HUNGARIAN LABOUR LAW
E - J O U R N A L

Break out of the Box

A Proposal on How to the Interpret Termination without Notice on the Grounds of Objective Impossibility in Hungarian Labour Law

Zoltán Petrovics*

In this paper, I seek to find a solution to one of the specific problems of the termination of employment in Hungarian labour law. Although, the rules of dismissal without notice based on "objective impossibility" have not changed in the Labour Code of 2012, the provisions of this Act impose a number of such obligations on the employee, which, in my opinion, upset its interpretative framework developed by the labour courts over the decades. Therefore, I try to find a solution to this problem by developing a new interpretive framework of the reasons of "objective impossibility".

First, I present the general framework of termination of employment in Hungarian labour law, then I turn to outline the traditional interpretative framework of dismissal without notice developed by the Hungarian labour courts. In the third part, I show how the Labour Code reshuffled employee obligations and broadened them with new elements that also affected conducts falling outside employment, and what effect this had on "objective impossibility". In the fourth part, I present the latest relevant court decisions, which truly reflect the uncertainty of the interpretative framework. In the fifth part, I outline my proposal to renew the interpretation. Finally, I address the pandemic-related cases of the application of "objective impossibility".

1. The system of termination of employment in Hungarian law – the problem

The thought of preparing a new labour law code in Hungary was brought up in October 2006, as a result of which the experts assigned by the Ministry of Social Affairs and Labour completed a draft by the spring of 2007. The *Thesis* which served as the basis of the regulation concept was

* Assistant Professor, ELTE University (Budapest), Faculty of Law, Department of Labour Law and Social Law. ORCID: orcid.org/0000-0001-5683-3624.

published at the end of 2008,[1] however, after that the codification work within the ministry had come to a halt, therefore the experts assigned originally started to prepare the act. The legislative work gained momentum again in June 2011, after the government had published the document titled Hungarian Labour Plan prepared in the frameworks of the Széll Kálmán Plan,[2] which proposed the transformation of employment relations, including the creation of the new Labour Code. The bill was developed along the lines of the objectives specified in the Hungarian Labour Plan. The main objectives included making the regulation flexible, as well as changing the characteristic of the rules ensuring the protection of employees.[3]

Act 1 of 2012 on the Labour Code[4] (hereinafter referred to as "Labour Code") – which entered into effect as of 1st July 2012 – brought numerous changes concerning the system of the termination of the employment relationship from 1st July 2012.[5] The reasoning of the Bill mentioned the solution of the discrepancies in law enforcement and the satisfaction of the practical claims as primary reasons for the changes.[6] The basis of the motivation was that the regulation of Act 22 of 1992 on the Labour Code (hereinafter referred to as "1992 Labour Code") placed the risk of prolonged labour lawsuits entirely to employers without justification – according to the reasoning of Bill. The primary objective was to eliminate the practice which increased the burdens of employers unreasonably, as well as to decrease the number of labour conflicts and employment litigation. From among the new rules, the legal consequences of unlawful termination of employment had the greatest resonance in legal practice.[7] However, this study concentrates on a seldom examined phenomenon hiding – we can say – "calmly" in the shadow of the essential changes, which is not even directly linked to the change of the termination system, but to the increase of the employee's obligations defined in the Labour Code.

Overall, the Labour Code has not changed the essential character of the legal instruments connected to the termination of employment. It is necessary to draw a dividing line between the cases of cessation[8] and termination of employment,[9] also in Hungarian labour law. In each case, the termination of employment arises from the intent of the party or parties; while the source of cessation

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1 Berke, Gyula – Kiss, György – Lőrincz, György – Pál, Lajos – Pethő, Róbert – Horváth, István: Tézisek az új Munka Törvénykönyve szabályozási koncepciójához. *Pécsi Munkajogi Közlemények,* 2009/3. 154–155.

2 *Széll Kálmán Terv. Magyar Munka Terv*, http://mcdsz.hu/1_doksik/Nemzetimunkaterv.pdf.

3 Berke–Kiss–Lőrincz–Pál–Pethő–Horváth op. cit. 146. See also Tamás Gyulavári – Gábor Kártyás: Effects of the New Hungarian Labour Code: The Most Flexible Labour Market in the World? *Lawyer Quaterly,* 2015/4. 233–245.

4 See https://mta-pte.ajk.pte.hu/downloads/12-01.tv-en.pdf.

5 Regarding regulation and practice of termination rules see Lőrincz, György: *A munkaviszony megszűnése* és *megszüntetése.* Budapest, HVG-ORAC, 2017.

6 General reasoning of the Labour Code, 18.

7 Regarding the analysis of the rules governing the legal consequences of the unlawful termination of the employment relationship, see Tamás Gyulavári – Gábor Kártyás: *The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy.* Budapest, Pázmány Press, 2015. 36–38.; Petrovics, Zoltán: A jogellenes munkajogviszony-megszüntetés jogkövetkezményeinek margójára. In: Horváth, István (ed): *Tisztelgés: Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára.* ELTE Eötvös, Budapest, 2015. 367–380.

