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## JUDICIAL PROTECTION OF WHISTLEBLOWERS\*\*

**ABSTRACT:** The Law on the Protection of Whistleblowers of the Republic of Serbia has been applied in court practice for almost ten years. Inspired by this fact, the author, relying on the existing normative framework and the positions taken in case law, addresses key issues relevant to the judicial protection of whistleblowers. These issues concern the application of the Law on the Protection of Whistleblowers, statutes of limitations for whistleblower protection, passive standing in whistleblower protection proceedings, court jurisdiction, the existence of a causal link between acts of whistleblowing and harmful actions, and, finally, interim measures for the protection of whistleblowers as the most effective means of whistleblower protection. In order to cover the application of the Law throughout the territory of the Republic of Serbia, the paper analyzes the case law of all four appellate courts in the country, as well as the practice of the Supreme Court.

**Keywords:** whistleblowers, judicial protection of whistleblowers, Law on the Protection of Whistleblowers, case law

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## INTRODUCTORY OBSERVATIONS ON THE LAW ON THE PROTECTION OF WHISTLEBLOWERS

On November 25, 2014, the National Assembly of the Republic of Serbia adopted the Law on the Protection of Whistleblowers (hereinafter: LPW),<sup>1</sup> which entered into force on the eighth day following its publication in the Official Gazette of the Republic of Serbia,<sup>2</sup> and has been applicable as of the expiry of six months from the date of its entry into force.<sup>3</sup>

In this way, the Republic of Serbia has comprehensively regulated, in a single statutory text, the whistleblowing procedure and the protection of this sensitive category of persons, in accordance with its obligations under the United Nations Convention against Corruption<sup>4</sup> and the Council of Europe Civil Law Convention on Corruption.<sup>5</sup>

There is hardly any need to emphasize the importance of adopting the LPW<sup>6</sup> because it provides protection to employees who decide, contrary to the duty of loyalty to the employer, to “blow the whistle” in situations where the employer<sup>7</sup> acts contrary to the public interest.<sup>8</sup>

<sup>1</sup> *Official Gazette of the RS*, No. 128/2014.

<sup>2</sup> That is, on December 4, 2014.

<sup>3</sup> Applicable as of June 5, 2015.

<sup>4</sup> Law on the Ratification of the United Nations Convention against Corruption, *Official Gazette of Serbia and Montenegro* – International Treaties, No. 12/2005.

<sup>5</sup> See: Law Confirming the Council of Europe Civil Law Convention on Corruption, *Official Gazette of the RS* – International Treaties, No. 102/2007; For more on international standards of whistleblower protection, see: Đurović, L. (2019). Analiza najboljih praksi zaštite uzbunjivača. *Administration and Public Policy*, 5(2), 48–54. For more on whistleblowers as a means of combating corruption, see: Dimovski, D., Kostić, M. (2019). Uzbunjivači kao sredstvo borbe protiv korupcije. *Pravni položaj uzbunjivača u uporednom i domaćem pravu (pravni i etički aspekti)*. *Zbornik radova sa okruglog stola*, 41–59. Banja Luka.

<sup>6</sup> The literature notes that, in the period from the beginning of the application of the LPW through June 30, 2018, 568 cases were received in disputes based on this law – Bilbija, V. (2020). Pet godina primene zakona o zaštiti uzbunjivača. *Izbor sudske prakse: stručno-informativni časopis*. 28(4), 10.

<sup>7</sup> This paper uses the term “employer” because the author addresses whistleblower protection from the perspective of labor law. However, it is important to note that, pursuant to the meaning of the terms in Article 2, paragraph 1, point 2 of the LPW, a whistleblower is not only a person who makes a report in connection with their employment and the hiring process, but also a person who makes a report in connection with the use of services of state and other bodies, holders of public authority or public services, business cooperation, and ownership rights in a company. On the comparative-law aspect of the concept of a whistleblower, see: Martić, M. (2016). Uporedno-pravni aspekti pojma uzbunjivač. *Strani pravni život. Teorija, zakonodavstvo, praksa*, 1, 201–214.

<sup>8</sup> For more on the duty of loyalty to the employer and the disclosure of information in the public interest, see: Kovačević, L.J. (2011). Cilj i smisao radnopravne zaštite „uzbunjivača“. *Kaznena redakcija u Srbiji. Tematska monografija [Part 1]*, 223–229.

Even before the adoption of the LPW, it was possible to provide whistleblowers with protection indirectly, through other regulations, such as ILO Convention No. 158 on Termination of Employment at the Initiative of the Employer.<sup>9</sup>

However, unlike the aforementioned Convention, which provides that filing a complaint or participating in proceedings against an employer for an alleged violation of laws or regulations, or addressing competent administrative authorities, shall not be considered a valid reason for termination of employment, the currently applicable LPW provides whistleblowers with protection not only against unlawful termination of employment, but against any harmful action suffered by whistleblowers.<sup>10</sup> The situation is identical to other regulations that only partially regulated this matter.<sup>11</sup>

Whistleblowing can be internal (disclosure of information to the employer), external (disclosure of information to a competent authority), and public (disclosure of information through the media, via the internet, at public gatherings, or in any other manner by which the information can be made available to the public).<sup>12</sup>

Article 26 of the LPW provides that a lawsuit for protection in connection with whistleblowing may seek:

- “1) a declaration that a harmful action has been taken against the whistleblower;
- 2) a prohibition of undertaking and repeating the harmful action;
- 3) removal of the consequences of the harmful action;
- 4) compensation for pecuniary and non-pecuniary damage;
- 5) publication of the judgment rendered upon the lawsuit on the grounds provided for in points 1) through 4) of this paragraph, in the media, at the expense of the defendant.”

