

About the Regulation of Termination of Employment Contracts in Draft Employment Contracts Act

Introduction

The need for reorganisation of the Estonian legal system and preparation of the draft Law of Obligations Act has given rise to heated discussions in the Estonian society. It is not clear as to whether the regulation of employment contracts should be included in the Law of Obligations Act, or whether the relationships created on the basis of employment contracts should be regulated separately.^{*1} During the three previous years, several draft acts for regulating employment relationships have been prepared on the initiative of the Ministry of Social Affairs and Ministry of Justice, whereas some of them presume that employment contracts will be regulated by the Law of Obligations Act; however, in one instance, adoption of a separate Employment Contracts Act serves as a prerequisite. The adoption of an independent employment contracts act does not mean that the regulation of employment contracts should not be related to the general principles of the law of obligations. These principles can and, in the case of particular issues, have to be taken into account even if the relevant regulation is not included in the Law of Obligations Act. The main problem in preparing drafts has not been the association with law of obligations but, rather, the extent of the regulation, its clarity, and the proportion of restrictions in public law. As the author of this article has enjoyed the opportunity to participate in preparation of several draft acts, as well as the discussion of relevant problems, the author has experienced that the representatives of trade unions require detailed and thorough formalisation of employment contract relationships on the level of legislation. Therefore, the main reason is the very limited proportion of employees who are parties to collective agreements. Nonetheless, the representatives of employers are of the opinion that the new regulation of employment contracts should abolish several guarantees provided for employees by law, and leave more space for agreement between the parties. During the discussion of draft acts, people have suggested that the currently applicable and relatively detailed labour laws inhibit the conclusion of collective agreements, as there is no need for employees to fight for the conclusion of collective agreements. Without denying the necessity to increase the importance of collective agreements for determining the working conditions, the impact of which on employment relationships is constantly increasing in developed countries^{*2}, we can not, however, create presently a

¹ See *The Position of Labour Law in the Private Law System: the Past, Present and Future of Estonian Labour Law* by G. Tavits in this issue.

² *The Employment Contract in Transform Ring Labour Relations*. Edited by L. Betten. Hague, London, Boston, 1995, p. 42.

situation where the laws do not establish guarantees necessary for employees, where there are no collective agreements either. The guarantees established for Estonian employees by legislation allow for a wider application – they even set conditions for the conclusion of collective agreements and establishment of supplementary benefits – because when compared to the guarantees provided for in many other states, our employees are protected to a considerably lesser extent. Thus, for example, in several EU member states, employees receive much higher benefits upon redundancy than in Estonia.^{*7} The importance of collective agreements has to increase, above all, with regard to determining the wage conditions. The modest proportion of collective agreements has not been caused by the higher level of protection provided to employees but, rather, by the lower level of organisation among employees and, frequently, also by the fact that employers lack potential for the establishment of additional benefits.

As mentioned above, attempts have been made to regulate employment contracts in several manners. By the time the article is printed, the working group formed by the Ministry of Social Affairs and headed by the Minister will have completed the preparation of another draft Employment Contracts Act, to which amendments and adjustments will probably be made in the course of reading; however, the conditions should remain the same with regard to the most important issues concerning termination of employment contracts.

The purpose of this article is to discuss the procedure for termination of employment contracts according to the new draft act. Problems are not likely to arise associated with the termination of employment contracts by agreement between the parties, upon expiration of the term, and as a result of the deaths of either the employee or employer, which has been regulated in a similar manner in most states; therefore, the following discussion will focus on the termination of employment contracts in regular and extraordinary cases, and on the consequences of illegal termination of employment contracts.

