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# A FEW OPEN QUESTIONS CONCERNING THE RIGHT TO SEVERANCE PAY IN THE REPUBLIC OF SERBIA[**]

***ABSTRACT***: This paper aims to explain the nature of employees' right to severance pay in situations where the employer resorts to collective dismissal due to economic, organizational, or technological changes. The validity of setting up public funds that would, together with the employer, participate in the payment of severance and their financing is called into question, as well as the possibility for foreign investors to use money from public funds in the event of collective dismissal. The author also identifies a problem related to employers' autonomy to make business decisions on economic, organizational, and technological changes and the (un)justified interference of courts in such decisions. The paper also offers a recommendation regarding the moment that is considered relevant for determining whether certain persons are affiliated, for the purposes of exercising employees' right to severance. Certain solutions adopted by domestic legislation are criticized, and potential future solutions are proposed. Employees' right to severance pay is primarily examined from the perspective of domestic positive law, but comparative-law solutions are also mentioned with respect to certain related institutes. A brief overview is also provided of other

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measures that an employer can take before terminating employment contracts on the stated grounds and paying severance.

***Keywords**:* severance pay, collective dismissal, redundancy, public funds, employment measures

## INTRODUCTION

When, during the work process, due to technological, economic, or organizational changes, the employer no longer needs a certain number of employees, the problem of redundancy arises; it is multidimensional because, in addition to labor-law aspects, it inherently includes economic, social, ethical, psychological, and other components.[1] First, it is clear that employees and their social rights must be protected, but it is also necessary to recognize the problem of protecting the employer, who is in an unfavorable position and who, due to the above changes, must resort to collective dismissal and the payment of severance. The question arises as to whether the domestic positive-law solution is valid, under which employers themselves (without the participation of public authorities) bear the entire cost of severance owed to employees in the event of collective dismissal. In addition, the question arises from which budget any potential public funds would be financed, as well as whether it would be justified for employers who use some form of incentive offered by the state (for example, for newly settled persons in the Republic of Serbia) to also use money from public funds when carrying out collective dismissal and paying severance.

In comparative law, it is understood that the employer is experiencing genuine and serious exogenous shocks that actually require operational changes on such a scale that they entail a change in the organization of work, whereby a certain number of employees are declared redundant; consequently, in a large number of countries, proof of economic difficulties, i.e., technological changes, is often required.[2] In this regard, it is important to note the problem of whether, in proceedings initiated due to an allegedly unlawful termination of an employment contract, courts may assess the justification and expediency of implementing economic and organizational changes at the employer. Therefore, the employer makes a certain business decision concerning technological, economic, or organizational changes, which represents the employer's reaction

[1] Simonović, D. (2009). *Radnopravna čitanka. Prva knjiga*. Belgrade: Official Gazette, 453.

[2] Boeri, T., Garibaldi, P., Moen, E. (2016). Inside Severance Pay. *Le Laboratoire interdisciplinaire d'évaluation des politiques publiques*, hal–03472003, 5.

to the circumstances that have occurred,[3] and consequently, the question arises as to the autonomy of the employer to make such a decision. This problem has also been recognized by the International Labor Organization (hereinafter: ILO), and the issue of redundancy has been introduced into ILO Convention No. 158 on the Termination of Employment at the Initiative of the Employer, from 1982, as well as Recommendation No. 166. It is precisely this Convention that stipulates that an employer who intends to terminate the employment of employees due to economic, technological, structural, or similar changes must provide relevant information in a timely manner to the interested and competent workers' representatives and, as early as possible, give them the opportunity for consultation on the measures to be taken.[4]

Every company wants to reorganize itself from time to time in order to achieve the best possible business results. In this sense, restructuring serves to increase efficiency and adapt to new market conditions, so reorganization does not need to have a negative connotation.[5] Reorganization includes various forms of transfer, transactions (mergers; acquisitions), or divisions, but it can also be carried out through redundancy, i.e., collective dismissal, as well as in the case of insolvency, that is, the employer's bankruptcy.[6] An employer's reorganization has its own economic, commercial, and financial aspects, which cannot be viewed separately without considering the social consequences of reorganization, i.e., the need to provide employees with appropriate protection against the social consequences of reorganization.[7] In addition, it is important to point out that dismissing an employee solely due to the change in question would be considered an unjustified reason for dismissal; rather, the economic, organizational, and technical reasons that influenced the change are taken into account, and most importantly, the passage of time from the change in question (caused by economic, organizational, and technical reasons) to the termination of the employment contract. There is also the question of the moment that is relevant for assessing whether companies that have the same parent company and that have carried out status changes in the past are still considered affiliated persons, for the purposes of exercising the right to severance pay. The answer to this question represents a legal gap in domestic legislation, and in this paper, the author will present a recommendation for resolving this issue.