In addition, paragraph 2 of the same article provides that in a lawsuit for protection in connection with whistleblowing, it is not possible to challenge

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<sup>9</sup> Law on Ratification of ILO Convention No. 158 on Termination of Employment at the Initiative of the Employer, *Official Gazette of the SFRY – International Treaties*, Nos. 4/84 and 7/91.

<sup>10</sup> In Art. 21 of the LPW, certain harmful actions are listed; the list is not exhaustive.

<sup>11</sup> For example, the Law on the Anti-Corruption Agency, *Official Gazette of the RS*, Nos. 97/2008, 53/2010, 66/2011 – decision of the Constitutional Court, 112/2013, 8/2015 – decision of the Constitutional Court, and 88/2019, whose provisions relate to public officials. For more on the state of legislation in this area prior to the adoption of the LPW, see: Kovačević, LJ. (2011). Novi standardi Saveta Evrope o zaštiti uzbunjivača. *Pravo i privreda. Časopis Udruženja pravnika u privredi SR Jugoslavije*, 48(1/3), 169–175; Lubarda, B. (2011). Posebna zaštita zaposlenog uzbunjivača – evropsko, uporedno i domaće pravo i praksa. *Pravni život. List za pravna pitanja i praksu*, 60(11), 435–450.

<sup>12</sup> Art. 12 of the LPW.

the lawfulness of an individual act of the employer deciding on the employee's rights, obligations, and responsibilities arising from employment.

A particular advantage afforded to whistleblowers by the LPW is the possibility of ordering an interim measure in accordance with the provisions of the law governing enforcement and security.<sup>13</sup> The importance of the possibility of ordering an interim measure is best reflected in the position of the Appellate Court in Niš that this is the most important part of the Law in terms of effectively preventing retaliation and temporarily eliminating harmful consequences for the whistleblower.<sup>14</sup>

## JUDICIAL PROTECTION OF WHISTLEBLOWERS

### Application of the Law on the Protection of Whistleblowers and Statutes of Limitations

As mentioned in the introductory observations, the LPW has been applicable as of the expiry of six months from the date of its entry into force, i.e., as of June 5, 2015.<sup>15</sup>

The Constitution of the Republic of Serbia<sup>16</sup> prohibits the retroactive effect of laws and other general acts, and stipulates that certain provisions of laws may be granted retroactive effect only if required by the public interest established at the time the law is adopted.<sup>17</sup>

Since the LPW does not provide for the retroactive effect of any of its provisions, it is clear that its provisions can only be applied prospectively, i.e., protection against harmful actions can be afforded to employees only in respect of acts of whistleblowing undertaken during the period in which the Law is applicable.

Although this is a general legal principle, courts in practice have not infrequently had the opportunity to draw plaintiffs' attention, in cases concerning protection against harmful actions, to the transitional and final provisions of the LPW.

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<sup>13</sup> Art. 32 of the LPW.

<sup>14</sup> Decision of the Appellate Court in Niš, Gž-uz 4/16, November 3, 2016; Judgment of the Appellate Court in Niš, Gž-uz 7/20, March 17, 2022. Although not explicitly mentioned in the cited decisions, probably because legal scholarship is not a source of law, an identical position is found in: Martić, M., Šarac, M. (2015). *Komentar Zakona o zaštiti uzbunjivača*. Belgrade: Službeni glasnik, 76.

<sup>15</sup> See Art. 40 of the LPW.

<sup>16</sup> *Official Gazette of the RS*, Nos. 98/2006 and 115/2021.

<sup>17</sup> Art. 197 of the Constitution of the Republic of Serbia.

For example, the Appellate Court in Kragujevac, although upholding a first-instance judgment on grounds unrelated to whistleblower protection, pointed out that the plaintiff had disclosed information about violations of regulations by the defendant before the LPW began to be applied, and that such acts cannot be considered acts of whistleblowing, nor can the plaintiff be regarded as a whistleblower within the meaning of the LPW.<sup>18</sup> In addition to plaintiffs, there have been instances where courts themselves did not take into account the transitional and final provisions of the LPW, which consequently led to an incorrect application of substantive law and the quashing of judgments.<sup>19</sup>

This does not mean that a person cannot acquire the status of a whistleblower and obtain protection under some other regulation, such as the Law on the Anti-Corruption Agency, provided that the conditions for protection under that law are met.<sup>20</sup>

It is also possible for plaintiffs to file a lawsuit seeking protection against multiple harmful actions, some of which were taken before the LPW began to apply and others after it became applicable. In such situations, it is appropriate to draw a temporal distinction between the acts of whistleblowing and harmful actions, and to apply the LPW only to those undertaken during the period in which it is applicable, as the Appellate Court in Niš did in one decision.<sup>21</sup>

It can be noted that this issue is primarily related to proceedings initiated in the first years of the implementation of the LPW. It could remain relevant only for a short time longer, given that June 5, 2025, marked the tenth anniversary of its application, and persons who took acts of whistleblowing before the start of its application will not be able to obtain protection due to the statutes of limitations for whistleblowing provided for in Article 5, paragraph 1, point 2 of the LPW.

Therefore, it is appropriate to note that a whistleblower is entitled to protection if they disclose information within one year from the day they learned of the action that is being reported, and no later than ten years from the day that action was taken.

Since, as stated, the statute of limitations is a condition for acquiring whistleblower status, the question may arise whether the burden of proving when the whistleblower learned of the action being reported lies with the employer or the employee. Case law has taken the position that the burden

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<sup>18</sup> Judgment of the Appellate Court in Kragujevac, GŽ1-uz 8/16, September 13, 2016.

<sup>19</sup> Decision of the Appellate Court in Kragujevac, GŽ1-uz 5/16, December 6, 2016.

<sup>20</sup> In that sense, see the judgment of the Supreme Court of Cassation, Rev2 1034/21, October 27, 2022.

