THE RIGHT OF ACCESS TO THE COURT IN INDIVIDUAL LABOR DISPUTES

Katarina KNOL RADOJA
Assistant Professor
Faculty of Law, Josip Juraj Strossmayer University of Osijek
Croatia
kknol@pravos.hr

Abstract
By analyzing and comparing the regulations, domestic jurisprudence and practice of the European Court of Human Rights this paper aims to identify the problems faced by employees when they seek the protection of their rights in labor disputes, and to propose possible solutions. In the Republic of Croatia, the Labor Act stipulates the obligation to strive to achieve a negotiated settlement before seeking protection of the court. The employee may, within a limited period of time, turn to the employer requesting protection. If the dispute is not resolved by agreement within the set deadline, the employee may, again, within the preclusive deadline, demand the protection of the violated right before the court. Therefore, apart from exceptional cases, the employee cannot claim protection of violated rights before the court until these procedural prerequisites are fulfilled. Because a satisfactory and rapid solution for both parties to the dispute is important for the economic development of the entire environment from which such a dispute arises, a settlement out of court is much preferable. The problem is that the process of pre-addressing an employer with the application for protection of the right in practice is often only a mere formality that needs to be fulfilled before submitting a lawsuit to the court, so it is often not very useful. In addition, it could be argued that this procedure limits the employee's right to access to a court and a fair trial because an employee, as a procedural party, is, in relation to an employer, in an unequal procedural position.

Key words: *labor disputes, peaceful settlement of disputes, deadlines, access to court, Croatia.*

1. Introduction

Employment relations are a type of social relation that involves the opposing interests of both employees and employers. In addition, establishing a regulated relationship of trust is of particular importance for the economic development of the working environment. Although the Croatian Labor Law (Official Gazette, no. 93/14., 127/17. - hereinafter: LL) does not contain a definition of employment relations, its elements can be determined by the provisions regulating the conclusion of an employment contract and from the basic rights and obligations arising from the employment relationship for its parties (Articles 10 and 7). Although the absence of a specific definition can lead to legal uncertainty, on the other hand, the law also allows for the possibility of covering different relationships that occur in practice (Davidov, Langille, 2006, 143). This approach is not a rarity because employment relations are generally more difficult to define than an employment contract. Although the legislation of many European countries (eg. Germany, Belgium, France, Italy, Sweden (Senčur Peček, Laleta, 2018, p. 416) also do not contain a definition of employment relations, the term is defined in case law and theory (Casale, 2011, p. 25).

In the employment relation, according to the provisions of the Croatian LL, the employer is obliged to supply an employee with an agreed upon job and pay the salary, and the employee is obliged to perform the job. The employer has the right to specify the place and manner of work, and his duty to provide the employee with safe working conditions (Grgurev, 2017, p. 62). If the employment relation is disrupted, we are talking about a labor dispute.

LL establishes three legal regimes for realizing the legal protection of employees in a labor dispute. The first regime relates to non monetary-claims, the second regime concerns the realization of monetary claims, and the third refers to a dispute to protect the employee's dignity. While the second and third regimes are not subject to restrictions, for the first regime a special procedure is stipulated with the obligation to try an out-of-court settlement of the dispute, with the obligation to comply with the strict limitation periods. The failure to comply with the prescribed obligations leads to the preclusion of the right to file a lawsuit and thus access to court.

The legal issue that the author deals with in this paper is the limitation of the right of access to a court due to the obligation of a preliminary request by the employee to the employer for a peaceful settlement of the dispute. In conclusion author states that a peaceful settlement of the dispute is generally accepted as a favorable method contributing to the relieving of courts and reducing the costs, but although the right of access to court can be limited in proportion to the legitimate aim, it is necessary to take care that the opposing parties are not placed in an unequal position (see *infra*). Another analyzed issue is the existence of preclusive deadlines for seeking protection of the rights of

the individual and the problems of inconsistency on the interpretation of the obligation to meet these deadlines in Croatian court practice, as well as of the Supreme Court of the Republic of Croatia itself. Inconsistent interpretation can violate a number of convention rights – trust in justice, the rule of law, prohibition of discrimination, violation of citizens' equality or the prohibition of arbitrariness. Although it is the purpose of the time-limit rules to ensure the proper functioning of the judicial system and respect of the principle of legal certainty, the courts need to make greater efforts to ensure that legal provisions are interpreted consistently, particularly when it comes to the interpretation of the Supreme Court.

2. Labor disputes

Labor disputes can be defined as a state of disagreement over a certain issue due to which employees or/and employers are in conflict, seeking protection of their rights, or for which employees or employers support other employees or employers in their claims or objections (Gotovac, 2004, p. 191). When we talk about labor disputes we distinguish individual and collective disputes,[1] but the subject of this paper are only individual disputes.

Two laws govern the procedure of solving labor disputes in court in the Republic of Croatia and these are the Civil Procedure Act (Official Gazette, no. 53/91., 91/92., 112/99., 129/00., 88/2001., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 25/13., 89/14. - hereinafter: CPA) and the LL.

