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## Unilateral Termination of Employment of Pensionable Workers Held Unconstitutional Between Equal Treatment, the Principle of Legality and Pure Formalism

### 1. Introduction

In December 2020, during the second wave of the COVID-19 epidemic, the Slovenian parliament adopted the Act Determining Intervention Measures to Assist in Mitigating the Consequences of the Second Wave of COVID-19 Epidemic (hereinafter: The Intervention Act).<sup>1</sup> Its aim was, according to the legislative proposal,<sup>2</sup> to mitigate and eliminate detrimental consequences and other negative

impacts of the COVID-19 epidemic on the economy, employment relations and the labour market, the social assistance scheme, and healthcare.

In general, the Intervention Act was introduced to regulate COVID-19 related content and protect the persons' health as well as the liquidity of business entities.<sup>3</sup> In pursuit of this aim, it was supposed to follow key principles of Slovenian constitutional law, *inter alia*, the social state principle (Article 2 of the Slovenian Constitution),<sup>4</sup> the principle

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<sup>1</sup> *Zakon o interventnih ukrepih za pomoč pri omilitvi posledic drugega vala epidemije COVID-19* (ZIUPOPĐVE, Official Gazette of the Republic of Slovenia, Nos. 203/20 to 206/21).

<sup>2</sup> *Predlog zakona o interventnih ukrepih za pomoč pri omilitvi posledic drugega vala epidemije COVID-19* (ZIUPOPĐVE), EVA: 2020-1611-0140 (hereinafter: the Proposal).

<sup>3</sup> The Proposal, p. 2.

<sup>4</sup> *Ustava Republike Slovenije* (Official Gazette of the RS, Nos. 33/92-1 to 92/21). The social state (Germ. *Sozialstaat*) concept is inherent to the principle of solidarity that can either be vertical (among different individuals in the generation of economically active people, distinguished on grounds of their income) or horizontal (e.g., among individuals of different—young, working, and retired—gen-

of solidarity, and the principle of legality (Articles 8 and 153 of the Slovenian Constitution).<sup>5</sup> However, two provisions of the Intervention Act—Articles 21 and 22—attracted particular attention because they regulated a somewhat COVID-19 non-related topic. They amended hitherto applicable arrangement for the ordinary termination of employment contracts due to business reasons set forth by the Employment Relationships Act (hereinafter: ERA)<sup>6</sup> and the Public Workers Act (hereinafter: PEA).<sup>7</sup>

Until the adoption of the Intervention Act, an ordinary termination of the employment contract due to a business reason was governed by Article 89 ERA, applicable to the private sector, and Article 156 PEA, applicable to the public sector. Both pieces of legislation, in their essence,

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erations). In the Proposal, the government stressed only the horizontal dimension of the solidarity principle (as well as mutual assistance) between the healthy and the sick, whereas it failed to mention the vertical aspect. This distinction is important because the Slovenian Government, when arguing for the constitutionality of the contested provisions before the Constitutional Court, heavily relied on the legitimate aim of employing younger people. See p. 3.

<sup>5</sup> According to Article 153 on the Conformity of Legal Acts, from which the interpretation of the principle of legality can be derived, laws, regulations and other general legal acts must be in conformity with the Constitution. The Proposal, pp. 2–3.

<sup>6</sup> *Zakon o delovnih razmerjih* (ZDR-1, Official Gazette of the RS, Nos. 21/13 to 54/22).

<sup>7</sup> *Zakon o javnih uslužbencih* (ZJU, Official Gazette of the RS, Nos. 63/07 to 3/22).

provided for the same termination conditions. Firstly, they demanded the presence of a valid (business) reason, i.e., a reduction in the need to perform tasks and other work under the employment contract because of economic, organisational, technological, structural, or similar reasons on the part of the employer. Secondly, they required a substantiation of such reason. Thereby, only a substantiated notice of a reduced scope of work justified the termination of the employment contract. Such an arrangement aimed to guarantee workers the necessary level of employment protection and legal certainty.

