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10 The Labour Lawyer's Reading of the *Baka* Case

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10.1 Introduction

Protecting human rights in the context of the employment relationship is of utmost importance. The employee works personally, under the employer's subordination, bringing her whole personality to the workplace and her wage means the basis of her own and her family's livelihood. Such features put the employee in a vulnerable situation as regards most human rights prescribed under the European Convention on Human Rights (ECHR). Labour law ultimately serves the goal of preserving the fundamental rights of employees. However, the level of protection is somewhat lower as regards state employees. In their case the employer represents the state and the employees take part in exercising powers stemming from state sovereignty. Their loyalty and obedience to the employer's orders occasionally outweighs their human rights which is most apparent in the case of members of the armed forces and the police. Even international standards are lower as regards state employees, and the ECHR permits certain limitations to a level necessary in a democratic society.

A new set of cases before the international human rights forums against Hungary shows that the boundaries of limiting state employees' basic rights deserves close attention, as the current tendency is to push such barriers even further.[1] The *Baka* case[2] is the newest element in this process and gives the author the possibility to examine how the concerns the European Court of Human Rights (Court) expressed as regards the premature termination of the Supreme Court's president's mandate effect the status of other state employees working in the civil service.[3] Below I assess some rules of Act 199 of 2011 on civil servants (Kttv.) which I find solicitous concerning the right to access to tribunal and

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1 *See* the European Court of Justice cases of mandatory retirement of judges and prosecutors (C-286/12 *Commission v. Hungary* [2012] ECR I-0000), the premature termination of the data privacy ombudsman's mandate (C-288/12) and the European Court of Human Rights cases of the 98% tax for state employees (*N.K.M. v. Hungary*, No. 66529/11) and the dismissal of government officials without notice (*K.M.C. v. Hungary*, No. 19554/11).

2 *Baka v. Hungary*, No. 20261/12.

3 I use term 'civil service' to refer to civil state employees working in the public administration.

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the freedom of expression. The last part covers another new tendency in Hungary, the limitations on unionisation in the public sphere, which has not been touched upon by any international human rights forum as of yet, but could easily be the next chapter in the set of cases mentioned below. As a preliminary remark, in my opinion the growing limitations on civil servants' human rights lead astray and definitely do not contribute to reinforcing a professional and effective civil service.[4]

10.2 Access to Tribunal – Three Problematic Cases

The *Baka* case was the second in a period of two years where the Court held that Hungary violated a state employee's right of access to court. In the *K.M.C. v. Hungary* case the Court found that governmental officials' dismissal without reasoning amounted to depriving the impugned right of action of all substance. Even if the official could theoretically bring a labour-law claim to court, this did not in itself ensure the effectiveness of the right of access to a court, as that possibility was devoid of any substance and thus of any prospect of success.[5] Before the Court delivered its judgement, the Constitutional Court had already annulled these rules based on the violation of five provisions of the Constitution.[6]

The current rules of the Kttv. were introduced after the Constitutional Court's decision but before the Court's judgement. Nevertheless it was clear for the legislator that the dismissal without reasoning could not be upheld, but the Constitutional Court also added that the effective operation of state administration might justify the introduction of more flexible rules on the dismissal of civil servants.[7] As a general rule, the Kttv. prescribes that the dismissal shall contain clearly the reasons it was based on and in case of a dispute, the burden of proof to verify the authenticity and substantiality of the reasoning shall lie with the employer.[8] In spite of the conclustion on the dismissal without reasoning, I shall point out certain elements of the regulation below which may still raise concerns about the effective right to access to tribunal. Note that Hungarian law does not explicitly exclude any civil servant from access to court, as set out in the *Eskelinen* test, thus, Article 6 is applicable.[9]

The first case is the veto against the appointment of civil servants in government offices. Government offices are authorities integrating the various branches of public administration at county level. The head of the government office, the government deputy may raise a

4 As defined as a goal in the preamble of Kttv.
5 *K.M.C. v. Hungary*, No. 19554/11, Paras. 33-34.
6 Right to work, right to access to civil office, rule of law, right to access to court, right to human dignity. *See* Constitutional Court Dec. No. 8/2011 (II. 18).
7 Constitutional Court Dec. No. 8/2011 (II. 18) point IV. 4.
8 Kttv. Art. 63(3).
9 *Baka* judgement Paras. 67-68.

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veto against the appointment of any new entrants in the office.[10] Such veto shall not be put in writing, needs no reasoning and it shall not be delivered to the person affected. Nonetheless, the veto impedes appointment. The question is how the rejected new entrant could claim legal remedy against such a veto.