8 Section 63 of the Labour Code.

9 Section 64 of the Labour Code.

is an objective legal fact that falls outside the parties' intent. The Labour Code defines mandatorily the certain statutory cases of cessation and termination of employment, consequently, the employment relationship may only cease in case of the existence of the legal ground defined in the act, or it can be terminated in such cases. Neither the agreement of the parties, nor collective agreements may define legal titles for cessation and termination that is not comprised in the act; and, generally, they may not exclude or limit the application of the statutory cases regulated in the act.[10]

In Hungarian legislation, the employment relationship can be terminated on the ground of a party's unilateral statement of intent by termination with or without notice and on the ground of the parties' bilateral legal statement by mutual consent.[11] The termination without notice covers three different statutory cases: termination without notice that requires reasoning,[12] termination without notice during probationary period[13] and termination without notice of a fixed-term employment relationship before the expiry.[14] The act does not define as case of statutory termination the termination without notice of the legal relationship established on the ground of an invalid agreement, this case is mentioned only among the legal consequences of invalidity.[15] Beyond this, – returning to the legislation in the field of private law prior to the second world war – it grants the right of rescission for both parties in the period between establishment of the employment relationship and the starting thereof, although this statutory provision cannot be found in the Chapter 10 of the Labour Code on termination, either.[16] Termination of employment shall be in written form and the unilateral termination of the employment by the employer shall include the notification about the manner of enforcing the claim and the deadline for the enforcement.[17]

In respect of termination without notice that requires reasoning, the Labour Code has formally brought only a change in terminology: the previous name "extraordinary termination" has been changed to "termination without notice that requires reasoning". Substantially, the practice of extraordinary termination remains applicable under the Labour Code too. In my opinion, the above mentioned "increase of obligations" – to which maybe too little attention had been paid by practice – shall have the consequence that the previous frames of interpretation established under the former legislation is no longer fully applicable to Article 78(1)b) of Labour Code, that is to the phrase of „objective impossibility". Pursuant to the referred provision, the employment relationship may be terminated by either party without notice, if the other party otherwise engages in conduct that would

10 Section 85(1)(a) and (b) of the Labour Code, and decision in principle of the Supreme Court (hereinafter referred to as "EBH") EBH2002. 688.

11 Section 64(1) of the Labour Code.

12 Section 78 of the Labour Code.

13 Section 79(1)(a) of the Labour Code.

14 Section 79(1)(b) of the Labour Code.

15 Section 29(1) of the Labour Code.

16 Section 49(2) of the Labour Code.

17 Section 22(3) and (5) of the Labour Code.

render the employment relationship impossible. I will examine this provision in the followings. I assume that we need to go further than the established, traditional frames of interpretation, otherwise this provision is expected to become meaningless, or an interpretation that is not appropriate in all respect from dogmatic point of view is expected to persist.

In the followings, we shall briefly overview the provisions about the termination without notice that requires reasoning.

2. The traditional frames of interpretation of termination without notice

The employment relationship can be terminated by the parties also by termination without notice that requires reasoning. Termination without notice is a unilateral legal statement addressed to the other party that terminates the employment relationship without the other party's consent, at the time of the communication of the legal statement, without a notice period. Both parties are obliged to give their reasons for a termination without notice. The general requirements of termination shall apply to the reasoning: the reasoning shall clearly specify the grounds for termination, the burden of proof to verify the authenticity of the grounds shall lie with the party exercising the right of termination without notice, the ground shall be reasonable that is adequately serious and convincing.[18]

The right of termination without notice that requires reasoning can be exercised on the ground of two particular statutory provisions. The difference between this two provisions can be described the way that the termination without notice is based by the other party's particularly serious and guilty breach of obligation on the ground of the first point called "qualified breach of obligation"; whereas, pursuant to the second point called "objective impossibility", it is based by the other party's conduct that renders the maintenance of the employment relationship objectively impossible. The parties may terminate the employment relationship without notice if the other party wilfully or by gross negligence significantly breaches any substantive obligation arising from the employment relationship; or otherwise engages in conduct that would render the employment relationship impossible.

The point of "qualified breach of obligation" contains three distinct statutory elements, all of them shall exist simultaneously so that the lawfulness of the termination without notice can be stated. Out of these three conjunctive statutory elements, two define objective conditions concerning the external character, objective aspects of the breach of the obligation, while the third one is a subjective condition referring to the conscience relationship between the infringing conduct and the breach of

[18] At the same time, it is to remark that in case of the first point of termination without notice that is in case of a qualified breach of obligation, the statutory elements involve reasonability, accordingly, if they are proven, this circumstance need not be justified separately. See *A felmondások* és *az azonnali hatályú felmondások gyakorlata.* Kúria, 24. November, 2014. 29. https://kuria-birosag.hu/sites/default/files/joggyak/a_felmondasok_es_azonnali_hatalyu_felmondasok_gyakorlata_-_osszefoglalo_jelentes.pdf

obligation. In the specific case, it is possible to adopt a conclusion in these issues on the ground of all circumstances of the facts.