[3] Brković, R., Urdarević, B. (2020). *Radno pravo sa elementima socijalnog prava*. Belgrade: Official Gazette, 230.

[4] Simonović, D. (2009). *Radnopravna čitanka. Prva knjiga*. Belgrade: Official Gazette, 453.

[5] Kovačević, T. (2023), Zaštita individualnih i kolektivnih prava zaposlenih u slučaju promene poslodavca. *Glasnik of the Bar Association of Vojvodina,* 95(3), 874.

[6] Lubarda, B. (2020). *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu*. Belgrade: University of Belgrade, Faculty of Law, 555.

[7] Blanpain, R., Engels, C. (1998). *European Labour Law*. Boston: Kluwer Law International, 330.

## COLLECTIVE DISMISSAL

Economic and financial crises, technological innovations, as well as large changes in many economic sectors and industries, have influenced the gradual development of rules on the protection of employees in the event of termination for reasons arising from economic difficulties, the introduction of new technologies, or structural changes that lead to a reduction in the workload or the cessation of the need for certain positions.[8] Collective dismissal is one of the particularly delicate issues in labor law, *inter alia,* due to the problems that modern countries face in aligning employment with the developmental needs of the economy and society. This is especially true for the Republic of Serbia, where the privatization process was unfortunately not aligned with other reform processes, which resulted in a significant number of collective dismissals. In this sense, the rules on collective dismissal should contribute to the achievement of three objectives. The first concerns the need for special protection of employees due to the serious consequences they face in the event of dismissal. The second objective is related to creating conditions for the effective exercise of employees' rights to information and consultation (in order to prevent or reduce the scope of dismissal, or mitigate its negative consequences). The third objective concerns the general interest in preventing unemployment and ensuring the proper functioning of the labor market, which is also supported by the duty to inform the competent authority or body (employment services, labor inspectorates, the ministry in charge of labor affairs).[9] The employer's need for employees' work may cease, first, due to the employer's efforts to preserve business continuity and, ultimately, to avoid bankruptcy, and second, due to the employer's efforts to preserve its competitive position in the market.[10] In the event of collective dismissal, employment termination occurs as an *ultima ratio*, i.e., as a last resort that the employer should use in the event of economic, organizational, or technological changes. Employment termination therefore appears as a "last remedy" for the difficulties faced by the company, which is why it can be resorted to only after all other measures have been unsuccessfully exhausted, such as strategic or economic measures (for example, the sale of materials or real estate), or employment measures, particularly employee reassignment or training the employee for work in another position, which is why some authors conclude that[11] "collective dismissal is not, in fact, a decision to terminate, but rather an

[8] Kovačević, LJ. (2016). *Valjani razlozi za otkaz ugovora o radu*. Belgrade: University of Belgrade, Faculty of Law, 399.

[9] *Ibid*., 414.

[10] Jovanović, P. (2009). Pitanje viška zaposlenih u međunarodnom i našem pravu. *Collected Papers of the Faculty of Law in Novi Sad,* 43(3), 48.

[11] Kovačević, LJ. (2016). *Op. cit.*, 415.

expression of will that termination may possibly occur."[12] This is supported by the employment measures explained below, which represent a kind of alternative to employment termination, i.e., a way for the employee to remain employed despite serious changes affecting the employer.

Domestic legislation provides, as grounds for termination, that an employee may be terminated if there is a justified reason relating to the employer's needs, that is, if, due to technological, economic, or organizational changes, the need to do a particular job ceases or the workload is reduced.[13] The cited statutory provision consists of several components; for employment to be terminated on this basis, there must first be a justified reason relating to changes at the employer, and second, it is possible that a certain position is completely abolished as a result of the change in question, or that the change leads to a reduction in the number of employees required at a specific position. Although the legislator places this reason for dismissal in the same article as dismissal by the employer due to reasons attributable to the employee, it is apparent from the statutory definition that, in this case, the employee is not at fault (it is not attributable to the employee's abilities or conduct), but rather it is exclusively termination due to the employer's needs. Precisely because this reason for termination is attributable to the employer, the terminated employee acquires rights under unemployment insurance, as well as other rights – primarily severance pay, but also priority in hiring by the same employer if they begin filling the same position again within a short period of time after dismissal.[14] This situation was previously referred to in domestic labor legislation as "technological redundancy," while the current legal regulations recognize it under the term "redundancy." Compared to "technological redundancy," the term "redundancy" itself is a broader concept because, in addition to technological reasons, employees can also become redundant due to economic or organizational changes.[15] Therefore, redundancy is understood as an economic and legal situation that arises as a consequence of changes in the employer's technological, economic, structural, or organizational (operational) position, where the reasons for the redundancy are not attributable to the employee's professional abilities or the quality of their work performance.[16]

[12] Desdentado Bonete, A. (2015). Marked by invalidations. The consultation period in collective redundancies. *Spanish Labour Law and Employment Relations Journal*, 4(1–2/2015), 15.

