Bulgaria

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General labour market and litigation trends

In the last two years, Bulgaria has had five governments. The political turmoil has affected the business climate, EU funding has been frozen, and this, combined with the weak Bulgarian economy, which has not recovered from the crisis, led to a peak in unemployment of 12.9% in 2013. Even though in 2014 one major Bulgarian bank went bankrupt, which stressed the whole market, the elections that followed during the same year sent a positive signal, restarting the economy and providing the needed feeling of stability in the business environment. The government regained trust at EU level, undertook vigorous measures against the black economy (which were beneficial for the budget and spending for the public sector) and large infrastructure projects were put in motion again, all of this creating a more positive environment and opportunities for business. Understandably, this reflected on the labour market –unemployment for 2014 went down to 11.4%, and for the second quarter of 2015 continued to shrink down to 9.9%. Businesses such as manufacturing, outsourcing and IT services are rapidly developing, and they boost the employment and the economy as a whole.

There are no clear trends in the volume of employment claims during the past year. The Sofia Regional Court, which reviews at first instance more labour-law claims than any other court in Bulgaria, reported a decrease of such claims in 2014 compared to their number in 2013, but other courts reported an increase. As far as employees are exempted from state fees and expenses for labour-law claims, they have easy access to justice. Litigation seems to be the preferred route for resolving employment disputes. Although Bulgaria adopted its Mediation Act in 2004, mediation does not have broad application at all. One of the reasons could be the lack of tradition in this area, and the other could be that employment litigation is not expensive in Bulgaria.

Redundancies, business transfers and reorganisations

The Labour Code enumerates the following hypotheses which may trigger automatic transfer of employees:

1. Merger of enterprises by the formation of a new enterprise (*merger*).
2. Merger by acquisition of one enterprise by another (*merger by acquisition*).
3. Distribution of the operations of one enterprise among two or more enterprises (*split up*).
4. Passing of a separate part of one enterprise to another (*spin-off).*
5. Change of the legal form of the enterprise (*e.g., from LLC to JSC*).
6. Change of the ownership of the enterprise or a separate part thereof (*transfer of a going concern*).

7. Assignment or transfer of business from one enterprise to another, including transfer of tangible assets (*transfer of business*).
8. Rent, lease, or concession of the enterprise or of a separate part thereof.

In addition to business transfers and reorganisations, the above hypotheses may result from legislative changes, specifically regarding public bodies, e.g., dividing of an agency.

In its interpretative decision from 2011, the Supreme Cassation Court seems to take the view that the Labour Code exhaustively enumerates the cases which trigger automatic transfer of employees, i.e., there would be such transfer only if the transaction could qualify under any of above cases.

The application of the hypotheses under points 1-5 and point 8 above generally do not raise difficulties, as the legal figures which they refer to are well known and regulated by the laws (e.g., the Commerce Act, the Farming Lease Act, the Obligations and Contracts Act, the Concessions Act).

The wording of the hypothesis under point 6 above is not quite clear, but the Supreme Cassation Court finds that it applies to a transfer of a going concern or a part thereof. These are transactions specifically regulated by the Commerce Act, where the going concern is defined as an "aggregate of rights, obligations, and factual relations".

Point 7 above seems to cover all other types of business transfers which are not covered by the other hypotheses. In the absence of any legal definition for a "transfer of business", the concept of Directive 2001/23/EC should apply "*a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*". The reference to tangible assets in the law is somewhat confusing, but it should be accepted that a business transfer could be present even without transfer of tangible assets (e.g., if tangible assets are not important for the transferred business).

Automatic transfer of employees triggers obligations for the information and consultation procedure for both the transferor and the transferee, regardless of the number of their employees. At least two months before the transfer, they have to provide to (1) their trade unions and (2) their employees' representatives under Art. 7, Para 2 of the Labour Code[1] the following information:

- the envisaged transfer and its planned date;
- the reasons for the transfer*;*
- any possible legal, economic and social consequences for the employees due to the transfer; and
- envisaged measures in respect to employees.

If there are no trade unions or employees' representatives at the employer, the information must be delivered to the "respective employees" – the transferring ones, as well as any other employee who will be affected by the transfer. There is no requirement as regards the form of this communication, but as a rule it is made in writing.