The qualified breach of obligation can be grounded by a breach of the party's significant obligation arising from the employment relationship.[19] According to judicial practice, the sources of the obligations resulting from the employment relationship can be not only the legislation or collective agreement, but also the employment contract, the employer's rules, general or single instruction, and written or unwritten norms of the given profession, occupation or job function. At the same time, termination without notice may only be applied in case of breach of obligations considered as significant, however, this means not only the obligations to work,[20] to be available,[21] and to perform instructions traditionally considered as main obligations;[22] but it can also be grounded by any other obligation,[23] or by provisions defining general obligations or principals (for example the obligation to cooperate,[24] the protection of the legitimate economic interests of the employer[25]).

Besides, the lawful termination without notice also requires the breach of obligation to be significant. The grave breach of a significant obligation, and the slight but serious breach of such obligation may be considered as significant as well.[26] Finally, the condition of wilfulness[27] or gross negligence requires the examination of the degree of the guilt.[28] According to the case-law, gross negligence can be stated not only in cases of breaches of obligations committed with recklessness with knowledge but also in

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19 Ferencz, Jácint (ed.): *Munkajog és társadalombiztosítási jog.* Budapest, Dialóg Campus, 2018. 78–79.

20 Such as failing to start working [decision of the Supreme Court or Curia (hereinafter referred to as "BH") BH1995. 131.], but it can be a reason for the termination without notice also if the employee fails to perform his/her work with the level of professional expertise and workmanship reasonably expected (BH1996. 287., BH1998. 302., BH1999. 527., BH2003. 210., BH2004. 203., BH2007. 386.), as well as if he or she omits a special obligation (e.g. to issue invoice) (BH1999. 44.).

21 Significant late (BH1995. 131.), leaving without permission (BH2008. 132.), a longer, unjustified absence (EBH2000. 247.), drunk on duty may also give rise to the termination without notice (EBH1999. 47., BH2001. 243., BH2002. 459.).

22 BH1994. 398., BH1996. 286., EBH1999. 142., BH2000. 173., BH2003. 262., BH2003. 263., BH2003. 475., BH2004. 390.

23 Such as borrowing for the benefit of the company without the permission of the owner (BH2005. 298.), vulgar communication to his or her superior (BH2005. 120.) or participating in an unlawful strike (BH1995. 545., BH1996. 563.).

24 If e.g. the employee fails to let the employer know about his/her being prevented from attend or his/her incapacity over a longer period of time without due cause.

25 Such as founding or participating in any way in a competing company without the knowledge of the employer, regardless of the fact whether it caused actual loss or not for the employer (BH1996. 450., BH1996. 502., BH1996. 666., EBH1999. 148.); disclosing of groundless accusations that insult the employer's personality, aimed at discrediting him/her in public (BH2003. 244.); criminal offense committed against the employer (theft, embezzlement, fraud) or misdemeanour offences, attempt thereof, irrespective of the value limits (BH1995. 682., BH1997. 463., BH1998. 51., BH2004. 251., BH2005. 329.); theft – even of scrap – at workplace (BH2000. 174.); pursuing any activity that is incompatible with the position (BH2004. 77.); violation of business secret (BH1996. 451.); scandalous, pugnacious behaviour (EBH2004. 1056.); using other colleague's computer for his/her own purpose; giving information the way it harms the employer's economic interests (BH2006. 64.); intentional cause of damage (BH1994. 494., BH1997. 421., BH2005. 330., BH2006. 375.). If an employee in position of responsibility fails to demand the compliance with the rules of work and discipline of his/her subordinates, that can also give rise to the termination without notice (BH1994. 573.).

26 Kulisity, Mária: A munkaviszony megszűnése és megszüntetése. In: Breznay, Tibor (ed.): *A munkajog nagy kézikönyve.* Budapest, CompLex, 2006. 1062–1063.

27 Resolution No. 25. of the Supreme Court's Labour Section.

28 Mfv.10.495/1993. (decision of the Supreme Court), BH2006. 229.

certain extremely serious cases of negligence. Judicial practice has the point of view concerning gross negligence that a striking indifference can be seen in the party's conduct or omission in these cases.[29]

According to the case law, the second point of termination without notice, which occurs less frequently in everyday life compared to the first case,[30] refers to conducts that render the employment relationship objectively impossible to be continued.[31] According to the case law, this statutory provision cannot be applied in case of breach of any obligation arising from the employment relationship,[32] it can only be applied in the event when the impossibility results from a conduct falling outside the employment relationship.[33] However, it is absolutely necessary to have a causal link between the behaviour and the impossibility of the maintenance of the employment relationship.[34] At the same time, it is unnecessary to examine the guilt, because it is not an element of the statutory facts, and it can be grounded even by conducts not attributable to the party.[35]

Under the 1992 Labour Code, "objective impossibility" could be grounded, if an employee in a position of confidence and trust, in his/her free time was engaged in a conduct similar to his/her position that rendered the employment relationship objectively impossible to be continued. Such case occurred, for instance, when:

- a fisheries officer was caught in the act of poaching, and criminal proceedings were instituted against him because of the offence of theft;[36]
- an employee behaved unworthy to his or her position (for example licentious or alcoholised life), or
- an employee committed public nuisance in the employer's uniform.
- the driving licence of an employee employed as driver was withdrawn for any reason.[37]

The employer of a limited liability company also arrived at this conclusion lawfully when its employee "[a]s a member of the company – using otherwise lawfully his membership right – had withdrawn his share from the company, endangering thereby its operation and his own occupation".[38] The reference to the loss of confidence held also in the case when the employee's conduct had been

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29 Kulisity op. cit. 1061.; Szűcs, Péter: A munkaviszony megszűnése és megszüntetése. In: Berki, Katalin – Handó, Tünde – Horváth, István – Lőrincz, György – Magyarfalvi, Katalin – Suba, Ildikó – Szűcs, Péter: *A Munka Törvénykönyve magyarázata*. Budapest, CompLex, 2006. 433.; BH1999. 527.; BH1999. 527.; BH2005. 370.