[13] Labor Law, *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, Art. 179, para. 5, point 1.

[14] *Ibid.*, 230–231.

[15] Simonović, D. (2009). *Radnopravna čitanka. Prva knjiga*. Belgrade: Official Gazette, 453.

[16] Salamon, M. (1987). *Industrial Relations: Theory and Practice*. Harlow: Prentice Hall International, 534.

As regards the procedure for resolving redundancy, the domestic Labor Law sets certain criteria depending on the relationship between the employer's total number of employees and the number of employees the employer intends to declare redundant. Depending on the cumulatively fulfilled conditions, the employer is required to adopt a program for resolving redundancy before declaring a certain number of employees redundant.[17] The procedure for adopting the program, as well as its structure and scope,[18] represents an additional burden for the employer, which is why employers often resort to employment measures instead of collective dismissal. At this point, the author would like to emphasize that the employer's obligation to pay severance also exists in the event that a single employee is declared redundant, as well as in situations where the employer resorts to collective dismissal.

When an employee has been declared redundant and has exercised the right to severance pay, there is still a statutory restriction on rehiring for the same positions with the same employer. Under domestic labor legislation, this

[17] Art. 153 of the Labor Law: The employer is required to adopt a program for resolving redundancy (hereinafter: the program), if it determines that, due to technological, economic, or organizational changes, there will be a cessation of the need for the work of employees employed for an indefinite term within a period of 30 days, for at least:

1) 10 employees at an employer who employs more than 20 and fewer than 100 employees for an indefinite term;

2) 10% of employees at an employer who employs at least 100 and no more than 300 employees for an indefinite term;

3) 30 employees at an employer who employs over 300 employees for an indefinite term.

In addition, the program must be adopted if the employer determines that there will no longer be a need for the work of at least 20 employees within 90 days, for the reasons referred to in paragraph 1 of this Article, regardless of the total number of employees.

[18] Art. 155 of the Labor Law: The program shall contain in particular:

1) the reasons for the cessation of the need for employees' work;

2) the total number of employees at the employer;

3) the number, qualification structure, age, and insurance service record of redundant employees, and their jobs;

4) the criteria for determining redundancy;

5) employment measures: reassignment to another position, working with another employer, retraining or additional training, part-time work but not shorter than half of full-time hours, and other measures;

6) funds for addressing the socio-economic status of redundant employees;

7) the period within which employment contracts will be terminated.

The employer is required to submit the draft program to the trade union referred to in Art. 154 of this Law and to the national employment service, no later than eight days from the day the draft program is determined, for the purpose of obtaining their opinion.

The program, on behalf of and for the account of the employer, is adopted by the competent body of the employer, i.e., the person determined by law or by the employer's internal regulations.

period lasts three months. If the need arises for this position to be filled, priority is given to the terminated employee. Reasons of fairness, as well as the prevention of possible abuse by the employer in collective dismissal, are the principal reasons for recognizing the right to priority hiring for an appropriate position, if the employer resorts to re-hiring for the same positions.[19]

Finally, taking into account that case law is not consistent regarding whether, in a labor dispute, a court can assess the expediency and justification of implementing organizational and economic changes, the legislator should find a *de lege ferenda* solution that would resolve this uncertainty and would lead to the conclusion that courts may not assess the expediency and justification of implementing economic, organizational, and technological changes by the employer or question the company's business decision by which the changes in question were determined and explained. For example, if a project on which 100 employees worked is shut down because a client terminated a business cooperation agreement (an economic change), and the employer makes a business decision to resort to collective dismissal, the courts should not interfere with the justification of such a business decision because making such a decision falls within the employer's autonomy. Nevertheless, domestic case law is not uniform regarding the question of whether a court in a labor dispute can assess the expediency and justification of implementing organizational and economic changes. While, on the one hand, courts take the position that this falls within the autonomous and independent sphere of the company's activity,[20] on the other hand, there are judgments in which the court unjustifiably interferes with the employer's autonomous decisions.[21]

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[19] Art. 155 of the Labor Law, 236.

