ostvaruje predviđene rezultate rada. Ipak, kao razlog zbog kojeg se naš zakonodavac opredelio da ih formuliše u vidu jedinstvenog otkaznog razloga čini nam se to što se neretko očekivani rezultati rada ne ostvaruju zbog neposedovanja potrebnih kvalifikacija. I pored naznačenih razlika, Zakon ova dva slučaja posmatra kao jedan otkazni razlog.

Suštinski ovde je reč o situaciji gde poslodavac na osnovu softvera za praćenje rezultata rada zaposlenih izvodi zaključak da konkretni zaposleni ne

ostvaruje odgovarajuće rezultate rada. Tako se kao primarno nameće pitanje koji su to odgovarajući rezultati rada, odnosno koji su to rezultati rada postavljeni kao parametar za upoređivanje rezultata rada konkretnog zaposlenog? Profesorka Kovačević s tim u vezi ističe da „neostvarivanje rezultata rada ne može predstavljati opravdani razlog za otkaz ako rezultati koje je zaposleni trebalo da ostvari nisu bili realni (ostvarivi)".[33] Pored toga, dodaje da očekivani rezultati rada moraju biti objektivno i unapred određeni, odnosno da „prethodno moraju biti utvrđena merila kojima se kvantifikuje ostvarivanje rezultata rada".[34] Pored navedenog, da bi ovaj otkazni razlog bio zakonit, potrebno je da poslodavac utvrdi da li je samo zaposleni odgovoran za neostvarivanje rezultata rada.

S tim u vezi sudska praksa stala je na stanovište da ne mogu samo finansijski parametri biti pokazatelj neostvarivanja rezultata rada,[35] već se moraju posmatrati sve objektivne okolnosti pod kojima je zaposleni vršio rad.[36] Ovo smatramo naročito važnim prilikom otkaza ugovora o radu na osnovu podataka prikupljenih upotrebom prethodno izloženih softverskih rešenja za praćenje produktivnosti rada. Jer, imajući u vidu količinu podataka koje poslodavac može da prikupi pomoću ovakvih softvera, kao i mogućnosti njihove analize, onda mora biti u stanju i da tačno utvrdi sve okolnosti u kojima (ne)nastaju očekivani rezultati rada zaposlenog.

Možemo zaključiti da otkaz iz razloga neostvarivanja rezultata rada može biti zakonit samo ukoliko zaposleni u uobičajenim uslovima rada, duži vremenski period nije ostvario realno i unapred određene rezultate u svom radu, a iz subjektivnih razloga.[37] Čak i kada je softver zadužen za praćenje načina i rezultata rada pokazao da zaposleni ne ostvaruje odgovarajuće rezultate rada, poslodavac ne može istog trenutka otkazati ugovor o radu. Zakonom je određena procedura koja predviđa da poslodavac najpre mora pisanim putem da obavesti zaposlenog o nedostacima u njegovom radu, da mu da uputstva kako da popravi svoj rad i da ostavi rok, nakon kojeg će poslodavac ponovo proveriti rezultate rada zaposlenog.[38] Tek ukoliko se i nakon ostavljenog perioda pokaže da zaposleni nije popravio rezultate rada, poslodavac može otkazati ugovor o radu. Svrha ovakvih pravila jeste da razlozi za otkaz moraju biti realno zasnovani, odnosno dokazani.[39]

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[33] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Pravni fakultet Univeziteta u Beogradu, 339.

[34] *Ibid*., 340; Presuda Vrhovnog suda Srbije Rev. 4735/93 od 19. 1. 1994. godine.

[35] Presuda Apelacionog suda u Novom Sadu, Gž1. 2044/12 od 10. 9. 2012. godine.

[36] Živković, B. (2008). Otkaz ugovora o radu zbog nezadovoljavajućeg vršenja posla. *Radno i socijalno pravo*, XII (1), 335–358.

[37] Tintić, N. (1969). *Radno i socijalno pravo: knjiga prva – radni odnosi*. Zagreb: *Narodne novine*, 262.

[38] Član 180a Zakona.

[39] Kovačević, LJ. (2016). *Op. cit.*, 342–343.

Otkaz ugovora o radu zbog povrede radne obaveze ili nepoštovanja radne discipline

Iako između ova dva otkazna razloga postoje određene razlike,[40] sa praktične tačke gledišta pitanje pravne kvalifikacije ponašanja zaposlenog kao povrede radne obaveze ili nepoštovanja radne discipline nije krucijalno za zakonitost rešenja o otkazu ugovora o radu. Ono što je ključni zadatak poslodavca jeste da utvrdi činjenice u pogledu toga kako je došlo do neprihvatljivog ponašanja zaposlenog, a u slučaju eventualnog radnog spora, sud može prekvalifikovati otkazni razlog, pod uslovom da je činjenično stanje pravilno i potpuno utvrđeno.[41]

Ovde je reč o situaciji kada poslodavac, zahvaljujući upotrebi softvera za praćenje rezultata rada, ustanovi da se konkretni zaposleni u radno vreme bavio stvarima koje nemaju veze sa njegovim opisom poslova. S tim u vezi sve veću pažnju kako opšte, tako i stručne javnosti privlači pitanje da li zaposleni zbog svoje aktivnosti na društvenim mrežama mogu biti sankcionisani otkazom ugovora o radu.[42]

Jasno je da ne može bilo kakva aktivnost koju zaposleni preduzimaju na društvenim mrežama, bilo u toku trajanja ili van radnog vremena, da rezultira otkazom ugovora o radu. Čak i kada bi tako nešto opštim aktom poslodavca bilo predviđeno kao povreda radne obaveze odnosno nepoštovanje radne discipline. Ovo iz razloga što se povrede radnih obaveza ne mogu određivati apsolutno proizvoljno od strane poslodavca, jer se smatra nedopuštenim dovođenje zaposlenog u stanje „stalnog straha od neočekivanog kažnjavanja i (iznenadnog) gubitka zaposlenja."[43]

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[40] Povredom radne obaveze smatra se svaka radnja činjenja ili nečinjenja kojom se povređuju obaveze koje zaposleni ima u vezi sa obavljanjem posla, a koja je kao takva unapred utvrđena merodavnim izvorima prava. Sa druge strane, nepoštovanje radne discipline predstavlja mnogo širi disciplinski okvir za ocenu ponašanja zaposlenog kao razloga za otkaz. Ovde je reč o ponašanju koje nije unapred predviđeno kao povreda radne obaveze, ali je to ponašanje takve prirode da se njime narušavaju i ugrožavaju predviđena organizacija, proces ili tehnologija rada, te se usled toga ne može očekivati od poslodavca da takvog zaposlenog zadrži na poslu. Iz navedenog, a uzimajući u obzir i zakonsko određenje ovih pojmova (v.: čl. 179. st. 2. i 3. Zakona) zaključujemo da suštinska razlika leži u tome što se povredom radne obaveze može kvalifikovati samo ono ponašanje koje je kao takvo prethodno utvrđeno Zakonom, opštim aktom ili ugovorom o radu, dok se nepoštovanjem radne discipline može kvalifikovati i ponašanje zaposlenog koje nije predviđeno kao povreda radne obaveze, ali je takve prirode da se ne može očekivati od poslodavca da zaposlenog posle toga zadrži u procesu rada.

[41] Trifunović, P. (2015). Novi Zakon o radu – dva sporna pitanja subordinacije. *Bilten Vrhovnog kasacionog suda*, (3), 264.

[42] Alonso, D. A. (2018). Social Media in the Employment Relationship Context: A Typology of Emerging Conflicts, and Notes for the Debate. *Comparative Labor Law Policy Journal*, 39 (2).