Pursuant to Article 34/1 point 10 CPA the Municipal Court has jurisdiction in labor disputes in the Republic of Croatia. After the abolition of the joint labor courts in 1990, labor disputes were returned to the jurisdiction of the state court (Triva, Dika, 2004, p. 793). Only for Zagreb and several municipalities near Zagreb does the Territories and Seats of Courts Act (Official Gazette, no. 67/18) regulate jurisdiction of special Labor Court in Zagreb. For the rest of Croatia, the municipal courts still have jurisdiction in accordance with the Article 34/1 point 10 CPA. In the second instance, procedure art. 4/1 of Territories and Seats of Courts Act regulates jurisdiction of County courts (Osijek, Rijeka, Split and Zagreb), but these are not specialized labor courts. They decide appeals against decisions of all municipal courts in labor disputes. In some other states, a special labor court was created for solving labor disputes.[2]

[1]In collective disputes, the subjects of collective labor relations (trade unions, employers' associations) are in conflict and they usually refer to the regulation of collective labor relations (Potočnjak, 2003, p. 266).

[2]For example, pursuant to Article 5 of the Slovenian Law on Labor and Social Courts (*Zakon o delovnih in socialnih sodiščih,* Official Gazette, no. 2/04, 10/04.), an individual labor dispute is defined as a dispute over the conclusion, existence,

In individual disputes, the parties are an employer and one or more[3] employees in a dispute to protect the rights within the individual employment relationship. The provisions of Art. 133 LL regulate the exercise of individual rights of employees, ie. the presumption of judicial protection of employment rights. According to this provision, an employee who considers that his employer has violated a right arising from employment relationship may, within 15 days from the date a decision violating this right was served on him, or from the date he gained knowledge of violation of the right, require the employer to exercise that right. If the employer fails to comply with this request (within 15 days from the submission of the request), the employee may (within a period of further 15 days) request the protection of violated rights before the competent court. These time limits are preclusive so that the employee who fails to previously demand protection of his rights within these deadlines from the employer shall lose the right to access the court, except in the case of monetary claims.

The specificity of both types of labor disputes is that, before initiating any action, a mandatory extra-judicial peaceful dispute settlement procedure (eg. mediation, conciliation, etc.) is stipulated. In accordance with Article 3 of the Croatian Law on Mediation (Official Gazette, no. 18/11.), mediation is any procedure, regardless of whether it is conducted at court, an institution for mediation or outside them, in which the parties try to settle their dispute with the assistance of one or more mediators who help the parties reach a settlement, without the power to impose a binding solution on them.

duration and termination of employment relationship, which is decided by the local competent labor court. In Germany, Sections 2 to 3 of the Labor Courts Act (*Arbeitsgerichtsgesetz*, Bundesgesetzblatt I, p. 853) contain provisions stipulating the jurisdiction of the labour courts. Point (3) of section 2(1) of the Labor Courts Act provides that the labour courts shall have jurisdiction over disputes that arise from the employment relationship; concerning the existence of an employment relationship; arising from negotiations to conclude an employment relationship; arising in tort if it is connected with the employment relationship and concerning documents of employment.

[3]In individual labor disputes can be more than one employee. It is important that they act like individuals (not as collective labor law subjects which are: employers' associations, workers' associations - trade unions, workers' councils, the Economic and Social Council, the Ministry of Labor, the Croatian Employment Service, temporary employment agencies, labor inspections) - personal criterion, and that the dispute is arising from employment relationship - causal criterion (Herman, Ćupurdija 2011, 30, 185).

This paper deals with a peaceful out-of-court settlement of disputes, primarily with the trends in the development of procedure of direct negotiations between the parties in dispute in order to reach an agreement (Knol Radoja, 2015, 111) and it is defined as any method aimed at solving the dispute solely by the conflicted parties without the need for a final decision of the competent court, which is a broader concept compared to the term mediation defined in the aforementioned Law. Mediation, as a procedure conducted before an independent third party, is therefore one of the methods of peaceful resolution of disputes (Uzelac *et al*., 2010, p. 1267).

In the Republic of Croatia, in accordance with the LL, mediation is compulsory in a collective dispute that can lead to a strike or other form of industrial action, while in individual disputes an attempt to reach a peaceful settlement of the dispute is a procedural prerequisite for the realization of the claim by the competent court.

3. Right of access to the court

The right to a fair trial is the most important procedural human right.[4] It exists in Croatian legal order at constitutional and legal levels and in several international conventions. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette, International Treaties, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10. – hereinafter: European Convention; Convention) is the international convention that the Republic of Croatia is also a signatory to guaranteeing everyone access to court, legal aid and advice, equality of arms, public hearing, fair hearing, rights to proof, public pronouncement of judgments, tribunal established by law, impartiality and independence, reasonable time, effective enforcement, legal certainty and ban of arbitrariness (Uzelac, 2011, p. 89). The European Court of Human Rights (hereinafter: ECtHR; Court) in its established case law, and even in case-law relating to cases against the Republic of Croatia, undoubtedly determines that it will not allow human rights violations relating to access to a court and a fair trial. It turned out that the violation of the right to a fair trial is not only the most common cause of proceedings before the ECtHR, but also in relation to the

[4]Since the *Ringeisen and König* cases (*Ringeisen v. Austria*, decision of 16 july 1971.; *König v. Germany,* decision of 28 june 1978), the European Court of Human Rights has taken the stand that the content of the decision is decisive and not the nature of the decision-making process, so that the trial can be reviewed in all types of proceedings (criminal, disciplinary, civil and administrative procedures and also procedures before other public authorities). It is important that in these procedures is deciding on the rights and obligations of private law, which includes property issues, as well as status, labor or commercial matters (Uzelac, 2011, 91).