[20] "Contrary to the plaintiff's allegations in the appeal, the first-instance court correctly finds that the implementation of organizational and economic changes falls within the autonomous and independent sphere of the company's activity, so the civil court cannot assess their expediency and justification in a labor dispute; for that reason, the allegations in the appeal that there were no conditions for abolishing the plaintiff's position and terminating their employment contract on the stated grounds, and that the defendant failed to prove the existence of such grounds, cannot be accepted. The defendant, therefore, finding that it was economically more expedient to have the tasks performed by the plaintiff carried out through a specialized service agency for this type of work, something the court is not authorized to assess in these proceedings, implemented organizational changes by which they abolished the position held by the plaintiff; therefore, by switching to a service-based system for performing the tasks of the position that the plaintiff had previously held, the defendant could abolish the plaintiff's position and to terminate the plaintiff's employment contract on this basis." Judgment of the Appellate Court in Novi Sad, Gž 1667/13, February 10, 2013.

[21] "The conclusion of the first-instance court is correct that the defendant's difficult financial situation due to the suspension of subsidies... as founder, and the resulting operating loss, constitute a reason justifying the rationalization measures undertaken by the

## THE CONCEPT OF SEVERANCE PAY

In domestic labor legislation, employees' right to severance pay is recognized upon retirement,[22] redundancy, and in the event of bankruptcy[23] as grounds for termination. In this paper, the author will not elaborate on the issue of severance pay upon retirement, nor the issue of severance pay in the event of bankruptcy as grounds for termination, but will instead focus on the employees' right to severance pay in the event of collective dismissal.

Severance pay, as a right in the event of collective dismissal, represents the last step in the process, i.e., it is paid when, despite the measures prescribed by law, the employer has failed to "save" the employee from termination. It can be defined in various ways, but regardless of the definition chosen, severance pay inevitably constitutes a monetary amount owed to employees due to employment termination for reasons not attributable to them. In addition, severance pay can be described as a monetary amount that the employer pays to the employee in addition to all outstanding salaries and other earnings in the event of employment termination, primarily for reasons beyond the employee's control.[24] It can also be said that severance pay is one of the statutorily established forms of legal protection for employees in the event of employment termination that the employee cannot waive.[25] In this sense, the right to severance pay does not have the legal character of a salary; rather, it is a one-time payment for the loss of employment through no fault of the employee.[26] The right to severance pay for employees who have been declared redundant could be viewed as a certain type of compensation for a no-fault termination

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defendant and a basis for adopting the relevant regulation on job classification, which in the specific case was applied to the plaintiff after it entered into force and was published." Judgment of the Appellate Court in Novi Sad, Gž 88/14, January 30, 2014.

[22] Art. 119, para. 1, point 1 of the Labor Law: The employer is required to pay, in accordance with internal regulations, severance to an employee upon retirement, in an amount not less than two average salaries. The author believes that interpreting this provision leads to the conclusion that the legislator had a clear intention to prescribe exclusively the minimum amount of severance pay upon retirement, while, of course, it is possible to prescribe a higher amount through internal regulations.

[23] Art. 125, para. 1, point 3 of the Labor Law: An employee is entitled to payment of severance due to retirement in the calendar year in which bankruptcy proceedings are opened, if they obtained the right to a pension before the opening of bankruptcy proceedings.

[24] Wan Kim, T. (2014). Decent Termination: A Moral Case for Severance Pay. *Carnegie Mellon University*, 24(2), 204.

[25] Judgment of the Supreme Court of Cassation, Rev2 1012/21, May 13, 2021.

[26] Lubarda, B. (2020). *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu*. Belgrade: University of Belgrade, Faculty of Law, 591.

of the employee. In this sense, the employee is, in a way, compensated for having lost their job for reasons that are completely separate from their work performance and work discipline. From a comparative-law perspective, European legislators recognize the need to pay a certain sum to an employee whose employment is terminated following the employer's reorganization, as a kind of compensation that will enable the employee to live with dignity during a period after employment termination, until new employment is found. From a historical perspective, it is worth pointing out the United Kingdom's Redundancy Payments Act 1965 and Ireland's Redundancy Payments Act 1967, according to which employees who were declared redundant were entitled to severance pay, but the employer was not required to give reasons for the decision declaring employees redundant.[27] This, it may be said, unacceptable approach was changed by the Employment Protection (Consolidation) Act, which entered into force in the United Kingdom in 1978.