1. Regular Termination of Employment Contracts

1.1. Terms for Giving Notification of Regular Termination

The principle of equality of the parties to an employment contract presumes that an employee and employer are in an equal position upon termination of an employment contract. A reasonable period of time shall be ensured to an employee for finding a new job; however, an employer also needs sufficient amount of time for finding a new employee. In many states, the same terms have been established both for employees and employers for regular termination of employment contracts, *i.e.* in Germany a common term for both parties for giving notification of regular termination of an employment contract is four weeks. If an employee has worked in a company for two or more years, the term for giving notification of termination shall be extended for both parties, which, depending on the time employed by the same employer, can total up to seven months.^{*8} The terms may be amended by a collective agreement and by agreement of the parties, but no longer term of giving notification of termination may be applied to an employee, than as to an employer.^{*9} When agreeing upon the terms for giving notification of regular termination of an employment contract in Estonia, the determination was made to establish the same terms for both parties. One draft of the act provided the terms for giving notification of termination depending on the length of employment in one company from one to four months, whereas starting from the tenth year of employment, both an employee and employer would be responsible for giving notification of termination of an employment contract at four months in advance.

This draft act would have introduced critical changes to the current condition of employee's. Section 79 of the applicable Employment Contracts Act^{*10} (hereinafter: ECA) provides to an employee an opportunity to terminate an employment contract by giving the employer only one month's advance notice of termination thereof. Thus, the persons working for the benefit of an employer over a longer period of time would have been in a less advantageous position. In case of such a regulation, changing of jobs would have become very problematic for an employee whose length of employment was longer. There are few

⁷ Employment Observatory. *Tableau de bord 1996*. Brussels, Luxembourg, 1996, pp. 38–39.

⁸ W. Däubler. *Das Arbeitsrecht: Leitfaden für Arbeitnehmer 2*. Hamburg: Rororo Aktuell, 1990, p. 508.

⁹ M. Weiss. *Labour Law and Industrial Relations in Germany*. Deventer, Boston: Kluwer Law and Taxation Publishers, 1995, pp. 89–90.

¹⁰ Töölepinguseadus (Employment Contracts Act) – Riigi Teataja (the State Gazette) 1992, 15/16, 241; I 200, 25, 144.

employers who are ready to wait four months until an employee is released from the previous job, particularly in the case of a shortage of work. If we examine the procedures applicable in other states, it is evident that in many of them, shorter terms for giving notice of regular termination of an employment contract have been assigned to employees, if compared to employers^{*11}, whereas the differentiation has been usually made proceeding from the length of employment.

Long terms of giving notice of termination have been eliminated in the last version of the draft act. An employee may give notice of the termination of an employment contract, concluded for an unspecified term, by notifying the employer thereof in writing. The terms for giving notice of the termination of an employment contract shall depend on the continuous length of employment of an employee with that employer:

- less than one year – at least 14 calendar days;
- 1–5 years – at least 21 calendar days;
- 5–10 years – at least one month;
- over 10 years – at least two months.

In many states, employers are obliged to follow the long terms of giving notice of termination imposed on them, even if the reason for termination is the behaviour of an employee (offence) or the employees unsuitability for a position, because the term for giving notice does not depend on the cause of termination. Long terms for giving notice of termination by all means protects the employee's interests^{*12}, but a question arises whether more emphasis should not be laid on employers' interests. It can be argued that there is little benefit for the employer in keeping an employee on the job who is violating the duties of employment, in an employment relationship for five or six months, while knowing that the employment contract of the employee would terminate upon expiry of that term? It would be difficult to expect that in such a case any employment duties would be performed in an efficient manner. The same problem arises in case of unsuitability of an employee for the job or position to be filled.

In the draft ECA, the terms for giving notice of termination of an employment contract provided to employees have been differentiated according to the causes of termination. If an employment contract is terminated due to the redundancy of an employee, the term for giving notice will depend on the continuous length of employment of the employee with that employer. An employee working under one year shall be given notice of termination of the employment contract at least one month in advance, an employee working for 1–5 years at least two months, an employee working 5–10 years at least three months and an employee working over 10 years at least four months. If the reason for termination of an employment contract is unsuitability of an employee for the duties or position of the employee or an offence by the employee, the employer need not give notice to the employee longer than one month in advance. If the unsuitability of an employee becomes evident during the probationary period agreed on by the parties, the employer would be obliged to give notice to the employee of termination of the employee's employment contract at least five calendar days in advance.