If there are any "envisaged measures" (*this is any measure which would significantly affect the employment status of the employee, e.g., possible redundancy, change of the organisation of work, professional training, etc.)*, then the employer must carry out a consultation with the trade union and employees' representatives (or with the respective employees, as the case may be). This consultation is an exchange of views and opinions regarding the measures, with the aim of finding a mutually beneficial solution. However, the employer is

not obliged to reach an agreement with them, and they cannot veto or impede the transfer. Even the lack of an information and consultation procedure would not affect the validity of the transfer − the legal consequences (putting aside the ones for the employer's reputation) would be that that the labour law authorities may impose penalties of up to €2,500 on the employer and up to €500 on the accountable official (commonly, the manager).

As the individual employment contract passes on to the new employer "as is", the latter is bound by it. In addition, the collective labour agreement (CLA) with the transferor continues to apply after the transfer, until a new collective agreement is concluded with the transferee, but not later than one year after the transfer. The general rule is that the new employer is to be bound by the contractual undertakings with the transferring employees. Its powers to amend the contractual arrangements are quite limited, as the general rule is that the employment contract may be amended only by the consent of the parties. It is common sense that the new employer may amend the line of reporting, or reorganise the department after the transfer, etc. However, it cannot unilaterally change the position of the employee or his/her core functions under the job description.

The new employer is not bound by any of these undertakings that do not have contractual nature. For example, if the employee was granted certain benefits under a programme implemented by the transferor (and there is no contractual obligation for such benefit), the transferee is not obliged to continue providing such benefits.

The transfer itself cannot be a ground for redundancies. However, redundancies are possible as a consequence of the transfer. This would be the case when, for example, the transferor needs to cut staff because of the new scale of its enterprise. Save the need for consultation in case such redundancies are envisaged before the transfer (see above), such dismissals would be regulated by the general rules.

Business protection and restrictive covenants

The employees have the general obligation to perform their duties in good faith, not to abuse the employer's trust, to refrain from dissemination of information which is confidential for the employer, and to protect employer's reputation. Any failure to comply with these requirements is a disciplinary breach, punishable by a disciplinary sanction of up to disciplinary dismissal (in addition to any monetary, administrative or criminal liability of the employee).

Usually, employers include confidentiality clauses in employment agreements, which specify (1) which information is confidential, and (2) the obligations related to confidentiality. It is permissible to extend the confidentiality obligation forever after the termination of the employment agreement.

Non-compete clauses are also common in an individual labour agreement. The individual contract may even prohibit any other employment under labour contract for the employee, regardless of whether it has a competitive nature or not. Non-compete clauses are valid only during the validity of the employment contract. According to the Supreme Cassation Court, they are invalid after the end of the employment because they violate the employee's constitutional right to work. It does not matter whether there is any consideration incentive for that, or not. To address this issue, some employers conclude agreements with their (ex-) employees, granting them incentive payments if they do not engage in competitive activities for a certain period of time after the termination of the employment. In other words, the employees do not undertake an obligation not to compete (which would be invalid), but if they do not compete, they will receive certain additional compensation.

Bulgarian law is not familiar with the concept of garden leave. The only hypothesis in which the employer may suspend the employee from work is when the employee is in a state which makes him/her unable to perform his/her duties (e.g., he/she is intoxicated). However, this regulation cannot meet the needs of employers, e.g., in cases where an investigation is pending against the employee, or there are other considerations which make the continuation of the employee at work counterproductive.

If the reason for the garden leave is the required notice period (i.e., if the employer does not want the employee to be at work during the notice period), there is a quite simple resolution: the employer is entitled to terminate the employment contract with immediate effect by paying compensation for the unobserved notice period. However, if there is another reason, there is no easy solution, and the employer must weigh (1) the benefits of a garden leave for the business, and (2) any possible penalties that may be imposed (up to €7,500 for the company and up to €5,000 to him/her personally). Putting the employee on a garden leave would not trigger problems in most cases, as long as the employer continues to pay the salary.