The Intervention Act amended Article 89 ERA and Article 156 PEA by introducing a new exception to the requirement of a substantiated valid (business) reason for dismissing a worker. Employers in both private and public sectors were now enabled to terminate the employment contracts for all workers who met the conditions for acquiring the right to an old-age pension without stating or justifying a valid (business) reason whatsoever.

The amending provisions supposedly aimed to facilitate the termination of employment contracts of pensionable workers and to enable to employ younger workers instead. Presumably, by relieving the administrative burden of the employers regarding the dismissals, the competitiveness as well as the flexibility of Slovenian labour market would be improved.<sup>8</sup> However, if dismissing a pensionable worker, the

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<sup>8</sup> The Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021, para. 8.

Intervention Act did not require employers to hire a younger worker. Consequently, the alleged aim of the Intervention Act was left highly questionable.

As a safeguard for the dismissed pensionable workers, the Intervention Act envisaged a notice period of 60 days and entitled them to the same severance pay they would have received in case of an ordinary dismissal due to a business reason pursuant to the previous legislation, i.e., by virtue of Article 89 ERA and Article 156 PEA.

It can be deduced that the Intervention Act changed the arrangement of dismissing workers by adding a new (business) reason for terminating the employment contract of pensionable employees, whereby the employers were no longer obliged to justify the reason behind the dismissal. The Intervention Act deemed sufficient for employers to prove that the dismissed workers meet the retirement conditions. No further explanation or reasoning was required.

## 2. The Case and the Decision

Soon after its adoption, the Intervention Act was heavily criticised both by the general and professional public, *inter alia*, because it assumably discriminated against pensionable persons as an especially vulnerable population group. Namely, pensionable workers are necessarily older persons whose employability is significantly difficult. As a result, their subsequent employment at another employer is highly improbable. In most cases, a dismissal at such a late stage of employment in practice leads to retirement.

In addition, it was emphasised that, irrespective of the temporary nature of the Intervention Act, the amending provisions are systematically and permanently amending Slovenian labour and social security law. Those changes were nevertheless adopted without previous social dialogue. It was also highlighted that the amending provisions deprive pensionable workers of several labour and social security rights, whereby the legitimate aim pursued by those provisions as well as their proportionality, are highly questionable.<sup>9</sup>

For these reasons, seven representative trade unions and the Advocate of the Principle of Equality initiated the procedure for the review of the constitutionality of the amending provisions before the Constitutional Court of the Republic of Slovenia (hereinafter: Court).

In February 2021, the Court issued an order to suspend the effect of the challenged provisions.<sup>10</sup> Consequently, it suspended the legal effect of already served terminations of employment contracts until reaching the final decision in the case. This decision was rendered in November 2021; the Court reversed the contested provisions of the Intervention Act due to their incompatibility with Article 8 of the Constitution, which demands compliance of national laws and regulations with international law.

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<sup>9</sup> See, for example, Bagari, Strban, 2021, pp. 9–29; Mišič, 2021, pp. 79–95.

<sup>10</sup> Constitutional Court Order No. U-I-16/21 of 18 February 2021.

### 2.1. *Procedural Reasons behind the Suspension*

According to Article 23a of the Constitutional Court Act (hereinafter: CCA),<sup>11</sup> a trade union, a representative in the territory of Slovenia, may initiate the procedure for the review of the constitutionality whenever the disputed legislation endangers workers' rights.

The Court preliminarily confirmed that initiating trade unions fulfil the condition of representativeness. Next, it examined whether the challenged provisions indeed endangered the rights of workers. More specifically, the Court explained that the legislation in question must present a concrete and direct threat to the labour and social security rights of workers represented by the trade union. In this regard, it remarked that the disputed provisions determine a new dismissal (business) reason which enables the employers to dismiss all workers who meet the retirement conditions (i.e., workers who meet the stipulated threshold of both requisite age and employment period) for business reasons without the need to substantiate the reason itself. Considering this, the Court concluded that the said provisions present a concrete and direct threat to the rights of workers.<sup>12</sup>

<sup>11</sup> *Zakon o ustavnem sodišču* (ZUstS, Official Gazette of the RS, Nos. 64/07 to 92/21).