According to the draft act, an employee shall be obliged to describe the causes for termination of the employee's employment contract in the notice concerning the termination and indicate the date for terminating the employment contract. Unlike the practice of several other states, where an employment contract is terminated by the 15th date or end of a month^{*13}, an employment contract may be terminated by any date according to the Estonian draft act. An employment contract shall not terminate by giving notice thereof if an employee and employer agree upon continuation of the employment relationship in writing after giving notice of termination of the employment contract. If the work terminates before the expiration of a term prescribed for giving notice of regular termination of an employment contract, the employer shall be obliged to pay to an employee compensation in the amount of the employee's average daily wages for each working day short of termination of the employment contract. Estonia has not opted for the way of establishing long terms of giving notice as in several European Union states, where the term for giving notice of termination may extend even 6–7 months or more.^{*14} Changes in the economy will not allow for the establishment of a long term for giving notice.

¹¹ R. Blanpain. *Labour Law in Belgium*. The Hague, London, Boston: Kluwer Law International, 1996, pp. 150–151; O. Hasselbalch, P. Jakobsen. *Labour Law and Industrial Relations in Denmark*. The Hague, London, Boston: Kluwer Law International, 1999, pp. 139–141; A. J. Suviranta. *Labour Law in Finland*. The Hague, London, Boston: Kluwer Law International, 2000, p. 74.

¹² A. Adlercrutz. *Sweden*. *Encyclopedia for Labour Law and Industrial Relations*. The Netherlands: Kluwer Law International, 1998, p. 102.

¹³ W. Däubler, p. 508.

¹⁴ Employment Observatori. *Tableau de bord*. Employment & social affairs. Brussels, Luxembourg, 1996, pp. 38–39.

1.2. Compensation Paid Upon Termination of Employment Contracts

According to the draft act, the amount of compensation shall depend on the causes for terminating the employment contract. If an employment contract is terminated due to termination of a legal person, termination of the work of an employer who is a natural person, redundancy of employees, or due to the age of an employee, an employer shall pay to a person working less than one year the employee's average monthly wages for a period one month, to a person working 1–5 years average monthly wages for a period of two months, an employee working 5–10 years shall get three average months wages, whereas four average months wages are paid to an employee who has worked over ten years. In case of unsuitability for duties or position, the amount of the compensation shall be a month's average wages. If an employment contract is terminated due to an employee's offence or unsuitability that became evident during the probationary period, no compensation shall be paid to the employee. According to the draft act, compensation shall be modest, as the majority of employers could not endure the imposition of larger amounts.

1.3. Bases for Regular Termination of Employment Contracts Concluded for Unspecified Term by Employer

The draft act sets out that an employer shall have the right to terminate an employment contract on a regular basis upon termination of a legal person, termination of the work of an employer who is a natural person, redundancy of employees, in case of unsuitability of an employee for the duties or position of the employee, due to an employee's offence, and an employee's age.

The regulation concerning the redundancy of employees always demands specific attention, as this is the main cause for terminating employment contracts. It is essential to determine the particular selection criteria, from which an employer is obliged to proceed when giving notice of termination of an employment contract. In various states the most frequent criteria taken into account upon selecting employees to be made redundant are the length of employment, appropriate qualifications, efficiency, and the employees' age. These criteria are often combined with other indicators, such as the number of dependants an employee has, performance of the representative functions of an employee, existence of a disability, etc.*¹⁵

