The Regulation of The Working Conditions as A Limit of Flexible Working - The Effects of The Green Paper Through The Example of Hungary

Peter Sipka

Abstract

On November 22, 2006, the European Commission presented its Green Paper: Modernising labour law to meet the challenges of the 21st century. The Paper gives a different vision of the future of European labour law, one which helps increasing flexibility combined with employment security and reduces labour market segmentation. As an effect of this, a number of member states reconsidered their regulation and started legislation to reach a better level of flexibility. In Hungary the new Labour Code came into force in 2012, modified the rules of the employer’s liability for damages, namely the causes for justification and created different grounds for the rules of liability for damages in labour law. The Act also gave rise to a number of “new” legal institutions, mostly in the field of atypical types of employment that result in a considerably more flexible employment, thus providing employers with what is necessary for flexible employment. In the paper it is observed how the EU directives in the field of working conditions narrow the flexible employment through the example of Hungary. As a conclusion it can be stated, that the EU must broaden its legislative activities in order to protect the employees. In addition, extending unified labour law regulations to most legal institutes possible can be justified, as it creates a unified framework for employers and contributes to the promotion of equality within the European Union.

Keywords: labour law, EU law, occupational health and safety, green paper, flexicurity

1. Introduction

One of the most important tasks of the broadly interpreted employment law is to create rules and establish a
system of relationships, which guarantees the protection of the workers throughout the employment relationship at the highest possible level. (Collins et al., 2012) So if the employee suffers occupational injury or gets sick in connection with her/his work, according to the Hungarian regulation, the resulting damages can be compensated for in a complex way because it is possible by applying three different fields of law together. Firstly, the employer’s liability is based on the “classical” norms of labour law for the damages caused in connection with the employment relationship, whose damages can be enforced by the employee against the employer in a labour law suit according to 285. § (1) of the Act I of 2012 act on the Labour Code (in the following: new LC.). In this procedure the employer has to prove her/his justification with the causes laid down in the new LC. Secondly, if it is questionable whether the employer acted according to the rules of occupational safety, it is possible for the Hungarian Labour Inspectorate to file for administrative action against the employer. The subject of this procedure is to examine whether the employer completely satisfies the requirements of the Act XCIII. on Occupational Safety (in the following: OSA.) because it contains the protective rules of occupational health and workplace security. If the employer is responsible for negligence in the administrative procedure, regulatory penalty will be imposed. Thirdly, according to the relevant rules of social security in Hungary, the social security administration conducts with action for compensation, if the accidents or the sickness emerge because of the following: the employer or her/his proxy did not fulfil the requirements of occupational safety or the employer or her/his member (employee) induced the accident intentionally.

In conclusion, we can state that the employer is liable for the same event or omission with a complex, multi-level responsibility. Albeit these complex structures for liability have the same starting point, they differ a lot in several aspects, and especially their interest, methods and purposes of regulation are diverse. At the same time a possible collision of these different fields of law arises, which causes uncertainty in jurisdiction because in spite of the same statement of facts the different regulatory methods suppose special ideas and methods so naturally, they cannot be effective to the same extent. The above described – not theoretical – scenario means the meeting point of labour law, law of occupational safety and the social security system where the employer has to fulfil all the criteria from all these three fields to avoid sanctions, but in my opinion it is impossible. So the employer has to choose from the values described within these fields because she/has can attest law abiding attitude only one way.

2. The effect of the Hungarian Labour Code’s new approach

One of the sources of the above mentioned problems is the new Hungarian Labour Code, which came into force on the 1st July 2012 and modified the rules of the employer’s liability for damages, namely the causes for justification and created new grounds for the rules of liability for damages in labour law, which adopts a new intuition in the Hungarian regulation.

The new Act emphasized that the system in operation throughout the past 20 years failed to fulfil the expectations, and the contractual legal source system of labour law did not evolve in Hungary, although it is a specificity of European labour law. Therefore the legislative body intends to promote the institution of collective agreement on the one hand and to live up to the employers’ expectations that stem from global competition. (Kardkovács, 2012) According to the theses for the regulation concept, this competition, propelled by globalisation, subjects all the components of employer operation, including the engagement of labour to the requisite of efficiency. Businesses frame their structure and operations to adapt, as much as possible, to changes enforced by economic competition, and this clearly affects employment as well. Therefore the new LC may not be confined to the traditional labour law framework and the static definitions of labour law were replaced by teleological definitions linked to objectives.