30 Lőrincz op. cit. 210.

31 Mfv.I.10.709/1995/5., Kulisity op. cit. 1065.

32 BH1994. 702.; Mfv.I.10.253/1993.; Ádám, Lóránt – Kertész, István – Pál, Lajos – Radnay, József – Zanathy, János: *A magyar munkajog.* Budapest, HVG-Orac, 2001. A/203.; Handó, Tünde: *A munkáltató és a munkaviszony. A munkaszerződéstől a felmondásig.* Budapest, Magyar Hivatalos Közlönykiadó, 2000. 198.; Bankó, Zoltán – Berke, Gyula – Kiss, György: *Kommentár a Munka T*örvénykönyvéhez. Budapest, Wolters Kluwer, 2017. 355.

33 The employee's behaviour can be a lawful ground for the termination without notice, when he or she neglects the requirement of good faith in a legal relationship other than the employment relationship but related to his/her employer's activity (BH2004. 483.).

34 Kulisity op. cit. 1064.; Lőrincz op. cit. 210.

35 Lőrincz op. cit. 210.

36 EBH2003. 894.

37 Ferencz, Jácint: A munkaviszony megszűnése és megszüntetése. In: Ferencz, Jácint – Göndör, Éva – Gyulaváři, Tamás – Kártyás, Gábor: *Munkajogi alapismeretek.* Budapest, ELTE Eötvös, 2013. 92.

38 Lőrincz op. cit. 210.; Mfv.I.10.346/1993.

suitable to shake the employer's confidence, for example committing of serious crime[39] or in case the employee has been arrested.[40] If the employer referred to the loss of confidence because of launch of criminal proceedings, however, later it turns out that the employee committed no crime, the measure is considered to be unlawful.[41] If the employer did not attribute the commitment of a crime to the employee, but he/she referred to a certain behaviour breaching his obligation in the termination without notice, and later the employee is acquitted, the termination by the employer shall not necessarily be unlawful.[42]

In connection with the relationship between the two points, it is necessary to refer to the fact that, according to the case-law, it is not unlawful to refer to both (a) and (b) points of Section 78(1) of Labour Code in the termination without notice, or to refer particularly to neither of them.[43] As pointed out by the Curia's (Hungarian Supreme Court)[44] group analysing the case law, it is irrelevant whether termination without notice indicates point (a) or (b) or both, because the court shall qualify the terminating legal statement on the basis of the reasons involved in it, according to its actual content.[45]

Termination without notice can only be lawful in case of compliance with two deadlines with different type. The right of termination without notice may be exercised within the so called subjective deadline of fifteen days of gaining knowledge of the grounds therefor, but within not more than one year of the occurrence of such grounds (in case of executive employees within three years), or in the event of a criminal offense up to the statutory limitation (so called objective deadline).[46]

In case of termination without notice by the employer, the employee shall be entitled only to the wages and other emoluments calculated until the day of termination. However, in case of termination without notice by the employee, the regulation – at a material level – intends to put the employee in the situation, as if it had been the employer who terminated the employment relationship by notice. In this latter case, the employer shall pay the employee the absentee-pay due for the period when he or she is exempted from work duty and the severance pay applicable to him/her.[47] In this latter case, the

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39 In such a case, when there was a reasonable ground to suspect a serious crime committed by the employee in connection with his/her employment relationship that justify the shake of the confidence, and the employer was not able to clarify the facts of the case within a short period of time, the termination without notice was lawful (EBH1999. 147).

40 EBH2005. 1244.

41 Mfv.I.10.378/1999. Szűcs op. cit. 442.; Bankó, Zoltán – Berke, Gyula – Gyulavári, Tamás – Kiss, György: *A Munka Törvénykönyvéről szóló 1992.* évi *XXII. törvény magyarázata.* I. köt. Budapest, Magyar Hivatalos Közlönykiadó, (s. a.); Pál, Lajos – Radnay, József – Tallián, Blanka – Tálné Molnár, Erika: *Munkajogi kézikönyv.* Budapest, HVG-ORAC, 2011. 161–162.

42 Mfv.I.10.616/2015.

43 Lőrincz op. cit. 211.

44 See https://www.kuria-birosag.hu/en

45 *A felmondások és az azonnali hatályú felmondások gyakorlata.* op. cit. 27.

