Flexicurity in termination the Employment Contract – the Comparison Between Estonia and Vietnam[1]

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Abstract: *This article compares the regulation on terminating the employment contract at the initiative of the employer between the Estonian Employment Contract Act and the Vietnamese Labour Code. The comparison is done in the theory of flexicurity to give some recommendations for reforming these regulations of the Vietnamese Labour Code.*

Keywords*: Flexicurity, temination the employment contract, labour law, Vietnam, Estonia.*

INTRODUCTION

The concept of flexicurity entered the academic and political discourse in the late 1990s. The most widely followed definition paints it as a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, work organization and labour relations on the one hand, and to enhance security – employment and social security – notably for weaker groups in and outside the labour market, on the other hand[1]. A combination of the flexibility of the labour market and the security of employees is also evident in policy discourse at European Union level, in particular in Commission's Green paper from 1997[2]. Flexicurity policy in Europe is aimed at solving social and economic problems as the development of the labour market enters the period of "erosion of the standard employment relationship" and the rise of "flexible employment" and the decline of indefinite full-time job and the long – term employment relation[3]. Some studies at that time show that, flexicurity policy will help support the competitiveness of firms, increase quality and productivity at work and facilitate the adaptation of firms and workers to economic change[4]. The flexicurity concept was also being implemented by the International Labour Organization (ILO) in the Middle East and developing countries, including Vietnam. These studies indicated that the harmonious combination of security and flexibility in promulgating labour relations in market economies is an appropriate policy to create economic development and decent work.[5]

In the framework of flexicurity, it is important to establish transparent rules on the termination employment contract at the initiative of the employer. The regulation of the termination of an employment contract at the request of the employer shows how flexible labour relations are. Estonia is also a European country that applies this policy to labour market reforms and labour laws since 2008. The basis for the draft act was the concept of flexicurity and therefore the Act aimed to increase flexibility and security in employment relations[6]. The new Employment Contracts Act of Estonian

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[1] Wilthagen and Tros, 2008, p. 169; Klammer, 2004.
[2] Per Kongshoj Madsen, 2006, p.3.
[3] ILO/Denmark/Molisa Project in Vietnam, Balancing security and flexicurity in emerging countries, 2009, p.37
[4] Ton Wilthagen and Frank Tros, 2008; Kazutoshi Chatani (2008)
[5] Maria Sabrina De Gobbi, 2007; Paul Vandenberg, 2008.
[6] Praxis Centar, Analysis of Labour Contract Act, *https://centar.ee/uus/wp-content/uploads/2013/03/Analysis-on-Labour-Contract-Act.pdf*; Estonian Employment Contracts Act: Cornerstone in Applying the Flexicurity in Estonia?

has been ratified in 2008 and effected from 01/01/2009 (EECA)[7] focuses on balancing the interests of the parties to employment contracts and attempts to make the rules more flexible. Estonia is considered as a successful country in fulfilling the flexicurity policy in Europe, especially on voluntary job mobility[8].

The first Labour Code of Vietnam was issued on June 23, 1994, takes effect from January 1, 1995, has passed four additional amendments in 2002, 2006, 2007 and 2012 (VLC). The application process of the Labour Code has appeared many shortcomings, limited from practical implementation. Comments on the draft Labour Code 2012, It is said that the provisions of this Code were strangling the labour market[9]. Through summarizing the implementation, many businesses, workers, user representatives, and trade unions have reflected many difficulties and shortcomings including the content of labour contracts. Currently, the Draft Law on Amendment and Supplementation to the VLC is being published publicly on the National Assembly website to get people's opinions (Draft).

In this article, the author will make a comparison of the rules of termination of the employment contract at the initiative of the employer in the concept of flexicurity between EEAC 2008 and VLC 2012. To point out the advantage and disadvantages of each and give some recommends for complete there rules of VLC 2012. Termination of the employment contract at the initiative of the employer is the case where the employer unilaterally terminates the labour contract without agreement of the employee. To protect the security of work for employees, EECA 2008 and VLC 2012 both regulate the ground and the procedure that the employer has to comply with.