Republic of Croatia, that these injuries, in the total number of decisions, are convincingly in the first place (Uzelac, 2011, p. 89). However, in the event of a violation of the right to a fair trial, the ECtHR will not substitute the decision of the body within the national legal order, but will limit itself to the findings of a violation and possible fair satisfaction, leaving to the respondent State to ensure fair trial and correct application of the law in that specific case and in all future similar cases (Uzelac, 2011, p. 92). Namely, the Court has already held in the case of *Ireland v. The United Kingdom* of 1978 that its judgments do not serve only to resolve those cases brought before it, but, more widely, to dissolve, preserve and develop the rules established by the Convention.

However, the right of access to court is subject to the restrictions. The opinion of the ECtHR is that the right of access to the court is not absolute. The underlying assumptions for the restrictions were first expressed in the judgment *Golder v. United Kingdom* (Application no. 4451/70., decision of 21 February 1975. – hereinafter: *Golder v. UK*) In the judgment Court states that since the obstacle to access to the courts affected a right guaranteed by European Convention, it needs to determine whether it was justifiable and in line of legitimate limitation on the exercise or enjoyment of that right (*Golder v. UK*, par. 37). Since the Convention refers to that right, but without specifying it in the narrow sense of the term, here, apart from the bounds that determine the very content of each right, there is room for restrictions that are implicitly permitted (*Golder v. UK*, par. 38). In the judgement *Kreuz v. Poland* (Application no. 28249/95., decision of 19 June 2001. - hereinafter: *Kreuz v. Poland*) ECtHR further elaborated view of implicitly permissible limitations on access to the court, and it was also noted that the right of access to a court is not absolute. This right may be subject to implicitly permitted restrictions because the right of access by its very nature requires regulation by the State (*Kreuz v. Poland*, par. 53). However, in these cases, the Court was convinced that the applicable limitations did not prevent or diminish the access that is provided to the applicant in such a way and extent that the very essence of that right would be weakened. The Court underlines that a restriction placed on access to a court will be incompatible with Article 6/1 of European Convention unless it follows a legitimate aim and there is a reasonable link of proportionality between the means employed and the legitimate aim that needs to be reached (*Kreuz v. Poland*, par. 55).

3.1. Alternative (out-of-court) dispute resolution as a restriction of access to the court

Alternative dispute resolution covers all out-of-court settlements of disputes, regardless of the particularities of their dispute resolution methods. The main goal of this dispute resolution method is to resolve tense relationships as early as possible and with the least cost (Masood, 2012, p. 151). In addition,

an out-of-court settlement of dispute will also reduce workload of the courts as well as create satisfaction with the long-term solution of the dispute (Knol Radoja, 2015, p. 115). Although there were various forms of peaceful settlement of disputes in the history used even by ancient Greeks and Romans, mediation as a precondition for bringing the dispute before the court, respectively for filing a lawsuit, was introduced with the French model of mediation at the time of the revolution (Bilić, 2008, p. 15). With Napoleon's conquest, mediation prior to litigation entered all legal systems designed by these conquests and in some it is still there (Van Rhee, 2005, p. 197).

In the Republic of Croatia, peaceful out-of-court settlement procedure is usually voluntary and only rarely compulsory. As compulsory, it will most often represent a procedural prerequisite for filing a lawsuit, so if that condition is not fulfilled, the lawsuit will be dismissed and the plaintiff will thus be denied access to the civil court. The obligation to the out-of-court dispute settlement procedure as a prerequisite for filing a lawsuit therefore raises the issue of constitutionality in terms of whether the aforementioned obligation limits the conventional right of access to a court (McGregor, 2015, p. 607).

In the context of the European Union law, a support for a compulsory peaceful attempt to resolve a dispute before filing a lawsuit can be found in the Court's decision in the case *Rosalba Alassini v. Telecom Italia SpA* (C-317/08, decision of 18 March 2010. – hereinafter: *Rosalba*). In this case, the Court stated that the obligation to conduct an alternative dispute settlement procedure does not seem disproportionate in regard to the pursued objectives. Court argues that there is no less restrictive alternative to the implementation of a compulsory procedure, since the alternative settlement procedure which is only optional would not be as effective. Court also did not find to those objectives any disproportionate disadvantages caused by the compulsory nature of the alternative out-of-court settlement procedure. Mandatory dispute resolution procedure as a prerequisite for a judicial proceeding does not constitute a disproportionate infringement upon the right to effective judicial protection. These obligations represent a minor infringement that is compensated by the opportunity to end the dispute inexpensively and quickly (*Rosalba*, par. 65).