## EMPLOYMENT MEASURES – AN ALTERNATIVE TO DISMISSAL AND SEVERANCE PAY

Measures aimed at preserving employment under the Labor Law include the right to reassignment, the right to transfer to a position with another employer, the right to additional training or retraining, the right to part-time work (not less than half of full-time hours), and other measures.[28]

The current Labor Law lists, as the first measure (i.e., the first right of an employee who has been declared redundant, and the corresponding obligation of the employer), reassignment to a position that corresponds to the professional qualifications of the employee who has been declared redundant, which is determined by the rulebook on the organization and systematization of jobs. It is important to emphasize that reassignment can refer to full-time as well as part-time work, provided it is not less than half of full-time hours. In this situation, the employee can have another part-time job and thus have full-time work with two different employers. Unlike domestic legislation, British law provides that if an employee refuses an employer's offer to be reassigned to another suitable position, the employee retains the right to severance pay based on termination for economic reasons (redundancy, *Dutton v. Hawker Siddeley Aviation Ltd.)*. It is also worth noting that in Germany, large companies often reassign an employee who has been declared redundant to another division

[27] Malo, M. (2001). European Labour Law and Severance Pay Determination in Collective Redundancies. *European Journal of Law and Economics*, 12, 75.

[28] Art. 155, para. 1, point 5 of the Labor Law.

with the same employer, with the aim of protecting the employee from dismissal and keeping them employed.[29]

The next measure prescribed by the Labor Law is transferred to a position with another employer, and this legal institute is permeated by the principle of tripartism because the transfer occurs based on an agreement – a transfer contract between the employer with a "surplus" of employees and the employer with a "shortage" of employees, with the mediation of the public employment service.[30]

Additional training and retraining as measures of protection against employment termination differ in that additional training involves acquiring a higher level of professional qualification within the same profession, while retraining is training for work in a different profession.[31] In countries with developed market economies, in order to avoid or reduce the number of employees affected by collective dismissal, new types of contracts are introduced by law – conversion contracts, i.e., contracts for additional vocational education, whose implementation is financed through special funds, for example, from the National Employment Fund in France.[32] Earlier labor legislation granted the right to vocational training, i.e., additional training and retraining, to groups of employees depending on their age and sex, whereas the current Labor Law does not discriminate on those grounds but rather makes the vocational training available to all employees without putting them into different categories, which the author considers to be the correct solution.

Previously, Yugoslav labor legislation provided, as one possible measure, for the purchase of pension-service years for an employee whose work was no longer needed, provided that the employee lacked up to five years of insurance service to acquire the right to an old-age pension. The purchase of pension-service years enabled employees who fall into the category of older workers, but who have not yet met the conditions regarding insurance service, to acquire the right to a pension. The current Labor Code no longer provides for such a possibility, although the *de lege ferenda* statutory solution should aim to prevent an employer from declaring redundant an employee who lacks up to five years of insurance service to acquire the right to an old-age pension. Such a statutory solution would protect vulnerable older employees who would be in a very unfavorable position, i.e., whose prospects for new employment

[29] Jahn, E. (2009). Do firms obey the law when they fire workers? Social criteria and severance payments in Germany. *International Journal of Manpower*, 30(7), 8.

[30] Lubarda, B. (2018). *Uvod u radno pravo*. Belgrade: University of Belgrade, Faculty of Law, 226.

[31] Lubarda, B. (2020). *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu*. Belgrade: University of Belgrade, Faculty of Law, 589.

[32] Camerlynck, G., Lyon-Caen, H., Pelissier, G. (1986). *Droit du travail*. Paris: Dalloz, 136–140.

would be very limited. In Italian law, "early retirement" was very popular and favored in the past, but has lately been progressively restricted.[33]

In addition to these measures, in comparative labor legislation there is also a measure for employees whose work is no longer needed – temporary leave from work with compensation, which is in the interest of both the employee and the employer, since a proportional part of the compensation is provided from special funds.[34] Such a statutory solution is recognized in Japanese, British, Swedish, German, and U.S. law;[35] accordingly, taking into account the large number of countries in the world in which the above solution has proven to be legally valid, this measure could represent a *de lege ferenda* solution in domestic legislation.

The author considers that domestic labor legislation is rather sparse when it comes to employment measures. The legislator should be more creative and prescribe a greater number of different options for employees whose work is no longer needed. Comparative law, in addition to the above, also provides for retaining the right to participate in the company's profits for a certain period after (collective) dismissal; the right to gifts (bonuses) for Christmas holidays; the right to reimbursement of travel and relocation costs upon termination; and retaining certain benefits related to the lease of apartments owned by the employer (for example, in German autonomous labor law).[36]

## THE RIGHT TO SEVERANCE PAY AS *ULTIMA RATIO*

When none of the above measures are possible, an employee who has been declared redundant is terminated, and they become entitled to severance pay. The law sets the minimum amount of severance pay, based on the length of employment with the same employer and the employee's salary,[37] while a collective bargaining agreement, in line with the principle of *in favorem laboratoris,* may provide for a higher amount of severance pay.[38] In order for an employer to be able to accept a higher severance amount in negotiations, i.e.,

[33] Treu, T. (2014). *Labour Law in Italy*. Wolters Kluwer Law & Business, 125.