1. THE GROUNDS OF CANCELLATION

Regulations on the grounds of cancellation show how easy/flexible that the employer could cancel legally employment contracts. In order to protect employees' works, Article 4 Convention Number 158 of the International Labour Organization (ILO) stipulates that, an employment contract must not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment, or service. Countries have regulated grounds and procedures for terminating contracts. The strict of these regulations show how flexible the employer is.

EECA

Fulfilling the concept of flexicurity, EEAC makes significant changes concerning the rules on the grounds for termination of an employment contract on the initiative of the employer. Instead of exact grounds[10], EEAC provides general reasons and guidelines for termination. The employers could decide which reasons are suitable for their enterprises. According to EEAC, the employer can cancel the employment contract only extraordinarily and due to an influential reason connected with the employee or the economic situation.

- *The grounds due to reasons from employees*

[7] The old EAC (1992) regulated the grounds and procedure for termination of employment contracts in great detail. That kind of rigid regulation on termination was not purposeful.

[8] Muffels, R. J. A., & Wilthagen, A. C. J. M., 2013.

[9] Lawyer Truong Quang Duc, Comments on the draft Labor Code 2012, http://luatsuquangthai.vn/bo-luat-bop-nghet-thi-truong-lao-dong-367-a3id. Many provisions remarked in this writing were regulated in Vietnamese Labor law code 2012.

[10] The old EAC (1992) provided ten specific grounds for terminating contracts, For each of the grounds for dismissal, the employer had an obligation to prove that there was a reason provided by law for the dismissal; otherwise, the dismissal was unlawful.

Section 1 Article 88 EECA provides a possibility for the employer to cancel the employment contract due to the reasonable excuse caused by the employee. The law lists examples of probable cancellation causes: (i) For a long time been unable to perform his or her duties due to his or her state of health which does not allow for the continuance of the employment relationship (decrease incapacity for work due to a state of health). A decrease in capacity for work due to state of health is presumed if the employee's state of health does not allow for the performance of duties over four months' (The employee has not been able to fulfil their work tasks due to the health condition for a long time); (ii) For a long time been unable to perform his or her duties due to his or her insufficient work skills, non- suitability for the position or inadaptability, which does not allow for the continuance of the employment relationship (decrease in capacity for work) (The employee cannot cope with work tasks due to insufficient knowledge or skills); (iii) In spite of a warning, disregarded the employer's reasonable instructions or breached his or her duties; (iv) In spite of the employer's warning been at work in a state of intoxication; (v) Committed a theft, fraud or another act bringing about the loss of the employer's trust in the employee; (vi) Brought about a third party's distrust in the employer; (vii) Wrongfully and to a significant extent damaged the employer's property or caused a threat of such damage; and (viii) Violated the obligation of maintaining confidentiality or restriction of trade. The employer can cancel the employment contract within a reasonable period after they learned or must have learned about the circumstances[11].

- *The grounds due to economic reasons*

Economic reasons are cases where due to objective reasons, employers must change their organizational structure or new technology or other objective reasons leading to labour redundancy. In this case, the employee lost his job completely without their fault.

According to EECA, an employer may extraordinarily cancel an employment contract if the continuance of the employment relationship on the agreed conditions becomes impossible due to: a decrease in the work volume or reorganization of work or other cessation of work; cessation of the activities of the employer; bankruptcy[12].

Before cancellation of an employment contract due to lay-off, an employer shall where possible, offer other work to the employee. Such obligations do not apply in the case of the employer's bankruptcy and when the employer ends its' activity. The employer shall, where necessary, organize the employee's in-service training or change the employee's working conditions, unless the changes cause disproportionately high costs for the employer[13].

Besides, the employer must follow the equal treatment principle during redundancy. This means that the employer may keep better-working employees employed. At the same time, the employer may not reduce employees based on their gender, age, nationality, sexual orientation or other circumstances not related to work. During redundancy, the employees' representative and employee raising a child under the age of 3 get preferential treatment. For instance, if the employer must make some employees redundant and has determined employees who will be let go, the employee raising a child under the age of 3 must be kept at work and another employee chose[14].