According to the draft act, redundancy may be caused by a decrease in work volume or reorganisation of work. An employer shall be obliged to offer to an employee, if possible, another position in the same company the work of which the employee is capable of performing, taking into account the employee's professional training, abilities, skills and health. A representative of employees and chairman of the board of the trade union shall have a preferential right to remain at work. When making a selection among the remaining employees, the employer shall provide an opportunity to continue work to those who have better performance results and who have performed their duties in a more efficient manner. Thus, the principal criteria upon giving preference shall be qualifications and skills. In order to make a selection an employer shall be obliged to compare employees within the limits of the same profession or area of specialisation or posts in the company where they work. If an employer so wishes, the employer may compare the employees of different enterprises belonging to the employer; however, this is not mandatory. In the case of equal performance results, preference shall be given to employees who have contracted an occupational disease or received a work injury by the fault of the employer, in whose family there are no other members receiving regular income, who have worked for the employer longer, who have less than five years left until retirement age, and who are developing their professional skills and expertise in an educational institution which provides special education. As such, all the previously listed criteria shall be equal. In case of equal performance results, an employer shall hear the opinion of a representative of employees on who should be given preference according to the secondary criteria and not to terminate the employment contract. For example, in Sweden, should the necessity to make employees redundant arise, one takes into account, above all, how long an employee has worked with this employer according to the principle "last in, first out," and if several equal employees fall within that indicator, preference is given to senior employees. In comparison with such regulation, one may say that the redundancy rules in the Estonian draft ECA proceed principally

¹⁵ R. Blanpain, C. Engels. *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*. VIth and revised edition. The Hague, London, Boston: Kluwer Law International, 1998, p. 285.

from the interests of an employer. In Sweden, the priority rules do not take into account employees' abilities and utility for the company.^{*16} As well, in Germany the social aspect is highly important in case of a redundancy caused by economic grounds. With regard to retaining of employment, preference shall be given to socially weaker employees who would suffer more as a result of redundancy.^{*17} When making people redundant in Estonia, it is not possible to take into account the social aspect, the age of an employee and length of employment, but rather the necessity to ensure to employers a supply of the most capable and efficient employees. Prevalence of the social aspect would weaken employers to a significant extent because there are quite a few economically less well-founded companies that are employers. The social aspect becomes relevant only in the case of equal work performance.

The draft act presents a detailed regulation of giving a collective notification of termination of an employment contract, notification of the representatives of employees thereof, the conducting of consultations and, as well, the notification of the Labour Inspectorate thereof and its rights in this procedure. In case of giving a collective notification of termination, an employee shall also be obliged to notify the employment office thereof. The relevant European Union directives have been observed when entering these provisions in the draft act. The draft act also provides sanctions for cases when an employer ignores the obligation to notify the representatives of employees or refuses to conduct consultations according to the prescribed procedure. In such cases, the employer shall pay to each employee one more average monthly wages in addition to ordinary compensation.

Proceeding from the draft act, an employer shall be obliged to re-employ a redundant employee, registered with the local employment office as a person seeking work, if the employee so wishes, and conclude a new employment contract, if new positions are created or vacated within six months of the termination of the employment contract, so long as the position is suitable to the employee's professional training and qualifications and state of health. In the Nordic countries, employers are subject to the obligation to re-employ redundant employees for even longer than six months after redundancy.^{*18} Unfortunately, the draft act fails to provide an answer to the question of what the consequences of violating this provision will be. It would be reasonable to provide for the payment of compensation to an employee in Estonia, as in Finland.^{*19}

The draft act provides a rather detailed regulation of the giving of notice of regular termination of an employment contract due to unsuitability of an employee. Unsuitability must be expressed, above all, by inadequate professional skills. However, on the same basis, a notice of termination of an employment contract may be given to an employee whose proficiency in official or foreign language does not conform to an agreed level and hinders the performance of employment duties. An employee's inadequate communication skills shall be considered equivalent to the lack of professional skills if the job presumes continual communication with subordinates, clients, consumers or business partners, as well as teaching. If an employee needs to acquire additional knowledge or skills, the employer shall provide to the employee reasonable time for the acquisition thereof. A permanent health disorder, hindering the performance of duties, may also serve as a cause for unsuitability. Upon giving notice of termination of a contract, an employer shall notify an employee in writing, in what the employee's unsuitability for work manifests itself.