It seems clear that the unreasoned oral veto which must not even be officially communicated to the recipient represents a clear violation of Article 6 ECHR. I see no reason why such discretion is required for the government deputy to control hiring processes in the office. The Kttv. contains a huge variety of institutions to guarantee the professional selection of personnel, from the detailed rules of public tendering to the compulsory probation period. In my view the government deputy's right to personal veto is unnecessary to guarantee professional hiring, but opens a wide space for abuse and arbitrary decisions on hiring without effective legal remedies. As the Court recalled in the *Baka* case, to justify the limitations on the access to court, it is not enough for the state to establish that the civil servant in question participates in the exercise of public power, but it needs to show that the subject matter of the dispute at issue is related to the exercise of state power or that it has called into question the special bond of trust and loyalty between the civil servant and the state.[11] Clearly, there is nothing in the appointment of a civil servant on the county level public administration which would require the annulment of the right of access to court.

To mention one more technical problem: although it is the government deputy who may prevent appointment, he is not considered as the person exercising employer's rights. At the same time, labour law litigation may only be launched against the employer.[12] Thus, there is no legal possibility to file a lawsuit against the deputy before the labour court which makes the right of access to tribunal illusory.

The second issue is the reinstatement of civil servants to office after the court held that their employment relationship was unlawfully terminated by the employer. Such a claim can only be raised in limited cases, where the termination seriously violated the law (for example in case of discrimination or when the labour law protection of union officials was not observed). The Kttv. authorizes the court to dismiss the civil servant's claim for reinstatement upon the request of the employer, if future employment cannot be expected from the employer. In such cases the civil servant is entitled to a flat rate compensation of two to twelve monthly wages, depending on the circumstances of the case.[13]

The problem is that the law contains an exemplificative list of cases when the court must accept the employer's request to reject reinstatement. The Kttv. prescribes that future employment is not expectable if, among others, the civil servant's position was filled or

10 Act 126 of 2010 Art. 15(3).
11 *Baka* judgement Paras. 68 and 77.
12 Act 3 of 1952 on the civil procedure, Art. 349.
13 Kttv. Art. 193.

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abolished in the meantime or there is a layoff going on.[14] In the cases explicitly listed in the Kttv. it is not in the discretion of the court to decide whether future employment is expectable from the employer or not, but must reject reinstatement. It seems obvious that by such broad interpretation of 'not expectable future employment', unlawfully dismissed civil servants can be reinstated only if the employer wishes to do so.

The Constitutional Court dealt with the employee's claim for reinstatement in two previous decisions.[15] It held that the right to reinstatement is not absolute and there is no constitutional obligation for the legislator to guarantee future employment in the same position regardless of any conditions. However, it is against the free will of the employee if its claim for reinstatement must be rejected upon the request of the employer who acted unlawfully and no specific reasons are required for such request. The Constitutional Court pointed out that the court shall have discretion over whether future employment is expectable from the employer and thus to reinstate the employee or not. In my view the Kttv. leaves so limited room for the courts to decide on the question of reinstatement that it raises serious doubts about the effectiveness of the right of access to court. It is highly possible that unlawfully dismissed civil servants could not be reinstated by the court even if they started the whole litigation for that aim.[16] Such limitation on the right to access the court might be considered as restricting the right's very essence.[17]

Finally, the Kttv. authorizes the employer to unilaterally modify the job profile or the place of work of the civil servant, if the new job is still suitable for her qualifications and professional experience and the travelling time to work and home does not exceed a certain limit prescribed by the law. Moreover, the employer shall not cause disproportionate harm by the unilateral modification.[18] Even if this right is limited by the aforementioned guarantees, it forms a vast intrusion into the contractual bases of the parties' legal relationship. The civil servants' employment relationship is based on the appointment and its acceptance by the civil servant.[19] The two unilateral acts form a quasi-contract.[20] In my view, it would be unimaginable in private sector employment to authorize the employer to unilaterally change the contractual bases of the legal relationship, even in cases when it causes 'only' proportionate harm to the employee.[21] Moreover, note that the Kttv. permits the temporary employment of the civil servant in a job profile or workplace other than stipulated in the

14 Kttv. Art. 193(2).

15 Constitutional Court Dec. Nos. 4/1998 (III. 1) and 549/B/1999.

16 The right of access to the courts is not absolute but may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

17 *Baka* judgement Para. 73.