<sup>12</sup> See, the Constitutional Court of the RS Order No. U-I-16/21 of 18 February 2021, paras. 9–12. With this conclusion, the Constitutional Court reversed its case-law, according to which the termination of the employment contract due to the fulfilment

In this regard, the Court emphasised particularly severe implications of terminating the employment contract of older workers who are generally challenged by difficult re-employment. For them, such termination most likely means not only loss of employment but also the end of their professional career. The risk of irreversible change of status from being economically active to being retired was deemed as another reason supporting the conclusion that the challenged provisions endanger workers' rights.<sup>13</sup>

In light of the above, the Court found that procedural conditions to decide upon suspending the effect of the disputed provisions of the Intervention Act, which enabled the employers to unilaterally terminate the employment contract to all pensionable employees without providing the reason behind the dismissal, are met. This enabled the Court to deal with the merits of the request for suspension.

### 2.2. *Substantive Reasons behind the Suspension*

Article 39(1) of the CCA allows the Court to suspend the contested legislation until its final decision if the enforcement of the contested act could result in detri-

of retirement conditions could not endanger the rights of workers. See, for example, Constitutional Court of the RS Order No. U-I-154/12 of 6 March 2014 or the Constitutional Court of the RS Decision No. U-I-68/14 of 9 September 20215, and others.

<sup>13</sup> See, the Constitutional Court of the RS Order No. U-I-16/21 of 18 February 2021, para. 13.

mental consequences that would be difficult to repair. Accordingly, the Court had to weigh the risks of detrimental consequences that would occur:

- On the one hand, if the contested legislation was enforced but later found unconstitutional, and
- On the other hand, if the challenged provisions were suspended but later found compliant with the Constitution.<sup>14</sup>

In the context of weighing the risks, the Court once again put forward the more difficult employability of the older persons and irreparable consequences of the disputed provisions on pensionable workers (see above, 2.1.). A key finding was that a potential reversal of the said provisions (in case they were found unconstitutional) would only be possible if the served terminations of employment were suspended. Meanwhile, the employers could still dismiss workers for business reasons if the reason for termination of employment would be appropriately substantiated.<sup>15</sup> Weighing both scenarios, the Court decided in favour of the claimants and issued an order to suspend the enforcement of the contested provisions of the Intervention Act until reaching the final decision in the case.

### 2.3. *Procedural Reasons behind the Reversal*

In the course of the proceedings, claims of representative trade unions were joined by the Advocate of the Principle of Equality. In its final decision, the Court

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<sup>14</sup> *Ibid.* para. 14.

<sup>15</sup> *Ibid.* para. 15.

thus dealt with its legitimacy for initiating the procedure for the review of the constitutionality of the challenged provisions of the Intervention.

The Court maintained that the Advocate of the Principle of Equality might claim violations of prohibited discrimination in connection with human rights and fundamental freedoms and breaches of the general principle of equal treatment.<sup>16</sup> Therefore, to the extent the Advocate of the Principle of Equality was not invoking violations of human rights and fundamental freedoms, the Court denied its capacity to bring forward the proceedings.<sup>17</sup> This finding, however, did not affect the substance of the final decision.

### 2.4. *Substantive Reasons behind the Reversal*

The Court initially stressed that the employer's choice to terminate the employment is limited by several substantive conditions. The main limitation is a requirement of an actual, valid reason substantiated in the written form, which must be:

- Either connected to the capacity or conduct of the worker or
- Based on the operational requirements of the employer (the so-called business reason).<sup>18</sup>

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<sup>16</sup> The Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021, para. 15.

<sup>17</sup> *Ibid.*, para. 16.

<sup>18</sup> *Ibid.*, para. 18.

Moreover, the Court outlined the provisions governing the employer's ordinary termination of an employment contract due to a business reason, i.e., Article 89 ERA and Article 156 PEA. According to ERA, a valid business reason is recognised as "a cessation of the needs to carry out certain work under the conditions pursuant to the employment contract, due to economic, organisational, technological, structural, or similar reasons on the employer's side," whilst PEA recognises such reason as a "decline in the volume of public tasks or the privatisation of public tasks or for organisational, structural, public finance or other similar reason." Both pieces of legislation require such a reason to be substantiated in a written form.