[34] Hanami, T. A. (1984). *Labour Law and Industrial Relations in Japan*. Deventer: Kluwer Law and Taxation Publishers, 91.

[35] Lubarda, B. (2020). *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu*. Belgrade: University of Belgrade, Faculty of Law, 593.

[36] Weiss, M. (1987). *Labour Law and Industrial Relations in the Federal Republic of Germany*. Kluwer Law and Taxation Publishers, 69–70.

[37] Camerlynck, G., Lyon–Caen, H., Pelissier, G. (1986). *Droit du travail*. Paris: Dalloz*,* 364.

[38] Lubarda, B. (2020). *Op. cit.*, 585.

to avoid a "boomerang" effect on the employer's competitiveness despite the cost reductions resulting from collective dismissal, comparative law provides for the establishment of special funds[39] aimed precisely at assisting employers in paying severance in the event of redundancy.

The importance of the right to severance pay in the event of employment termination at the initiative of the employer has also been recognized at the international level, namely by the ILO. It is stipulated that an employee who has been terminated has the right, in accordance with national regulations and practice, to severance pay or other similar benefits, the amount of which will depend, *inter alia*, on the length of employment and the employee's salary; such benefits are paid directly by the employer or from a fund established by employer contributions.[40]

Under the Labor Law, the amount of severance pay is determined by internal regulations[41] or the employment contract, provided that it may not be lower than the sum of one-third of the employee's salary for each completed year of employment with the employer with whom they are exercising the right to severance pay.[42] Accordingly, the cited statutory provision indicates that the employer is not free to determine the amount of severance pay but is bound by the statutory minimum, while it is, of course, possible to prescribe an amount higher than the statutory minimum. In addition, domestic legislation stipulates that "salary" refers to the employee's average monthly salary paid for the last three months preceding the month in which severance is paid,[43] wherease in French law the rule is that the base is the average salary for the preceding 12 months of employment or for the last three months of employment, whichever is more favorable to the employee.[44]

This definition of the right to severance pay raises the question whether the legislator intended that salary, for the purposes of severance pay, should be understood in gross or net amounts. If internal regulations[45] establish that

[39] Wedderburn, L. (1986). *The Worker and the Law*. London: Penguin Books, 220–221, 398–401.

[40] Law on the 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, Art. 12.

[41] For purposes of the cited provision and other provisions of the Labor Law, "internal regulations" refers to a collective bargaining agreement, an agreement between the employer and the trade union, i.e., the employer and employees, and/or an employment rulebook.

[42] Art. 158, para. 2 of the Labor Law.

[43] Art. 159 of the Labor Law.

[44] Laborde, J., Rojot, J. (2011). *Labour Law in France*. Wolters Kluwer, 168.

[45] "Internal regulations" refers to a collective bargaining agreement, an agreement between the employer and the trade union, i.e., the employer and employees, and/or an employment rulebook.

the base for calculating severance pay is determined based on gross earnings, the employer is obligated to comply and take gross earnings as the base when calculating severance pay,[46] whereas in other cases, the rule is that net amounts are used. In order to avoid a legal gap, a *de lege ferenda* statutory solution should explicitly stipulate whether the salary is calculated in gross or net amounts for the purposes of severance pay. It is important to note here that paying severance in an amount lower than that which belongs to the employee does not render the decision terminating the employment contract unlawful; rather, in separate proceedings, the employee may seek payment of the remaining amount.[47]

The employer is required to pay severance before the termination of the employment contract.[48] However, "the decision to terminate employment will not be null and void if payment was made after the date indicated as the moment of termination of employment, due to: an error in salary calculation; if payment was made later as a result of an agreement between the employer and the employee; if the employee received severance pay before filing a lawsuit to annul the decision on employment termination, for these reasons alone."[49]

For the purposes of determining severance pay, the length of employment relationship with a predecessor employer is also taken into account in the event of a status change and a change of employer, as well as with persons affiliated with the employer, in accordance with the law,[50] while a change in ownership of capital is not considered a change of employer for the purposes of severance pay.[51] In addition, the Labor Law also protects employers by providing that a collective bargaining agreement, an employment rulebook, and an employment contract cannot perscribe a longer period for the payment of severance than the period determined established by law,[52] and it also stipulates that an employee cannot exercise the right to severance pay for the same period for which severance has already been paid by the same employer or another employer.[53]

With regard to the cited statutory provision, the question logically arises as to the moment that is relevant for assessing whether two persons are

[46] Judgment of the Supreme Court of Cassation, Rev 2 940/15, June 10, 2015.