In Estonian court practice, the issue of attestation of unsuitability has proved to be problematic. Thus, the Supreme Court has adopted a position that an employer is to determine what facts indicate whether the abilities, knowledge and skills of an employee conform to the work to be performed. In case of a dispute, the employer shall attest only these circumstances due to which the employee is unsuitable for the work to be performed.^{*20}

Giving notice of termination of an employment contract due to offence has also been regulated in detail. An employment contract may be terminated due to offence if an employee has breached the duties of the employee, an employer has lost trust in an employee or when an employee has behaved in an indecent manner. Termination of an employment contract due to offence shall be justified according to the draft act, if it is in conformity with the gravity of an offence.

¹⁶ T. Peijpe. Employment Protection under Strain (Sweden, Denmark, the Netherlands). *Bulletin of Comparative Labour Relations* 33 – 1998. Boston: Kluwer International, 1998, p. 84.

¹⁷ M. Weiss, p. 93.

¹⁸ N. Bruun, B. Flodgren, M. Halvorson, H. Hyda. *The Nordic Labour Relations Model*. Dartmouth, 1992, lk 103; A. J. Suviranta, p. 108.

¹⁹ A. J. Suviranta, p. 108.

²⁰ I.-M. Orgo. *Töövaidluste lahendamine (Settlement of Labour Disputes)*. Juura, Õigusteabe AS. Tallinn, p. 32.

An employment contract may be terminated due to loss of trust. If an employee has, by breach of the duties of the employee, caused a deficit in the property of the employer, endangered the preservation of the property of the employer, or caused distrust of the employer by consumers, clients or business partners, which may be unfavourable to the economic situation of the employer, may result in the termination of an employment contract. An employment contract of a person engaged in maintaining, marketing or issue of property may be terminated due to loss of trust in the employee even if the employee committed a criminal offence against property outside the performance of the employee's duties. Termination of an employment contract may also be caused by deception of an employer.

Indecent behaviour shall serve as a cause for terminating an employment contract only in case of employees whose duty is to teach or educate youth or organise the work of their subordinates. This behaviour that is contrary to the generally recognised moral standards or which discredit an employee or employer shall be indecent. Indecent behaviour also constitutes the basis for termination of an employment contract if it is committed outside of the performance of duties.

Termination of an employment contract due to the breach of duties by an employee presumes a prior written warning to the employee of an earlier breach. A warning shall be effective for a year, starting from the moment it was given. In case of loss of trust and committing of an indecent act, prior warning is not required; however, the gravity of the offence shall certainly be taken into account.

An employer shall be obliged to issue to an employee, upon termination of an employment contract, a written note concerning the description of the circumstances of the offence(s) committed by the employee, indicating the time when the offence(s) was (were) committed. Regular termination of an employment contract due to an offence is not permitted, if more than one year has passed since the offence was committed, unless in case of an offence proved by the findings of an inventory, review, audit, etc., if more than two years have passed. An employer shall give notice of the termination of an employment contract and terminate thereof within two months of becoming aware of reasons for dismissal.

The age may serve as a cause for terminating an employment contract starting from the moment when an employee attains 65 years of age. The draft act does not prescribe any other circumstances in the case of this cause.

The causes for terminating employment contracts are not usually regulated so precisely as it has been done in the draft act under inspection. An employer shall have a weighty reason for terminating an employment contract.^{*21} The Swedish Employment Protection Act^{*22} sets out that an employer may dismiss an employee due to objective circumstances without specifying the circumstances. Termination of an employment contract by an employer is generally justified either due to economic reasons, or reasons arising from the personality and behaviour of an employee.^{*23} It is for court practice to determine when termination of an employment contract by an employer is justified. This general regulation undoubtedly has its positive aspects. In case of disputes, courts are more free to decide whether the termination of an employment contract was justified or not, whether there was a weighty and sufficient reason therefor. In the course of preparing the draft act, tendency towards a more general regulation of terminating employment contracts was considered. It was strongly opposed by the leaders of trade unions, according to whom employees and employers had to be competent to decide without mediation of the court when and according to what procedure an employment contract might be terminated and what consequences this would entail. The main cause therefor lies in the fact that the parties to an employment relationship are accustomed to a detailed regulation and its abolition by a new act would give rise to very serious conflicts and particular confusion also in court practice. Equally, many employers are not interested in a general regulation either.