<sup>21</sup> Judgment of the Appellate Court in Niš, GŽ-uz 2/24, March 11, 2024.

of proving when the employee learned of the action being reported lies with the employee.<sup>22</sup>

Given that the LPW prescribes special rules on the burden of proof only with respect to the causal link between the harmful action and the act of whistleblowing,<sup>23</sup> the courts correctly apply the rules on the burden of proof set out in Article 231, paragraphs 1 and 2 of the Law on Civil Procedure.<sup>24</sup>

The situation is identical with respect to the subjective time limit from Article 23, paragraph 2 of the LPW, which stipulates that judicial protection must be sought within six months from the day the person learned of the harmful action taken, or within three years from the day the harmful action was taken.

### **Disclosure of Information**

Under the statutory definition, whistleblowing means

“...disclosing information regarding a violation of regulations, a violation of human rights, the exercise of public authority contrary to the purpose for which it was conferred, a threat to life, public health, safety, the environment, as well as disclosure aimed at preventing large-scale damage.”<sup>25</sup>

From the above, it is clear that the purpose of whistleblowing is the protection of the public interest. This is also a substantive prerequisite that must be met for a whistleblower to obtain protection in court proceedings.<sup>26</sup>

Therefore, not every report constitutes whistleblowing. This is best illustrated by the positions taken in case law. Thus, the Appellate Court in Kragujevac emphasizes that a report by the plaintiff of unlawful conduct by his employer regarding the failure to issue a decision on the use of annual leave does not constitute an act of disclosing information aimed at protecting the public interest and the common good, and therefore does not give the plaintiff the right to protection.<sup>27</sup>

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<sup>22</sup> Judgment of the Appellate Court in Novi Sad, GŽ1-uz 1/20, May 12, 2020.

<sup>23</sup> Art. 29 of the LPW.

<sup>24</sup> *Official Gazette of the RS*, Nos. 72/2011, 49/2013 – decision of the Constitutional Court, 74/2013 – decision of the Constitutional Court, 55/2014, 87/2018, 18/2020, and 10/2023 – other law.

<sup>25</sup> Art. 2, para. 1, point 3 of the LPW.

<sup>26</sup> In that sense, see the judgment of the Appellate Court in Belgrade, GŽ1-uz 4/19, March 28, 2019, as well as the judgment of the Supreme Court of Cassation, Rev2-uz 2/17, June 22, 2017.

<sup>27</sup> Judgment of the Appellate Court in Kragujevac, GŽ1-uz 8/16, September 13, 2016.

Likewise, case law rightly points out that plaintiffs' objections regarding unpaid wages, which were not raised either in writing or orally with the defendant's director, cannot be considered an act of whistleblowing.<sup>28</sup>

This is not only because there is no public interest concerning unpaid wages, but also because for an act to qualify as whistleblowing, it must be carried out in the manner and through the procedure prescribed by law, which is another condition that constitutes a prerequisite for providing protection to a whistleblower. In this regard, particular attention should also be paid to the Rulebook on the method of internal whistleblowing, the method of designating an authorized person with the employer, and other issues relevant to internal whistleblowing with employers that have more than ten employees.<sup>29</sup>

Case law correctly points out that the fact that the plaintiff shared information that had already been publicly published via his profile on the social network "Facebook" does not constitute whistleblowing, given that the essence of such a post is not to remedy irregularities, nor can information that has already been disclosed be disclosed again. In this sense, the Appellate Court in Novi Sad states that the essence of whistleblowing is not in the transmission, but in the disclosure of information.<sup>30</sup>

Therefore, in order for a person to be considered a whistleblower and obtain protection under the LPW, they must first disclose information for the purpose of protecting the public interest and the common good, and they must do so in the manner and through the procedure prescribed by the Law, as well as by the above-mentioned bylaw.

In light of the above, it is irrelevant whether the whistleblower declared themselves as such when disclosing the information because even if they did not, this is without legal significance for the statutory right to judicial protection, as correctly concluded by the Appellate Court in Niš.<sup>31</sup>

The previous subheading addressed the issue of the time limit within which whistleblowing must be undertaken in order for the whistleblower to obtain the right to protection; therefore, after mentioning the qualitative conditions relating to the disclosure of information, it is necessary to mention the third condition that must be met for the whistleblower to obtain the right to protection. A whistleblower is entitled to protection if, at the time of whistleblowing, based on the available data, a person with average knowledge and experience, comparable to that of the whistleblower, would believe the information to be true.<sup>32</sup>

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<sup>28</sup> Judgment of the Appellate Court in Niš, Gž-uz 2/17, March 2, 2017.

<sup>29</sup> *Official Gazette of the RS*, Nos. 49/2015 and 44/2018 – other law.

<sup>30</sup> Judgment of the Appellate Court in Novi Sad, Gž-uz 2/17, February 6, 2017.

<sup>31</sup> Judgment of the Appellate Court in Niš, Gž-uz 9/20, May 5, 2020.

<sup>32</sup> Art. 5 of the LPW.

In addition to the person who undertakes the act of whistleblowing, protection is also afforded to the person who makes it probable that a harmful action was taken against them due to their association with the whistleblower.<sup>33</sup> In practice, these are most often persons who provide the whistleblower with legal or moral support, but theoretically, they can also be persons connected through family ties.<sup>34</sup> Moreover, protection is also afforded to a person who is mistakenly declared a whistleblower (a so-called putative whistleblower), a person who provides information in the performance of official duties, and a person who requests data related to the information.<sup>35</sup>

### **Passive Standing in Disputes for Whistleblower Protection**

The LPW provides that a whistleblower against whom a harmful action is taken in connection with whistleblowing has the right to judicial protection.<sup>36</sup> This protection is exercised by filing a lawsuit with the competent court within six months from the day they learned of the harmful action taken, or within three years from the day the harmful action was taken.<sup>37</sup>

Unlike the Law on the Prevention of Harassment at Work,<sup>38</sup> which, in the section relating to judicial protection, explicitly states that the lawsuit is filed against the employer,<sup>39</sup> the LPW does not contain such an explicit provision.<sup>40</sup>

Nevertheless, from the explicit prohibition imposed on the employer not to, by act or omission, put the whistleblower in a less favorable position in connection with the whistleblowing,<sup>41</sup> it can be unequivocally concluded that

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<sup>33</sup> Art. 6 of the LPW.