If any restrictive covenant is incompatible with the law, the court may declare it invalid and refuse to recognise its effect. As regards penalties, the court may decrease their amount, if they are excessive.

Protection against discrimination

Both the Labour Code and the 2003 Protection against the Discrimination Act (the "**PDA**") prohibit discrimination.

The PDA prohibits discrimination based on the following protected grounds: gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or on any other grounds established by law or by an international treaty to which the Republic of Bulgaria is a party.

The PDA defines direct and indirect discrimination. Direct discrimination occurs when a person is treated less favourably than other people in a similar situation because of a protected ground. Indirect discrimination occurs if, due to a protected ground, a person is put at a disadvantage compared to other persons by an apparently neutral provision, criterion or practice, unless this is (a) objectively justified in view of a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary. Any harassment based on a protected ground, as well as any instigation to discrimination, are also forms of discrimination.

Specifically in the field of employment, the PDA has a separate section entitled "Protection in Exercising the Right to Work". It prohibits discrimination on any protected ground in the fields of recruitment, working conditions, pay, performance-evaluation criteria, vocational training, qualification, career, disciplinary measures, and the most common types of unilateral dismissal. There is a rule that employees are entitled to equal pay for equal or equivalent work, and the employer has the obligation to apply identical work evaluation criteria, which must be set out in the collective labour agreement, the internal salary rules, or in the legislative acts. "Equal work" means work performed by different persons who have the same qualities (qualification, skills, etc.), and "equivalent work" means different work which is performed by different persons, but which has equivalent value and usefulness. The concrete factors which will be taken into account in the assessment of the work are its specific features, required education, qualification, as well

as skills, volume and level of performance, results, etc. The requirement for equal pay encompasses all direct and indirect payments, in cash or in kind, regardless of the duration of the employment contract or the length of the working time.

In certain circumstances, different treatment is permissible, e.g. if it is based on genuine occupational requirements. Other examples include special treatment of pregnant women or women in an advanced stage of *in-vitro* treatment, disabled employees, etc. The employer is also obliged to promote employment as well as (all other conditions being equal) vocational development of a gender or an ethnic group which is less represented at the enterprise.

Breaches of anti-discrimination legislation may trigger proceedings before the Commission for Protection against Discrimination or directly before the court. In such proceedings, the burden of proof is shifted. If the employee presents facts on the basis of which a hypothesis for discrimination may be drawn, the employer has the burden of proof to establish that equal-treatment rules were not breached. The penalties for breaches are up to €1,000 in a general case and the awarded compensation for the employee in most cases is up to €2,000.

Protection against dismissal

Labour agreements in Bulgaria can be terminated only on the grounds enumerated exhaustively in the Labour Code, i.e., the employer cannot freely terminate the employment. The grounds for termination can be classified broadly into three main categories: (1) common grounds for termination; (2) termination by the employee (with and without notice); and (3) termination by the employer (with and without notice).

The employer can carry out dismissals (unilateral termination) in the following cases:

With notice:

1. upon closure of the enterprise;
2. upon closure of part of the enterprise or staff cut;
3. upon reduction in the volume of work;
4. upon suspension of business for more than 15 working days;
5. when the employee lacks qualities for efficient performance of the work;
6. when the employee does not possess the required education or professional qualification for the work performed.
7. when the employee refuses to follow the enterprise or its division in which he works, when it relocates to another city or location;
8. when the position occupied by the employee must be vacated for reinstatement of a wrongfully dismissed employee, who previously occupied the same position;
9. when the employee has acquired a right to a pension for social security length of service and age (*there are specific rules for professors, associate professors or persons holding a doctoral degree*);
10. when the employment relationship started after the employee exercised his right to a pension for social security length of service and age;
11. upon change of the requirements for the position, if the employee does not meet them;
12. when the performance of the employment contract is objectively impossible; or
13. (only for managerial positions) within nine months after conclusion of a management contract (between the company and its manager).

Without notice:

14. when the employee is detained for enforcement of a sentence;
15. when the employee is deprived, by a sentence or according to an administrative procedure, of the right to exercise the profession, or occupy the position, to which he is appointed;
16. when the employee is deprived of his academic degree, if the contract of employment has been concluded in view of this degree;
17. when the employee refuses to accept suitable work, if there is a ruling by the medical authorities that he should be reassigned to a lighter work; or
18. upon disciplinary dismissal.