In the Republic of Croatia, the right to access to a court is protected by Article 29 para. 1 of the Constitution (Official Gazette, no. 85/10., 05/14.), which states, *inter alia*, that everyone has the right to an impartial and independent forum to decide fairly on his or her rights and obligations in a reasonable time. Due to the mandatory attempt of peaceful dispute, settlement before a lawsuit is filed types of disputes, also before the Croatian Constitutional Court the question arose whether such procedural prerequisite limited the access to the courts. When it comes to the right of access to court, the Constitutional Court of the Republic of Croatia in its case-law has fully taken over the legal points of view of the ECtHR and in its decisions repeatedly

emphasizes that this right is an integral element of the fundamental human right to a fair trial (Šarin, 2015, 276). In its ruling (no. U-I/54269/2009) of 18 October 2016, the Constitutional Court accepted the view of the ECtHR laid down in the case of *Golder v. UK* and *Kreuz v. Poland* and also took the view that the right to access to the court is not absolute and is subject to limitations. In par. 10 of that judgement the Constitutional Court points out that that right may be limited by law (Article 16 of the Constitution (Official Gazette, no. 85/10., 05/14.)), for example with the statutory presumptions that must be met for filing a lawsuit or with preclusive deadlines. Any limitation, however, must be established by law, must have a legitimate aim and there must be a reasonable proportionality between the restriction and the goal to be achieved by that limitation. The decision was reached on the request to review the constitutionality of Article 186a of the Civil Procedure Act. Article 186a of the Civil Procedure Act provides procedural prerequisites for filing a lawsuit against the Republic of Croatia. A person intending to file a lawsuit before filing that lawsuit against the Republic of Croatia must submit a request for a peaceful settlement of the dispute to the competent State Attorney's Office. This obligation shall also apply *mutatis mutandis* in cases where the Republic of Croatia intends to sue a person residing or established in the Republic of Croatia. The applicant in this case considers that the provision is inconsistent with the Constitution and the European Convention on Human Rights and it establishes that the Republic of Croatia rises above all other persons and thus violates one of the fundamental principles of the equality of all before the law. The Constitutional Court however in par. 13 considers that the disputed Article 186a CPA has the legitimate aim – providing the opportunity for the parties (natural and legal persons) in proceedings in which the Republic of Croatia is one of the parties to effectively address their claims without conducting judicial proceedings, on the one hand, and, at the same time, relieving the courts (no. U-I/54269/2009, par. 13). As regards the proportionality of the restriction to the legitimate aim, par. 14 stipulates that the disputed Article of the CPA applies in cases where a person intends to file a lawsuit against the Republic of Croatia, and in cases where the Republic of Croatia intends to sue a person with residence or head office in the Republic of Croatia. Therefore, the disputed articles of the CPA provide the same procedural position of the Republic of Croatia as the plaintiff and the party that intends to sue the Republic of Croatia (no. U-I/54269/2009, par. 14).

3.1.1. Request for peaceful resolution of an individual labor dispute as a restriction of access to court

On the issue of individual labor disputes LL stipulates the obligation to strive to reach a negotiated settlement of the dispute as a prerequisite for seeking protection of rights in court.[5]

Namely, the employee who considers that his employer has violated his rights that are arising from employment relationship may, within fifteen days following the day since he learned about such violation, seek from the employer the exercise of his rights. If the employer does not meet the employee's request within next fifteen days, the employee may within another fifteen days seek judicial protection before the competent court (Art. 133/1 and 2 LL). Therefore, the employee who has failed to submit that request (because he did not know about such an obligation, deadline is to short or he was unable to do this, for ex. because of illness), may not seek for protection of his rights before the court, except in the case of the employee's claim for compensation of damage or in case of another monetary claims that arise from the employment relationship (Art. 133/3 LL).

As already stated, according to the LL, the exemption from the obligation to request the employer to exercise his rights arising from employment is stipulated by Article 133/3 LL in the case of the employee's claim to be awarded damages or in case of another monetary claim which relate to the employment. As argued by the Zagreb County Court in its decision (no. Gžr-2989/09) of 20 October 2009, this means that even in the case of an oral termination of a labor contract that, due to the lack of a written form, is illegal (*arg. ex.* Art. 120 LL), an employee may seek protection of his injured rights, but must bear in mind that, if he has not previously filed request for protection of the rights because of oral dismissal, he shall not be entitled to judicial protection, irrespective of whether such dismissal is unlawful. It is therefore important to point out that with an oral dismissal the employer violated employee's right since he illegally prevented the employee from performing the contract. In this case an employee

[5] In the case of a collective labor dispute which may lead to strike or other forms of industrial action, pursuant to Article 206 LL mediation is obligatory (refusal of participation in the procedure of mediation is punishable under Article 228/1, point 30 and Article 230 point 7 of LL) if the parties in the dispute have not agreed on any other means of its peaceful resolution. The commencement of a strike before the compulsory mediation process or prior to another peaceful settlement of the dispute and the refusal to participate in this proceedings may, as noted, result in sanctions. Therefore, it can be concluded that compulsory mediation in collective labor disputes constitutes a presumption of the admissibility of a strike, but not a procedural prerequisite for the realization of the claim by the competent court.

may seek protection of his rights, first by submitting the employer a request for protection of his rights, and if the employer disagrees with the request, there still remains the possibility for the employee to seek protection of his rights at court.