[43] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Beograd: Pravni fakultet Univeziteta u Beogradu, 355.

Da bismo neku od aktivnosti koju zaposleni preduzima na društvenim mrežama mogli kvalifikovati kao otkazni razlog, takva aktivnost mora imati negativan uticaj na legitimne interese poslodavca. Kako se aktivnosti na društvenim mrežama manifestuju kroz određene komentare, slike, video-zapise i sl. kojima zaposleni izražavaju svoje stavove povodom određenog ličnog ili društvenog pitanja, prvo ograničenje legitimnim interesima poslodavca vidimo u jednako legitimnom interesu zaposlenog da slobodno izrazi svoje mišljenje.[44]

Sloboda izražavanja zagarantovana je kako Ustavom Republike Srbije,[45] tako i Evropskom konvencijom.[46] Polazeći od toga da je radna snaga neodvojiva od sveukupne ličnosti zaposlenog, a kako sloboda izražavanja predstavlja jedno od fundamentalnih ljudskih prava, nesumnjivo da je kao takva prisutna i u radnom odnosu. Međutim i jedan i drugi izvor prava predviđaju i ograničenja slobode izražavanja,[47] a kao glavno ograničenje ističe se zaštita prava i ugleda drugih. Ovde je ključno pitanje upravo u tome da se odredi gde se nalazi granica slobode izražavanja zaposlenog na društvenim mrežama u odnosu na ugled poslodavca.[48]

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[44] Sloboda misli je u stvari sloboda izražavanja misli, a čovek ima prirodno pravo da misli. Posledica slobode misli je da građani mogu javno izraziti svoj pogled na svet, svoje stavove i mišljenja o ljudima, stanjima i pojavama. I da je Ustav ne proglašava, sloboda misli je u prirodi čoveka kao *homo sapiens*-a, svojstvena njemu kao psihofizičkom biću. Marković P. (2014). *Ustavno pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu, 478.

[45] Odredbom čl. 46. st. 1. Ustava predviđeno je da: „Jemči se sloboda mišljenja i izražavanja, kao i sloboda da se govorom, pisanjem, slikom ili na drugi način traže, primaju i šire obaveštenja i ideje."

[46] Odredbom čl. 10. st. 1. Evropske konvencije predviđeno je da: „Svako ima pravo na slobodu izražavanja. Ovo pravo uključuje slobodu posedovanja sopstvenog mišljenja, primanja i saopštavanja informacija i ideja bez mešanja javne vlasti i bez obzira na granice. Ovaj član ne sprečava države da zahtevaju dozvole za rad televizijskih, radio i bioskopskih preduzeća."

[47] Odredbom čl. 46. st. 2. Ustava predviđeno je da: „Sloboda izražavanja može se zakonom ograničiti, ako je to neophodno radi zaštite prava i ugleda drugih, čuvanja autoriteta i nepristrasnosti suda i zaštite javnog zdravlja, morala demokratskog društva i nacionalne bezbednosti Republike Srbije."

Odredbom čl. 10. Evropske konvencije st. 2. predviđeno je da: „Pošto korišćenje ovih sloboda povlači za sobom dužnosti i odgovornosti, ono se može podvrgnuti formalnostima, uslovima, ograničenjima ili kaznama propisanim zakonom i neophodnim u demokratskom društvu u interesu nacionalne bezbednosti, teritorijalnog integriteta ili javne bezbednosti, radi sprečavanja nereda ili kriminala, zaštite zdravlja ili morala, zaštite ugleda ili prava drugih, sprečavanja otkrivanja obaveštenja dobijenih u poverenju, ili radi očuvanja autoriteta i nepristrasnosti sudstva."

[48] Apelacioni sud odlučivao je po žalbi na prvostepenu odluku Osnovnog suda u Kikindi, br. 2 II1.94/16 od 3. 3. 2017. godine, u predmetu gde je zaposleni tužio poslodavca za nezakonit otkaz. Zaposlenom je otkazan ugovor o radu jer je na svom Facebook nalogu postavio fotografiju koju je slikao mobilnim telefonom u delu proizvodnog pogona gde je na nekoliko mesta izričito istaknuto obaveštenje da je zabranjeno snimanje i fotogra-

Da zaključimo, samo u situaciji kada aktivnost koju zaposleni preduzimaju na društvenim mrežama prevazilazi okvire slobode izražavanja i kao takva rezultira povredom ugleda i prava poslodavca, može se smatrati nepoštovanjem radne discipline, a samim tim i opravdanim razlogom za otkaz. U tom smislu, prepoznajemo tri situacije kod kojih bi se dale ispuniti navedene okolnosti, uz napomenu da su komentari i objave koje zaposleni plasiraju na društvenim mrežama, sadržinski posmatrano, negativne konotacije prema onima na koje se odnose.

Najpre, tu vidimo slučaj gde

> „...zaposleni ostavlja negativne komentare i objave na račun klijenata i/ili poslovnih saradnika poslodaca".

Nesumnjivo da na ovaj način dolazi do narušavanja ugleda poslodavca u poslovnim krugovima, što se posledično nepovoljno odražava i na njegove dalje poslovne uspehe, odnosno profit. A kako je to glavni legitimni interes poslodavca, u ovom slučaju pomenutu aktivnost zaposlenog usmerenu ka klijentima poslodavca vidimo kao opravdani razlog za otkaz u smislu nepoštovanja radne discipline.

Pored toga, na ovaj način se ozbiljno narušava i odnos poverenja, vernosti, između zaposlenog i poslodavca. Jer upravo je radni odnos kod konkretnog poslodavca razlog zbog kojeg je zaposleni uopšte i došao u kontakt sa njegovim klijentima, a onda je negativnim objavama ili komentarima o istom tom klijentu narušio poverenje koje mu je poslodavac ukazao zaključivši s tim zaposlenim radni odnos, a potom mu poverio saradnju sa konkretnim klijentom. Zbog svega navedenog, opisanu aktivnost zaposlenog na društvenim mrežama vidimo kao ponašanje posle kojeg se ne može očekivati od poslodavca da tog zaposlenog i zadrži u radnom odnosu.

Na liniji istog zaključka je i situacija kada su

> „...negativni komentari ili objave zaposlenog na platformama za društveno umrežavanje upućeni kolegi, tj. drugom zaposlenom kod poslodavca".[49]

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fisanje. Fotografija je objavljena uz negativan komentar o uslovima rada kod poslodavca, iako je fotografija nastala usred vanrednog događaja zbog čišćenja ventilacije. Prvostepeni sud je odbio tužbeni zahtev tužioca, međutim, drugostepeni sud je preinačio odluku prvostepenog suda, navodeći u obrazloženju da postavljena fotografija, između ostalog, „ne predstavlja akt nepoštovanja radne discipline zbog kojeg tužilac ne može nastaviti rad kod tuženog, već pre akt slobode izražavanja koji nije podvrgnut uslovima, ograničenjima ili kaznama u interesu zaštite prava i ugleda drugih, u smislu čl. 10. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda." Presuda Apelacionog suda u Novom Sadu, br. Gž1.1296/17 od 8. 9. 2017. godine.

[49] O slikovitom primeru u engleskoj praksi vidi u predmetu *Teggart v. TeleTech UK Ltd (2012);* Pearson, M. (2014). Offensive Expression and the Workplace. *Industrial Law Journal*, 43 (4), 449.

