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Changes in the freedom of contract in employment contract law during a pandemic (HU)

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Summary

On 22 May 2020, fifty-two members of the Hungarian parliament petitoned the Constitutional Court which was requested to establish the unconstitutionality of Section 6(4) of Government Decree no. 47/2020 (III. 18), its conflict with an international treaty and to annul it with retroactive effect to the date of its entry into force. According to Section 6(4) of the Decree "in a separate agreement, the employee and the employer may depart from the provisions of the Labour Code" (i.e. 'absolute dispositivity'). In their petition the members of parliament, among other things, alleged the violation of equal treatment and the right to rest and leisure. The Constitutional Court rejected the motion to establish the unconstitutionality of Section 6(4) and its annulment, since it was repealed on 18 June 2020. The Constitutional Court may, as a general rule, examine the unconstitutionality of the legislation in force, however it was no longer possible to examine the challenged piece of legislation in the framework of a posterior abstract norm control.

Legal background

The state of danger declared due to the coronavirus pandemic by Government Decree no. 40/2020 (III. 1) on 11 March 2020 as well as subsequent government decrees and measures have given rise to essential changes in the labour law.

One of the most significant provisions was Section 6 of Government Decree no. 47/2020 (III. 18) (the 'Decree') on immediate measures necessary for alleviating the effects of the coronavirus pandemic on the national economy, in force between 19 March 2020 and 18 June 2020, under which "with a view to ensuring compliance with prohibitions and restrictions ordered within the period of state of danger declared in Government Decree 40/2020 (11 March) on the declaration of state of danger, Act I of 2012 on the Labour Code shall apply with the derogations provided for in paragraphs (2) to (4) of the Decree."

Out of such rules, Section 6(4) is to be specifically emphasised and is the most significant in dogmatic terms, according to which "in a separate agreement, the employee and the employer may depart from the provisions of the Labour Code" (i.e. 'absolute dispositivity'). According to some, this "practically puts labour law as a branch of law in parentheses", since "no rule has any truly binding effect." As a result, the principle of 'non-waivability' is effectively 'set aside', according to which in most cases it is necessary to guarantee a total ban on 'contracting' of workers' rights, even against the will of the worker. Others believe that "this is essentially a return to mid-19th century labour law conception, which was still based on unlimited freedom of contract." Although this rule was conditional (observance of the prohibitions and restrictions prescribed during the duration of the emergency) and fixed for a certain period, it essentially altered the standard hierarchy of the legal sources of Hungarian labour law, according to which "unless otherwise provided for by law, the employment contract may derogate from the provisions of Part Two of Labour Code to the benefit of the employee." As a general rule, any derogation from the second part of the Labour Code is allowed only in favour of the employee (with certain exceptions), while the rest of the provisions of the Labour Code are 'cogent'.

There are no statistics available on the exact number of employers who have made use of the absolute dispositivity option, but practice shows that probably the most common situation where employers have made use of it is to allocate and claim vacation time. Namely, the immediate allocation of vacation may be hindered by the following regulations of the Labour Code: "Employers shall allocate seven working days of the vested vacation time in a given year in not more than two parts, at the time requested by the employee. The employee shall notify the employer of such request at least fifteen days in advance." "Employees shall be notified of the scheduled date of their vacation time no later than fifteen days before the first day of vacation." However, Section 6(4)

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of the Decree allowed the parties to deviate from such provisions by mutual consent; consequently, the time limits could be shortened or even omitted, thus facilitating the procedure for allocation of vacation.
On the other hand, according to professional opinion, there are a number of dogmatic, international law, constitutional and practical concerns regarding such absolute dispositivity. One of such concerns is the issue of the mandatory minimum wage and the guaranteed wage minimum (collectively the 'mandatory minimum wage'). Under Section 136(1) of the Labour Code, the basic wage of a full-time employee may not be less than the amount of the mandatory minimum wage. According to Section 6(4) of the Decree, the parties also had the option to derogate from these provisions, so in principle they could agree on a lower remuneration. However, as the minimum wage is more like a 'public law' rule, its potential contractual bypass would raise serious concerns.

Facts

On 22 May 2020, fifty-two members of parliament petitioned the Constitutional Court which was requested to establish the unconstitutionality of Section 6(4) of the Decree, its conflict with an international treaty and to annul it with retroactive effect to the date of its entry into force.