The Court affirmed that the Intervention Act adopts a brand new (business) reason for terminating the employment contract, characterised by two specialities:<sup>19</sup>

1. It applies only to workers who meet the retirement conditions and
2. There is no need for substantiation or other explanation.<sup>20</sup>

The claimants asserted that such an arrangement contradicts international treaties binding on Slovenia, invoking particularly Article 4 of the International Labour Organization Convention No. 158 (hereinafter: ILO Convention No. 158) and the revised European Social Charter (hereinafter: ESC). The reference to binding international treaties is important in the context of the hierarchy of legal acts enshrined in Article 8 (and Article 153) of

the Constitution, the highest legal act in the Slovenian legal system. Both articles demand that all national laws conform with international law and international treaties binding Slovenia.

To decide on the subject matter, the Court thus relied on two international treaties. First, on Article 4 of the ILO Convention No. 158, which reads: "The employment of a worker shall not be terminated unless there is a *valid reason* [emphasis added] for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service." Second, on Article 24(1)(a) of the ESC, which provides for "the right of all workers not to have their employment terminated without *valid reasons* [emphasis added] for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment, or service."<sup>21</sup>

The Court found that, by demanding a valid reason for termination of the employment contract, both international treaties pursue the same objective—to

<sup>21</sup> Article 24(1)(b) of the ESC provides for an alternative right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief. However, the compensation (as a reimbursement of a damage) should be differentiated from the severance pay (as a benefit after the employment relationship ends). For this reason, the disputed provisions cannot be understood in terms of a compensated termination of the employment relationship without a valid reason.

<sup>19</sup> *Ibid.*, para. 19.

<sup>20</sup> *Ibid.*, para. 20.

protect the worker against unjustified dismissal by the employer.<sup>22</sup>

Furthermore, it was remarked that both international instruments explicitly specify (the exact same non-exhaustive) list of circumstances<sup>23</sup> that shall *not* constitute valid reasons for terminating the employment contract.<sup>24</sup> With respect to the ILO Convention No. 158, the Court also observed the Recommendation No. 166 (hereinafter: Recommendation) that supplements the Convention and sets interpretative guidelines. In addition to non-valid reasons for dismissal set forth by the Convention, Article 5 of the Recommendation specifically classifies retirement age as another reason that cannot justify the termination of the employment contract. Interestingly, the Court did not elaborate on this matter any further.<sup>25</sup>

Considering the acknowledged Recommendation, the Court could have discussed whether a non-exhaustive list of

non-valid reasons for a dismissal stipulated by Article 5 of the ILO Convention No. 158 should consider the supplementing Recommendation (and if not, why so). However, in the case at hand, the scope of Article 158 was not discussed. Reasons not expressly listed therein were deemed as potentially valid reasons for termination of the employment contract, provided that they are sufficiently and appropriately substantiated.<sup>26</sup>

With respect to the required substantiation, the Court explained that only reasoning of the valid reason behind the termination of the employment contract enables an impartial subsequent examination whether the dismissal was justified, legitimate and legally compliant.<sup>27</sup> In this regard, the Court recalled that the burden of proving the existence of a valid reason is on the employer.<sup>28</sup>

In line with the foregoing, the Court concluded that a dismissal by the employer is justified only in case of a sufficiently and appropriately substantiated valid reason; whether the valid reason could include pensionable age was not directly answered. In case the termination of the employment contract is not substantiated, there is no valid reason and, consequently, there is no justified termination in the

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<sup>22</sup> See, the Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021, para. 24.

<sup>23</sup> Non-exhaustive nature can be deduced from the text of both international treaties, which explicitly use wording *inter alia* [A/N: wording by the Article 5 ILO Convention No. 158] or *in particular* [A/N: wording by the Article 24 of the Appendix to the ESC] before listing non-valid reasons for termination of employment contract.

<sup>24</sup> See Articles 5 and 6 of the ILO Convention No. 158 and Article 24(3) of the Appendix to the ESC.