18 Kttv. Art. 48(3-5).

19 Kttv. Art. 38(1).

20 Cs. Lehoczkyné Kollonay, *A magyar munkajog I*, Vince Kiadó, 2001, p. 97.

21 Note that in case of executive civil servants even disproportionate harm might be caused. This means that the employer may put the executive to any simple position without reasoning, although the law elsewhere regulates this modification also as a disciplinary action [Kttv. Art. 48(6), 155(2) e)].

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appointment upon the order of the employer.[22] Given the possibility of temporary unilateral modification, in my view the effective operation of the administration does not require the unilateral modification of the appointment for an indefinite period.

If the civil servant no longer wishes to work under the modified conditions, he may request the employer to dismiss him which the employer cannot refuse.[23] The law does not link the unilateral modification to any specific circumstance, thus the employer may resort to it without reasoning. I see serious concerns with respect to the right of access to tribunal as the civil servant can be forced to ask for her dismissal by a unilateral act of the employer which needs no reasoning. It is worth mentioning that the Committee of Ministers' recommendation on the status of public officials in Europe prescribes that in so far as possible, public officials should not be transferred without their consent unless it is required in the public interest and, in particular, of good public administration. Public officials should have a legal remedy against the possible unlawfulness of such a measure.[24]

10.3 The Freedom of Expression and 'Professional Loyalty'

As a general rule, the Kttv. prescribes that the personal rights of parties falling within its scope shall be respected. The personal right of civil servants may be restricted if deemed strictly necessary for reasons directly related to the intended purpose of the civil service and in case it is proportionate to the objective pursued.[25] Moreover, the law entitles the civil servant to put in writing his dissenting opinion if he does not agree with the order or decision of his superior. The civil servant shall not be subject to any inconvenience if she exercises this right.[26]

However, the Kttv. introduced a new obligation of civil servants, the so-called professional loyalty. The law obliges civil servants to fulfil their tasks with professional loyalty towards their superiors, meaning the commitment towards the professional merits determined by the superior, creative cooperation with colleagues and fulfilment of tasks with professional calling, discipline and concentration.[27] If the civil servant breaches the obligation of professional loyalty, he must be dismissed on the grounds of 'loss of trust'.[28]

Given the subordination between the parties in the employment relationship and the nature of the civil servant's duties, earlier court practice acknowledged the employer's

22 Kttv. Arts. 51-52, 54-55.
23 Kttv. Arts. 48(7), 63(2) d). This also means that the civil servant is eligible to severance pay and other benefits as in other cases of dismissal.
24 Recommendation No. R (2000) 6, point 6.
25 Kttv. Art. 11(1).
26 Kttv. Art. 78(4).
27 Kttv. Art. 76(2).
28 Kttv. Arts. 63(2) e), 66(1).

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right to unilaterally terminate the relationship on the grounds of the loss of trust.[29] However, the Kttv.'s definition of professional loyalty covers elements related much rather to bad performance than issues concerning the executive's trust. If a civil servant reflects upon irrelevant facts in the wording of a decision ('concentration'), cannot work together with colleagues ('creative cooperation'), or does not respect deadlines ('fulfilment of tasks with discipline'), he simply could be dismissed on the grounds of inadequate performance rather than loss of trust. Besides, these malpractices could also lead to a disciplinary action.[30] Hence the exact content of the dismissal based on the loss of trust cannot be defined as it overlaps with other institutions.

From the aspect of the freedom of expression, it should be pointed out that in case of the rather blurry loss of trust the employer has no discretion, but it is mandatory to dismiss the civil servant. This means that if the executive notices that her dependent dissents from the professional merits she determined, she has no other option than to dismiss the civil servant. For instance, an environmental engineer working in the environmental authority expresses her opinion that she is against nuclear energy, while the leaders order the whole office to start a campaign to promote the building of a new nuclear plant. Here, the absurd requirement of the law is to dismiss this civil servant as she does not show the necessary professional loyalty.

In my view, the expectation of professional loyalty could easily be read as rule that the civil servant has no right to express her opinion if it contradicts that of her executive, or – more precisely – this would inevitably lead to the termination of her employment. The question is not the civil servant's eligibility for public service, nor her professional ability to exercise her functions, thus, it relates to the freedom of expression and not to the holding of a public post in the public administration.[31] Mandatory dismissal also applies in situations when – as in the *Baka* case – the views expressed are mere criticisms from a strictly professional perspective, without any gratuitous personal attacks or insults.[32] Here, I see such a restriction of civil servants' freedom of expression that is in no way necessary 'in a democratic society'.[33] On the contrary, the civil servants' expression of opinions serving the public interest should be protected by all means.[34] Obviously, the fear of such a severe sanction leads to a 'chilling effect' on the exercise of the freedom of expression in the civil service, which the Court labelled as working to the detriment of society as a whole.[35]

29 *See* e.g. the following decisions of the Supreme Court: EBH1999/147, EBH2003/894, EBH2005/1244, EBH2006/1441, BH2004/484, EBH2004/1055, MD II/701.