In the explanation of the draft bill, a clear reference is made to the Green Paper as a theoretical source, and, at the same time, a number of legal institutions that are remotely connected to the objectives designated by the Green Paper have been re-regulated by the new Code. One of the high-priority legislative objectives of the new LC was to set out in which cases and to what extent it is required and reasonable to maintain traditional labour-regulated regulation. On the other hand, during the process of legislation it was a central point not to weaken employment guarantees in general, all the less so because there are great numbers of employees working for traditional large firms as well. (Berke et al, 2009)

As a result, the new LC has given rise to a number of “new” legal institutions, mostly in the field of atypical
types of employment that result in a considerably more flexible employment, thus providing employers with what is necessary for flexible employment. According to the commentary of the Code, atypical work refers to employment relationships not conforming to the standard or ‘typical’ model of full-time, regular, open-ended employment with a single employer over a long time span. Such forms are employment by more than one employer, division of a field of work, specification of the rules of agency, call on work, revision of rules on working and hours and breaks and resting periods, regulation of simplified employment, home-worker legal relationship etc. The other aspect of this modification of the Act is that the Hungarian regulation made an effort to approximate EU expectations (e.g. 2003/88/EC directive, 2008/104/EC directive), also considering judgments on each legal institution, decided by the European Court of Justice.

The new regulation intends to reduce the level of employer’s liability for damages, so the new LC. broadened the scope of justification from liability without culpability. In this process several legal documents of the European Union – which tries to find legal solutions for the new challenges for labour law of the 21st century – had great effects. (GREEN PAPER on Modernising labour law to meet the challenges of the 21st century, COM(2006) 708 final, Brussels, 22.11.2006) The dilemma for the so-called “seeking ways” emerged in the scientific literature of international labour law as well (e.g. Clauwaert et al, 2012) and the essence of this can be summarized the following way: how can proper labour law norms be created, taking into consideration the social protection of workers and the interests of the labour market – mainly flexibility of employment relationships – at the same time? (Kun, 2013) On the one hand, if the economic aspects of labour law are given preferences, it will result in the remission of the level of social protection necessary because of the flexible solutions, on the other hand, if the social interests are strengthened, efficiency and competitiveness will decrease because of the inflexibility. (Kiss, 2012) This problem was already emphasized in the legal literature several years ago (e.g. Kaufmann, 2007) and the “social side” was seriously stressed (Mantouvalou, 2012), but the economic aspects have become more and more dominant recently. (Gyulavári, 2012)

In the Hungarian legal system there is another problem, namely, the lack of modification of the OSA. In spite of the new rules of employer’s liability for damages, in this field the norms are still synchronized with the international expectations in connection with the strict rules, among which there is no place for the employer’s justification. So the infringement of these strict rules establishes the employer’s liability for damages. Surveying the unified judicial practice we can state that the courts have followed a very strict interpretation in the field of occupational safety in the last twenty years and as a consequence the rate of the employer’s favourable result of the lawsuit is insignificant in the lawsuits connected to occupational safety.

3. The significance of the EU law

The assurance of the fixedness of the OSA’s regulation is based on the EU law, namely the directives created for protecting the safety and health of workers at work. This type of legislation provides that the member states harmonise their legal systems in order to reach a consistent regulation in the field of workers’ protection. The permission for this process can be found in Article 115 of Treaty on the Functioning of the European Union. This emphasises that „Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.” For this harmonisation the best instrument is the “directive” which is „binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” (Article 288 of FEU). It can be seen that this method gives the member states the liberty to choose the best way for them to achieve the stated legal situation. However, it must be stated that the member states can use only such solutions which are suitable for the emergence of the directive, namely it can be extorted by the internal law. (Várnay-Papp, 2012)

The most important substantial document of this area is the 89/391 EC (frame) directive on the introduction of measures to encourage improvements in the safety and health of workers at work. It was stated in the preamble of the document that the “improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations”. This means that this document oversteps the economy-centered approach of legislation and uses a completely different view in which the worker’s well-being is an
important aspect. Therefore the object of the Directive is to „introduce measures to encourage improvements in the safety and health of workers at work”. To reach this goal, the document contains „general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles”

The significance of the directive is that it regulates the general system of occupational health and safety through a different aspect namely it states the minimum standards of the basic rights and obligations of the employer, employee and the state as well. Based on this approach, every member state can shape its legal system to meet the requirements of the directive. It is important that according to the directive the regulation „shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work”.

After the announcement of the directive the legislation in different sectors began. As an effect, for the first time 15 sectorial directives were passed, which contained the concrete minimum standards of different sectors. (Gádor, 2004) The framework directive and the sectorial directives created the EU policy on occupational health and safety in essence, because they stipulate the minimum requirements of the working conditions which must be observed by the member states. (Lantos, 2000) Further relevancies of the sectorial directives are the precise definitions and the unequivocal expectations, where the harmonisation of the member states is required. These documents contain that the extension of the regulation promotes the realisation of the social aspect of the internal market. According to the type of these legal sources the member states cannot diverge from the regulation, which means that these rules can be considered as the limit of flexible working conditions, because it is prohibited for the member states to give permission to the parties to set aside these regulations.