<sup>34</sup> Judgment of the Appellate Court in Novi Sad, Gž-uz 7/17, June 20, 2017; Judgment of the Supreme Court of Cassation, Rev2-uz 7/17, June 21, 2019. In the cited work, Martić and Šarac emphasize that the LPW does not define the boundaries, type, or other characteristics of the “association” between the whistleblower and the “associated person,” and that the Law leaves open possibilities for the protection of associated persons regardless of the type or degree of association, 31.

<sup>35</sup> Arts. 7, 8, and 9 of the LPW.

<sup>36</sup> Art. 23, para. 1 of the LPW.

<sup>37</sup> Art. 23, para. 2 of the LPW.

<sup>38</sup> *Official Gazette of the RS*, No. 36/2010.

<sup>39</sup> Art. 23, para. 2 of the Law on the Prevention of Harassment at Work.

<sup>40</sup> This is likely because, as already mentioned in fn. 7, whistleblowers are not only persons who make a report in connection with their work engagement or the hiring process, but also in connection with the use of services of state and other bodies, holders of public authority or public services, business cooperation, and ownership rights in a company.

<sup>41</sup> Art. 21 of the LPW.

only the employer has passive standing in proceedings for the protection of whistleblowers.<sup>42</sup>

Despite the above, it is important to mention the position of the Appellate Court in Niš, which, referring to Article 2, paragraph 1, point 3 of the LPW, and the meaning of the term “employer,” emphasized that in whistleblowing disputes, the defendant is always a legal entity or an entrepreneur.<sup>43</sup> It is also interesting to draw attention to the position of the Appellate Court in Kragujevac, which supports its assertion that in proceedings related to whistleblowing, the defendant can only be a business or an entrepreneur, by pointing out that Article 26, paragraph 3 of the LPW refers to the *mutatis mutandis* application of the Law on Civil Procedure, which governs labor disputes, which can only be conducted against the employer.<sup>44</sup>

All of the above is important to emphasize because, in practice, there have been instances where, in proceedings for the protection of whistleblowers, a person other than the employer, or a person in addition to the employer, was designated as the defendant.<sup>45</sup>

### **Court Jurisdiction (Dual/Parallel Jurisdiction)**

In proceedings for the judicial protection of whistleblowers, jurisdiction lies with the higher court<sup>46</sup> either according to the place where the harmful action was undertaken or according to the plaintiff’s place of residence.<sup>47</sup> The content of the lawsuit is determined by Article 26 of the LPW, as discussed above.<sup>48</sup> It was also noted that, in a lawsuit for protection in connection with

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<sup>42</sup> Except, of course, where whistleblowing is not carried out in connection with the use of services of state and other bodies, holders of public authority or public services, business cooperation, and ownership rights in a company.

<sup>43</sup> Judgment of the Appellate Court in Niš, Gž-uz 4/18, July 11, 2018.

<sup>44</sup> Judgment of the Appellate Court in Kragujevac, Gž-uz 2/17, December 28, 2017.

<sup>45</sup> In that sense, see the judgment of the Appellate Court in Niš, Gž-uz 2/23, April 20, 2023.

<sup>46</sup> Art. 25, para. 1 of the LPW provides that the judge deciding on a lawsuit in connection with whistleblowing, or in the special proceedings under Art. 27 of this Law, must have acquired special knowledge relating to whistleblower protection. The acquisition of such special knowledge is regulated by the *Rulebook on the Program for Acquiring Special Knowledge Relating to Whistleblower Protection, Official Gazette of the RS, No. 4/2015.*

<sup>47</sup> Art. 23, para. 3 of the LPW.

<sup>48</sup> Establishing that a harmful action has been taken against the whistleblower; a prohibition on undertaking and repeating the harmful action; removal of the consequences of the harmful action; compensation for pecuniary and non-pecuniary damage; publication of the judgment rendered upon the lawsuit, on the grounds provided under items 1) through 4) of this paragraph, in the media, at the defendant’s expense.

whistleblowing, it is not possible to challenge the lawfulness of an individual act of the employer deciding on the employee's rights, obligations, and responsibilities arising from employment.<sup>49</sup> The reason this is mentioned again here is that this legislative solution gives rise to certain dilemmas.

Namely, Article 27, paragraph 1 of the LPW stipulates that, in a lawsuit seeking an assessment of the lawfulness of an individual act of the employer deciding on the whistleblower's rights, obligations, and responsibilities arising from employment under special regulations, the whistleblower may assert that the employer's individual act constitutes a harmful action in connection with whistleblowing. In such situations, the court, in separate proceedings, assesses the merits of the allegation that the employer's individual act constitutes a harmful action in connection with the whistleblowing.<sup>50</sup> A condition for such a decision in separate proceedings is that the employee raises the allegation that the employer's individual act constitutes a harmful action in connection with the whistleblowing in the lawsuit itself or at the preparatory hearing, and thereafter only if the person raising the allegation makes it probable that, through no fault of their own, they could not have raised it earlier.<sup>51</sup>

Pursuant to Article 24, paragraph 3 of the Law on the Organization of Courts,<sup>52</sup> basic courts have jurisdiction to decide disputes concerning the establishment, existence, and termination of employment, rights, obligations, and responsibilities arising from employment, compensation for damage suffered by an employee at work or in connection with work, and disputes regarding the satisfaction of housing needs arising from employment. From the above, it is clear that, in addition to higher courts, basic courts also provide protection to whistleblowers.