Iako je ovde reč o povredi prava (ili ugleda) drugog subjekta, a ne poslodavca, smatra se da, posredno, takvo ponašanje ostavlja i negativne reperkusije po samog poslodavca. Jer, nesumnjivo da poremećeni kolegijalni odnosi mogu imati samo negativan uticaj na izvršavanje poslova i radnih zadataka zaposlenih i organizaciju rada kod poslodavca. Pored toga, takvim ponašanjem zaposlenog otškrinuta su vrata za postojanje zlostavljanja na radu.[50]

Od svih slučajeva negativnih komentara i objava zaposlenog na društvenim mrežama onaj koji se najdirektnije odnosi na poslodavca zahteva i najveću opreznost u kvalifikovanju takvog ponašanja kao opravdanog razloga za otkaz jeste situacija gde „zaposleni ostavlja negativne komentare i objave o samom poslodavcu". Nije opravdan otkaz svaka situacija u kojoj zaposleni na društvenim mrežama u negativnom kontekstu govori o poslodavcu. Najpre, negativni komentari kojima se ukazuje i na nezakonito postupanje od strane poslodavca ne samo da nisu legitimni razlog za otkaz, već upravo suprotno, takav zaposleni uživa zaštitu u smislu i pod uslovima regulative o uzbunjivanju.[51]

Kao najdelikatniji slučaj otkazivanja ugovora o radu vidimo situaciju u kojoj zaposleni na platformama za društveno umrežavanje govori kritički ili u negativnom kontekstu o poslodavcu, pri čemu ne ukazuje na njegovo nezakonito postupanje.[52] U ovoj situaciji se sudaraju sloboda izražavanja zapo-

[50] Zakon o sprečavanju zlostavljanja na radu u čl. 6. st. 1. određuje zlostavljanje na radu kao „svako aktivno ili pasivno ponašanje prema zaposlenom ili grupi zaposlenih kod poslodavca koje se ponavlja, a koje za cilj ima ili predstavlja povredu dostojanstva, ugleda, ličnog i profesionalnog integriteta, zdravlja, položaja zaposlenog i koje izaziva strah ili stvara neprijateljsko, ponižavajuće ili uvredljivo okruženje, pogoršava uslove rada ili dovodi do toga da se zaposleni izoluje ili navede da na sopstvenu inicijativu raskine radni odnos ili otkaže ugovor o radu ili drugi ugovor", dok u st. 3. istog člana stoji: „Izvršiocem zlostavljanja smatra se poslodavac sa svojstvom fizičkog lica ili odgovorno lice kod poslodavca sa svojstvom pravnog lica, zaposleni ili grupa zaposlenih kod poslodavca, koji vrši zlostavljanje iz st. 1. i 2. ovog člana."

[51] Pitanje uzbunjivanja u našem pravu regulisano je Zakonom o zaštiti uzbunjivača, *Službeni glasnik RS*, br. 128/2014, gde u čl. 2. određuje ključne pojmove. Tako, uzbunjivanjem se smatra „otkrivanje informacije o kršenju propisa, kršenju ljudskih prava, vršenju javnog ovlašćenja protivno svrsi zbog koje je povereno, opasnosti po život, javno zdravlje, bezbednost, životnu sredinu, kao i radi sprečavanja štete velikih razmera"; uzbunjivač je „fizičko lice koje izvrši uzbunjivanje u vezi sa svojim radnim angažovanjem, postupkom zapošljavanja, korišćenjem usluga državnih i drugih organa, nosilaca javnih ovlašćenja ili javnih službi, poslovnom saradnjom i pravom vlasništva na privrednom društvu"; dok se poslodavcem u smislu pomenutog zakona smatra „organ Republike Srbije, teritorijalne autonomije ili jedinice lokalne samouprave, nosilac javnih ovlašćenja ili javna služba, pravno lice ili preduzetnik koji radno angažuje jedno ili više lica". O pojmu uzbunjivanja i regulativi u Republici Srbiji vidi kod: Kovačević, LJ. (2015). Odnos između sistema unutrašnjeg i spoljašnjeg uzbunjivanja i osobenosti zaštite zaposlenog uzbunjivača u okviru njih. *Radno i socijalno pravo*, XIX (2), 39–62; Jovanović, P. (2018). *Radno pravo*. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu, 278–284.

[52] Da i negativni komentari uživaju zaštitu u smislu slobode izražavanja potvrđuje i Evropski sud za ljudska prava u predmetu *Lingens v. Austria* (App. No. 9815/82), 8. 7.

slenog i sloboda preduzetništva poslodavca. Pitanje je koji interes (tj. sloboda) ovde preteže. Nije moguće dati jednoznačan odgovor, zato što bi koordinate za rešavanje sukoba ovih dveju sloboda trebalo tražiti u okolnostima svakog konkretnog slučaja. Ipak, u teoriji figuriraju različiti kriterijumi kojima bi sudovi trebalo da se vode prilikom donošenja odluke čiji će legitimni interes prevagnuti u konkretnom slučaju.[53] Među njima tri ključna kriterijuma bila bi: 1) istinitost negativnih komentara ili kritika o poslodavcu; 2) koji zaposleni i u kom kontekstu daje negativne komentare i objave o poslodavcu (npr. veći stepen zaštite slobode izražavanja postoji kod komentara ili objava koje dolaze od strane sindikalnog predstavnika, ili u kontekstu sindikalnih tema);[54] i 3) stepen uvredljivog sadržaja u konkretnom komentaru ili objavi.

Dakle, da bi se aktivnost zaposlenog na društvenim mrežama mogla smatrati opravdanim razlogom za otkaz, da se zaključiti da je tu zapravo reč o upotrebi slobode izražavanja suprotno svrsi zbog koje je ustanovljena. Tako, zloupotreba slobode izražavanja je ta koja dovodi do štetnih posledica po poslodavca i samo tada ima ishodovati opravdanim razlogom za otkaz.

ZAKLJUČAK

Upotreba softvera za praćenje rezultata rada zaposlenih temelji se na legitimnom interesu poslodavca koji se tiče povećanja produktivnosti. Jer, što je veća produktivnost zaposlenih, veći je i profit poslodavca. A profit je glavni razlog zbog kojeg poslodavac stupa u radni odnos sa zaposlenim. Ipak, u ovoj situaciji, legitiman interes poslodavca ograničen je podjednako legitimnim interesom zaposlenog za poštovanjem njegovih ljudskih prava na radnom mestu, jer

1986. gde u para. 41. presude između ostalog stoji da se sloboda izražavanja odnosi „ne samo na informacije ili ideje koje se povoljno primaju ili smatraju neuvredljivim ili su predmet ravnodušnosti, nego i one koje vređaju, šokiraju ili uznemiravaju. To su zahtevi pluralizma, tolerancije i širokoumnosti bez kojih nema demokratskog društva."

[53] Mantouvalou, V. (2019). „I Lost My Job over a Facebook Post: Was that Fair?" Discipline and Dismissal for Social Media Activity. *International Journal of Comparative Labour Law and Industrial Relations*, 35 (1), 122*;* Del Punta, R. (2019). Social Media and Workers' Rights: What Is at Stake?. *The International Journal of Comparative Labour Law and Industrial Relations*, 35 (1), 94–95; Wragg, P. (2015). Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle*. Industrial Law Journal*, 44 (1), 15–19; Alonso, D. A. (2018). Social Media in the Employment Relationship Context: A Typology of Emerging Conflicts, and Notes for the Debate. *Comparative Labor Law Policy Journal*, 39 (2), 305–306.