2. Extraordinary Termination of Employment Contract

An employee shall have the right to terminate an employment contract concluded for both an unspecified and specified term due to a good reason, if continuation of work with the same employer can not be assumed.

²¹ A. J. Suviranta, p. 107.

²² Employment Protection Act (SFS 1982:80).

²³ M. Weiss, p. 92; A. Bernstein. Labour Law in Switzerland. Kluwer Law and Taxation Publishers, 1994, pp. 119–123.

The draft act also lists the principal cases of extraordinary termination. The latter can not be presumed in case of a permanent deterioration of an employee's capacity for work, need to care for a family member who is ill or disabled, if continuation of work is related to an actual danger to the life and health of the employee, if the employee violates the terms of the employment contract and it ends in a significant deterioration of the working conditions of the employee. Also, rude handling of an employee may serve as a cause for the extraordinary termination of an employment contract, as well as the fact that the employee forces the employee to commit acts that are contrary to law or generally accepted practices. An employee shall be obliged to notify the employer of the cause for terminating an employment contract in writing. If the termination of an employment contract is caused by the indecent behaviour of an employer, the latter shall pay to the employee compensation in the amount of two average wages of the employee.

An employer, in turn, may extraordinarily terminate an employment contract without giving notice thereof, but notifying the employee of the cause for the termination in writing. Such extraordinary termination is permitted upon declaration of bankruptcy of an employer, in case of the long-term incapacity for work of an employee, committing of an offence, and emergence of circumstances hindering continuation of work. A trustee in bankruptcy shall have the right to extraordinarily terminate the employment contract of an employee, if continuation of the employment contract would violate the creditors' interests. In such cases, compensation shall be paid to an employee in the same amount as upon the redundancy of an employee.

A long-term incapacity for work shall serve as a cause for an extraordinary termination of an employment contract, if an employee who has worked with that employer less than for one year is absent from work due to incapacity for work for over 60 days. An employment contract may be terminated with an employee who has worked for more than one year, if the employee has been absent due to incapacity for work for 120 successive days or for the total of 150 calendar days per year. A position shall be retained for 240 calendar days for employees who have contracted tuberculosis. An employer shall maintain the job of an employee who is temporarily incapacitated for work due to a work injury or occupational disease until the employee's recovery or determination of the employee's disability, if the work injury or occupational disease has occurred by fault of the employer.

Although absence from work due to incapacity for work is not usually accompanied by permanent deterioration of capacity for work, which would hinder performance of duties after the recovery, the Estonian legislation, unlike the Finnish²⁴, permits to terminate an employment contract also according to the applicable procedure, and the possibility has been also included in the new draft act with some reservations.

Provision of such a possibility to an employer is certainly condemnable from the social aspect; however, it is not possible either to place companies in a situation where they may never know whether an employee appears at work the next day or has taken another certificate for sick leave. This situation may be particularly complicated for the many small companies that are in Estonia.

An employee's offences may cause extraordinary termination of an employment contract also in cases where continuing cooperation cannot be presumed. The draft act sets out the following offences by an employee: intentional endangering of the employer's property, causing of substantial damage due to negligence, the theft of property of the employer or a colleague, deceiving the employer, repeated presence at work when intoxicated by alcohol, narcotics or toxic substances, rude handling of the employer or a representative of the employer, unauthorised absence from work for more than three working days and placing himself or herself or his or her colleagues into actual danger by violation of occupational safety or health regulations.

Compared to the applicable procedure, upon the adoption of the ECA, the most significant changes will occur with regard to termination of an employment contract due to an offence by an employee. According to the Employees Disciplinary Punishments Act²⁵ (hereinafter also: EDPA), termination of an employment contract due to violation of the duties of employment, loss of trust or indecent act shall be a disciplinary punishment determined according to the rigid rules prescribed by law. According to § 11 of the EDPA, a disciplinary punishment shall be formalised in at least two written copies, one of which shall be retained by an employer and the other shall be given to the employee by the employer. This document shall contain the name of the employee to be punished, the time of commission of the offence, a description of the offence and other circumstances taken into account upon punishment, the imposed punishment, the date that the

²⁴ A. J. Suviranta, p. 107.