(*There are also other grounds which apply to positions in public authorities (e.g. incompatibility, established conflict of interest), or for medical professions (deletions from the registers of the respective professional organisation*)).

The procedure that must be followed for dismissal differs in each case. For example, in case of staff cuts, the employer must: (1) adopt a decision for staff cut; (2) collect information about whether the employee enjoys special protection against dismissal; and (3) serve the dismissal documents (if there is no special protection). The amount of compensation due varies depending on the type of dismissal, but in the most common cases the compensation is capped to two monthly salaries plus compensation for unused paid leave.

The employee may file a claim for wrongful dismissal within two months after the dismissal. It may request from the court: (1) to establish that the dismissal was unlawful and to repeal it; (2) to reinstate the employee to the position occupied; and (3) to be awarded compensation for the time of unemployment that is equal to the employee's salary and is due only for the first six months after the dismissal (i.e., capped to six monthly salaries, if the employee remains unemployed). The speed of the employment litigation may vary significantly depending on the court, but usually the case has to be finally resolved within a period of one to three years.

The following categories of employees enjoy protection against dismissal on the most common grounds (points 2, 3, 5, 11, and 18 above):

- mothers of children below three years of age;
- employees assigned to a lighter position due to health-related reasons;
- employees suffering from certain diseases (ischemia of the heart, active form of tuberculosis, an oncology disease, an occupational disease, mental illness, diabetes);
- employees using permitted leave; or
- any employees' representatives (under Art. 7, Para 2 and 7a of the Labour Code, representatives in the Special Negotiation Body, the European Works Council, representatives on health and safety at work).

In the above cases, the employer must obtain a prior permission from the Labour Inspectorate for the dismissal, and sometimes an opinion from the medical authorities is required. The procedure can last from seven days up to several months.

Other categories of employees also enjoy protection against dismissal: members of trade union leaderships; pregnant women and women in an advanced stage of *in-vitro* treatment; employees in the process of using leave for pregnancy, birth and adoption; and trade union members (if provided for in the CLA). The type of protection and the employer's options in respect of these employees vary significantly, so each case must be considered separately.

It must be always remembered that the employer must ask the employee who is identified for dismissal to declare the existence or lack of such protection before serving on him/her the notice/dismissal documents (if protection rules cover this type of dismissal). Otherwise, dismissal of a protected employee is *per se* unlawful.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Notice entitlement applies only to certain types of dismissals (see point 5 above). The notice period varies depending on the duration of the employment contract. The statutory notice period for contracts of indefinite duration is 30 days, but it can be extended to up to three months in the individual labour agreement. In addition, the collective labour agreement can also provide for an extended notice period for the most common types of dismissal. For fixed-term contracts, the notice period is three months, but not more than the remaining term of the contract (its duration cannot be amended by the parties). The employer may decide not to observe the notice period, but to pay the employee compensation for the unobserved notice period, calculated on the basis of the employee's salary from the last calendar month before the month of dismissal.

Working time in Bulgaria is eight hours per day (seven hours for night work), and five days per week. The daily rest is at least 12 hours, and the weekly rest is at least 48 hours. Overtime is generally prohibited, except in several limited hypotheses (e.g., for completion of started work). However, the employer has tools for flexible working time, some of which are:

- Increasing the length of working time on some days and decreasing it on other days.
- Implementation of an open-ended working day, meaning that certain employees could occasionally work after the end of the working time and this would not qualify as overtime. Such employees are entitled to at least five days' additional annual paid leave.
- Implementation of an aggregate calculation of working time, meaning that working time is calculated in aggregate for certain periods (up to 6 months), and the average working time for these periods must meet the statutory requirement. In this case, the employer may extend the working time to up to 12 hours daily and 56 hours weekly.