[54] Jasno je da okolnost da je zaposleni sindikalni predstavnik ili su komentari u sindikalnom kontekstu ne abolira zaposlenog u svakoj situaciji. S tim u vezi videti više u odluci Evropskog suda za ljudska prava u predmetu *Palomo Sánchez and others v. Spain* (App. №. 28955/06, 28957/06, 28959/06, 28964/06), od 12. 9. 2011. godine.

obim nadzora koji se sprovodi putem izloženih softvera može bitno povrediti pre svega pravo na privatnost zaposlenog. S tim u vezi, prilikom implementacije ovih softvera u proces rada kod poslodavca neophodno je poštovati zahteve principa transparentnosti i proporcionalnosti manifestovanih u odluci Evropskog suda za ljudska prava u predmetu *Barbulesku protiv Rumunije*.

Nakon pitanja implementacije navedenih softvera obradili smo pitanje otkaza ugovora o radu od strane poslodavca na osnovu pokazatelja do kojih se dolazi putem ovakvih softvera. Ovde smo analizirali dva otkazna razloga.

Prvi se tiče otkaza ugovora o radu kada zaposleni ne ostvaruje rezultate rada ili nema potrebna znanja i sposobnosti za obavljanje poslova na kojima radi. Na ovom mestu izveli smo zaključak da otkaz iz razloga neostvarivanja rezultata rada može biti zakonit samo ukoliko zaposleni u uobičajenim uslovima rada duži vremenski period nije ostvario realne i unapred određene rezultate u svom radu, a iz subjektivnih razloga.

Drugi se tiče otkaza ugovora o radu zbog povrede radne obaveze ili nepoštovanja radne discipline. Suštinski, reč je o situaciji kada poslodavac zahvaljujući upotrebi softvera za praćenje rezultata rada ustanovi da se konkretni zaposleni u radno vreme bavio stvarima koje nemaju veze sa njegovim opisom poslova, s tim da smo u fokus posebno stavili aktivnosti zaposlenih na društvenim mrežama. Ove aktivnosti analizirali smo kroz prizmu granica slobode izražavanja zaposlenog posredstvom društvenih mreža u odnosu na slobodu preduzetništva poslodavca. Na ovako postavljeno pitanje nije moguće dati jednoznačan odgovor, iz razloga što bi isti pretežno zavisio od okolnosti svakog konkretnog slučaja. Ipak, ukazali smo na teorijske stavove o kriterijumima kojima bi sudovi mogli da se vode prilikom donošenja odluke o postavljanju granica u konkretnom slučaju. Među njima, tri ključna kriterijuma bila bi: 1) istinitost negativnih komentara ili kritika o poslodavcu koje zaposleni objavljuje na društvenim mrežama; 2) koji zaposleni i u kojem kontekstu daje takve negativne komentare i objave o poslodavcu (npr. veći stepen zaštite slobode izražavanja postoji kod komentara ili objava koje dolaze od strane sindikalnog predstavnika, ili u kontekstu sindikalnih tema); i 3) stepen uvredljivog sadržaja u konkretnom komentaru ili objavi.

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THE USE OF SOFTWARE FOR MONITORING EMPLOYEES' WORK PERFORMANCE AND THE TERMINATION OF EMPLOYMENT**

ABSTRACT: The widespread use of information technologies has significantly changed how people live and work. Modern production links cannot be imagined without the presence of various IT solutions in the work process. Their main feature is that they speed up and facilitate the work process itself, making it more productive. However, the use of such technology also raises various legal issues. One of them concerns the application of various software solutions for monitoring employees' work. The data obtained by the employer using such software solutions can lead to termination. This paper attempts to point out the key labour law issues in the termination of employment contracts due to the use of various software for monitoring the performance of employees, as well as to offer answers to overcome them.

Keywords: termination, monitoring, software for monitoring the performance of employees

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INTRODUCTORY REMARKS

The development of information technologies has brought about significant changes in relation to the ways in which we live and work. The contemporary relations of production are to a significant degree based on the use of different digital solutions. Even though such solutions facilitate and speed up the process of production, their use does not come without certain (legal) risks. Part of those risks is connected to the realization and protection of the rights of employees on the basis of their work. Moreover, in labour law theory, it is stressed that the digitalization of the relations of production changes the economic and organizational environment of the labour relations and the emerging socio-economic circumstances result in the destabilization of the employment relation, among other things.[2] No institute of the employment relation has remained immune to the problems caused by the application of information technologies in the labour process, and the institute of the termination of employment is not an exception. The question of the termination of the employment relation is one of the most significant ones in the sphere of labour law. After all, the identity of labour law as a branch of law is reflected in the legal regime of the termination of employment relation because one of the integral elements of the right to work is the stability of employment, while taking into account the interests of the employer.[3] In that regard, we will first analyse the key aspects of the termination of the employment relation in the legal system of the Republic of Serbia, and then, we will introduce the use of different software solutions through which the employer tracks the employees' results. After that, we will point out the legal problems that are caused by the application of these technologies in our legal system pertaining to the termination of the employment contract on the part of the employer.

ON THE TERMINATION OF THE EMPLOYMENT RELATION

The employment relation can be terminated only in the presence of facts that the legal system associates with the possibility or inevitability of the termination of employment relation.[4] In the Republic of Serbia, the legal regime of the termination of the employment relation is regulated in the Employment

[2] Jašarević, S. (2013). Radni odnos – tendencije u praksi i regulativi. *Collected Papers of the Faculty of Law in Novi Sad*, XLVII (3), 243.

[3] Lubarda, B. (2012). *Radno pravo: Rasprava o dostojanstvu na radu i socijalnom dijalogu*. Belgrade: Faculty of Law, University of Belgrade, 718.

[4] Šunderić, B., Kovačević, LJ. (2017). *Radno pravo: priručnik za polaganje pravosudnog ispita*. Belgrade: Official Gazette, 355.

Act (hereinafter: the Act).[5] This means that all the reasons or cases in which the employment relation can be terminated are prescribed in the Act.[6] One set of these reasons which our legal system associates with the possibility of terminating the employment relation is the will of its subjects. Since the legal relation is primarily a voluntary relation, it is logical that the duration of this relation depends in the first instance on the wills of the subject of that relation.[7] Thereby, the consensus of the employee and the employer figures as the most logical way of terminating the employment relation because this is the same way in which the employment relation came into existence.[8] In addition to the consensus of the subjects of the employment relation, a unilateral expression of will of one of the subjects can lead to the termination of the employment relation. This, of course, refers to the act of dismissal. The will for the termination of the employment relation can be expressed by both the employer and the employee. However, we must point out that the unilateral expression of the will is not absolute, i.e., by itself, it cannot lead to the termination of employment. In order for the expression of the will by one side to truly result in the termination of the employment relation, it is necessary that it meets the requirements prescribed in the Act. In this regard, there is a certain asymmetry in the authorities of the subjects of the employment relation.[9] The conditions of the legal effects of employment termination on the part of the employee are defined quite loosely.[10] On the other hand, the Act contains detailed rules of both material and procedural character,[11] the respect of which

[5] Employment Act, Official Gazette of the Republic of Serbia, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – Decision of the Constitutional Court, 113/2017 and 95/2018 – official interpretation.

[6] Article 175 of the Act.

[7] Jovanović, P. (2012). *Radno pravo*. Novi Sad: Faculty of Law, University of Novi Sad, 314.

[8] Consensual termination of the employment relation is regulated by Article 177 of the Act.

[9] Kovačević, Lj. (2016). *Valjani razlozi za otkaz ugovora o radu.* Belgrade: Faculty of Law, University of Belgrade, 133.

[10] Pursuant to Article 178 of the Act, in order for the termination of the employment agreement on the part of the employee to be valid, they need to submit their statement of termination to the employer in written form and observe the termination period which presupposes that they continue to carry out their work obligations defined in their employment agreement for at least 15 and at most 30 days from the day when the statement of termination was submitted, depending on the length of the termination period defined in the employer's corporate bylaws or the employment agreement.