46 Section 78(2) of the Labour Code.

47 Section 78(3), 70(3), 77 of the Labour Code.

employee generally has to enforce his/her claim in a labour dispute, because it is not realistic that in this case the employer voluntarily pays the allowances to the employee.[48]

3. "Integration" of conducts outside the workplace

As I have pointed out above, the Labour Code has increased the sphere of obligations on the employee's side, and as a consequence thereof, in my opinion, the frames of interpretation outlined in the previous subtitle can no longer be applied today. As a consequence, a significant part of the facts involved in "objective impossibility" "slips" into the field of qualified breach of obligations. In support of the foregoing, I will present first the provisions that refer to the increase of the obligations arising from the employment relationship and its impact on the employee's conduct outside the employment relationship.

From 1st July 2012, Section 8(2) of Labour Code provides that employees may not engage in any conduct even outside their paid working hours that – on the ground of the employee's job, his or her position in the employer's hierarchy – directly and factually suitable to endanger the employer's reputation, legitimate economic interest or the intended purpose of the employment relationship. This general prohibition – in accordance with the decision No. 56/1994. (XI. 10.) of the Constitutional Court[49] – concentrates specifically on behaviours outside the workplace, thereby it "involves" *expressis verbis* these conducts in the sphere of relevant circumstances in terms of the employment relationship, making them possible to be judged on the ground of the requirements for the employment relationship.

The grammatical, logical and systematic interpretation of the norm set out in Section 8(2) of Labour Code, the obvious wording of the legal requirement expressing a prohibition evidences that this section of the Labour Code prescribes clearly an obligation for the employee that arises from the employment relationship. Obviously, the fact that a norm prohibits – mostly – behaviours outside the employment relationship or the workplace, does not mean by itself that this norm cannot be considered as an obligation arisen from the employment relationship. This is particularly true in the light of Section 8(1) of Labour Code. This rule namely provides that employees may not engage in any conduct during the employment relationship that would endanger his or her employer's legitimate economic interest, unless they are entitled to do that by law. The prohibition of endangering the legitimate economic interest is consistently considered as an obligation arising from the employment relationship by case law, in spite of the fact that a certain part of the behaviours are pursued almost naturally outside the employment relationship (for example entering into a work-related legal relationship with a competing business association, participating in meetings organised for disclosing trade secrets).

48 BH1998. 556.

49 No. 1226/B/1992., ABH 1994, 312.

The provision set out in point (d) of Section 52(1) of Labour Code that requires the employee to behave in such a way that demonstrates the trust vested in him/her for the job in question, leads to a similar conclusion. This obligation also involves in its effect conducts falling outside the employment relationship or workplace, therefore the breach thereof, the fact of loss of confidence go further than the traditional frames of interpretation of the provision of „objective impossibility". Namely, if this latter can be applied only in case when it is about the breach of an obligation arising from other than an employment relationship, then the employer's loss of confidence resulted from a conduct outside the employment relationship, resting on point (d) of Section 52(1) of Labour Code cannot be interpreted pursuant to point (b) of Section 78(1) of Labour Code. In other words, because of the fact that Labour Code defines the behaviour that is in accordance with the trust necessary to perform work among the employee's priority obligations, the former practice can be maintained only if the point of "objective impossibility" applies also to the breach of contract.

As it is pointed out by György Lőrincz, a conduct falling outside the employment relationship can only give rise to a termination without notice, if it affects the employment relationship, and therefore, in his opinion, these cases – "apart from certain very exceptional cases" – mean at the same time the violence of a – for example ethic – expectation arising from employment relationship.[50] Concerning this wording, it is impossible to ignore that although the "expectation" do not entirely correspond with the word "obligation", but it has very similar consequences: substantially, it prescribes a requirement for the employee concerning his or her conduct. This refers also indirectly to the connection between the point (b) of Section 78(1) of Labour Code and the obligations (expectations) arising from an employment relationship.

On the ground of the employee's obligations described above, in my opinion, we can have the consequence, that previous judicial practice has to be altered, because if the findings concerning the objective impossibility drafted in the 2nd subtitle are right, then there are only a few facts at present that correspond to the conditions set out by the case-law and which is under point (b) of Section 78(1) of Labour Code. Therefore, in the followings, I will attempt to interpret the point of "objective impossibility" the way, that will without doubt differ from the present judicial practice in several aspects, but it makes it possible to "revitalise" it.

4. Practice is "closed in a box"

In my opinion, the breaking of the traditional frames of interpretation is underpinned by everyday labour law practice as well, since these requirements and the conviction of the users of the law related to Section 78 (1)b) of the Labour Code are not necessarily consistent. To illustrate it: the practice is

[50] Lőrincz op. cit. 210.

closed in a "box" from which it attempts to break out, but it does not allow it. It can be concluded from the fact that employers frequently refer to both the point of "qualified breach of obligation" and to the point of "objective impossibility" on the same facts and they surely do this in order to provide a "solid" foundation for the termination without notice, in spite of the fact that on the basis of the practice described in the 2nd subtitle, it seems that practically, the two cases are mutually exclusive, they cannot exist simultaneously.

In order to establish a "diagnosis" about the legal state in effect, I reviewed the labour decisions adopted in this subject, and the anonymised decisions of the Curia published following the entering into force of the Labour Code. In doing so, I examined two decisions in principle which is relevant to this subject and sixty-five judgments in which the employment relationship had been terminated without notice. Only nine of the latter judgements referred to the point of objective breach of obligation, including seven cases, in which the underlying facts of the case was actually about the employee's qualified breach of obligation. In the followings, I will present the elements – essential from the point of view of my subject – of the examined judgements.