Employees' representative and a parent of a child under the age of 3 can only be made redundant if one position (employing this person) will be made redundant and there are no other people to let go from the same position instead. For instance, when the only accountant of the company will be let go as the company shall procure accountancy service from outside the company in the future[15].

[11] Section 4 Article 88 EAC 2008
[12] Section 1 Article 89 EEAC 2008
[13] Section 3 Article 89 EECA 2008
[14] subsection 1, 2 Section 1, Section 2 Article 88 EECA
[15] Section 4,5 Article 89 EEAC 2008

VLC

According to VLC, the grounds that the employer may cancel employment contract are stipulated at four articles with different procedures of cancellation: (i) Cases where employers shall may unilaterally terminate labour contracts which has two groups of grounds: reason arising from the employee and force majeure reasons (Article 38); (ii) Obligations of employers in cases of changes in structure, technology or due to economic reasons (Article 44); (iii) Obligations of employers in cases of merger, consolidation, division, or separation of enterprises and cooperatives (Article 45); Dismissed (Article 126). Although they are regulated in different articles with different names, they can be divided into two groups: the grounds due to reasons arising from employees and the ground due to economic reasons.

- *The grounds due to reasons from employees*

The grounds due to reasons from employees that the employer may cancel employment contract are stipulated at two articles:

The first group is regulated in Section 1 Article 38 VLC with the right to unilaterally terminate the employment contract of the employer. The employer shall have the right to unilaterally terminate the employment contract in the following cases: (i) The employee repeatedly fails to perform his/her work in accordance with the terms of the employment contract; (ii) An employee is sick or has an accident and remains unable to work after having received treatment for a period of twelve consecutive months in the case of an indefinite term employment contract, for six consecutive months in the case of an definite employment contract, or more than half the duration of the contract in the case of an employment contract for seasonal work or a specific task of less than 12 months. Upon recovery, the employee shall be considered for reinstatement or continue to work for the employer (The employee has not been able to fulfil their work tasks due to the health condition for a long time); (iii) The employee does not present him/herself at the workplace until the period of 15 days from the expiry of the suspension period of the employment contract as stipulated in Article 32 VLC.

In those cases, the employer could cancelation the employment contract after doing prior notice to the employee, which are regulated in Section 2, Article 38 VLC.

Second group is stipulated at Article 126 VLC with the right of the employer to dismiss employees as the a disciplinary measure, includes: (i) The employee commits an act of theft, embezzlement, gambling, intentionally causing injury, using illicit drug inside the workplace, disclosing technological or business secrets or infringing the intellectual property rights of the employer, or commits acts which are seriously detrimental or posing seriously detrimental threat to the assets or interests of the employer; (ii) The employee who is subject to the disciplinary measure of deferment of wage increase recidivates while the disciplinary measure is not yet repealed; or where an employee was demoted as a labour discipline and recidivates. Recidivism means an employee recommits the same breach of labour disciplinary regulations while the disciplinary measure has not been repealed in accordance with Article 127 of this Code; (iii) the employee has been absent from work for 05 accumulated days in 01 month or 20 accumulated days in 01 year without a proper reason. Proper reasons include natural calamities or fires; the employee or his/her family member suffers from illness with a certification by a competent health care institution; and other reasons as stipulated in the internal work regulations.

Employers have to comply with the principles and procedures for settling violations of labour disciplinary regulations which are regulated by law[16]: The employer must demonstrate the culpability of the employee; There must be the participation of the representative organization of the

[16] Article 123 VLC 2012,

worker's collective at the grassroots level; The employee must be physically present and is entitled to self-defence or to have a lawyer or other persons to assist in his/her defence; if the employee is under 18 years of age, his/her father, mother or a legal representative must be present; and any settlement of violations of labour disciplinary regulations must be documented.