[11] Termination of the employment agreement on the part of the employer is regulated in Articles 179 and 191 of the Act. The notion of material rules primarily refers to the rules about the justifiability of the particular reason for termination while procedural rules refer to the actions that the employer needs to carry out in order to ensure the legality of the procedure for establishing the existence of the reason for termination.

is a necessary condition for a lawful termination of employment on the part of the employer. After all, this form of employment termination represents one of the most complex questions of labour law. This is illustrated quite effectively by several facts. First, the international standards on the termination of the employment relation had only been adopted in 1982 in the form of the Termination of Employment Convention No. 158. pertaining to the termination of employment at the initiative of the employer (hereinafter: Convention 158).[12] Not only was this convention adopted relatively late,[13] but it has not secured a large number of ratifications to date.[14] The cause of the abovementioned asymmetry lies in the unequal positions of the subjects of the employment relation, and it represents a kind of restriction of the power of the employer over the employee in the employment relation. This is, above all, a consequence of economic inequality because the employer introduces capital (in the form of the means of production), which represents a scarce resource in the labour marker, whereby the employment relation represents only one way of capital accumulation for the employer. On the other hand, for the employee, the employment relation is the primary source of securing his or her means of existence.[15] This economic inequality of the subjects of the employment relation has its legal manifestation in the form of one of the more important elements of the employment relation, which is subordination. The essence of this element is the fact that the employee carries out his or her work under the authority of the employer while its content manifests itself through different legally recognized authorities of the employer which are categorized as normative, managerial and disciplinary authority.[16]

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[12] Serbia ratified this Convention: The Law on the Ratification of the Termination of Employment Convention No. 158, Official Gazette of the SFRY – international agreements, No. 4/1984.

[13] The first document pertaining to the termination of the employment relation was adopted by the International Labor Organization and this was the Termination of Employment Recommendation No. 119. from 1963. Almost 20 years later, the regulation of international standards in the domain of employment termination was completed by the adoption of Convention 158 and Recommendation 166 of the same name as a result of the recognition of contemporary circumstances in the field of sharp global competition and economic aspects that affected the stability of employment negatively. Pursuant to: *Employment protection legislation: Summary indicators in the area of terminating regular contracts – individual dismissals* (2015). ILO, 1. On the emergence of these documents of the International Labor Organization, see: Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: Faculty of Law, University of Belgrade, 203–215.

[14] By September 28, 2021, a total of 36 member states of the International Labor Organization ratified Convention 158.

[15] Jovanović, P. (2013). Interesni sukobi i socijalna stabilnost u sferi radnih odnosa. *Labor and Social Law,* (1). 38.

[16] It is precisely the subordination of the employee to the normative, managerial and disciplinary authorities of the employer that is considered the essential feature of legal

ON THE SOFTWARE USED FOR MONITORING THE RESULTS OF EMPLOYEES' LABOUR

The managerial authority of the employer comprises a set of authorities for issuing orders and instructions for work to the employees. An important segment of the managerial authority of the employer comes down to his supervisory powers. They enable the employer to secure control over the labour process. However, what the employer is primarily interested in is the consequence of that process or the results of labour. This is because better results of labour mean higher productivity and consequently higher profits for the employer.

When it comes to monitoring productivity or the results of employees' work, there are numerous software solutions that use different criteria to calculate productivity. Some of those solutions start from the traditional idea that time is money, and they take time as the main criterion for calculating productivity (*time tracking software*).[17] These pieces of software function according to the principle of recording the amount of time that the employee spent on individual tasks.[18] On that basis, the software offers the employer a large number of possibilities for short-term and/or long-term analyses of the time spent on work and the results that were achieved. The second type of software solutions for tracking work productivity is based on collecting data about the frequency and timing of accessing the digital tools that employees use to carry out their work assignments.[19] Given that a large number of different kinds of data is collected in this manner,[20] the number of ways in which it can intersect is large as well, and, consequently, the array of possibilities for the analysis of employees' productivity is even broader than with software that only takes into account work time.[21]

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subordination, pursuant to: Kovačević, LJ. (2013). *Pravna subordinacija u random odnosu i njene granice*. Belgrade: Faculty of Law, University of Belgrade. 92 and 135.

[17] Examples of this kind of software are: *Proofhub* (www.proofhub.com), *DeskTime* (www.desktime.com), *Toggl* (www.toggl.com).

[18] For example, for how many minutes (and the exact time) during the work day the employee used software for email, for how many minutes they used programs for the processing of photography, sound, text, etc.

[19] Examples of this kind of software are: *Teramind* (www.teramind.co), or *Transparentbusiness* (www.transparentbusiness.com).

[20] The data that is collected is: how many times and at which time the employee accessed a particular application or document; data on the movement of a particular document through the information system of the employer as well as the use of portable devices (USB); the data on printing or attempted printing of particular documents; the manner of using programs for electronic mail; number of keyboard or mouse clicks per a defined unit of time, etc.

[21] On the basis of this data, the software makes different calculations about the productivity of the employees, identifies behavioural patterns in individual employees or

THE LEGALITY AND LEGITIMACY OF THE USE OF SOFTWARE FOR MONITORING THE RESULTS OF EMPLOYEES' WORK

The tendency to implement contemporary software solutions that enable detailed monitoring of employees' work is based on the legitimate interest of employers regarding the maximization of productivity. As we pointed out, increased productivity is associated with higher profits, which is simultaneously the main reason why the employer enters the employment relation with the employee. However, here, the legitimate interest of the employer is constrained by the equally legitimate interest of the employee for the respect of their human rights in the workplace.[22] Precisely in this regard, we recognize the special role of labour law. This role is reflected in the need to create a balance between these two mutually conflicting interests.[23] In this concrete case, the concern is about the rules which restrict the monitoring authority of the employer. These rules need to secure the application of the principle of transparency,[24] as well as the principle of proportionality,[25] in the use of different software solutions for the purpose of monitoring the work of employees. All of this is to achieve the goal of protecting the fundamental human rights in the workplace, primarily the right to privacy. Comparatively speaking, at the national level, national legislatures lack cogent legal rules that would regulate the question of monitoring employees' work,[26] and the approach in our country is not an exception.[27]

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groups of employees and gives recommendations on how to improve the productivity of each employee.

[22] Kovačević, LJ. (2013). Radnopravna zaštita građanskih sloboda i prava zaposlenih na mestu rada – prodor demokratskih vrednosti u svet rada ili kompenzacija za veću nesigurnost zaposlenja? *Teme*, XXXVII (4), 1595–1596.

[23] Jovanović, P. (1993). Sukovi interesa radnika i poslodavaca kao uzrok prava. *Matica Srpska Journal for Social Sciences*, (95), 307–313.

[24] The principle of transparency requires that the employees be familiarized with the existence of monitoring of their work as well as the maner and duration of monitoring. For more, see: Kovačević, LJ. (2010). Radni odnos i pravo na poštovanje privatnog života. Proceedings from the workshop "The realization and Protection of Social Rights", Zlatibor, 175.

[25] The principle of proportionality requires that the restrictions on the monitoring authority be proportional to the goal that they aim to accomplish. See: Davidov, G. (2012), The principle of proportionality in labor law and its impact on precarious workers. *Comparative Labor Law & Policy Journal*, 34 (1), 63–64.

[26] Still, positive examples are present in Austria, the United Kingdom, Luxembourg, Finland, Slovakia and Portugal.