<sup>25</sup> The Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021, para. 25, footnote 14.

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<sup>26</sup> The Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021, para. 25, footnote 14.

<sup>27</sup> Article 24 of the ESC.

<sup>28</sup> *Ibid.*, paras. 18 and 26.



sense of both the ILO Convention No. 158 and the ESC.<sup>29</sup>

In the present case, the challenged provisions of the Intervention Act excluded the requirement to substantiate a valid (business) reason for the dismissal. It was sufficient that the worker met the retirement conditions. No further explanation was required.

For the Court,<sup>30</sup> the key acknowledgment was that the fulfilment of retirement conditions in itself—with no further substantiation by the employer—cannot constitute a requisite valid (business) reason pursuant to the observed international law provisions. By excluding the employers' obligation to substantiate a valid (business) reason, the disputed provisions eliminated the essential element of workers' protection against unjustified unilateral dismissal. Moreover, in the absence of any substantiation behind the dismissal, any subsequent examination by an impartial body would be disabled. As a result, workers would be deprived of adequate labour protection regarding the termination of the employment contract.

The above-mentioned led the Court to conclude that unilateral termination of the employment contract solely because the worker fulfils the retirement conditions without the need for the employer's decision to be justified by a valid (business) reason is not consistent with the ILO Convention No. 158 and the

ESC. Because the provisions of a (legislative) Intervention Act derogated from international treaties, they were found to be inconsistent with Article 8 of the Constitution. Ultimately, the Court reversed the challenged provisions allowing employers to dismiss pensionable employees without the need to explain the reason behind the dismissal.

It should be noted that Article 8 of the Constitution is of procedural nature, as it regulates the hierarchy among legal acts in the RS (*lex superior derogate legi inferiori*). In addition, the claimants raised many substantive issues relating to human rights and obligations of the State. In this regard, they relied on Equality before the Law (Article 14 of the Constitution), Freedom of Work (Article 49 of the Constitution), and Security of Employment (Article 66 of the Constitution).<sup>31</sup> Yet, because the challenged provisions were found unconstitutional for procedural reasons already, substantive claims put forward by the claimants were not addressed by the Court.

### 3. Assessing the Separate Opinion of Judge Accetto

In his concurring separate opinion,<sup>32</sup> Judge Accetto firstly confirmed the need for a valid substantiated reason to terminate the employment contract as an essen-

<sup>29</sup> The Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021, paras. 18 and 28.

<sup>30</sup> *Ibid.*, paras. 18, 27 and 28.

<sup>31</sup> *Ibid.*, para. 1.

<sup>32</sup> Separate concurring opinion by Judge Accetto to the Constitutional Court of the RS Decision in Joint Cases Nos. U-I-27/21 and U-I-16/21-17 of 18 November 2021. The opinion was joined by Judge Knez.

tial element of workers' protection against unjustified dismissal.<sup>33</sup> However, he emphasised whether the possibility to dismiss a worker due to a business reason, solely because workers fulfil the retirement age, is admissible in substance. Referring to the Statement of Interpretation of Article 24 of the ESC, rendered by the European Committee of Social Rights (hereinafter: ECSR), he highlighted that age is a controversial reason for unilaterally terminating the employment contract. As observed by Accetto, this issue was also indicated but not elaborated on in the decision itself (the concern was raised within a footnote only).<sup>34</sup> The ECSR has consistently held that a unilateral dismissal by the employer on grounds of the worker reaching pensionable age is contrary to the ESC unless the termination is properly justified with reference to one of the valid grounds explicitly expressed therein.<sup>35</sup> Judge Accetto maintained that the Court could have paid more attention to the question of whether a general possibility to unilaterally terminate the employment contract solely because the worker meets the retire-

ment conditions could satisfy the requirement of a valid substantiated reason from Article 24 of the ESC.<sup>36</sup>

Secondly, Judge Accetto underlined another aspect the decision left aside—the relevance of EU law. EU law, for example, Articles 15 (Freedom of Occupation and Work) and 21 (Prohibition of Discrimination) of the Charter of Fundamental Rights of the European Union, addresses issues related to those discussed in the present case as well. He expressed his belief that EU law is also relevant in assessing the issues raised in the present case and, for this reason, should have been considered.<sup>37</sup>