As regards individual acts relating to civil servants, by virtue of Article 143, paragraph 3 of the Law on Civil Servants, the Administrative Court has jurisdiction.<sup>53</sup>

The question may be raised as to the *ratio* of the provision establishing the jurisdiction of higher courts in the first instance, and whether it can be exercised at all, given that basic courts have jurisdiction in situations where

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<sup>49</sup> Art. 26, para. 2 of the LPW.

<sup>50</sup> Art. 27, para. 3 of the LPW.

<sup>51</sup> Art. 27, para. 2 of the LPW; Judgment of the Supreme Court of Cassation, Rev2 4161/19, November 25, 2021; Decision of the Appellate Court in Niš, GŽ1-uz 3/19, June 28, 2019.

<sup>52</sup> *Official Gazette of the RS*, No. 10/2023.

<sup>53</sup> *Official Gazette of the RS*, Nos. 79/2005, 81/2005 – corr., 83/2005 – corr., 64/2007, 67/2007 – corr., 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020, and 142/2022.

an employer's individual act constitutes a harmful action in connection with whistleblowing, and that the number of such proceedings is not negligible.<sup>54</sup>

In case law to date, the question of so-called "dual" or "parallel" jurisdiction has often been raised. The Appellate Court in Niš states, "From the above it follows that, in a situation where an employee, due to reporting irregularities in the employer's conduct, received an individual act depriving them of rights at work and in connection with work or terminating their employment, they must file a lawsuit with the competent court seeking annulment of that act within the prescribed time limit and cannot simultaneously conduct proceedings for protection in connection with whistleblowing before a higher court. Therefore, the law excludes dual or parallel jurisdiction in the event of a decision on an individual right that whistleblowers are entitled to under labor law or other regulations."<sup>55</sup>

On the other hand, the Appellate Court in Novi Sad points out in one of its decisions, "The grounds of appeal according to which the court acted contrary to the principle of *ne bis in idem* are also not acceptable, as stated, because the plaintiff, at the same time as filing the lawsuit in these civil proceedings, filed a lawsuit on November 30, 2021, initiating proceedings before the Basic Court in Novi Sad seeking annulment of the decision terminating the employment contract, in which a first-instance judgment has been rendered in the meantime in case P1.3042/21, yet appellate proceedings are pending. The plaintiff's right to judicial protection is guaranteed by both the Law on the Protection of Whistleblowers and the Labor Law, so it is within their discretion to decide on how they will seek to obtain such protection."<sup>56</sup>

This position of the Appellate Court in Novi Sad is unacceptable. First of all, it is clear from the cited legal provisions that it is not at the whistleblower's discretion to decide how they will seek protection, but rather that this is determined depending on the type of harmful action undertaken. If such a position of the court were accepted, an employee could file a lawsuit with a basic court seeking annulment of the decision, while asserting that such an individual act constitutes a harmful action in connection with whistleblowing,

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<sup>54</sup> In case law, there are numerous proceedings in which it was alleged that an individual act constitutes a harmful action in connection with whistleblowing, and in which protection in the first instance is provided by basic courts; in that sense see, e.g., Judgment of the Appellate Court in Kragujevac, GŽ1-uz 2/18, October 2, 2018; Judgment of the Appellate Court in Kragujevac, GŽ1-uz 1/19, September 27, 2019; Judgment of the Appellate Court in Kragujevac, GŽ1-uz 2/20, October 19, 2020; Judgment of the Appellate Court in Kragujevac, GŽ1-uz 2/21, January 19, 2022; Judgment of the Appellate Court in Kragujevac, GŽ1-uz 2/22, August 16, 2022; Judgment of the Appellate Court in Niš, GŽ1-uz 3/19, June 28, 2019.

<sup>55</sup> Judgment of the Appellate Court in Niš, GŽ-uz 10/17, October 27, 2017.

<sup>56</sup> Judgment of the Appellate Court in Novi Sad, GŽ-uz 2/22, November 10, 2022.

and, in addition, challenge the lawfulness of the same individual act before the higher court as well. This would raise the issue of double *lis pendens* and, in that sense, the procedural bar under Article 203, paragraph 3 of the Law on Civil Procedure.<sup>57</sup>

Moreover, this would practically undermine the strictness of the preclusive provision – Article 195 of the Labor Law,<sup>58</sup> which stipulates that the time limit for initiating a dispute against a decision that violates an employee’s right is 60 days from the day the decision is served. The employee could still seek protection before a higher court after the expiry of this time limit because the time limit for initiating proceedings under the LPW is six months from the day the person learned of the harmful action taken, or three years from the day the harmful action was taken.

Although there are several arguments in favor of excluding dual jurisdiction, the fact cannot be ignored that whistleblowers who suffer harmful actions in the form of the adoption of individual acts are in a less favorable position in terms of time limits for judicial protection compared to whistleblowers who suffer harmful actions in a different form.

It is important to point out that the above-mentioned judgment of the Appellate Court was quashed by a Supreme Court decision,<sup>59</sup> which stated that the law excludes dual jurisdiction, and the Supreme Court has taken the same position in multiple decisions.<sup>60</sup> Particularly interesting is the Supreme Court’s conclusion that a decision terminating an employment contract is an individual legal act that becomes final and binding and cannot be challenged by a lawsuit seeking a declaratory judgment, but only by a lawsuit seeking annulment of that act.<sup>61</sup> This position essentially justifies the exclusion of dual court jurisdiction.