[27] Nonetheless, we want to draw attention to the Manual of Rules for the Behaviour of Employers and Employees in Relation to the Prevention of Harassment in the Workplace, Official Gazette of the Republic of Serbia, No. 62/2010, where in Article 12, point

In the absence of cogent regulations regarding the question at hand, we would like to draw attention to the significance of the practice of the European Court of Human Rights (hereinafter: the Court). This Court ruled on cases regarding the restrictions on the monitoring authority of employers in the context of violations of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention).[28] Article 8 of the European Convention guarantees the respect of the private and family lives of individuals. First, in one of the cases that were carried out in relation to violations of Article 8 of the Convention, the Court emphasized that this article also pertains to the protection of privacy in the workplace.[29] In its praxis in relation to the application of Article 8 of the European Convention and pertaining to the protection of the right to privacy of employees with regard to the monitoring authority of the employer, the Court developed the concept of "reasonably expected privacy".[30] This notion refers to the degree of privacy that an employee can rely on according to the usual circumstances in the workplace, whereby the permissibility of monitoring is based on the duties of the employer to familiarize the employee with the fact that their work will be monitored in advance.[31]

One of the cases that is crucial for our subject matter is *Bărbulescu* v. *Romania*.[32] This is because in this decision, the European Court established the guidelines for the implementation of systems for monitoring employees' work. Those guidelines are related to the set of measure that need to be undertaken in order to secure the conditions for the enjoyment of the right to privacy in

4, the behaviours that are prohibited include: unjustified and excessive monitoring (Line 8) and unjustified and excessive use of cameras and other technical devices that enable control over employees (Line 12).

[28] Our country ratified this convention in The Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette of Serbia and Montenegro – international agreements, No. 9/2003.

[29] *Niemietz v. Germany* (App. no. 13710/88), December 16, 1992, paragraph 29.

[30] Even though this concept was initially developed in the practice of American courts, in Europe it has a significantly different meaning. On the development of the concept of reasonably expected privacy in American case law, see: Danilović, J. (2017). Pravo na privatnost zaposlenih. *Annals of the Faculty of Law in Belgrade*, 65 (2), 172–173. On the difference pertaining to this concept in the USA and in Europe, see: Dragićević, M. (2018). Savremene tehnologije i pravo zaposlenog na poštovanje privatnog života. *Annals of the Faculty of Law in Niš*, (80), 426–427; Evans L. (2007). Monitoring Technology in the American Workplace: Would Adopting English Privacy Standards Better Balance Employee Privacy and Productivity. *California Law Review*, 95 (4), 1115–1149, 1140.

[31] See: *Halford v. The United Kingdom* (App. no. 20605/92), June 25, 1997*,* paragraphs 43 and 45; *Copland v. The United Kingdom* (App. no. 62617/00), April, 03, 2007, paragraph 42.

[32] *Bărbulescu v Romania* (App. no. 61496/08), September 05, 2017.

the workplace. Those measures include: a) that employees need to be notified about the possibility that their work will be monitored and the nature of this monitoring itself, before any measures are implemented in the work process; b) that employees need to be notified about the scope of monitoring (e.g. whether only the time of sending/receiving messages is monitored or their content is monitored as well); c) that justified reasons that allow the employer to introduce monitoring measures be established in advance; d) that an evaluation regarding the feasibility of other means of monitoring that would threaten employees' privacy less while fulfilling the same purpose be carried out first; e) that the purposes for which the data will be collected through monitoring be determined first; f) that the appropriate measures for protection be made available to the employees in order to secure that the employer cannot be acquainted with the content of the communication that an employee engages in in the workplace, unless they are notified about it in advance.[33]

Therefore, given the absence of cogent regulations about the implementation of monitoring employees' work, the respect of the presented guidelines from *Bărbulescu* v. *Romania* can be seen as conditions for the legality of the use of software solutions for tracking the results of employees' work.

SOFTWARE FOR MONITORING THE RESULTS OF EMPLOYEES' WORK AND GROUNDS FOR TERMINATION

In the previous section, we explained what the ways in which an employer needs to conduct monitoring over the work of the employees in order to secure the legality of the data obtained in this way are. Here, we will focus on the question of how the data that is collected through the use of software for monitoring the results of the work of employees can lead to the termination of the employment agreement. Starting from Article 179 of the Act which regulates the grounds for the termination of an employment agreement on the part of the employer, we identify two cases in which it is possible to terminate an employment agreement on the basis of the data collected through the use of the abovementioned software solutions. These are failure to achieve the necessary results or a lack of knowledge and skills that are necessary for the tasks that the employee is entrusted with, from Article 179, Paragraph 1, Line 1 of the Act and violations of work obligations or the neglect of work discipline from Article 179, Paragraphs 2 and 3 of the Act.

[33] Para. 121 of the verdict. On *Bărbulescu v Romania*, see: Božičić, D. (2018), Granice poslodavčevih nadzornih ovlašćenja u odnosu na zaštitu prava na privatnost zaposlenih. *Labor and Social Law*, XXII (2), 100–102.

Termination of the employment agreement when the employee fails to achieve work results or does not possess the necessary knowledge and skills to carry out the tasks that are assigned to them

In Article 179, Paragraph 1, Line 1 of the Act, the failure to achieve work results and the lack of necessary knowledge and skills for carrying out the assigned tasks are formulated as one reason for termination. However, we can make a distinction between these two reasons. The main distinction is that the latter reason cannot be considered the fault of the employee. Therefore, the employee has the will to work, but simply does not have the necessary qualifications to carry out the tasks that are prescribed by the employment agreement. The other case is when the employee does possess the skills and knowledge needed for work, but because of their attitude towards work does not achieve the expected results. Still, what seems to be the rationale for why our legislators decided to formulate them as one reason is because, often, the expected results are not achieved due to a lack of the necessary qualifications. Even with the noted differences, the Act treats these cases as a single reason for termination.

Essentially, here we are dealing with a situation in which through the use of software for monitoring the results of employees' work, the employer reaches the conclusion that the employee in question does not achieve the appropriate results. Thereby, the question that arises is what the appropriate results of work are, i.e. what are the results that are defined as the parameters for assessing the results of a particular employee's work. In relation to this, Professor Kovačević points out that "the failure to achieve the results of work cannot constitute a justified reason for termination if the results that the employee was supposed to achieve were not realistic (achievable)."[34] Besides, she adds that the expected results must be objectively defined in advance, i.e. "the metrics that are used to quantify the achievement of the results of work must be defined in advance."[35] On top of this, in order for this reason for termination to be justified, it is necessary for the employer to determine whether the employee was solely responsible for failing to achieve the results of work.

In this regard, the court praxis took the position that financial parameters cannot be the only metric for the failure to achieve the results of work.[36] Instead, all the objective circumstances in which the employee carried out

[34] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: Faculty of Law, University of Belgrade, 339.

[35] *Ibid.*, 340; Verdict of the Supreme Court of Serbia, Revision 4735/93 dated January 19, 1994.

[36] Verdict of the Court of Appeal in Novi Sad, Gž 1. 2044/12 dated September 10, 2012.

their work must be taken into consideration.[37] We consider this to be especially important in relation to the termination of the employment relation on the basis of the data collected through the use of previously presented software solutions for monitoring productivity. Because, having in mind the amount of data that the employer can collect using this kind of software, as well as the possibilities for analysing it, they need to be able to determine all the circumstances in which the results of the employee's work are or are not achieved.