The basic annual paid leave in Bulgaria is 20 working days, but there are some categories of employees who are entitled to additional paid leave (working in hard or hazardous working conditions; working under open-ended working days; trade union leaders, etc.) There are detailed rules for the calculation of compensation for annual paid leave, but generally it is calculated on the basis of the salary received for the last calendar month before the month of the leave in which the employee has worked at least 10 days. The basis for the calculation does not include bonuses, overtime or night work payments, or any other payment which does not have a permanent character.

For sick leave holidays, the employer pays the employee 70% of his/her salary for the first three days, and afterwards the employee receives compensation from the state in the amount of 80% or 90% of his/her salary depending on whether the sick leave is due to a general or an occupational incident/disease.

The Labour Code also provides for family-friendly leave, and the most important ones are:

- paid leave of 410 days for pregnancy and childbirth;
- parental leave of 15 days for birth;
- paid leave for raising a child until two years of age, if the child does not attend kindergarten;

- unpaid leave of six months for both the mother and father for raising a child between two and eight years of age; and
- paid leave of one year for adoption of a child who is over two years of age (but such leave cannot be used after the child becomes five).

Worker consultation, trade union and industrial action

Employers must carry out consultations with: (1) the different categories of employees' representatives; and (2) trade unions in the cases envisaged by the Labour Code. The most important types of consultations are related to:

- automatic transfer of employees (see point 2 above); and
- collective redundancies.

Employers must start consultations with the trade unions and the employees' representatives under Art. 7, Para 2 of the Labour Code in due time, but not later than 45 days before the redundancies. The consultations aim at avoiding or limiting the collective redundancies or their consequences.

If the employer: (1) envisages any measures threatening the employment; (2) uses or contemplates using staffing agencies for lease of personnel; or (3) contemplates significant changes in the organisation of work, the consultations are held with a special category of employees' representatives – under Art. 7a of the Labour Code, but this is applicable only in companies with more than 50 employees.

There are also other cases which require consultation with the trade unions and the employees' representatives under Art. 7, Para 2 of the Labour Code: for increase of the length of the working day; for implementation of reduced working time or for an open-ended working day; or for the adoption of the Internal Labour Order/Discipline Rules.

It is evident that the role of the trade unions is important. Their recognition at national level is done by the Council of Ministers and must be renewed every four years. A National Union must cover certain criteria, the most important of which is to have at least 75,000 members. Currently, there are two trade unions which are recognised at national level: The Confederation of the Independent Trade Unions in Bulgaria, and Labour Confederation Podkrepa. Formation of trade unions at company level is done freely according to the statute of the respective trade unions (usually three employees will suffice to form a trade union section).

Trade unions represent employees on matters of labour and social-security relations and cost of living through collective bargaining, participation in tripartite co-operation, organisation of strikes and other actions within the law.

Collective bargaining is one of the most significant activities of the trade unions. Collective Labour Agreements regulate labour and social security matters that are not regulated by the imperative provisions of the law. There are four levels for conclusion of a CLA: enterprise; branch (of an economic activity); an entire industry; and municipality.

CLAs at branch or industry level are concluded between the trade unions and the respective employers' representative organisations from the branch/industry. If all trade unions and employers' organisations sign the CLA, the Minister of Labour and Social Policy can, upon their request, expand the application of the CLA, or some of its provisions, over the entire branch/industry.

At company level, CLAs are concluded between the employer and the trade union(s). The usual duration of the CLA is one year, unless the parties agree otherwise, but it cannot have

duration of more than two years. The parties may amend the CLA at any time, and they must start negotiations for a new CLA not later than three months before the expiry of the existing one. The CLA applies to all trade union members, but other employees may also join the CLA and benefit from it according to rules specified in the CLA (usually against payment of a joining fee).

The Labour Code provides protection for trade union leaders and members. In addition to the general protection from discrimination on the grounds of trade union membership, there are specific provisions for protection against dismissal, for obliging employers to provide conditions for their work, etc.