The attitude of the Croatian doctrine and the judiciary is that the employee's failure to address the employer with a request for the protection of rights before filing a lawsuit, or the omission of deadlines, except in the abovementioned exceptions, has the meaning of a procedural prerequisite and leads to the dismissal of the lawsuit (Triva, Dika, 2004, p. 800). The Supreme Court of the Republic of Croatia in the decision (no. Rev 1439/1997-2) of 24 September 1997 argues as well that this provision of the Law should be interpreted in a way that judicial protection cannot be sought by an employee who has not previously sought protection of his rights before the competent body of the employer. Therefore, the Supreme Court considers that the lower courts in the aforementioned case misapplied the substantive law when deciding on the lawsuit because the plaintiff could not in this case claim protection before the court since the legal presumptions for judicial protection, as outlined above, were not fulfilled, thus the lawsuit had to be dismissed.

The equivalent obligation of the employer's obligation for previous referral to a employee is found for example in Article 119 LL. Prior to the regular termination of the contract due to the employee's behavior, unless there are circumstances due to which the employer cannot be reasonably expected to do so, the employer has a duty to alert him in writing about obligations from the employment relationship and indicate to him the possibility of obtaining a dismissal. Similarly, prior to giving a regular notice of dismissal or an extraordinary notice of termination because of the employee's misbehavior, the employer, in accordance with this article, must give him an opportunity to defend himself, unless there are circumstances because of which the employer cannot be reasonably expected to do so (Article 119 LL). An employer is obliged to look for the employee's manifestation regardless of the certainty of the existence of breach of duty. Therefore, the form of peaceful settlement of the dispute is also the employer's obligation prior to giving a regular notice of dismissal because of the employee's misbehavior, to inform him about his obligations from labor relationship and about the risk of termination in the event of further violation of his obligations. This warning also, among other things, eliminates any misunderstandings about the obligations of the employees that may arise from the provisions of the employment contract. Likewise, the employer is usually obliged to provide that an employee present his defense. This requires from the employer that he or an authorized person, prior to the dismissal due to misconduct, ask the employee about the circumstances relevant for making such a decision. However, it is important to say that the employer has complied with this obligation if he only invites the employee to

present his defense, and the employee has not responded to this invitation for no justified reason. However, withholding the opportunity to present defense certainly is relevant, if the employee's defense, if expressed, would deter an employer from making such a decision on the dismissal since the employee can justify his behavior (eg. absence from work due to illness). Nevertheless, it should be emphasized that these cases of obligatory address to an employee for a peaceful solution of the dispute are not a procedural prerequisite for filing a lawsuit, but a material presumption for the termination of the contract, and thus do not constitute a restriction on the employer's right of access to a court in a labor dispute. In Croatian doctrine it is stated that the process of the previous referral to the employer with the request for protection of rights, in the practice, albeit mandatory, is often only a mere formality that must be fulfilled before filing a lawsuit, which opens doubts about its purposefulness. In addition, as Triva and Dika suggest, it could be established that this procedure is counter-productive because it limits the right of access to the court and because of the fact that the employee as a procedural party has an unequal legal status in relation to the employer. Namely, the right of an employer to seek judicial protection against an employee is not limited with duty of prior referral to an employee in order to comply with the right to exercise his right (Triva, Dika, 2004, p. 800). We can agree with this standpoint because the assessment of the proportionality of the limitations with a legitimate aim, namely, putting the opposing parties in the same procedural position, which is not the case with the mandatory previous referral to the employer is also apparent from the analyzed judgement of the Constitutional Court (no. U-I/54269/2009) of 18 October 2016, and we consider it to be crucial. In a labor dispute, the employee's right to direct access to the court is limited, whereas there is no such limitation on the employer's side.

3.1.2. Preclusive deadline

By stipulating the process of the previous referral to the employer with the request for protection of his rights as a special procedural prerequisite for filing a lawsuit, an employee is prevented from directly accessing to the court and placed in an unequal procedural position because there is no equivalent employer's obligation. Besides, employee’s omission of preclusive deadlines for addressing the employer and later the court also leads to a loss of his rights to legal protection. This is a tough and perhaps inadequate consequence of a failure affecting only an employee (Uzelac *et al.*, 2010, p. 1290).

However, restrictions on access to justice in the form of existence of limitation periods exist, in many other states, as well. For example, in Germany a lawsuit for contesting the dismissal must be filed by the employee before a labor court in a period of three weeks from the date of the dismissal. If an employee misses this deadline, by the expiration of this period the dismissal

becomes effective and can no longer be challenged even at court. Additionally, in case of non-payment of salary to an employee, an employee should send the employer a written letter requesting him to pay an unpaid salary within a certain time. If the employer fails to respond within the established time limit, an employee may file his lawsuit to the labor court. In Germany, in case of non-payment of salary it is therefore mandatory to take into account the exact time limit set out in the employment contract or collective agreement. After expiration of the deadline, payment claims are no longer possible and the employee can no longer demand payment from the employer or from the court (Office for the Equal Treatment of EU Workers, 2018).