We can conclude that the termination for reasons of failing to achieve the results of work can be legal only if the employee, under the usual circumstances in the workplace, for an extended period of time, failed to achieve realistic and predefined results for subjective reasons.[38] Even when the software that is used to monitor the ways and results of an employee's work shows that the employee did not achieve adequate results, the employer is not in the position to terminate the employment agreement immediately. The Act defines a procedure according to which the employer needs to notify the employee about the shortcomings of their work in written form and provide them with instructions to improve their work while giving a deadline after which the results of the employee's work will be evaluated again.[39] Only if it is established that the employee did not improve the results of their work before this deadline can the employer terminate the employment agreement. The purpose of these rules is that reasons for termination have to be objectively grounded, i.e. proven.[40]

Termination of employment based on the violation of a work obligation or work discipline

Even though there are certain differences between these two reasons for termination,[41] from a practical standpoint, the question of the legal qualifica-

[37] Živković, B. (2008). Otkaz ugovora o radu zbog nezadovoljavajućeg vršenja posla. *Labor and Social Law*, XII (1), 335–358.

[38] Tintić, N. (1969). *Radno i socijalno pravo: Knjiga prva – radni odnosi*. Zagreb: Narodne novine, 262.

[39] Article 180a of the Act.

[40] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: Faculty of Law, University of Belgrade, 342–343.

[41] Actions that are considered as violations of the work-related obligations are all actions or non-actions which violate the obligations of the employee stemming from their job description and which are, as such, determined in advance in the relevant sources of law. On the other hand, the violation of work discipline represents a much broader framework for the assessment of the behaviour of an employee as a reason for termination. Here, the topic is behaviour that is not defined as a violation of a work-related obligation in advance. Bearing in mind the legal definition of these notions (see Article 179, Paras. 2 and 3 of the Act), from the abovementioned, we conclude that the difference lies in the fact that the

tion of an employee's behaviour as a violation of a work obligation or work discipline is not crucial for the legality of the termination of an employment agreement. The crucial task of the employer is to determine the facts pertaining to the way in which the unacceptable behaviour of the employee took place, and in the case of a potential labour dispute, the court can change the qualification of the reason for termination provided that the facts are properly and thoroughly established.[42]

Here, the subject is a situation in which the employer establishes, using software for monitoring the results of employees' work, that the employee was engaged in activities that are not related to their job description during work hours. In this regard, increased attention, from both the general and expert public, is devoted to the question of whether employees can be punished by the termination of employment because of their activity on social media.[43]

It is clear that not every activity that the employee carries out on social media, either during or outside of work hours, can result in the termination of employment. This applies even if an action of that sort were defined as a violation of the work obligations in the employer's corporate bylaws. This is because the violations of work obligations cannot be arbitrarily defined by the employer because it is considered unacceptable to place the employee in a state of "permanent fear of unexpected punishment or (sudden) loss of employment."[44]

In order to be able to qualify a particular activity that an employee carries out on social media as the reason for termination, this activity has to have a negative impact on the legitimate interests of the employer. Since the activities on social media manifest themselves through comments, photographs, video clips, etc., in which employees express their attitudes regarding personal or social issues, the first constraint on the legitimate interests of the employer can be seen in the legitimate interests of the employee to express their views freely.[45]

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behaviours that can be qualified as violations of work-related obligations are only those behaviours that are defined as such by the Act, corporate bylaws or the employment agreement, while violations of work discipline can also be the behaviour of the employee which is not prescribed as a violation of work discipline but it is of such a nature that the employer cannot be expected to keep the employer in the labour process following such action.

[42] Trifunović, P. (2015). Novi Zakon o radu – dva sporna pitanja subordinacije. *Bulletin of the Supreme Court of Cassation*, (3), 264.

[43] Alonso D. A. (2018). Social Media in the Employment Relationship Context: A Typology of Emerging Conflicts, and Notes for the Debate. *Comparative Labor Law Policy Journal*, 39 (2).

[44] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: Faculty of Law, University of Belgrade, 355.

[45] The freedom of thought is actually the freedom of expressing thought, and human beings have a natural right to think. The consequence of freedom of thought is that citi-

Freedom of expression is guaranteed both in the Constitution of the Republic of Serbia[46] as well as the European Convention.[47] Starting from the fact that the labour that an employee provides is inseparable from the entirety of the employee's personality, and the fact that freedom of expression is one of the fundamental human rights, it is undoubtedly the case that, as such, it is present in the employment relation as well. However, both sources prescribe some limitations on freedom of expression[48] and the main limitation is the protection of the rights and reputations of other individuals. Here, the crucial question concerns defining the boundaries of the freedom of expression of the employee on the social media in relation to the reputation of the employer.[49]

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zens are able to publicly express their worldviews, and their attitudes and opinions about people, situations and events. Even if it were not protected by the Constitution, freedom of though is inherent to every human being as *homo sapiens* and a property of the species as a psycho-physical being. Marković, R. (2014). *Ustavno pravo*. Belgrade: Faculty of Law, University of Belgrade, 478.

[46] The provision in Article 46, Paragraph 1 of the Constitution reads: "Freedom of thought and expression is guaranteed as well as the freedom to seek, receive and spread ideas by means of speech, writing, image or in other ways."

[47] The provision in Article 10, Paragraph 1 of the European Convention reads: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

[48] The provision in Article 46, Paragraph 2 of the Constitution reads: "Freedom of expression can be restricted by law if doing so is necessary in order to protect the rights and reputations of others, preservation of the authority and impartiality of courts and the protection of public health, morals of a democratic society and national security of the Republic of Serbia."

The provision in Article 10, Paragraph 2 of the European Convention reads: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[49] The Court of Appeal decided on the appeal to the verdict of the Basic Court in Kikinda, No. 2 II1.94/16 dated March 03, 2017, in a case in which an employee sued their employer for unlawful termination. The employee's employment agreement was terminated because they posted a photograph on their *Facebook* profile, taken with a mobile phone in a part of a manufacturing plant where notifications prohibiting recording and taking photographs were displayed clearly on several locations. The photograph was posted with a negative comment about the labour conditions in the company even though the photograph was captured during an irregular event following the repairs of the ventilation system. The Basic Court dismissed the plaintiff's claim; however, the Court of Appeal overturned the decision by stating that the posted photograph, among other things, "does not represent an act of violating work discipline due to which the employee cannot continue to work for

To conclude, only in situations in which the activities that employees undertake on social media exceed the scope of freedom of expression and as such result in damage to the reputation and the rights of the employer, one can consider it a violation of work discipline, and, consequently, a justification for termination. In that sense, we identify three situations in which the abovementioned circumstances can fulfilled, with the observation that comments and posts that employees make on social media, in terms of content, contain negative connotations towards those individuals they pertain to.

First, here we can see a case where the

> „...employee makes negative comments and posts about the clients and/or business associates of the employer."

Undoubtedly, in this way, the reputation of the employer in business circles is harmed, which consequently reflects poorly on their subsequent business ventures, i.e. profits. Since profits are the main legitimate interest of the employer, in this case, the abovementioned activity of the employee directed towards the employer's clients can be seen as a justified reason for termination in the sense of a violation of work discipline.

In addition, in this way, the relationship of trust and loyalty between the employer and the employee is seriously threatened. It is precisely the work relationship with the employer that allowed the employee to come into contact with the clients in the first place, and, subsequently, by making such negative comments on social media, the employee violated the trust provided to them by virtue of employment and the assignment of the particular client. Due to these reasons, the described activity of the employee on social media can be considered a form of behaviour after which the employer cannot be expected to retain the employee in the employment relationship.

In line with the same conclusion, one can view situations in which

> „negative comments or posts on social media platforms pertain to colleagues or other employees with the same employer.[50]"

Even though here we are dealing with a violation of the right (or reputation) of another person, and not the employer, it is considered that this behaviour indirectly has negative repercussions for the employer. Because,

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the employer, but an act of freedom of expression which is not subject to the conditions, restrictions and punishments in the interest of protecting the rights and reputations of others in the sense of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms." Verdict of the Court of Appeal in Novi Sad, Gž1. 2044/12 dated September 10, 2012.