The members of parliament, among other things, alleged a violation of equal treatment in their petition. The requirement for equal treatment is mentioned in several provisions of the Labour Code. Each of these provisions is cogent, and as a general rule could not be derogated from. The derogation is only possible due to Section 6(4) of the Decree. In the opinion of the petitioners, this legal provision, which allows deviation from the parts of the Labour Code stipulating equal treatment and human dignity, was unconstitutional.
The petitioners also alleged violation of the right to rest and leisure. In this context, it was argued that the right to rest and the right to paid annual leave are guaranteed by the Fundamental Law of Hungary (25 April 2011), which is also "protected by the Fundamental Law through the fundamental right to work" and by a provision on health to guarantee the recreation and healthy life of citizens. In this context, the State also has an obligation to protect legal institutions, especially with regard to international commitments. It was emphasised that "the legislator is to create a legal environment adequate to guarantee the right to rest. Consequently, a provision which introduces the possibility of *de facto* contracting out of the statutory rules on the provision of rest periods cannot be in line with the Fundamental Law."
The petitioners also claimed that the Decree was in breach of international treaties. In this context, it has been argued that the requirement for equal treatment and annual paid leave is set out in a number of international conventions. It was stated that in this field Hungary was also subject to legislative obligations arising from several conventions, the essence of which is that Hungary should guarantee the rights specified in the international conventions by legal means. Being labour law provisions, these provisions have been included in the Labour Code, containing requirements relating to human dignity, equal treatment and rest periods. However, the Decree allows for the possibility to derogate from these requirements in such a way that Hungary has not requested a release from the international obligation. In this respect, the contested provision conflicts with international conventions since the State does not comply with the requirements set out therein, even though it has recognised them as binding upon itself.

Judgment

In connection with the motion to establish the conflict of Section 6(4) of the Decree with an international agreement, the Constitutional Court found that the international agreements in question had no direct effect on the legal relationship between the employer and the employee. The provisions of international treaties had been incorporated into the provisions of the Labour Code. There was no connection between the international treaties identified in the petition and the contested legal provision, nor was there a relevant detailed argument. Consequently, the petition had not met the legal requirements in this respect and therefore it was rejected.
The Constitutional Court also rejected the motion to establish the unconstitutionality of Section 6(4) of the Decree and to annul it, since the Decree was repealed on 18 June 2020 (after expiry of the state of danger). The Constitutional Court may, as a general rule, examine the unconstitutionality of the legislation in force, however it was no longer possible to examine the challenged piece of legislation in the framework of a so-called posterior abstract norm control.
On the other hand, the Constitutional Court noted that under Section 41(3) of Act CLI of 2011 on the Constitutional Court, the competence of the Court may also extend to the examination of the constitutionality of a repealed law on rare occasions if it is still applicable in any specific case. In the abstract posterior norm control procedure it is no longer possible to examine the application of a legal provision in connection with a specific employment relationship between a given employee and a given employer, however, constitutional issues and fundamental violations of law that can be traced back to Section 6(4) of the Decree could be initiated in a separate constitutional complaint procedure, with proof of individual involvement. In addition, the possibility of judicial initiative is also available if a specific right guaranteed by the Fundamental Law is violated through the

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application of legal provisions that have already been repealed.

Commentary

By creating the Decree and allowing for the 'absolute dispositivity' declared in it, the legislator intended to enable employers (and the parties to an employment contract) to immediately adapt employment rules to a crisis situation. However, it would have been better and necessary to indicate in the Decree the rules of the Labour Code from which it will be allowed to derogate even to the detriment of the employee as well as those from which it is certainly not possible to derogate at all (for example provisions based on constitutional or international law pillars), thus eliminating legal uncertainty.
I personally deeply regret that the Constitutional Court did not examine the arguments set out in the motion on the merits, since it would have been interesting to see the position of the constitutional judges on this fundamental labour law dilemma which they could have expounded in the form of a dissenting opinion or concurring opinion.

Subject: Changes in the freedom of contract in labour relations, Absolute dispositivity, Constitutional concerns

Parties: fifty-two members of parliament

Court: *Alkotmánybíróság* (Constitutional Court)

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