Trade unions are the main players when it comes to industrial action. According to the Settlement of Collective Labour Disputes Act, collective labour disputes are resolved through negotiations, at the start of which the employees must provide to the employer written information on their request and their representatives. If such negotiations fail, each party may request mediation or voluntary arbitration by the National Institute for Reconciliation and Arbitration, or appointment of arbitrator(s). If there is an arbitration decision, it is compulsory for the parties. However, if the parties fail to reach an agreement (with or without mediation), or the employer does not perform committed undertakings, a general meeting of employees may adopt a decision for a strike with a simple majority of all employees. There are cases in which a strike is not allowed, e.g., when negotiations have not taken place or if there is a settlement or arbitration decision on the issue, or for resolution of individual labour disputes, etc. Once a decision for a strike is adopted, the employees have to inform the employer about the strike at least seven days in advance. They must be at their working places during the strike, and they do not receive remuneration for this time. In addition, they may not hinder the work of the other employees who are not on strike. The striking employees do not have disciplinary or monetary liability against the employer, if the strike is legitimate. The law prohibits lockouts, but the employer may at any time file a lawsuit for the illegality of the strike before the respective District Court at its seat.

Employee privacy

The Bulgarian Constitution establishes the principle of protection of a personal life, as well as of personal correspondence and all other communications. The Criminal Code, the Personal Data Protection Act ("**PDPA**"), and other pieces of legislation contain specific rules regarding privacy and the limits to interference into someone's personal life.

It is common sense that employees cannot have the same degree of privacy at the workplace as at home. The PDPA provides rules which help employers establish what is permitted and what is not. First, employers must observe the core principles that personal data is processed legitimately and in good faith, for specific and legitimate purposes; the data must be relevant and proportionate to such purposes; it must be correct; and it is to be deleted if its processing is not necessary anymore. Second, as the PDPA specifies exhaustively the hypotheses which allow for processing of personal data, employers must ensure that the processing of each type of personal data qualifies under at least one of them.

The legality of monitoring at the workplace must be assessed on a case-by-case basis. For example, CCTV monitoring may be justified based on the legitimate interests of the employer, or on a legislative requirement (e.g., in banks, casinos), when it is necessary to protect the life and health of people (e.g., in hospitals), or if it is based on the explicit consent of the employee − provided, however, that such processing meets the principles of legitimacy, proportionality, and relevance.

Regarding monitoring of email/internet use, employers should bear in mind the constitutional right to confidentiality of correspondence, and that breach thereof is a crime under the Criminal Code. Some employers address this issue by prohibiting the use of the company's IT structure for personal purposes, in which case they could monitor email/internet use, because business correspondence does not fall under the protection of private correspondence. Others allow limited use of the IT structure for personal purposes, but require the employee's consent to process such data. However, the latter approach is somewhat questionable.

The scope of permissible background checks is also disputable, considering that the law enumerates the specific documents to be produced for the conclusion of the labour contract, and forbids the employer from requesting other documents. Also to be considered are the anti-discrimination rules which forbid the employer from collecting information related to any of the discrimination-protected grounds, as well as the PDPA rules requiring proportionality and relevance for such checks. Generally, it should be accepted that the employer may request the employment history of the employee, and documents evidencing education and qualification. However, calling ex-employers without the employee's consent, asking for credit history or for marital status would normally hardly meet the criteria for legitimate processing.

Testing (e.g. for alcohol or drugs, etc.) in the workplace can be done only with the employee's consent. However, any employee's refusal of such testing should not trigger negative consequences for him.

Other recent developments in the field of employment and labour law

The latest substantial amendments in the Labour Code were from July 2015, and the most important of them include:

- *Introduction of a new type of employment contract – for short-term, seasonal work in agriculture*

  The aim of this type of agreement is to pull short-term agricultural employment out of the black economy. The duration of such agreement is one working day and is applicable only for unqualified work in the agricultural sector. An employee cannot work for more than 90 days per calendar year under such type of agreement.

- *New rules for the use of annual paid leave*

  The regime for its use was liberalised, the most important amendment being the deletion of the rule that leave is to be used according to a schedule approved by the employer until 31 December of the previous year. This approach provides for more flexibility.

- *New grounds for termination of employment agreements*

  Both the employee and the employer may terminate the agreement if the employee has acquired the right to a pension for social security length of service and age.

* * *

Endnote

1. These are representatives elected by the general meeting of employees to represent their interests on labour law and social security matters with a mandate of one to three years.

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