- *The grounds due to economic reasons*

According to VLC, the economic reasons that the employer has the right to lay-of employees are regulated in more detail, concludes: (i) Changes of organizational structure, re-organization of employments: (i) Changes of products, product structure; (ii) Changes of technology process, machinery, business manufacturing equipment, associated with production, business activities of the employer[17]; (ii) Economic reasons: Economic crisis or recession; or Implementation of the governmental policy on restructuring the economy or implementation of international commitments[18]; (iii) In cases of merger, consolidation, division, or separation of enterprises and cooperatives[19]; (iv) In cases of force majeure: in the event of a natural calamity, fire, hostilities, epidemics, relocation or narrowing of the production and business sites, at the request of competent state agencies and the employer has exhausted all possibilities, and is forced to scale down production and reduce the workforce[20].

Except for the cases of force majeure, VLC also requires the employer to offer and/or re-train employees for continued employment[21].

Comments:

Firstly, in regulations of the grounds due to reasons arising from employees, EECA provides the employer the right to cancel the employment contract easier than VLC does:

- EECA provides an employer the right to cancel the employment contract in the cases that are not allowed by VLC: (i) In spite of a warning, disregarded the employer's reasonable instructions or breached his or her duties; and (ii) In spite of the employer's warning been at work in a state of intoxication;

- For serious violations of employees, EECA allows employers to unilaterally terminate labour contracts just with prior notice. Meanwhile, VLC regulates that, the employer can only terminate the labour contract by disciplining with the dismissal penalty in a very strict procedure. These grounds are: Committed a theft, fraud or another act bringing about the loss of the employer's trust in the employee; Brought about a third party's distrust in the employer; Wrongfully and to a significant extent damaged the employer's property or caused a threat of such damage; Violated the obligation of maintaining confidentiality or restriction of trade[22].

Secondly, the grounds due to economic reasons stipulated in EECA are the same in VLC but the conditions to lay-off employees in EECA are stricter than those in VLC. Many grounds regulated in VLC are just specified examples for the case of re-organizing of works, which are regulated in both EECA and VLC. EECA prohibits discrimination and treatment and limits the number of cases not allowed to quit, while VLC does not. So EECA is more reasonable than VLC in the meaning of security of employees. In reality, the employer could easy to create the grounds for redundancy (such as the grounds of reorganizing of employment, restructuring of activity). The equal treatment principle of EECA prevents the arbitrariness of the employer and protects week employees in the

[17] Section 1 Article 44 VLC 2012, Article 13 Degree 05/2015/NĐ-CP
[18] section 2 Article 44 VLC 2012, Article 13 Degree 05/2015/NĐ-CP
[19] Article 45 VLC 2012
[20] subsection a Section 1 Article 38 VLC
[21] Article 44,45,46 VLC
[22] These grounds are for employers to cancel the employment contract according to section 1 Article 88 EECA, and for employers dismiss employees as a disciplinary method according to Article 126 VLC.

case of redundancy. VLC does not such restrict regulations so the employer often applies these measures to cancel the employment contract.

Thirdly, the obligation of employers to arrange other jobs for the employees is regulated in EECA is more reasonable than that in VLC. EECA requires the employer to offer a new job for the employee in any case possible, not depend on the reasons lead to cancellation. VLC only requires the employer to do this obligation in the case of redundancy[23]. The employer has no obligation to offer anther job for employees in case of employees cannot cope with work tasks due to objective reasons (health status or personal capacity[24]). In this field, EECA considers to the social responsibility of the employer to protect security for the employee better than VLC. The obligation of employers to offer another job for employees is a method to guarantee the security of work for employees. According to EECA, this obligation of the employer is set up in cases where an employer cannot guarantee the job according to the contract without employees' fault, or employees cannot cope with work tasks due to objective reasons. This regulation is base on both sociality and contract aspects. For cases where the employee does not undertake the work due to objective reasons such as health status or personal capacity, the employer offers the other appropriate job (if any). These regulations reach to the social responsibility of employers. In the case of redundancy, employers cannot provide work to the employee on agreed conditions because of economic reasons, arranging another job for the employee is considered to implement the obligations in the contract law.

2. PROCEDURE ON CANCELATION

- **Terms for advance notice of cancellation**

Advance notice of cancelation has the purpose to give the employee the chance to find a new job and to reduce the expenses of the unemployment insurance fund. The longer the period of advance notice, the more security for employees and the less flexible for employers.