[47] Judgment of the Supreme Court of Cassation, Rev 2 1412/2014, January 28, 2015.

[48] Art. 158, para. 1 of the Labor Law.

[49] Legal opinion of the Civil Division of the Supreme Court (2004 and 2005); Ivošević, Z. M., Ivošević, M. Z. (2007). *Komentar Zakona o radu*. Belgrade: Official Gazette, 291.

[50] Art. 158, para. 3 of the Labor Law.

[51] Art. 158, para. 4 of the Labor Law.

[52] Art. 158, para. 5 of the Labor Law.

[53] Art. 158, para. 6 of the Labor Law.

affiliated within the meaning of the Law on Companies,[54] in connection with exercising the right to severance pay. For example, company X and company Y have the same parent company. If a status change occurs so that company X merges with company Y, and in that process company X ceases to exist, and all members and employees of company X become members and employees of company Y. After this status change, company Z is established, and company Y merges with company Z, and all members and employees of company Y become members and employees of company Z. Company Z now wishes to carry out collective dismissal and pay severance to employees declared redundant. The question arises whether the length of employment that employees accrued in companies X and Y will be counted toward the total length of employment taken into account when paying severance. According to the Opinion of the Ministry of Labor, Employment, Veteran and Social Affairs, Labor Sector, No. 011–00–00360/2014–02 of October 27, 2014, the relevant moment for determining whether two persons are to be considered affiliated is the moment of adopting the decision establishing the right to severance pay. If this position is accepted, employees in company Z would not have their length of service accrued while working in companies X and Y counted toward length of employment for purposes of calculating severance pay in the event of collective dismissal. The author considers the above-mentioned Opinion of the Ministry of Labor, Employment, Veteran and Social Affairs unacceptable because, on the one hand, the legislator's intention in regulating the institute of affiliated persons was precisely to avoid abuse and practices that do not deal in good faith, and, on the other hand, it would not be fair toward employees from the perspective of distributive justice, since contributions accrued through their work in affiliated entities would not be properly valued; that is, the employer, as the "stronger" party in this situation, would not allow the "subordinate" subjects, employees, to exercise the rights they acquired through their work in affiliated entities.

## PARTICIPATION OF PUBLIC AUTHORITIES IN SEVERANCE PAY

An employer resorts to collective dismissal precisely in order to avoid insolvency, i.e., to increase competitiveness; therefore, due to the relatively high costs of dismissal, the employer could find itself in a kind of *circulus vitiosus* if public authorities do not provide appropriate financial support to the

[54] *Official Gazette of the RS,* Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021.

employer in meeting its obligations toward redundant employees.[55] It is precisely for this reason that some countries have recognized the importance of establishing funds to support the exercise of redundancy-related rights, aimed at assisting employers and participating in the costs of severance pay, as well as the costs of vocational training, additional training, retraining, finding alternative employment, etc. The establishment of such funds is of great importance, given that an employer resorts to collective dismissal to avoid insolvency, and it is legitimate for them to receive financial assistance from public authorities in order to meet their obligations toward redundant employees. Such support funds exist in Japan, the United Kingdom, and France, whereas domestic legislation does not provide for the participation of public authorities (funds) in assisting the employer in paying severance. On the other hand, the Labor Law provides for the participation of the National Employment Service (hereinafter: NES) in order to reduce dismissals through retraining, additional training, and self-employment of employees who have been declared redundant.[56] Although the NES participates to some extent in assisting employers and employees, the author believes that the ultimate result is nevertheless lacking, since there is no severance fund within the NES. From a historical perspective, Serbia's Budget Law (2010 and 2011) provided for a transitional fund for so-called social protection in order to provide funds for the (partial) payment of severance to employees in the process of the reorganization of certain companies. A transitional fund was also provided by the Law on Broadcasting (2002) in connection with the transformation of the public company RTS into a broadcasting institution.[57] The author considers that public authorities should establish a dedicated fund (for the payment of severance) that would assist employers, in a certain percentage, in paying severance or that would, together with the employer, participate in a certain percentage in paying severance to employees who have been declared redundant. Such a solution would benefit the employer by helping it retain competitiveness in the market and enabling it to continue operating after collective dismissal. However, it would also benefit employees who would be able to exercise their right to severance pay regardless of the employer's will and capability. In addition, the solution in question would significantly reduce the number of court proceedings initiated by employees against employers for the payment of severance.