In most of the judgements examined on the ground of the foregoing aspects, the person practicing termination without notice has referred to point (b) of Section 78(1) of Labour Code even in cases where he/she otherwise based the termination of the relationship on a breach of obligation regulated in the Labour Code. In one of the cases, the employer designated unjustified absence of the employee in the reasoning, and he referred to the fact that thereby the conduct of the employee rendered it impossible to maintain the employment relationship.[51] In another case, the employee's termination designated the point of "objective impossibility" as well, but in the reasoning of the termination without notice the employer's breaches of obligations were mentioned unequivocally. The employee claimed among others that the employer had banned him out of the area of the factory, thereby prevented him from the performance of the tasks of his post, besides, he referred to the lack of conditions necessary to the work, and also to the fact that the employer kept him under "psychological harassment", and the owner had cried at him several times a day in unspeakable style in front of other persons as well.[52]

It occurred several times, that the employer referred to both points in course of the termination without notice, although the facts would fall only within the point of qualified breach of obligation. In a case, the employer terminated the employment relationship of the employee without notice, because he refused to blow into the breath analyser, although he knew that car drivers are obliged to do that at the beginning and at the end of the working time without any further demand. Furthermore, he took negative statements about his employer, questioned his decisions, gave partial information on his employment steps connected with the employer. This conduct was against the prejudice of good

51 Mfv.I.10.722/2016/4.

52 Mfv.I.10.112/2017/4.

order and discipline at workplace and aimed to confuse the employees' thoughts, therefore, it rent it impossible to maintain his employment relationship.[53]

In order to justify his termination without notice, the employer claimed both points as well, when he found his employee scheduled for night work sleeping instead of fulfilling his tasks of position, this conduct violates the rules of the employment relationship, therefore, pursuant to the reasoning, it is no longer possible to maintain his employment relationship.[54] There was a double reference also in the case, where the employer attributed the responsibility to the employee for the serious irregularities detected by the environmental inspectorate.[55] The employer referred jointly to both points also, when he charged the employee with documentation of fictive transactions, and with breach of the instruction about the regulation of usage and establishment of customer relations codes of the company.[56]

It occurred in practice, that objective impossibility was referred expressly as result of breaches of obligations. On the basis of the facts, the employer attributed numerous breaches of obligations to the employer who have been a forester, leader of the sector, subordinate hunter, on the basis of which the employer terminated his employment relationship without notice pursuant to points (a) and (b) of Section 78(1) of Labour Code. The reasoning stated that a large degree of mistrust has developed from the side of the employer, which makes it impossible to maintain the employment relationship, subject to the breach of obligations.[57] In this case, termination without notice proved to be lawful, because the breach of obligations attributed to the employee gave rise to the termination without notice. However, the reference to point (b) of Section 78(1) of Labour Code seemed to be superfluous, it is likely that the Curia did not mention it in the judgement for this reason.

Out of the examined nine cases, there were only two, in which the reason of termination without notice was actually in accordance with the frames of interpretation established by judicial practice. It can be concluded from the facts of the first such case (because it is not obvious from the judgement itself), that the employer referred to the point of "objective impossibility" in the termination of the employment relationship without notice of the employee working as leader of the service. According to the facts of the case, the employee – as a private person, pursuing a car-dealing activity that was the main activity of the employer – offered for sale a passenger car on an online car-dealing website, by giving his own phone number, with false vehicle odometer value. The reasoning referred – among others – to the infringement of the legitimate economic interests of the employer and to the fact that the employee is expected to be aware that rewinding the meter is a crime.[58]

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53 Mfv.III.10.579/2017/9.

54 Mfv.II.10.535/2013/5.

55 Mfv.I.10.314/2017/8.

56 Mfv.I.10.338/2016/8. In this case, the Curia came to the conclusion that the intentional and significant breach of obligation alleged by the employer had not been established, thus it could not be accompanied by loss of trust from the side of the employer.

57 Mfv.III.10.016/2018/7.

58 Mfv.I.10.135/2016/4.

The point of "objective impossibility" has been lawfully applied in the case where the employee was a team leader who performed account management. This employee made private payments and transfers four times from the account of the class money opened and managed by himself, later he transferred almost the whole sum (HUF 29,000.) from his own account to the class money account. In termination without notice, the employer that is a financial institution referred to point (b) of Section 78(1) of Labour Code pursuant to which the using of the class money for private purposes on four occasions questions the moral integrity, and this conduct makes it impossible to further maintain the employment relationship as result of the loss of trust toward the employee. The Curia adjudicated that the employee's conduct outside working hours was actually suitable for endangering the purpose of the employment relationship, with regard to the nature of the position and the place occupied by the employee in the employer's organisation. If an employee in the given position disposes of the bank account with which he has been entrusted as of his own, outside the working hours, it erodes with reason the employer's trust toward him, therefore, the termination without notice was in accordance with point (b) of Section 78(1) of Labour Code.[59]

Out of the two examined labour decisions in principle, the Curia stated in the first one that the termination without notice have been unlawful, whereas in the second one, it has not assessed in the end the reference to "objective impossibility".