EECA

According to EECA, an employer shall give an employee advance notice of extraordinary cancellation if the employee's employment relationship with the employer has lasted:

- Less than one year of employment – no less than 15 calendar days;
- One to five years of employment – no less than 30 calendar days;
- Five to ten years of employment – no less than 60 calendar days;
- Ten and more years of employment – no less than 90 calendar days.

On the basis specified in subsection 1 Article 88 EECA (contract is terminated due to the employee's actions) an employer may cancel an employment contract without adhering to the term for advance notice if, considering all circumstances and mutual interests, it cannot be reasonably demanded that the performance of the contract be continued until the expiry of the agreed term or term for advance notice.

VLC

VLC requires the employer to give the prior notice only in the case of unilateral termination of the employment contract specified at Article 38 VLC. The period of advance notice does not depend on the length of employment at the employer's company but depends on the types of labour

[23] Article 44,45,46 VLC

[24] Stipulated at subsection a, b Section 1 Article 38 VLC

contracts. When unilaterally terminating an employment contract in cases provided at section 1 Article 38 VLC, an employer shall give notice to the employee as follows[25]:

- At least 45 days in the case of an indefinite term employment contract;
- At least 30 days in the case of a definite term employment contract;
- At least 03 working days in the case of an employment contract for seasonal work or a specific task of fewer than 12 months' duration and in the case the employee has not been able to fulfil their work tasks due to the health condition for a long time.

Comments

To give the employee the chance to find a new job, the terms of advance notice in EECA 2008 is more reasonable. The employer should do the prior notice in the entire termination contract at the initiative of the employer. This obligation is only omitted in the case of impossible or not be necessary. These regulations in VLC are not reasonable and do not meet the purpose of gaining a security job for employees. According to VLC, employers do not have the obligation to do advance notice in the case of redundancy and dismissal. VLC has no exception on the case initiative termination employment contract, which is regulated in Section 1 Article 38. Another while, In case of force majeure, the employers also should do the prior notice to employees. In the case of an employment contract for seasonal work or a specific task of fewer than 12 months' duration and in the case the employee has not been able to fulfil their work tasks due to the health condition for a long time, the period of prior notice of 3 working days is too short to find a new job.

• The obligation of employers to grant time off:

Obligation of the employer to grant time off is regulated in EECA but not be in VLC. Article 99 EECA stipulates: "*If an employer cancels an employment contract extraordinarily, the employer shall grant the employee within the period of advance notice time off to a reasonable extent to find new employment"*.

The obligation of the employer to grant time off is a good regulation for granting the security of work for the employee. To get a new job as soon as terminating the employment, the employee needs to do some procedure such as: finding information, applying employment fill, take part in a recruitment procedure.

3. ALLOWANCE/ COMPENSATION

Allowance/ compensation that the employer must pay to the employee in the case of termination contract has a role as granting the security of income for the employee. Vietnam and Estonia both have implemented the unemployment insurance scheme. The employer and employees have to contribute monthly to the unemployment fund. Employees will receive unemployment benefits in most cases of unemployment because of the terminating labour contract. In these cases, employers have no obligation to pay an allowance to employees because they had contributed to the unemployment fund for this purpose. Granting the amount and the range of unemployment benefits is considered as a method to fulfil the flexicurity policy.

EECA

EECA requires the employer to compensate employees just in case of redundant[26]. The amount of money for compensation depends on the type of employment contract:

[25] Section 2 Article 38 VLC 2012

[26] In this case, an employee also has the right to receive a benefit upon lay-offs under the conditions and according to the procedure prescribed in the Unemployment Insurance Act of Estonia.

"- Upon cancellation of an employment contract due to lay-off, an employer shall pay an employee compensation to the extent of one month's average wages of the employee.

– Upon cancellation of an employment contract entered into for a specified term for economic reasons, except for reason of bankruptcy, an employer shall pay an employee compensation to the extent that corresponds to the wages that the employee would have been entitled to until the expiry of the contract term. No compensation shall be paid if the employment contract is cancelled due to force majeure.