[50] On an illustrative example in English praxis, see the case *Teggart v. TeleTech UK Ltd (2012);* Pearson M. (2014). Offensive Expression and the Workplace. *Industrial Law Journal*, 43 (4), 449.

undoubtedly, strained work relationships have a negative impact on the execution of tasks and work assignments of the employees and the employer's work organization. In addition, this kind of behaviour of the employee opens the door to harassment in the workplace.[51]

Out of all the potential cases of negative comments and posts of employees on social media, the cases that are directly related to the employer demand the highest degree of caution when it comes to qualifying these behaviours as reasons for termination, and these are situations in which an employee *makes negative comments and posts directly about the employer*. Not every termination based on a situation in which an employee speaks negatively about the employer on social media is justified. First of all, negative comments in which one points to illegal actions on the part of the employer are not only not illegitimate reasons for termination, but to the contrary, such an employee enjoys legal protection in the sense of regulations pertaining to whistleblowing.[52]

The most delicate case of employment termination is the situation in which an employee uses social media platforms to speak critically about the employer without pointing out their illegal actions.[53] In this situation, there

[51] The Law on the Prevention of Harassment in the Workplace, Article 6, Paragraph 1 defines harassment as "every active and passive behaviour towards an employee or a group of employees in a company which is repeated on multiple occasions and which has as its goal or represents a violation of dignity, reputation, professional integrity, health, or status of an employee and which causes fear or creates hostility, a humiliating or insulting environment, worsens labour conditions or leads to an employee's isolation or causes them to terminate their employment or cancels a labour contract or some other agreement," while Article 3 of the same Act reads, "The following persons will be considered as perpetrators of harassment: the employer as a natural person or a responsible person in the employer's company as a natural person, an employee or a group of employees who carry out harassment from Articles 1 and 2 of this Act".

[52] The question of whistleblowing in Serbian law is regulated in the Law on the Protection of Whistleblowers, Official Gazette of the Republic of Serbia, No. 128/2014, where Article 2 defines the crucial notions. Thereby, under whistleblowing, the law refers to "making public information about the violations of regulations, violations of human rights, carrying out public office in a manner that contradicts the purpose of that office, threats to life, public health, security, the environment as well as for the purposes of preventing large-scale damage"; the whistleblower is "a natural person who carries out whistleblowing in relation to their professional work, the process of employment, the use of the services of the state and other bodies, holders of public office and authorities, business relations or property rights over a corporation"; while the employer is "an organ of the Republic of Serbia, provincial autonomous body or a unit of local self-government, holder of public authority or a public service, legal person or an entrepreneur who employs one or more people." On the notion of whistleblowing in the regulations of the Republic of Serbia. see also: Kovačević, LJ. (2015). Odnos između sistema unutrašnjeg i spoljašnjeg uzbunjivanja i osobenosti zaposlenog uzbunjivača u okviru njih. *Labor and Social Law*, XIX (2), 278–284.

[53] The fact that even negative comments are protected in the sense of the freedom of expression is confirmed by the European Court of Human Rights in the case *Lingens v.*

is a conflict between the employee's freedom of expression and the employer's freedom to conduct business. The question is which interest (or which freedom) is privileged. It is not possible to give a uniform answer here, because he solution for the conflicts between two freedoms should be sought in the circumstances of each particular case. Still, in jurisprudence, there are different criteria by which the courts should abide when making decisions about whose legitimate interests will hold sway in a particular case.[54] Among those, three crucial criteria would be (1) the truthfulness of the negative comments and criticisms of the employer; (2) which employee and in which contexts made the negative comments about the employer in question (e.g. a higher degree of protection is provided to comments and posts that are made by a union representative in the context of topics related to the activities of unions)[55]; and (3) the degree of insulting content in the particular comment or post.

Therefore, in order for the activity of an employee on social media to be considered a justified reason for termination, it has to contradict the reasons why freedom of expression was established in the first place. In that sense, it is the abuse of the freedom of expression that leads to harmful consequences for the employer that can result in a justified reason for termination.

CONCLUSION

The use of software for monitoring the work of employees is based on the legitimate interest of the employer that relates to increasing productivity;

Austria (App. No. *9815/82*), July 08, 1986, where in Paragraph 41 of the verdict it is stated, among other things, that freedom of expression refers to "not just information or ideas that are received positively or are not considered insulting or are subject to indifference, but also those that insult, shock, and provoke. These are the requirements of pluralism, tolerance and open-mindedness without which a democratic society cannot exist."

[54] Mantouvalou, V. (2019). 'I Lost My Job over a Facebook Post: Was that Fair?' Discipline and Dismissal for Social Media Activity. *International Journal of Comparative Labour Law and Industrial Relations*, 35 (1), 122; Del Punta, R. (2019). Social Media and Workers' Rights: What Is at Stake?. *The International Journal of Comparative Labour Law and Industrial Relations*, 35 (1), 94–95; Wragg, P. (2015). Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle. *Industrial Law Journal*, 44 (1), 15–19; Alonso, D. A. (2018). Social Media in the Employment Relationship Context: A Typology of Emerging Conflicts, and Notes for the Debate. *Comparative Labor Law Policy Journal*, 39 (2), 305–306.

[55] It is clear that the circumstance that the employee is a union representative or that the comments are made in the context of a discussions related to the activities of the union does not exculpate the employee in every situation. For more on this subject, see the decision of the European Court of Human Rights in *Palomo* Sánchez and others *v. Spain* (App. no. 28955/06, 28957/06, 28959/06, 28964/06), September 12, 2011.

the more productive the employees are, the more profits that the employer has. And profit is the main reason that an employer enters into an employment relation with an employee. Yet, in this instance, the legitimate interest of the employer is limited by the equally legitimate interest of the employee to have their human rights respected at their workplace, as the use of such software may seriously infringe on, primarily, the employee's right to privacy. In that context, during the implementation of the software in the work process, it is necessary to respect the principles of transparency and proportionality, as they are manifested in the decision of the European Court of Human Rights in the *Bărbulescu* v. *Romania* case.

After the issue of implementing the monitoring software, the issue of the termination of an employment relation by the employer based on the data that is obtained via the use of this type of software was discussed. Two reasons for termination were analysed.

The first relates to the termination of employment as a result of a failure by the employee to achieve work results or a lack of the necessary knowledge and skills for carrying out the assigned tasks. Here, it was concluded that termination due to failure to achieve results can only be legal if the employee, in the usual work conditions, does not achieve realistic and predefined results for a longer period of time because of subjective reasons.

The other relates to the termination of employment based on a violation of the work obligation or work discipline. In essence, this regards situations where an employer, via the use of monitoring software, establishes that a specific employee engaged in activities that are not related to their job during work hours, with a focus on employees' activities on social media. These activities were analysed through the prism of the limitations of the employee's freedom of expression on social media in relation to the freedom of entrepreneurship of the employer. There is no uniform answer when the issue is presented in this manner because it would depend on the circumstances of each concrete case. Still, we have noted the theoretical positions on the criteria that courts could use when adjudicating the limits in a concrete case. Among them, the three key criteria are: (1) the truthfulness of the negative comments and criticisms of the employer that the employee publishes on social media; (2) which employee and in which contexts makes the negative comments and posts about the employer (e.g. a higher degree of protection is provided to comments and posts that are made by a union representative or in the context of topics related to the activities of unions); (3) the degree of insulting content in the particular comment or post.

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