On the basis of the facts of the case of the labour decision in principle No. 21/2015, it was the employee who terminated his employment relationship without notice with reference to point (b) of Section 78(1) of Labour Code, because the employer had withdrawn – without prior information and consultation – the possibility of getting to work granted to him, furthermore, the employer had refused to consult with him in order to find solution to this situation despite his initiatives, and this decision made the employment relationship impossible. Although the termination without notice was obviously not in accordance with point (b) of Section 78(1) of Labour Code, the Curia pointed out that legal statements shall be evaluated in line with their content, irrespectively of the fact that which point of the regulation had been referred to. In this light, on the ground of the reasons set out in the termination without notice, no omission or conduct on the part of the employer could be confirmed that would have lawfully justify the termination without notice disclosed by the employee even pursuant to point (a) of Section 78(1) of the Labour Code.

According to the facts of the case published in labour decision in principle No. 18/2018, the employer referred – slightly simplifying the reasoning – to qualified breach of obligation on the one hand, as the employee had been absent from work arbitrarily and inexcusably for four hours, which endangered the safe care of the habitants of the old people's home. In this connection, he referred to the breach of Section 6(1) and (2) and points (a), (b) and (c) of Section 52(1) of the Labour Code. Besides, termination without notice relied on point (b) of Section 78(1) of the Labour Code in connection with the fact

[59] Mfv.I.10.301/2016/3.

that the employee's speech taken on the meeting of the boards of representatives made the employer appear as if the employees would suffer a regular "miscarriage of justice". Besides she failed to make distinction in order to portray in the real light the previous and the present state of the institution, and by acting so, she made statements that violated and endangered the employer's reputation, legitimate economic interests, thus Sections 8(1)-(4) of Labour Code have been infringed. The Curia did not examine the reasoning related to the attendance on public hearing and evaluation of the statements made there, on the ground that one out of the several reasons involved in the termination without notice is enough to be proved, provided that the gravity thereof justifies adequately the termination of the legal relationship.

5. An attempt to "break out of the box"

In my view, point (b) of Section 78(1) of the Labour Code can be interpreted in the way that makes it possible to tackle the present barriers and the "break-out from the box". The private law rules of the breach of contract could mean a suitable starting point, thus, the point of "objective impossibility" could be filled with life again. Pursuant to Act 5 of 2013 on Civil Code[60] (hereinafter referred to as "Civil Code".), any failure to perform the obligation in conformity with the contract means the breach of that contract.[61] As Gyula Eörsi stated, each conduct, circumstance or condition that infringes the contract and/or infringes any party's rights connected with the contract mean the breach of contract.[62] The subjective breach of contract originates in either party's chargeability, whereas in case of an objective breach of contract, the condition or circumstance infringing the contract may come into being independently of the parties' contribution.[63]

Without doubt, it is common in points (a) and (b) of Section 78(1) of Labour Code that both cases involve facts of serious breach of contract that makes possible the termination of the employment relationship without notice. On the basis of the simple grammatical interpretation of Section 78(1) of Labour Code, it can be established that beside the qualified breach of obligation, the employment relationship can be terminated without notice also in the case where the party otherwise engages in conduct that would render the employment relationship impossible. On the basis of this sentence, the interpretation according to which the expression of "otherwise" refers to all facts outside the first point that is "qualified breach of contract" – and not to the conducts outside breaches of obligations – cannot be excluded.

60 See njt.hu/translated/doc/J2013T0005P_20180808_FIN.pdf.

61 Section 6:137. of Civil Code.

62 Eörsi, Gyula: *Kötelmi jog. Általános rész.* Budapest, Nemzeti Tankönyvkiadó, 1998. 149.

63 Ibid. 150.

I consider that point (b) of Section 78(1) of Labour Code does not aim to exclude all conducts deemed as breach of obligation. In my opinion, "point (b)" shall make the termination without notice to be available in cases that do not entirely satisfy all three conjunctive elements of the qualified breach, and yet they are so serious that they justify the termination without notice of the employment relationship.

In this respect, "point (b)" can be considered as a sort of "escape clause" that makes termination of an employment relationship possible without notice, even if the party's conduct was not intentional or grossly negligent, or he or she "not even entered" the field of guilt, or that not absolutely means a significant breach of an essential obligation arising from the employment relationship. If the party's conduct infringes the other party's interest so seriously that renders it objectively impossible to maintain the employment relationship, that is a serious breach of contract without doubt. Thus, point (b) involves conducts that infringes the employment contract or an obligation resulting from it or infringes the other party's rights arising from the employment contract and which affect the existence of the employment relationship at the root or endanger its purpose. Thus, defaulting conducts may also occur in this sphere that makes it impossible to maintain the employment relationship, and conducts that as well are not related to obligations, but make it objectively impossible for the other party to continue the employment relationship.