- If an employer gives advance notice of cancellation later than provided by law or a collective agreement, the employee has the right to receive compensation to the extent to which he or she would have been entitled to upon adhering to the term for advance notice."[27]

VLC

In Vietnam, the unemployment insurance regime is implemented from January 1, 2009. Employees are obliged to participate in unemployment insurance when working under indefinite labour contracts and definite labour contracts with a term of from full 3 months[28].

In case an employment contract is terminated at the initiative of the employer, which are regulated in Section 1 Article 38 VLC, the employer is responsible for paying severance allowance to the employee who has worked regularly for a period of at least a full 12 months. Half of the monthly wage is payable for each year of work[29]. Where the employment contract is terminated because of economic reasons which are regulated at Article 44, 45 VLC, and the employee has worked regularly for the employer for at least 12 months, the employer shall pay a job-loss allowance to the employee. The job-loss allowance shall be one-month wage for each year of employment, and shall not be lower than 2 months' wage[30]. The qualified period of work for the calculation of severance allowance and job-loss allowance shall be the total period during which the employee actually worked for the employer minus the period in which the employee participated in the unemployment insurance scheme in accordance with the Law on Social Insurance, and the period for which the employee has been already paid severance allowance by the employer[31]. The reference wage for the calculation of severance allowance and job-loss allowance shall be the average of the wages, which are stated in the employment contract valid for 06 months preceding the termination of the employment contract[32].

Comments

- In cases where the employer unilaterally terminates, the labor contract basing on the grounds due to the reasons from the employee, EECA and VLC both do not require the employer to subsidize or compensate employees. The employer-paid unemployment insurance premiums for employees during the time of employment. So in these cases, employees only receive unemployment benefits if they meet the conditions prescribed by the law on unemployment insurance.

- In cases where the employer unilaterally terminates the labour contract basing on the grounds due to financial reasons, EECA requires the employer to subsidize or compensate employees while VLC does not. Besides the unemployment insurance allowance, EECA provides the obligation of the employer to pay compensation of one average salary month to the employee. If the employment contract is a fix-term one, this amount of compensation equal to the salary for the rest time of the contract. In these cases, the employer cannot guarantee employment for employees

[27] Article 100 EECA
[28] Article 43 Vietnamese employment law 2013
[29] Section 1 Article 48 VLC
[30] Section 1 Article 49 VLC
[31] Section 2 Article 48, Section 2 Article 49 VLC
[32] Section 3 Article 48, Section 3 Article 49 VLC

according to the signed contract without the employee's fault. Therefore the employer has to compensate employees. This regulation will make the employer considers carefully in redundancy. According to VLC, the employer does not have the obligation to pay any allowance or compensation to the employee when terminating the employment contract due to financial reasons[33]. This provision of VLC is not reasonable to base on the contracting aspect as explaining above. It also conflicts with the nature of job-loss allowance according to VLC. The job-loss allowance is paid to employees who have lost their jobs without their faults, so the amount of job-less allowance is twice of the amount of severance allowance. Job-Less allowance includes two parts: half is the severance allowance and half is compensation that the employer has to pay to the employees because of not guaranteeing work for the employee under the employment contract. In the case of employees take part in the unemployment insurance regime, the employer has contributed the amount of money to the unemployment insurance fund so in ordinary they do not have to obligation to pay severance allowance to the employee in ordinary termination of employment contracts. But it is not fair if employers have no obligation to pay any allowance/compensation to employees in the case of extraordinary termination employment contract base on economic reasons. The obligation to compensate employees in this case also limits the employer applying economic reasons to lay – off employees.

4. CONSEQUENCES OF ILEGAL TERMINATION OF LABOR CONTRACT AT INITIATIVE OF EMPLOYERS

EECA

Article 104 EECA stipulates that voidness of cancellation happens in these cases: (1) Cancellation of an employment contract without a legal basis or in conflict with the law; (2) Cancellation of the employment contract of a pregnant employee or an employee who has the right to pregnancy and maternity leave. Violation the terms of advance notification is not void[34].

An action with the court or an application with a labour dispute committee for the establishment of the voidness of cancellation shall be filed within 30 calendar days as of the receipt of the declaration of cancellation. If an action or application is not filed within the term or if the term for filing the action or application is not restored, the cancellation is valid from the start and the contract has expired on the date specified in the declaration of cancellation[35].