²⁵ Töötajate distsiplinaarvastutuse seadus (The Employees Disciplinary Punishments Act) – Riigi Teataja (the State Gazette) I 1993, 26, 441; 1998, 64/65, 1009.

document is prepared, and the name and signature of the person imposing the punishment. The terms provided for imposing a punishment are relatively short. A punishment shall be imposed within six months after the date that an offence is committed, but not later than one month after the date that any person to whom the offender reports to becomes aware of the offence. Termination of an employment contract as a disciplinary punishment shall not be in apparent conflict with the gravity of the offence. A significant violation of the rules of procedure for imposing a disciplinary punishment may entail declaration of the termination of an employment contract illegal.^{*26} This has also been accepted by the Supreme Court. An analysis of court practice testifies that in many cases, the cause for declaring termination of an employment contract illegal, has been the inability to formalise termination of an employment contract, not the fact that the employer has arbitrarily terminated an employment contract.^{*27} The draft act under inspection will simplify the rules of procedure for terminating employment contracts. Upon the adoption of the draft act, the EDPA shall become invalid with regard to employees. However, § 103 of the applicable ECA permits an employer to terminate an employment contract for the first severe breach of duties by an employee, whereas the employer is not obliged to notify the employee thereof. According to the developed practice, unauthorised absence from work while present at work is a severe breach of duties and termination of the employment contract therefor does not presume repeated breach. On the basis of the draft act, an employment contract may be extraordinarily terminated only when an employee has been absent from work for over three working days or has been repeatedly present at work when intoxicated by alcohol, narcotics or toxic substances. The adoption of the draft act will entail particular changes in all cases of terminating an employment contract.

3. Restrictions on Termination of Employment Contracts

The draft act provides for special guarantees for imposing restrictions on the termination of employment contracts with pregnant women and women raising infants. An employer may terminate an employment contract with a pregnant woman or a woman raising a child below three years of age only upon a prior written consent of a labour inspector. If there is no such consent, termination of an employment contract shall be invalid, except for cases when an employee does not notify the employer of any of the above-mentioned circumstances. According to the applicable procedure, it is impossible to make pregnant women and women raising a child below three years of age redundant, neither can the employment contract of such employees be terminated due to the unsuitability of the employee, restrictions have been imposed thereon also in case of long-term incapacity for work. The draft act does not provide for a universal prohibition and relates termination to the consent of a labour inspector. Consequently, in this respect, the redundancy of pregnant women and mothers of infants will be simplified, and proceeding from the principle of equal treatment, the same guarantees will be applied to men.

Termination of an employment contract with a representative of employees due to the legal activities of the representative upon representing the employees' interests shall be prohibited. According to the draft act, a representative of employees, a member of the board of the trade union, a working environment representative, and members of the working environment council shall be subject to special protection. An employment contract may not be terminated with them without the consent of a labour inspector either. The need for the special protection of representatives of employees is caused by the fact that according to court practice, employers attempt to rid themselves of particularly active representatives of employees.

On the basis of the draft act, termination of an employment contract shall be prohibited during an annual holiday, as well as during pregnancy and maternity leave of an employee. The same prohibition also applies during service in the armed forces. In other periods of terminating an employment contract, notification of termination of an employment contract may be given but the employment contract may not terminate at that time. Thus, when an employee is, for example, ill on the day provided for the termination of the employee's employment contract, the contract shall terminate upon the recovery of the employee.

²⁶ Individuaalse töövaidluse lahendamise seadus (Individual Labour Dispute Resolution Act, hereinafter: ILDRA) § 28 – Riigi Teataja (the State Gazette) I 1996, 3, 57. See also I.-M. Orgo, H. Siigur, G. Tavits. Töölepingu seadus. Kommenteeritud väljaanne (kolmas parandatud ja täiendatud trükk) (Employment Contracts Act. Commented Edition, third revised version). Juura, Õigusteabe AS, 1997, p. 121.