Judge Accetto also speculated about the reasons for putting EU law aside by the Court. One of them could be the sheer nature of EU law which provides for *additional* protection of workers' rights. Should the Court find the disputed provisions of the Intervention Act inadmissible already on the grounds of Slovenian (domestic) law, the effect of EU law would not be decisive. Nevertheless, in his view, because the Court relied heavily on the ILO Convention No. 158 and the ESC, it could have, *a fortiori*, assessed the compatibility of the said provisions with EU law as well.<sup>38</sup>

#### 4. Conclusion

Before the decision was rendered, the contested provisions had attracted much

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<sup>33</sup> *Ibid.*, para. 2.

<sup>34</sup> *Ibid.*, para. 3.

<sup>35</sup> ECSR, Statement of interpretation on Art. 24 of the ESC, para. 3. See also: Conclusions of ECSR concerning Armenia (2020), Conclusions of ECSR concerning Turkey (2012), Decision of ECSR, case *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, <[https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCDIdentifier%22:\[%22cc-74-2011-dmerits-en%22\]\]>](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCDIdentifier%22:[%22cc-74-2011-dmerits-en%22]]>).

<sup>36</sup> *Ibid.*, para. 5.

<sup>37</sup> Separate concurring opinion of Judge Accetto, para. 6.

<sup>38</sup> *Ibid.*, para. 7.

attention. Many issues concerning the contested Intervention Act were raised by legal scholars, politicians, and the civil society. All pointed out that they interfered with the fields of labour law and social security law significantly and permanently. A question whether those provisions present an admissible, appropriate, and proportionate measure limiting the human right to work was raised. Doubts were put forward, whether it is suitable to introduce a systematic and permanent change by an intervention law adopted to mitigate the consequences of the COVID-19 epidemic.<sup>39</sup> Furthermore, the said provisions were opposed because they added to the problem of low economic activity of older persons and, as such, contradicted pension and disability insurance provisions aiming to encourage later retirement. It was also stressed that older workers, now unemployed persons, find it hard to become reemployed, thus, such a measure would have ultimately deprived them of significant social security rights and benefits. In addition, it was emphasised that the legislative changes contradicted the principle of legal certainty and predictability. By leaving the workers' position to the complete discretion of the employer,

<sup>39</sup> The measure was by no means associated with the COVID-19 epidemic. Additionally, a key feature of intervention laws is their transitional nature. Yet, dismissing workers who fulfil retirement conditions, in practice, constitutes an irreparable measure for the dismissed older workers. Due to a significantly difficult employability after meeting the retirement conditions, the workers would have most likely retired permanently.

workers' private autonomy was allegedly put at severe risk.<sup>40</sup> In a broader sense, a complete subordination of older workers in relation to their employers could also interfere with their personality rights and personal dignity. Finally, the relevant provisions were also problematised in terms of unjustified and unequal treatment of older persons. The Advocate of the Principle of Equality made an extensive assessment of discrimination of such provisions. Breach of anti-discrimination legislation was also invoked by the trade unions as initiators of the review procedure.

Notwithstanding all the issues and concerns mentioned above, the Court refrained from addressing most of the substantive questions arising out of the challenged provisions of the Intervention Act. It reversed them for a formal reason only—because of their inconsistency with the relevant international treaties (excluding EU law). Accordingly, the main substantive question about the merits of placing a pensionable age as a “valid (business) reason” for a unilateral dismissal remained unanswered.<sup>41</sup> This conclusion is indicated in the concurring separate opinion of Judge Accetto as well.

Another remained uncertainty is whether the retirement age (subject to

<sup>40</sup> To illustrate, a sudden and unpredicted loss of employment may affect the dismissed individuals' ability to assume and fulfil financial commitments (credit loans, private insurances, etc.). See, for example, Bagari and Strban, 2021, pp. 9–29; Mišič, 2021, pp. 79–95.