Within 30 calendar days as of the receipt of a declaration of cancellation an employee may file an action with the court or an application with a labour dispute committee to challenge the cancellation in force due to a conflict with the principle of good faith, unless the employer cancelled the contract due to a breach of the employment contract by the employee. In the case a court or labour dispute committee establishes that cancellation of an employment contract is void, the court or labour dispute committee shall, at the request of the employer or the employee, terminate the employment contract as of the time when it would have expired in the case of validity of the cancellation. the court or labour dispute committee shall not terminate the employment contract if the employee is pregnant or has the right to pregnancy or maternity leave or has been elected as the employees' representative unless it is reasonably not possible considering mutual interests[36].

[33] the employer only pays job loss allowance for the period that the employee does not participate in unemployment insurance regime.

[34] Where the employer fails to comply with the provisions on advance notice, the employee shall be paid a compensation equivalent to his/her wage for the number of days during which the notice is not given (Section 4 Article 100 EEAC)

[35] Article 105 EECA

[36] Article 106,107 EEAC

Upon the unlawful cancellation of an employment contract, if the employment relationship continues, an employee has the right to demand compensation for damage, in particular wages not received. The part obtained by way of different use of the employee's labour force may be deducted from the compensation. In case of termination of the employment relationship in court or labour dispute committee, an employer shall pay employee compensation in the amount of three months' average wages of the employee. If the court or labour dispute committee terminates an employment contract with an employee who is pregnant, who has the right to pregnancy and maternity leave or who has been elected as the employees' representative, the employer shall pay the employee compensation in the amount of six months' average wages of the employee. In these case, the court or labour dispute committee may change the amount of the compensation, considering the circumstances of the cancellation of the employment contract and the interests of both parties[37].

VLC

According to Article 41 VLC, the unilateral termination of an employment contract is illegal in cases that are inconsistent with Article 37, 38, 39 VLC. That means the cancellation is void if the employer violates the regulations on grounds of termination, advance notice or in cases the right of the employer to unilaterally terminate an employment contract is limited. Comparing with EECA, VLC regulates stricter in the grounds of illegal termination employment contracts. Violating the advance notice terms is void according to VLC, but it is not void according to EECA 2008. That leads to the result that violating advance notice term is treated as violating grounds of termination or prohibit cases of termination.

The legal consequences of illegal termination of labour contracts of employers under VLC are also stricter than those of EECA. Article 42 VLC stipulated that, in cases of illegal unilateral termination of employment contracts, employers have these obligations:

- The employer shall pay the wage, social insurance and health insurance for the period during which the employee was not allowed to work, and additionally at least 2 months of wage as stipulated in the employment contract;

- The employer shall reinstate the employee in accordance with the original employment contract: where the employee does not wish to return to work, the employer shall pay the severance allowance; where the employer does not wish to reinstate the employee, and the employee agrees, two parties shall negotiate additional compensation which shall be at least equal to two months' wage as stipulated in the employment contract, in order to terminate the employment contract; where there is no longer a vacancy for the position or work as agreed in the employment contract and the employee still wishes to continue working, two parties shall negotiate to amend and supplement the employment contract.

- Where the employer fails to comply with the provisions on advance notice, the employee shall be paid a compensation equivalent to his/her wage for the number of days during which the notice is not given.

Comments:

- VLC is very stricter than EECA in requiring the employer to reinstate work for the employee. The regulation on reinstating the employee is one aspect of flexicurity in gaining security for employees and decreeing flexible for employers. According to ECA, in case of wrongful termination of an employment contract, it is possible to terminate the employment contract by a decision of the court, if at least one of the parties intends to do so. This means that even in the case of wrongful dismissal, an employee will lose his or her job. However, the employee has an opportunity to obtain compensation from the employer, the amount of compensation will be determined by the court.

[37] Article 108,109 EECA

Being opposite to EECA, VLC requires the employer to reinstate the job for the employee in all cases of illegal termination of labour contract at the initiative of the employer.