In summary, point (b) is applicable not only in case of conducts not qualified as breach of obligations, but also regarding conducts breaching obligations resulting from employment relationship. The focus of the facts shall be in every case whether the party's conduct is considered to be so grave that makes it objectively impossible for the other party to further maintain the employment relationship. That is precisely why, if either party's conduct infringes an obligation arising from the employment relationship, but all of the conjunctive conditions of the qualified breach of obligations are not met, regardless of this, "point (b)" may come into operation, provided that the interest to maintain the employment relationship, to perform the employment contract has ceased.

In parallel to the acceptance of the foregoing interpretation, the question may arise: what is the relationship between all of this and the reasoning regulated in point (c) of Section 66(8) of Labour Code about the termination of the fixed-term employment relationship with notice by the employer, which allows the termination if maintaining the employment relationship is no longer possible due to unavoidable external reasons. On the ground of grammatic interpretation of this latter provision, it can be stated that the reason shall be an objectively unavoidable circumstance falling outside the employer that makes it impossible for the employee to perform the employment relationship.

Unavoidable external reasons can be such events or circumstances that are not related to the individual employer concerned, that the employer could not foresee and that the employer is unable to affect or prevent for objective reasons. I consider that any reason related to the individual employee concerned may fall under point (c) of Section 66(8), irrespectively of the fact whether it is attributable

to him/her or not. Thus, a circumstance that can be traced back to the employee's conduct and which may have – theoretically – an intersection with point (b) of Section 78(1) of Labour Code, may serve as reason for the termination.

However, a reasoned distinction has to be made between termination without notice pursuant to point (b) of Section 78(1) of Labour Code, and the above-mentioned termination of a fixed-term employment relationship. The judicial practice should reflect that the former case is in principle means a legal title for the termination with immediate effect that is "stricter" and has the nature of a sanction; while the latter allows a special but "more traditional" way to terminate the employment relationship with notice. An obvious criterion governing the demarcation can be between the two cases that in case of termination without notice only the party's conduct can reason the termination, whereas the termination of a fixed-term employment relationship may be triggered by other circumstances not related to the employer.

6. The objective impossibility and the state of danger concerning the pandemic

Taking forward the foregoing line of thinking, the question may arise if any conduct, primarily on the employee's side, may occur in the state of danger concerning the pandemic that makes it impossible to maintain the employment relationship directly in connection with this state. In my opinion, it is simple to answer the question whether the employment relationship of the employee, who is in „compulsory quarantine", may be terminated on the ground of Article 78(1)b) of Labour Code. This is the case, if the employee is isolated by the authority on grounds of public health, or (s)he cannot appear at the workplace because of the quarantine, and obviously, (s)he can be employed neither in other workplace nor in other position temporarily.[64] In this case, termination without notice cannot be lawful, as the order of the isolation by the authority and the quarantine in themselves can hardly be considered as conducts of the employee, who is otherwise incapable for work under the Act 83 of 1997 on allowances of the compulsory health insurance, because they are ordered by the decision of the authority.

However, it is a little bit more complex to assess the facts occurring in practice, when the employee stays in surroundings or contact with persons, either despite the employer's expressed request, or in the lack of such request, for example violating a possible restriction on leaving homes or as participant of a private trip to abroad, as a consequence of which, there is a risk of coronavirus infection. In such cases, in order to protect other employees' health, the employer may take the decision to oblige the employee to stay away from work. However, this is only one consequence.

64 Act 83 of 1997 on allowances of the compulsory health insurance Section 44(g).

I cannot exclude that the employer will assess the employee's conduct as a breach of obligation so grave, because of its irresponsibility and unacceptability, that gives rise to the termination without notice. It cannot be excluded therefore that in the circumstances of the case, the outlined facts will correspond with point (a) of Section 78(1) of Labour Code, but it is also possible that some of the elements of the statutory provisions of point (a) is missing (for example the employer failed to give an expressed request, therefore it could hardly be evidenced that the breach of obligation was significant). On the basis of the above argumentation, the employee's conduct and the resulting situation can objectively make it impossible for the employer to further maintain the employment relationship.

7. Summary

In the foregoing, I attempted to renew the interpretation of dismissal without notice based on "objective impossibility" ["point (b)"] in the context of Hungarian labour law. Although, the Labour Code has not changed the essential character of the termination of employment, the increased sphere of obligations on the employee's side has changed the frames of interpretation of dismissal without notice based on the conduct that renders the maintenance of the employment objectively impossible. Traditionally, this provision can only be applied when the impossibility results from a conduct falling outside the employment and cannot be applied in case of breach of any obligation arising from the employment relationship. However, provisions of Section 8(2) and 52(1)(d) of Labour Code prohibit certain conducts falling outside the employment relationship, workplace or working time, so a significant part of these behaviours formerly covered by reasons of "objective impossibility" "slipped" into the field of qualified breach of obligations.

In order to breathe life into the emptied "point (b)", I reviewed the related court decisions published following the entering into force of the Labour Code. Based on my analysis, I came to the conclusion, that "point (b)" can also be interpreted as a serious breach of the contract, which makes termination without notice to be available in such cases, that do not fall under the scope of the qualified breach of obligation ["point (a)"]. According to this interpretation "point (b)" is a sort of "escape clause", which comprises every conduct, including the breach of obligation resulting from the employment relationship, which makes it objectively impossible for the other party to maintain the employment relationship.