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<sup>57</sup> Art. 203, para. 3 of the Law on Civil Procedure provides that, while litigation is pending, no new litigation between the same parties may be initiated regarding the same lawsuit, and if such litigation is initiated, the court will dismiss the lawsuit. On *lis pendens*, the procedural effects of *lis pendens*, and the rationale for prohibiting double *lis pendens*, see: Keča, R., Knežević, M. (2022). *Građansko procesno pravo*. Belgrade: Službeni glasnik, 210–212.

<sup>58</sup> *Official Gazette of the RS*, Nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – decision of the Constitutional Court, 113/2017, and 95/2018 – authentic interpretation.

<sup>59</sup> Decision of the Supreme Court, Rev-uz 3/23, July 20, 2023.

<sup>60</sup> See, in that sense, e.g., the judgment of the Supreme Court of Cassation, Rev2-uz 3/16, January 18, 2017, in which the court states that anything relating to the assessment of the lawfulness of an individual act cannot be raised in these proceedings under Art. 20, para. 2 of the LPW.

<sup>61</sup> Judgment of the Supreme Court, Rev-uz 4/2022, June 14, 2023. See also, in that sense, the judgment of the Supreme Court of Cassation, Rev2-uz 5/17, March 7, 2018.

However, as regards the specific decision of the Appellate Court in Novi Sad discussed above, the reason for quashing was the failure to determine whether the lawfulness of the decision terminating the employment contract had been the subject of assessment in separate proceedings within the meaning of Article 27 of the LPW; accordingly, depending on the decision of the Basic Court in the proceedings assessing the lawfulness of the individual act, the first-instance court must decide on the merits of the whistleblower's lawsuit for damages within the meaning of Article 22 of the LPW.<sup>62</sup>

This is emphasized particularly because such a position raises other questions as well. For example, in addition to the right to annulment of such an act, does the whistleblower also enjoy other rights provided under Article 26 of the LPW? If so, the question arises – before which court?

Although whistleblowers who suffer harmful actions in the form of individual acts are deprived of the possibility of challenging the lawfulness of the individual act in proceedings under the LPW, there is no reason to deny them other rights provided by this Law.<sup>63</sup>

However, basic courts do not have jurisdiction to decide on those other claims; rather, jurisdiction lies with higher courts pursuant to the LPW.

The harmful action established in proceedings seeking annulment of an individual act constitutes the factual basis for the higher court when deciding on another whistleblower right, such as the right to compensation for damage.<sup>64</sup>

It can be noted that this is another aspect of the less favorable position of whistleblowers who suffer harmful actions via an individual act because not only are the time limits for obtaining legal protection shorter, but in practice, in addition to proceedings to annul such an act, they initiate a second set of proceedings if they wish to exercise rights under Article 27 of the LPW. This solution is not economical because, in such situations, whistleblowers first bear the costs of two proceedings, and it would certainly be more efficient for them to conduct a single set of proceedings.

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<sup>62</sup> In that sense, see also the judgment of the Appellate Court in Niš, Gž-uz 3/18, September 24, 2018; Judgment of the Appellate Court in Niš, Gž-uz 4/19, April 12, 2019.

<sup>63</sup> In this context, it is important to mention the judgment of the Appellate Court in Niš, Gž-uz 6/21, January 17, 2022, which reversed the first-instance judgment that had denied the plaintiff's request to have the judgment published in a daily newspaper, considering that establishing that a harmful action had been undertaken and ordering the defendant to pay damages constituted sufficient satisfaction for the plaintiff. The Appellate Court emphasized that this was an incorrect application of substantive law and that these lawsuits are independent of one another and do not mutually exclude each other.

<sup>64</sup> Judgment of the Supreme Court, Rev-uz 5/23, January 17, 2024.

### **Causal Link between Whistleblowing and Harmful Actions**

In order for a whistleblower to obtain protection, there must be a causal link between the act of whistleblowing and the harmful act.

If the whistleblower makes it probable that a harmful action was taken against them in connection with the whistleblowing, the burden of proving that the harmful action is not causally linked to whistleblowing lies with the defendant.<sup>65</sup>

Although the existence of this link is primarily a question of fact rather than a question of law, it is interesting to mention one criterion used by courts in practice when determining whether it exists.<sup>66</sup> This auxiliary criterion is time, that is, the temporal sequence between the acts of whistleblowing and the harmful actions.

The Appellate Court in Kragujevac states, “The positions of auxiliary staff that remained, i.e., that were envisaged under the new job classification, whose duties could have been offered to the plaintiff with the same or a lower level of qualifications, were filled; therefore, the court concluded that the plaintiff was not placed in a less favorable position because of his status as a whistleblower, given that a longer period of time had elapsed between the act of whistleblowing and any act of the defendant undertaken in the rationalization procedure, and thus the defendant’s act cannot be linked to the plaintiff’s act.”<sup>67</sup>

From the quoted part of the decision, it is clear that the time between the act of whistleblowing and the harmful action is an auxiliary criterion for establishing a causal link between them, while what constitutes a “longer period of time” is also a question of fact.

In practice, situations in which the harmful action precedes the act of whistleblowing are particularly interesting. Often, the employer takes an action, the employee engages in whistleblowing and then seeks protection from the action that preceded the whistleblowing.

On this issue, case law is uniform that it is unacceptable for the whistleblowing procedure to occur after the harmful action, with the explanation that the harmful action is a consequence of the whistleblowing, and not vice versa.<sup>68</sup>

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<sup>65</sup> Art. 29 of the LPW.

<sup>66</sup> The consequence of the fact that this is a factual rather than a legal issue is that the court of revision cannot engage with such questions. In that sense, see the judgment of the Supreme Court of Cassation, Rev2-uz 2/21, October 7, 2021.

<sup>67</sup> Judgment of the Appellate Court in Kragujevac, Gž1-uz 1/22, June 3, 2022.

