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AMICABLE RESOLUTION OF INDIVIDUAL LABOUR DISPUTES

For resolving labour disputes, Serbian law doesn't envisage exclusive jurisdiction of a court or another body, so disputes can be resolved in one of the following two ways: a) by agreement between the disputing parties; b) by ruling of the relevant body or authority. The Labour Act provides for the possibility of entrusting the resolution of labour disputes (via the collective agreement or labour rulebook or employment contract) to an arbiter,¹ while the Mediation Act explicitly provides for the possibility of resolving labour disputes through mediation.² This is continued in the Act on Amicable Resolution of Labour Disputes (2004), which established the Republic Agency for Amicable Resolution of Labour Disputes.³ With the participation of this public institution, individual labour disputes can be resolved before the arbiter, while collective labour disputes can be resolved through conciliation. Parties in dispute do not pay the arbiters' and conciliators' remuneration nor do they cover their expenses, for they are paid from the budget of the Republic of Serbia.

Conciliation, mediation and arbitration allow the parties in dispute to save time, energy and money. Due to their informal or less formal nature, they can be attractive even for persons who could bear the costs of court proceedings and legal representation, but give priority to amicable resolution of labour disputes because the procedure is more intimate and interactive and takes place away from the public eye. The latter is especially important for employers who do not wish the identity of the parties in dispute disclosed or the ruling published, so they can protect their business reputation, but it also allows employees to present their needs and interests in a confidential atmosphere. Despite these advantages, judicial settlement of labour disputes in the Republic of Serbia takes precedence⁴, even though the court cases, on average, last longer than four years, because there are no specialized courts for labour disputes. In addition, there aren't enough judges and they oftentimes lack both the initial and the continued training and specialization in labour law issues and unsuccessful judicial reform has lead to the collapse of the judicial power. On the other hand, social partnership and social dialogue in Serbia are insufficiently developed, while the labour inspection is burdened by many problems, from the insufficient number and training of labour inspectors to the unclear structure of their jurisdiction. This, finally, means that proliferation of labour law norms is not accompanied by the respective

1 Labour Act (*Official Gazette of the Republic of Serbia*, n° 24/05, 61/05, 54/09, 32/13, 75/14, 13/17 and 113/17), article 194, par. 1-2.

2 Mediation Act (*Official Gazette of the Republic of Serbia*, n° 18/05), article 1, paragraph 1.

3 Act on Amicable Resolution of Labour Disputes (*Official Gazette of the Republic of Serbia*, n°125/04, 104/09 and 50/18).

4 From 2005 to 2016, 14.192 labour disputes were filed before the Agency for Amicable Resolution of Labour disputes, of which 5.118 individual and 126 collective labour disputes were resolved. In 2016 the Agency dealt with 956 labour disputes, while (basic and higher) courts received 33.389 cases that same year. This illustrates rather well the need to relieve the courts and to widen the catalogue of individual labour disputes that can be dealt with before the Agency.

mechanisms, institutions and procedures for protection of rights and that most of the labour disputes are still resolved in court. This can be explained by a distinctive legal culture where settling disputes in court is the quintessential method, despite the problems that impede its application. In addition, the parties to the employment relationship are insufficiently informed on the possibilities and advantages of amicable resolution of labour disputes and the legal framework for implementation of these methods is imprecise. The issues further include the lack of a two-tier decision-making system in arbitration and problems related to the execution of an arbitration award.

Insufficient utilization of the amicable resolution of labour disputes' potential made the Serbian legislator draft an Amendment to the Act on Amicable Resolution of Labour Disputes, which was enacted on 28 June 2018.⁵ It improved the working conditions of the conciliators and arbiters (in terms of precise regulation of requirements and procedures for appointment, issuing official ids, creation of the legal basis for the adoption of the code of ethics) and introduced clear-cut rules for implementing the stages of the dispute resolution procedure. Still, the biggest novelty is the broadening of the scope of the Act on Amicable Resolution of Labour Disputes. According to the original text of the Act, arbitration could only be used if the individual labour dispute was related to one of the following issues: a) termination of employment; b) payment of minimum wages; c) discrimination and mobbing; d) meal reimbursement; e) commuter expense reimbursement; f) payment of the award for years of service; g) payment of the holiday allowance. After 14 years, the scope of arbitrage has been broadened to include labour disputes concerning: a) working hours; b) the right to annual leave; c) payment of salaries and wages and d) severance pay. This should be commended, since the aforementioned rights are oftentimes violated, either by being denied or by being reduced in scope. This is particularly true for payment of salaries, irrespective of their level, and can come in the form of non-payment of higher rates for overtime or night work, failing to send the payroll calculation to the employees, thereby reducing their ability to initiate proceedings for violation of rights and "opening the doors" to violations of the tax law provisions. On the other hand, some employers transfer the proper sums to their employees' bank accounts, only to have a part of that sum returned in cash by those employees. Straying from the other rights arising from employment, primarily the right to limited working hours and the right to annual leave, is connected to the efforts of employers to reduce labour costs in order to preserve business continuity or achieve competitive advantage and maximize profits. Therefore, extending the scope of the Act on Amicable Resolution of Labour Disputes to the aforementioned issues is deemed significant and is accompanied by the possibility of hiring court certified experts, whose expenses would be covered by the parties in dispute.

5 Amendment to the Law on Amicable Resolution of Labour Disputes (*Official Gazette of the Republic of Serbia*, n° 50/18).