²⁷ I.-M. Orgo. Töövaidluste lahendamine (Settlement of Labour Disputes) (Note 16), pp. 47–49.

Upon the transfer of a company, a part thereof or other structural unit, employment contracts shall transfer to the employer continuing the same or similar activities and termination of employment contracts due to the exchange of employers shall be prohibited.

4. Consequences of Illegal Termination of Employment Contract

Section 117 of the ECA determines the liability of an employer upon illegal termination of an employment contract. Upon illegal termination of an employment contract, the employee shall have the right to demand reinstatement in the employee's position and payment of the employee's average wages for the time of compelled absence from work. If an employee waives reinstatement in the employee's position, the employee may demand that the statement of the basis for the termination of the employment contract is amended and payment of compensation in the amount of the employee's six months' average wages to be ordered. If the labour dispute committee or court identifies that the employment contract had been terminated upon lack of circumstances that serve as the basis for terminating an employment contract according to law, or the basis for terminating an employment contract prescribed by law had been adjusted by substantial violation of rules of procedure established therefor, the labour dispute committee or court shall declare the termination of an employment contract illegal and the employee shall have the right to demand reinstatement in the former job or position. In that case, the labour dispute committee or court shall adopt a decision on reinstatement of the employee in their former job or position. The applicable law does not grant to the labour dispute committee or court the right to decide on the practicability of reinstatement in position, *i.e.* the application of the employee shall be satisfied in each case when an illegal termination of an employment contract has been identified. Such a rigid regulation of § 117 of the ECA and § 29 (1) of the ILDRA has led to a situation where the labour dispute committees and courts reinstate employees even when the position has been liquidated or there are no preconditions for normal continuation of cooperation between the parties. In case of any dispute, it is always beneficial for an employee to demand reinstatement. In such cases, the payment of average wages for the whole time of compelled absence from work until the making of the decision is ordered, is considerably larger than the compensation that the employee would receive without demanding reinstatement. The analysis of court practice demonstrates that employees frequently have themselves reinstated in their positions and ordered payment of average wages, but thereafter waiver the reinstatement. The rigid regulation of an employer's liability for illegal termination of an employment contract is unjustified and does not enable the labour dispute committee and court to take into account a particular situation when making a decision. This deficiency has been eliminated from the draft act. If the employer terminated the employment contract with an employee illegally, the employee shall have the right to demand reinstatement in the employee's position; however, the labour dispute committee or court shall satisfy the employee's claim for reinstatement in the employee's position only when it is possible for the employer to employ the employee and it may be presumed that the cooperation between the parties may continue. If it is impossible to reinstate an employee in the employee's position, or it is impracticable, the labour dispute committee or court shall order the payment of compensation in the amount of the average wages for three to twelve months to the employee, depending on the circumstances of the termination of the employment contract and the employee's length of employment with that employer.

An employer need not contest the termination of an employment contract starting from the receipt of the notice of the termination, but starting from the expiry of the term for termination, thus from the moment when the employment contract was actually terminated. As an employment contract is concluded in written form, both the applicable law as well as the draft act provide for the entry of the basis for terminating an employment contract into the employment contract together with a reference to the particular provision of law.

In conclusion, one may say that the procedure for termination of an employment contract is currently rather detailed in the ECA and, as well, precise regulation is included in the draft act. The rules related to the termination of an employment contract are included and will hopefully continue to be included primarily in a single act. These rules have been aimed at ensuring the consistency of an employment relationship but take into account the interests of both parties to the relationship. Proceeding from law, unjustified

termination of an employment contract by the employer is precluded; however, the justified economic interests of an employer have been taken into account when preparing the draft act. Not too many obligations have been imposed on an employer upon setting out the terms for giving notification of termination of employment contracts, amounts of compensation and the procedure for termination, neither have attempts been made to solve the social problems in community on account of an employer.