<sup>68</sup> Judgment of the Appellate Court in Kragujevac, Gž-uz 3/20, November 30, 2021; Judgment of the Appellate Court in Niš, Gž-uz 10/17, October 27, 2017; Judgment of the Appellate Court in Niš, Gž-uz 4/20, June 3, 2020; Judgment of the Supreme Court of

Although this position of the courts is acceptable, because it is logical that whistleblowing precedes the harmful action, it is necessary to make an exception when agreeing with this position. This exception is provided for in Article 9 of the LPW. The legislator provides that a person who requested data related to the information has the right to protection as a whistleblower if they make it probable that a harmful action was taken against them because they requested such data. Although this is essentially not a matter of whistleblowing, in this situation, the harmful action may precede it.

Therefore, the existence of a causal link is a key factor in proceedings for the protection of whistleblowers. Whistleblower protection is not absolute, and it is possible for an employee to be lawfully terminated even though they engaged in whistleblowing, if the termination is not a consequence of whistleblowing but, for example, of failure to comply with work discipline.<sup>69</sup> For that reason, the procedural activity of employers in court proceedings is aimed at proving the absence of a causal link between the harmful action and the act of whistleblowing, and the outcome of the proceedings will depend on the employer's success in this respect.<sup>70</sup> Of course, this is assuming that the employee first makes it probable that the harmful action is a consequence of the whistleblowing.<sup>71</sup>

Regarding the causal link, it is particularly difficult to distinguish harmful actions from measures undertaken by the employer for genuine and objective reasons. This is why it often happens that the court dismisses the plaintiff's lawsuit, finding that these are not harmful actions because they are not motivated by whistleblowing, but rather by organizational changes with the employer or the exercise of autonomous powers in accordance with the law or a general act.<sup>72</sup>

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Cassation, Rev2-uz 2/17, June 22, 2017; Judgment of the Supreme Court, Rev-uz 1/23, June 28, 2023.

<sup>69</sup> Judgment of the Supreme Court of Cassation, Rev2-3314/19, February 26, 2020.

<sup>70</sup> In the judgment of the Supreme Court, Rev-uz 7/23, January 31, 2024, the court concludes that, although the plaintiff made it probable that a harmful action was taken against him in connection with whistleblowing, the defendant, through the substance of the evidence presented, rebutted the existence of this presumption, and therefore the plaintiff is not entitled to the protection sought.

<sup>71</sup> In the judgment of the Appellate Court in Niš, Gž-uz 21/19, December 26, 2019, the court found that the employee did not make it probable that a harmful action was taken against him – namely, issuing a suspension, because the basis for the suspension was an incident caused by the employee.

<sup>72</sup> Judgment of the Appellate Court in Kragujevac, Gž1-uz 6/16, July 18, 2016; Judgment of the Appellate Court in Novi Sad, Gž1-uz 1/17, January 17, 2017; Judgment of the Appellate Court in Niš, Gž-uz 5/19, April 8, 2019; Judgment of the Supreme Court of Cassation, Rev2 2481/18, July 9, 2020; Judgment of the Supreme Court of Cassation, Rev2-uz

### Interim Measures

As already emphasized, the provisions of the LPW on the possibility of ordering an interim measure are of exceptional importance.<sup>73</sup> It is provided that, in proceedings for protection in connection with whistleblowing, or in proceedings under Article 27 of the LPW,<sup>74</sup> the court conducting the proceedings may order an interim measure in accordance with the law governing enforcement and security. A motion for an interim measure may be filed before the initiation of court proceedings, during court proceedings, or after the conclusion of court proceedings, as long as enforcement has not yet been carried out. The court is authorized to order an interim measure *ex officio*.<sup>75</sup>

Article 34 of the LPW expressly stipulates that a request can be made via a motion for an interim measure that the court postpone the legal effect of an act, prohibit the undertaking of a harmful action, or order the removal of consequences caused by a harmful action. Therefore, the content of an interim measure is strictly determined by the LPW, and it is not permitted to seek another type of protection through an interim measure, such as a plaintiff's request that the court annul an individual act of the employer.<sup>76</sup>

Since the LPW refers to the law regulating enforcement and security in its provisions on interim measures, it is important to emphasize that the law governing enforcement and security (hereinafter: the LES)<sup>77</sup> recognizes two types of interim measures: those that secure monetary claims and those that secure non-monetary claims. It is evident that, as regards the conditions for ordering an interim measure, the conditions and provisions of the LES applicable to interim measures securing non-monetary claims apply.

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4/21, October 28, 2021; Judgment of the Appellate Court in Niš, Gž-uz 2/22, July 11, 2022; Judgment of the Supreme Court of Cassation, Rev2-uz 1/22, September 20, 2022; Judgment of the Appellate Court in Novi Sad, Gž-uz 2/23, February 8, 2023.

<sup>73</sup> Andrejević, S. states: "Such prior protection is essential for the exercise of whistleblowers' rights, because it provides the best protection against retaliation, effectively and quickly, so that, in court proceedings, the whistleblower may obtain full protection of his right through a final judgment on the merits. Without prior protection, the whistleblower would be exposed to retaliation for a longer period of time and would bear all consequences of retaliation even though he acted in the public interest." Andrejević, S. (2015). *Sudska zaštita uzbunjivača. Izbor sudske prakse. Stručno-informativni časopis*, 23(5), 189–190.

<sup>74</sup> Proceedings under Art. 27 of the LPW are proceedings for the assessment of the lawfulness of an individual act (when the whistleblower asserts that the employer's individual act constitutes a harmful action in connection with whistleblowing).

<sup>75</sup> Art. 32 of the LPW.

<sup>76</sup> Decision of the Appellate Court in Belgrade, Gž1-uz 2/20, February 7, 2020.