4. **The role of the judicial practice in the field of occupational health and safety**

Surveying the unified judicial practice in Hungary we can state that the courts have followed a very strict interpretation in the field of occupational safety in the last twenty years and as a consequence, the rate of the employer’s favourable result of the lawsuit is insignificant in the lawsuits connected to occupational safety. This means that the Hungarian regulation (mostly based on the above mentioned EU law) has been protecting the workers correctly. But the appearance of the demand of flexibility, and the new forms of working types can propose such legal situations where the liability of the employer can decrease.

Let’s take the following as an example of this problem: according to 51. § (1) of the new Hungarian LC., the employer is obliged to employ the employee according to the employment contract and labour law norms and – in absence of the parties’ different agreement – to assure the conditions of work. Consequently, the parties can agree that the conditions of work or tools are provided by the employee so the employer does not have an impact any more on the tools used by the worker. But even with this kind of agreement the employer cannot be exempted from her/his obligation to control or from the obligation to secure the conditions of occupational safety and workplace health; so theoretically she/he has to check before and during the working activity constantly whether the tools used by the worker are complied with the relevant rules. But in the everyday practice it is not clear for the employees how to act in accordance with the relevant regulations, so they cannot judge whether the tool used fits the instruction and regulations. In case it does not, the question arises whether the employer can sanction this kind of obvious breach of contract and whether she/he can raise a claim against the employee for her/his damages emerged from this violation of law.

Another question also arises: supposing the tool is seemingly in accordance with the relevant provisions, but for example it has a latent defect, can the employer exempt herself/himself from the liability for damages, i.e. can the justification be successful if the employer checked the tool’s state reportedly before the start of work and it goes wrong during the work? It is interesting because the conditions for justification laid down in the new LC theoretically exist, namely the cause is beyond the employer’s scope of supervision and she/he cannot foresee it.

These ideas are relevant because, according to the new Hungarian regulation, the employer can still be the prevailing party in a labour law suit with justification laid down in the new LC but at the same time in the procedure of the labour inspectorate there is no way to exempt herself/himself.
5. Conclusion

As we can see, some rules of the Green Paper appear in Hungary as part of legal regulation, which, on the one hand, is expected to provoke a long-term increase in employment, but also, necessarily, to put certain groups of employees in a disadvantageous situation, and that is a step back, compared to earlier legislation. The new LC was carried out with reference to competitiveness, but the legislative body put no emphasis on their “temporary” character, that is to say, we cannot find any rule where a “return” to a regulation that is not disadvantageous for the employee would be formulated as an objective or purpose.

The complexity of the question is partly due to the fact that a weaker situation of employees can go together with higher competitiveness, since in those member states where employees are entitled to less benefits, shorter breaks and rest periods, less holiday, and where employers are bound by moderate rules in case of an eventual indemnification procedure, conditions are more suitable for investments and enterprises than in member states that are on a “higher level of protection”. Therefore it is a serious task of European labour law to determine the necessity and designate the proportion of eventual directives that would mark the way for the member states with regard to this regulation.

Another great challenge is that the spread of atypical work forms makes the reconsideration of employer’s liability in EU level necessary. According to the present Hungarian regulation in a lawsuit the employer’s chance for justification is better against an employee who worked beyond the scope of supervision of the employer, namely outside the employer’s site. This means that the workers employed through atypical legal relationship are less protected by the Hungarian LC.

It must be stated that in the present legal environment a serious stretch of rules of occupational safety seems impossible because the background of these norms are stated in EU directives, which limits the scope for action of legislation. But in the field of liability for damages in labour law there are no exact EU obligations and modification of this because of the competence of the Member States are incalculable.

The Hungarian judicial practice based on the OSA is unified in the following: the occurrence of the accident itself is enough to condemn the employer because the accident justifies the inappropriate level of workplace safety and health. Contrary to this, the new LC placed a new requirement for conditions of time with the clause of foreseeing on the employer’s side, which can result in justification.

The previous Hungarian LC followed a different method of liability for damages, which was synchronized effectively with the regulations of occupational safety. With the new regulation new ways of justification are available for the employer, which can lead to undesired outcomes in legislation and jurisdiction as well. Different judgments can be made based on the same accident in labour lawsuits, suits in connection with norms of occupational safety or social security. This means that the employer’s position can be hopeless because she/his has to present three different answers to charges with three different ways of reasoning or maybe she/he has several statement obligations with different content. In my opinion this can happen easily and the employer has to “choose” this way from the ways of defence according to her/his most important interests. So she/he will construct the counter-claim focusing only on one of these three diverse fields of law and this way the employer risks the possibility of condemnation in the other procedures.

This phenomenon makes the labour law environment very incalculable for the employers, which imposes more financial and administrative burden on them.

On the basis of what I have described, it is my opinion that extending unified labour law regulations to most legal institutes possible can be justified, as it creates a unified framework for employers and contributes to the promotion of equality within the European Union.

References

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