The European Court of Human Rights in the *Grizelj v. Croatia* (Application no. 50564/14., decision of 5 July 2018. – hereinafter: *Grizelj v. Croatia*) referred to the aforementioned issue of preclusive deadlines. In this case the applicant complained that he had been denied of access to court in the civil proceedings concerning his dismissal from work, as domestic courts rejected his lawsuit filed beyond the deadline. However, the ECtHR took into account the circumstance in which the applicant refused to take a notice of dismissal when the employer first wanted to deliver it and thereby put himself in a position to risk preclusion of deadlines for filing lawsuit. The Court saw no special circumstances which can justify the applicant's refusal to take the notice of dismissal, or for which the applicant should not be held accountable. The Court shared the view of the respondent Government that employees are not allowed to choose between the two time-limit starting times provided the LL. Court therefore states that the primary responsibility for having his claim declared inadmissible, because it was filed beyond the deadline, lies with the applicant (*Grizelj v. Croatia*, par. 26). In view of the above considerations, the Court considers that it cannot be said that the manner in which the procedural requirement for seeking judicial protection provided for in LL was applied violated the very essence of the applicant's right of access to a court (*Grizelj v. Croatia*, par. 28).

However, in the case of *Gregurić v. Croatia* (Application no. 45611/13., decision of 15 March 2018. – hereinafter: *Gregurić v. Croatia*) ECtHR, considering the circumstances of the case, noted that the only reason why the national courts rejected the applicant's claim was that he did not exercise the protection of his rights in relation to the employer within 15 days on the basis of Article 133 of the LL and hence did not meet the procedural preconditions for timely filing the claim (*Gregurić v. Croatia*, par. 35). In this case, the ECtHR should have determined whether this procedural limitation applied by the domestic courts sought to the legitimate aim and was it proportionate to that aim. The Court reiterated that the purpose of the time limits for filing a lawsuit are certainly to safeguard the proper functioning of the judicial system and in particular respecting the principle of legal certainty (*Gregurić v. Croatia*, par.

37). The Court then examined if there was a reasonable connection of proportionality between the legitimate aim which the state intended to accomplish and the applied means. In this respect, the Court, firstly, notes that the applicant's claim aimed at obtaining recognition of the fact that he had entered an open-ended contract of employment and his reinstatement, and that domestic courts declared his claim inadmissible on the grounds that he had failed to observe the requirement laid down in Article 133 of the LL. However, that finding contradicts the established case-law of the Supreme Court developed in the application of that provision. The Supreme Court's jurisprudence shows that when an employee asks a court to recognize that he or she has entered an open-ended contract of employment, such a claim is of a declaratory nature within the meaning of Article 187 of the CPA and, as such, is not subject to deadlines. Namely, the procedural prerequisite for lodging a declaratory claim is the existence of a legal interest in bringing such a claim before a court and not an obligation to request the employer for the protection of the right that has supposedly been violated (*Gregurić v. Croatia*, par. 39). However, in the applicant's case, the domestic courts, contrary to the above-cited interpretation of the ECtHR and application of the relevant national law, in particular Article 133 of the LL, in cases that were identical to that of the applicant, dismissed his claim on the grounds of alleged non-compliance with the deadline under that provision. In doing so, neither the lower courts, nor the Supreme Court provided any arguments capable of justifying their departure from conclusions reached in cases identical to that of the applicant (*Gregurić v. Croatia*, par. 40). The previous considerations are appropriate for the Court to decide that the manner in which the domestic courts applied the relevant national law was not foreseeable for the applicant, who could have reasonably expected that his claim would be examined on the merits. That situation, which was contrary to the well-established case-law of the highest court in the State, infringed the standard of legal certainty and led to a denial of justice which violated the very essence of the applicant's right of access to a court as secured by Article 6/1 of the Convention (*Gregurić v. Croatia*, par. 41).

We can certainly conclude that legal certainty is greater when court practice is established, which also supports the principle of fairness (Pavčnik, 1991, p. 161). Citizens must be able to ascertain that the legal rules are intended for a particular case and the provisions must be sufficiently prone to enable predictability in order to direct the behavior of the subjects to which it relates (Clements, 1999, p. 166).

In addition to the analyzed case, the ECtHR has many times in its decisions turned upon the issue of inconsistent court practice. In *McLeod v. United Kingdom* (Application no. 24755/94., decision of 23 September 1998. – hereinafter: *McLeod v. United Kingdom*) Court discusses the property of the law in question, requiring that it be available to the concerned persons and

formulated with enough precision to enable them to predict, to a reasonable degree, the outcomes which some action may entail. However, those outcomes need not be predictable with complete certainty, since such certainty might give rise to extreme inflexibility, and the law must be able to keep up with the changes (*McLeod v. United Kingdom*, par. 41). In *Atanasovski v. The Former Yugoslav Republic of Macedonia* (Application no. 36815/03 decision of 14 January 2010. – hereinafter: *Atanasovski protiv Makedonije*) the Court comments that the development of the case-law is not opposing to the duly administration of justice since a failure to maintain a evolutive and dynamic approach could represent an obstacle to reform or improvement. However, it suggests that the existence of an established court practice should be taken into account when assessing the scope of the reasoning to be given in a particular case. Therefore, the Court considers that the case law that is well-established imposed an obligation on the Supreme Court to make a more significant statement of reasons explaining the deviation or the fairness of the proceedings will be violated (*Atanasovski v. The Former Yugoslav Republic of Macedonia*, par. 38).