Examples from developed countries can serve as a *de lege ferenda* solution for domestic legislation in order to find an adequate model for providing

[55] Lubarda, B. (2018). *Uvod u radno pravo*. Belgrade: University of Belgrade, Faculty of Law, 235.

[56] Art. 156, para. 2 of the Labor Law.

[57] Lubarda, B. (2018). *Op. cit.,* 226.

financial assistance to an employer who is legally obligated to meet its financial obligations, in the form of severance pay, toward employees who have been declared redundant. However, the question arises as to what reaction employers would have to such a model. Would they be more inclined to declare employees redundant, or would they still leave room for applying employment measures as an alternative to employment termination and severance pay, given that they would not bear the costs of severance themselves? The author believes that a system should be established that would allow employers to cooperate with public funds regarding the payment of severance only if it is determined that the application of employment measures is truly impossible or ineffective.

Furthermore, the question arises regarding financing such public funds. A logical answer would be that employers, and employees while they are employed, would be obligated to pay a kind of contribution to public funds, from which a portion of severance would be paid to dismissed employees, thus expressing solidarity among employees and achieving social justice to a certain extent. The Constitution of the Republic of Serbia guarantees the right to work, in accordance with the law;[58] therefore, if employees were to be terminated for reasons that are not attributable to them, but rather to the employer's business operations, it would be justified to expect the state to prescribe rules that would help employees exercise their right to severance pay.

It is also necessary to address the question of whether it would be justified for foreign investors who use state incentives when hiring new employees, after the collective dismissal of those same employees, to also spend money from the public budget in order to enable the payment of severance. The author believes that such a modality would cause abuse in the use of funds from the public budget, and that employers who have already used money from the state budget in the hiring process should be prevented from doing so again in the event of collective dismissal. This is because employers would not face a business risk; rather, they would fully rely on state assistance both in paying salaries and in paying severance.

## CONCLUSION

Severance pay serves as an *ultima ratio* means in the context of collective dismissal when all other measures prescribed by law have proven ineffective or cannot be used. Severance pay is a legally recognized right of employees to be compensated after a no-fault employment termination. The

[58] Constitution of the Republic of Serbia, *Official Gazette of the RS,* Nos. 98/2006 and 115/2021, Art. 60, para. 1.

statutory minimum severance amount, which the employer pays to employees who have been declared redundant, represents a significant burden on the employer in a large number of cases, which is why the employer risks its competitiveness in the market and therefore often resorts to other measures. However, when collective dismissal occurs, the statutory right to severance pay belongs to the employees, and it cannot be waived. Collective dismissal certainly puts employees in an unfavorable position, but it also affects the employer because, in addition to the obligation to pay severance, collective dismissal of employees also puts the employer's reputation at risk. If domestic legislation recognized the importance of establishing public funds that would participate with the employer in paying severance in the event of collective dismissal and would participate in these costs on a proportional basis, employers would have fewer concerns about losing competitiveness in the market. It is clear that collective dismissal is a necessary measure that suits neither the employee nor the employer, but it is necessary when all other options have been exhausted. The author believes that the right to severance pay in the event of collective dismissal represents a form of damages, namely, damages in the form of lost profit, i.e., preventing the increase in the employee's assets that would have certainly occurred had the employee remained employed. Since the employer went through economic, organizational, or technological changes, which constitute a harmful event, the harmful consequences occur in the form of collective dismissal, and the employer becomes obligated to compensate the employee for the damage that the employee inevitably suffers.

Given that domestic case law is not uniform regarding whether, in a labor dispute, a court should assess the justification of economic, organizational, or technological changes, the author is of the opinion that the court should not be permitted to assess the justification of the employer's business decision by which the change in question was determined. This is because such changes are within the employer's autonomy, which would be seriously undermined by the court's interference.

Finally, it is clear that there is also a legal gap regarding the question of the relevant moment for assessing whether two persons are affiliated within the meaning of the Law on Companies.[59] Therefore, if the legislator has prescribed that

> "...in determining the amount of severance pay, the length of employment with the predecessor employer shall also be taken into account in the event of a status change and a change of employer within the meaning of Article

[59] *Official Gazette of the RS,* Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021.

147 of this Law, as well as with persons affiliated with the employer in accordance with the law,"[60]

the author believes that the *de lege ferenda* statutory solution addressing the legal gap regarding the moment relevant for assessing whether two persons are affiliated within the meaning of the Law on Companies,[61] in connection with exercising the right to severance pay, should take into account the length of employment acquired with all affiliated persons, regardless of the moment of adopting the decision on the payment of severance.

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[60] Art. 158, para. 3 of the Labor Law.

[61] *Official Gazette of the RS,* Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021.

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