<sup>41</sup> Constitutional Court of the RS Decision on Joint Cases Nos. U-I-27/21 and U-I-16/21-17 from 18 November 2021, paras. 18 and 27.

national law and practice regarding retirement) set forth by the Recommendation could be interpreted as being covered by Article 5 of the ILO Convention No. 158, which specifies a non-exhaustive<sup>42</sup> list of non-valid reasons for terminating the employment contract. Even though the Recommendation is not directly binding on the Republic of Slovenia, its analysis remains important – deviation from the Recommendation can ultimately result in a misuse of the binding ILO document (and the essentially analogous ESC).

In conclusion, although the interested public has been eagerly awaiting the decision of the Court on the subject matter, the decision is silent on key substantive issues brought by the case at hand. The Court significantly narrowed its judgement down to whether the disputed provisions of the Intervention Act contradict the relevant international treaties (excluding EU law) and, consequently, Article 8 (and Article 153) of the Constitution. Nonetheless, such a decision certainly confirmed the contested amendment's unconstitutional nature. Therefore, the decision provides a solid employment safeguard promoting the older workers to remain economically active even after they *may* – and not *shall* – retire.

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<sup>42</sup> Article 5 of the ILO Convention states: "The following, *inter alia*, shall not constitute a valid reason for termination [...]". Recommendation is adding the following: "In addition to the grounds referred to in Article 5 [...] the following should not constitute valid reasons for termination [...] age, subject to national law and practice regarding retirement [...]"

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### **Enostranska odpoved pogodbe o zaposlitvi delavcem, ki izpolnjujejo pogoje za starostno upokožitev, je v neskladju z ustavo**

Sredi drugega vala epidemije covid-19 je Državni zbor z namenom omejitve in odprave negativnih učinkov epidemije za gospodarstvo, trg dela, zdravstva in sisteme socialne varnosti sprejel Zakon o interventnih ukrepih za pomoč pri omilitvi posledic drugega vala epidemije COVID-19 (ZIUPOPĐVE). Kljub tako določenemu namenu pa je zakon omogočil tudi odpoved pogodb o zaposlitvi delavcem, ki so izpolnili pogoje za starostno upokožitev, ne da bi njihovemu delodajalcu, bodisi v javnem bodisi zasebnem sektorju, bilo treba navesti oziroma utemeljiti obstoj (poslovnega) razloga. Prispevek obravnava odločbo Ustavnega sodišča RS v zadevi, ki so jo zaradi očitane diskriminacije sprožili sindikati in zagovornik načela enakosti, pri čemer se osredinja na nekoliko formalističen pristop sodišča v zadevi, ki bi sicer lahko bila ena najpomembnejših nacionalnih odločb o enakosti pred zakonom ne glede na starost.

**Ključne besede:** pogodba o zaposlitvi, starost, odpoved pogodbe, upokožitev, enaka obravnava.

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### **Unilateral Termination of Employment of Pensionable Workers Held Unconstitutional – Between Equal Treatment, the Principle of Legality and Pure Formalism**

During the second wave of the COVID-19 epidemic, the Slovenian legislator adopted the Act Determining Intervention Measures to Assist in Mitigating the Consequences of the Second Wave of COVID-19 Epidemic (*Zakon o interventnih ukrepih za pomoč pri omilitvi posledic drugega vala epidemije COVID-19*). According to the draft law, the aim of the emergency piece of legislation was to mitigate and eliminate negative effects of the COVID-19 epidemic on businesses, the labour market, the healthcare system and social security schemes. Nevertheless, the intervention act also amended provisions concerning the termination of employment contract by introducing a new exception to the requirement of a substantiated valid (business) reason for dismissing a worker. The employers in both private and public sector were now eligible to terminate the employment contracts of workers who met the conditions for acquiring the right to an old-age pension without stating or justifying any valid (business) reason whatsoever. The article examines the judgement of the Constitutional Court of the Republic of Slovenia reached in a case put forward by Slovenian trade unions and the Advocate of the Principle of Equality, with an emphasis on the courts somewhat formalistic approach to what could have been a major antidiscrimination decision concerning old-age.

**Key words:** employment contract, old-age, termination of contract, retirement, equal treatment.



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