Conventional law, therefore, does not stop changing the practice or further development of court interpretations. The development of court practice through new interpretations is not contradictory to conventional provisions, because avoiding a dynamic and evolutionary approach would mean giving up on progress (Karas, 2014, p. 120). ECtHR does not oppose the possibility of creating a new interpretation in judicial practice, but examines whether it is a departure or the emergence of a new uniform interpretation (*Tudor Tudor v. Romania*, Application no. 21911/03., decision of 24 March 2009, par. 30). In case *Ferreira Santos Pardal v. Portugal* (Application no. 30123/10., decision of 30 July 2015. – hereinafter: *Ferreira Santos Pardal v. Portugal*) ECtHR determines that the deviations in judicial practice are an integral part of each judicial system based on a network of courts of varying instances. The Court states that the role of the Supreme Court is to solve such conflicts and that precisely the Supreme Court may be the source of legal uncertainty if it causes deviations in judicial practice leading to the undermining of the standards of legal certainty and the reduction of public confidence in the judicial system (*Ferreira Santos Pardal v. Portugal*, par. 42). Furthermore, the Court concluded that the inconsistency of the case-law because of which the applicant's lawsuit was rejected and the lack of a mechanism by which the Supreme Court questioned such inconsistency, denied the applicant the right to be heard, although that right was enabled to other persons in similar situations (*Ferreira Santos Pardal v. Portugal*, par. 51).

4. Conclusion

The right of access to the court is not absolute, it can be restricted for a legitimate purpose, and there is a reasonable link of proportionality between the legitimate aim to be achieved and the employed means. Encouraging a peaceful settlement of disputes of all types, particularly analyzed individual labor disputes certainly fall into this category. However, the perceived problem of this form of constraint stems from putting one side of the process, most often the weakest with less experience and financial resources, in an unequal procedural position in relation to the other more powerful party. According to the Croatian Labor Law, before the court proceeding, there is a duty of the employee to address the employer with the request for protection of rights and as such, it constitutes the procedural prerequisite for filing the lawsuit. This means that, if the employee does not fulfil this obligation, his lawsuit will be dismissed. An equal employer's obligation before accessing to the court in the case of a dispute with an employee does not exist. Therefore, such a provision, due to its discriminatory effect and disproportionality to the legitimate aim, hinders the employee's right to direct access to the court.

A sort of restriction of the right of access to the court in labor disputes is also the existence of preclusive deadlines for filing a lawsuit. In the case of *Grizelj v. Croatia*, the applicant complained that his right of access to the court was violated because the domestic courts rejected his lawsuit challenging the termination of employment relationship, filed beyond the deadline. However, the ECtHR concluded that the manner in which a request for judicial protection under the Labor Act was decided did not diminish the very essence of the applicant's right of access to the court and that its limitation, in the sense of the existence of preclusive deadlines, is in accordance with a legitimate aim and proportionate to that aim. The applicant's application was therefore rejected as inadmissible, considering it manifestly ill-founded (*Grizelj v. Croatia*, par. 29).

On the other hand, in the case of *Gregurić v. Croatia*, which also concerns the problem of preclusive deadlines in labor disputes, ECtHR found inconsistency. However, the problem does not arise from the existence of preclusive deadlines, but in a different interpretation of the prerequisites for the filing of declaratory claims. The Court concludes that the dismissal of the claim, due to the expiration of the preclusive deadline, resulted in a deviation from the established practice according to which the submission of a declaratory claim for recognizing that employee has entered an open-ended contract of employment was not related to any deadline.

The ECtHR adheres to the broader concept of legality, and not only narrow formal concept expressed in written regulations. As far as any provision is determined, in every legal system there is an inevitable element of the judicial interpretation because there is always a need to resolve doubts and to adapt to new circumstances (*Kononov v. Latvia*, Application no. 36376/04., decision of

24 July 2008. par. 114c). According to this approach, the case law also falls under the general conditions for the assessment of legality, which is entirely justified because it is not abstract norms, but concrete interpretations by judges that are applied on the citizens (Karas, 2014, p. 114). If the jurisprudence, based on the same rules brought unpredictable results, the predictability of the interpreted norm would be questionable, which certainly does not contribute to legal certainty, and in some cases, as in the analyzed case *Gregurić v. Croatia*, also leads to violations of the right of access to the court.

References

Books and articles

Bilić, V., Bilić, V. (2008). Alternativno rješavanje sporova i parnični postupak, Doktorska disertacija, Zagreb

Casale, G. (2011). The Employment Relationship, A Comparative Overview, Hart Publishing, Oxford, International Labour Office, Geneva

Clements, L. (1999). European Human Rights, Sweet and Maxwell, London

Davidov, G., Langille, B. (2006). Boundaries and Frontiers of Labour Law, Hart Publishing, Oxford

Gotovac, V. (2004). Alternativne metode rješavanja radnih sporova: mirenje i arbitraža, in:

Dika, M. *et al*., Zasnivanje i prestanak radnih odnosa; Rješavanje radnih sporova, Zagreb, 185-224.