According to the provisions of the Act on Amicable Resolution of Labour Disputes, the procedure to resolve a labour dispute amicably is initiated by a proposal that the parties in dispute submit to the Republic Agency for Amicable Resolution of Labour Disputes jointly or separately. They will jointly select an arbiter from the Directory of conciliators and arbiters, and, failing to do so, the selection will be made by the Director of the Agency. The arbiter is obliged to schedule a hearing, where he will take statements, gather evidence and take care that all the relevant facts are presented. Each party can state their case, respond to allegations and give their closing argument. If the arbiter feels like the case was presented in its entirety and that he can make his decision, he will conclude the hearing and make his decision within 30 days from the start of the hearing. The 2018 Amendment stipulates the obligation of the arbiter to emphasize, during the proceedings, the possibility of agreement between the parties in dispute. This is an important rule because in case of agreement of the parties, the arbiter will not make a decision on the basis of factual evidence. The novelty is a rule stating that discrimination disputes will not have a public hearing and that discrimination disputes (as well as mobbing disputes) will end by an arbitrator's decision rendered on the basis of the agreement of parties in dispute. This significantly alters the position of employees, since the arbiter, in the absence of an agreement, suspends the proceedings, so that the same case can be prosecuted in court.

Arbitrator's decision cannot be appealed: it is final and enforceable from the date of delivery to the parties. In this regard, the issue of the possibility of filing a legal remedy against the arbiter's decision has come up, in the sense that there is a Constitutional right to a legal remedy against a decision that affects rights, obligations or interests. The issue of (in)admissibility of judicial protection against arbiter decisions in disputes brought before the Republic Agency for Amicable Resolution of Disputes emerged as the Act on Amicable Resolution of Disputes came into force. This is because the Act does not contain provisions on legal remedy against arbitration decision, while the rule that the arbitral award is final and enforceable on the day of delivery to the parties - means that there is no two-tier decision-making system. In practice, Serbian courts have treated this issue in different ways. The first few years of the application of the Act on Amicable Resolution of Disputes, the parties were deprived of the right to seek judicial protection against an arbitration decision, although the Act on Arbitration introduced the possibility of court action to repeal the domestic arbitration award.⁶ The Supreme Court of Cassation recently took a different position, citing that judicial control of an arbitration decision is possible even when the decision was made on the basis of the Act on Amicable Resolution of Disputes.⁷ This, finally, means that the parties in dispute can, in accordance with the Act on Arbitration, use a lawsuit to repeal an arbitral award for which the court will enforce subsequent limited control. The 2018 Amendment doesn't provide additional protection to the parties in labour dispute before the Agency, such as a two-tier arbitration procedure (by forming a second-tier arbitration council at Agency level), which remains a challenge for the future legislators in this field.

A specific issue, when it comes to individual labour disputes that were arbitrable before 2018, is the issue of discrimination at work. Even though arbitration has certain advantages when compared to discrimination disputes handled by the court, one should keep in mind that the Commissioner for Protection of Equality proclaimed mediation as a special model for resolving discrimination disputes. This is especially important if one has in mind that

6 Arbitrage Act (*Official Gazette of the Republic of Serbia*, n° 46/06), art. 57-63.

7 Ruling of the Supreme Court of Cassation Rz 146/2014, Rev2 653/2014 of 10 September 2015.

in Serbian law there is a dilemma whether a dispute between an employee who feels he was discriminated against and an employer should be regarded as a labour dispute or a discrimination dispute. This is due to the fact that there is room for both legal qualifications, because the relationship between the Anti-discrimination Act (and other antidiscrimination regulations), on the one hand, and other acts (including the Labour Act) that explicitly prohibit discrimination, on the other hand, remains unresolved in the legal system. Namely, this is connected with the risk of violation of the principle of legal certainty and unfair solutions that emerged from practice. In the jurisprudence of the courts, the dispute over the violation of employees' rights to protection against discrimination is considered a labour dispute, or a kind of "technical subgroup of labour disputes", which may be problematic, given the peculiarities of labour and discriminatory disputes and the different objectives and principles to which their resolution is directed, or on which they rest.⁸ In this sense, there is a need to encourage the amicable resolution of disputes concerning discrimination at work, especially when it comes to mediation, which seems to be the most acceptable method of resolving these types of disputes. Big advantage in arbitration, when compared to court action, is that it leads to reconciliation of conflicted interests and agreement based on the needs of the parties, assuming that the employer does not deny that particular action has taken place in the manner indicated in the employee's complaint and therefore accepts responsibility for discriminatory treatment. Conversely, mediation is not an acceptable method if the parties do not agree on all the circumstances of a particular case or one party refuses to actively participate in the proceedings or participates in it to delay or block the proceedings or otherwise violate the principle of conscientiousness and honesty. The same goes for situations with an urgent need for authoritative intervention in the deteriorating relations between an employee and an employer, primarily in the form of a temporary measure, for in that case mediation wouldn't be useful and could even be harmful. Another weakness of the mediation process is that in some cases the quality of the agreement reached will depend on the ability of an employee to "haggle" with the employer during the procedure, which is not in accordance with the principle of fairness and justice.

8 This is evidenced in case law where, in discrimination disputes, the courts apply provisions of the Labour Act that allow the dispute against the decision of an employer that violated the rights of an employee, to be filed within 60 days from the date of delivery of the decision. In accordance with this, courts will dismiss lawsuits filed by employees who feel they were discriminated against, after the deadline from the Labour Act, even though the Anti discrimination law doesn't contain such deadline.