30 Kttv. Art. 155.

31 *Baka* judgement Para. 89.

32 *Baka* judgement Para. 100.

33 ECHR Art. 10(2).

34 T. Jónás, 'Véleménynyilvánítási szabadság a munkaviszonyban', III(II) *Pécsi Munkajogi Közlemények* (2010), p. 44.

35 *Baka* judgement Para. 101.

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10.4 The Freedom of Association and the Chamber of Government Officials

In the last part I examine the tendencies of state employees' unionization as a new sphere where limitations on human rights appeared in Hungary. Article 11 ECHR regulates the freedom of association in a more restrictive way than other international standards as it permits lawful restriction not only regarding members of the armed forces and of the police but also of the administration of the state. By contrast, ILO conventions state that public employees shall have, just as other workers, the civil and political rights which are essential for the normal exercise of the freedom of association, subject only to the obligations arising from their status and the nature of their functions. Restrictions are only acceptable for members of the armed forces and the police.[36] The ILO Freedom of Association Committee emphasized that the members of the armed forces who can be excluded from the freedom of association should be defined in a restrictive manner and workers should be considered as civilians in case of doubt.[37] Note that the Court also interprets possible restrictions narrowly.[38]

As of 1 July 2012 the Kttv. established a new institution for employee representation, the Chamber of Government Officials (*Magyar Kormánytisztviselői Kar*, MKK). All government officials[39] become members of MKK automatically, by law, irrespective of the will of the affected officials.[40] The law empowers the MKK with certain rights that are traditionally exercised by unions. For instance, it represents the interests of its members, contributes to the legislation process and gives opinion on questions concerning the employment of its members, etc.[41]

Hence, the MKK is entitled to exercise traditional union rights but it is based on compulsory membership. Moreover, there is no legal requirement for the MKK whether and how to consult its members when it exercises its statutory rights. This situation might be used to weaken trade unions and as a result, to restrain the freedom of association. ILO Convention 135, Article 5 prescribes that where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not

36 ILO Convention 87 Art. 9 1) and Convention 151, Arts. 1(3) and 9. Art. 5 of the European Social Charter also limits the possible restrictions to the police and the armed forces.

37 Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (hereinafter: 'Digest'). International Labour Office, 2006, Paras. 223, 226.

38 Z. Mataga, *The Right to Freedom of Association under The European Convention on the Protection of Human Rights and Fundamental Freedoms*, 2006, pp. 22-23.

39 Government officials are civil servants working for the public administration bodies subordinated of the Government. E.g. civil servants working for local governments are not government officials.

40 Kttv. Arts. 29(2), 33(1).

41 Kttv. Art. 29(6).

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used to undermine the position of the trade unions concerned or their representatives. The Freedom of Association Committee also recalled that legislative or other measures have to be taken in order to ensure that organizations that are separate from trade unions do not assume responsibility for trade union activities and to ensure effective protection against all forms of anti-union discrimination.[42]

The MKK does not collect membership dues,[43] its operation is funded by the state budget, i.e. by the employer. The Kttv. explicitly states that the minister or the executive of any state authority may offer financial support to the MKK.[44] This raises concerns regarding ILO Convention 151, Article 5(3), stating that acts which are designed to support public employees' organisations by financial or other means, with the object of placing such organisations under the control of a public authority, shall be deemed to constitute acts of prohibited interference. Considering the above, the MKK – established as an alternative to trade unions – is an unreasonable and unnecessary institution which might harm the freedom of association. Two other similar chambers have been established, one for teachers and one for employees in law enforcement.[45]

Finally, as of 1 January 2014, the act on the National Tax and Customs Administration prescribes that all personnel needs the prior consent of the employer to become an official of a trade union.[46] Such a requirement clearly contradicts ILO Convention 87, Article 3, which states that workers' organisations shall have the right to elect their representatives in full freedom. ILO Convention 151, Article 5 prescribes that public employees' organisations shall enjoy complete independence from public authorities and adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.

42 Digest Paras. 879, 870.
43 Kttv. Art. 33(10).
44 Kttv. Art. 35(7).
45 Act 43 of 1996 Chapter IV, Act 190 of 2011 Chapter 35/A.
46 Act 122 of 2010, Art. 33/C (1) and (2a).