<sup>77</sup> Law on Enforcement and Security, *Official Gazette of the RS*, Nos. 106/2015, 106/2016 – authentic interpretation, 113/2017 – authentic interpretation, 54/2019, 9/2020 – authentic interpretation, and 10/2023 – other law.

Pursuant to Article 449, paragraph 3 of the LES, to order an interim measure to secure a non-monetary claim, the enforcement creditor, in addition to the likelihood of the existence of the claim, must also make it probable that, without the interim measure, the satisfaction of the claim would be prevented or significantly hindered, or that force would be used or irreparable harm would occur (a threat to the claim).

Exceptionally, the enforcement creditor is not required to prove a threat to the claim if it is made probable that, due to the interim measure, the enforcement debtor could suffer only negligible damage or that the claim is to be satisfied abroad.<sup>78</sup>

Therefore, when ordering an interim measure, the court applies the provisions of the LPW together with the provisions of the LES: when examining the conditions for ordering an interim measure, it will be guided by the LES, while when deciding on the type and content of the interim measure, it will certainly be bound by those interim measures provided under the LPW.

A particularly interesting decision is that of the Appellate Court in Kragujevac, which emphasized that the first-instance court incorrectly applied substantive law when it dismissed the motion for an interim measure by relying solely on the LES (because the motion did not specify the means and object of enforcement, and because it lacked an indication that the enforcement would be carried out by the basic court), whereas there were conditions for deciding on the merits by applying the provisions of the LPW as well (ordering an interim measure was proposed to postpone the legal effect of the decision terminating the employment contract, and to order the opposing party to reinstate the employee until the final conclusion of the labor dispute seeking annulment of that decision).<sup>79</sup>

Article 35 of the LPW provides that a separate appeal is not permitted against a decision ordering a temporary measure, which means that an appeal is permitted only if the court dismisses the motion on procedural grounds or rejects it on the merits.

In regulating this matter, the legislator likely relied on Article 439, paragraph 3 of the Law on Civil Procedure, which stipulates that in labor disputes, a separate appeal is not permitted against a decision ordering an interim measure.

Since an appeal is expressly permitted against a decision rejecting or dismissing a motion for an interim measure, the question remains as to the admissibility of a revision (an appeal on points of law).

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<sup>78</sup> Art. 449, para. 5 of the LES.

<sup>79</sup> Decision of the Appellate Court in Kragujevac, Gž1-uz 1/18, May 10, 2018.

Article 23, paragraph 5 of the LPW provides that, in proceedings for judicial protection in connection with whistleblowing, revision is permitted. An isolated interpretation could lead to the conclusion that revision is also permitted in proceedings for an interim measure.

However, if the context of the entire Article 23 of the LPW is considered, and in particular paragraph 2, it is clear that, by “proceedings for judicial protection of whistleblowers,” the legislator refers to judicial protection initiated by filing a lawsuit, not by filing a motion for an interim measure. This is also supported by the position of the Supreme Court of Cassation<sup>80</sup> that, pursuant to the LES, neither revision nor reopening of proceedings is permitted against a final and binding decision, and that there are no conditions for filing a revision against such a decision pursuant to the Law on Civil Procedure, because it is not a decision that finally concludes the proceedings.

## CONCLUSION

The judicial protection of whistleblowers is a mechanism for protecting employees from employer retaliation in situations where employees “blow the whistle” because the employer is acting contrary to the public interest. For this reason, it is of utmost importance that the need for such a form of protection has been recognized and that our legal system contains a legal instrument that has comprehensively regulated this matter.

The key issues relevant to judicial protection are, above all, whether the whistleblower disclosed information relevant to the public interest in accordance with the law, whether they addressed the competent court within the statutory time limits and directed the lawsuit against the party with passive standing, and whether there is an adequate causal link between the act of whistleblowing and the harmful actions. In addition, a particular advantage afforded to whistleblowers by the LPW is the possibility of ordering an interim measure as an effective means of eliminating the negative consequences of harmful actions.

It is commendable to note that, with minor deviations, the case law on the application and interpretation of the LPW is fairly uniform. The decisions of the Supreme Court of Serbia significantly contribute to this uniformity, and the fact that revision is always permitted in these proceedings represents one of the most significant possibilities for the protection of whistleblowers.

However, despite all the good legislative solutions contained in this law, the paper highlights the less favorable position of whistleblowers who suffer

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<sup>80</sup> Decision of the Supreme Court of Cassation, Rev2-uz 1/21, March 24, 2021.

harmful actions in the form of individual acts deciding on the rights, obligations, and responsibilities arising from employment.

The unfavorable position of these persons is reflected in the fact that, in practice, in addition to the proceedings they initiate before a basic court seeking annulment of that individual act, they initiate another set of proceedings before a higher court in order to exercise other rights under Article 26 of the LPW, which is neither efficient nor economical.

In this regard, it would be appropriate for the legislator to find a mechanism to improve the position of this category of whistleblowers, that is, a mechanism to place them on equal footing with that of whistleblowers who suffer harmful consequences in other forms.

When considering ways to improve the position of this category of whistleblowers, one idea that arises is to grant explicit authority to basic courts, in proceedings seeking annulment of an individual act where the whistleblower asserts that the individual act constitutes a harmful action, to decide at the same time on the whistleblower's rights under Article 26 of the LPW. However, this would call into question the *ratio* of the LPW provision that assigns whistleblower protection to higher courts.

On the other hand, closing the gap could also be supported by a provision that would allow a basic court to declare its lack of subject-matter jurisdiction and refer the case to a higher court in situations where an employee asserts that an individual act constitutes a harmful action. However, even such a potential solution could be criticized for encroaching upon the provisions of the Law on the Organization of Courts, which stipulates that basic courts in the first instance adjudicate disputes concerning the establishment, existence, and termination of employment, as well as rights, obligations, and responsibilities arising from employment.

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