Grgurev, I. (2017). The Concept of 'Employee': The Position in Croatia, in: Restatement of Labour Law in Europe, Vol I: The Concept of Employee (ed. B. Waas, G. H. van Voss), Hart Publishing, Oxford and Portland, Oregon, 59-83.

Herman, V., Ćupurdija, M. (2011). Osnove radnog prava, Pravni fakultet Osijek

Karas, Ž. (2014). Neujednačena sudska praksa u kaznenom postupku kao povreda Europske konvencije za zaštitu ljudskih prava, Zbornik Pravnog fakulteta u Zagrebu, 64(1), 111-131.

Knol Radoja, K. (2015). Obvezno mirenje – osvrt na rješenja iz komparativnog i hrvatskog prava, Pravni vjesnik, 31(2), 111-130.

Masood A. (2012). Implied Compulsory Mediation, Civil Justice Quarterly, 31, 151-175.

McGregor, L. (2015). Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, European Journal of International Law, 26(3), 607–634.

Pavčnik, M. (1991). Argumentacija v pravu, Cankarjeva založba, Ljubljana

Potočnjak, Ž. (2003). Kolektivni radni sporovi te načini njihova rješavanja (mirenje, arbitraža, štrajk i isključenje s rada), in: Babić, V. *et al.,* Novine u radnim odnosima, Zagreb, 265–299.

Šarin, D. (2015). Pravo na pristup sudu u praksi Europskog suda za ljudska prava, Pravni vjesnik, 31(3-4), 267-296.

Senčur Peček, D., Laleta, S. (2018). Ugovor o radu i ugovor o djelu: područje primjene radnoga zakonodavstva, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 39(1), 411-456.

Triva, S., Dika, M. (2004). Građansko parnično procesno pravo, Narodne novine, Zagreb

Uzelac, A. (2011). Pravo na pošteno suđenje: opći i građanski aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, in: Usklađenost zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, ed. Radačić, I., Centar za mirovne studije, Zagreb, 89-125.

Uzelac, A., Aras, S., Maršić, M., Mitrović, M., Kauzlarić Ž., Stojčević, P. (2010). Aktualni trendovi mirnog rješavanja sporova u Hrvatskoj: dosezi i ograničenja, Zbornik Pravnog fakulteta u Zagrebu, 60(3), 1265-1308.

Van Rhee, C. H. (2005). European Traditions in Civil Procedure, Intersentia nv, Oxford.

List of regulations, acts and court decisions

Atanasovski protiv Makedonije, Application no. 36815/03., decision of 14 January 2010.

Civil Procedure Act, Official Gazette, no. 53/91., 91/92., 112/99., 129/00., 88/2001., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 25/13., 89/14.

Constitution of the Republic of Croatia, Official Gazette, no. 85/10., 05/14.

Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International Treaties, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

Decision of the Constitutional Court of the Republic of Croatia, U-I/54269/2009, of 18 October 2016.

Decision of the County Court in Zagreb, Gžr-2989/09, of 20 October 2009.

Ferreira Santos Pardal v. Portugal, Application no. 30123/10., decision of 30 July 2015.

German Labor Courts Act (*Arbeitsgerichtsgesetz*), as promulgated on 2 July 1979 (Bundesgesetzblatt I, p. 853),

German Works Constitution Act (*Betriebsverfassungsgesetz*), adopted 25 September 2001 (Bundesgesetzblatt I, p. 2518).

Golder v. UK, Application no. 4451/70., decision of 21 February 1975.
Gregurić v. Croatia, Application no. 45611/13., decision of 15 March 2018.
Grizelj v. Croatia, Application no. 50564/14., decision of 5 July 2018.
Kononov v. Latvia, Application no. 36376/04., decision of 24 July 2008.
Kreuz v. Poland, Application no. 28249/95., decision of 19 June 2001.
Labor Law (invalid), Official Gazette, no. 149/09., 61/11., 82/12., 73/13.
Labor Law, Official Gazette, no. 93/14., 127/17.
McLeod v. United Kingdom, Application no. 24755/94., decision of 23 September 1998.
Rosalba Alassini v. Telecom Italia SpA (C-317/08), decision of 18 March 2010.
Slovenian Law on Labor and Social Courts (*Zakon o delovnih in socialnih sodiščih*, Uradni list RS, no. 2/04, 10/04.
The decision of the Supreme Court of the Republic of Croatia, Rev 1439/1997-2 judgement of 24 September 1997.
The Law on Mediation, Official Gazette, no. 18/11.
Tudor Tudor v. Romania, Application no. 21911/03., decision of 24 March 2009.

Website references

Office for the Equal Treatment of EU Workers (2018), Rad u Njemačkoj, Dobivanje spora, retrieved from: https://www.eu-gleichbehandlungsstelle.de/eugs-hr/gra%C4%91ani-eu-a/infoteka/rad-u-njema%C4%8Dkoj/dobivanje-spora, accessed on 1 March 2019.