- *The legal consequence in case the employer violates the prior notice term is too strict according to VLC.* For example, in case the employee "repeatedly fails to perform his/her work in accordance with the terms of the employment contract"[38], the employer has cancelled employment contract with him/her without advance notice or notify with a period less than that are regulated by law. This case is the illegal termination of labour contracts according to Article 41 VLC. The employer has to reinstate the employee, pay the wage, social insurance, and health insurance for the period during which the employee was not allowed to work, and additionally at least a 2-month wage as stipulated in the employment contract. Besides, the employer has to pay compensation equivalent to his/her wage for the number of days during which the notice is not given. Meanwhile, according to EECA, in the above case, the employer has only the obligation to pay to the employee's wage for the number of days during which the notice is not given.

- *The amount of compensation in case the unfix-term labour contract according to VLC is so strict comparing with that in EECA.* In the case of an indefinite term labour contract, the employer must compensate wages during the working days from the date of termination of the illegal labour contract. The time limit to bring an individual labour dispute to the Court is 01 year from the date of detection of the act, which a party claims that their lawful rights or interests are infringed upon[39]. The employee who is cancelled illegal labour contract will look for another job and get unemployment insurance allowance (in the time of unemployment). They will file a lawsuit after nearly 1 year and it is taken at least 6 months for trial. In this case, the employer must compensate for the salary during the days of not working under the contract is about 18 salary months, plus at least 2 months by law. Meanwhile, he/she still received unemployment benefits or salaries in other companies during that time.

5. SOME RECOMMENDATIONS FOR VLC

- ***Re-divide the grounds of cancelation***

In general, there are two kinds of the grounds that the employer shall may cancel labour contracts: first kind is arising from the employee (violating contracts, disciplinary or inadequate health, ability to perform work under contract); the second kind comes from the objective reasons that the employer cannot guarantee the work for the employee (force majeure reasons or measures to develop production and business, increase labour productivity resulting in employers having to narrow their production and business leading to labour redundancy). In the first kind of the grounds the failure to perform the contract is due to reasons arising from the employee, not entirely due to the fault of the employer. In the second kind of the grounds the reasons lead to the job-loss is not entirely due to the employee's fault. The division base on the employee's fault above will have fair treatment in the cancelation procedures and the responsibility of the employer when terminating the contract. Obviously, in the second kind of grounds, employers must be more responsible than the first one. The Draft remains the regulation of the grounds of cancelation as present VLC. The Authors of this article recommends that new VLC need to re-divide the grounds of cancelation into two kinds as that in EECA. Specifically:

- Moving the grounds that the employer has the right to dismiss the employee from Article 126 VLC to Section 1 Article 38 VLC. These are serious disciplinary violations of employees but

[38] a ground that the employer may cancel the employment contract stipulated at subsection a section 1 Article 38 VLC
[39] Article 202 VLC

the employer has to fulfil a much stricter procedure to cancelation employment contract than other cases, which are regulated at Article 38.

- Moving the grounds that the employer has the right to unilateral employment contract at subsection d Section 1 Article 38 (force majeure) to Article 44 as an economic reason.

• *Adding the cases that the employer has an obligation to re-train and/or offer another job for the employee.*

The obligation of the employer to re-train and/or offer another job for the employee is a method to gain the security of work for the employee. This obligation should be regulated in case the employer cannot provide work for the employee according to the employment contract because of objective reasons, except the case impossible or unreasonable. In order to guarantee work for employees, VLC should provide two more case that the employer has to retrain and/or offer another job for employee like EECA: in case of employees cannot cope with work tasks due to objective reasons (health status or personal capacity[40]).

• *Amending the term of advance notice*

Firstly, VLC should require employers to give advance notice in cases they unilateral terminate the labour contract unless it is not possible to do not unnecessary. The authors of this article agree with the Draft that regulates the obligation of the employer to give advance notice in case of redundancy (Article 42, 43 Draft). Besides, the employer also should give advance notice in the case of dismissal regulated in Article 126 VLC. Besides, VLC should point out the cases that the employer has no obligation to give prior notice, for example: The employee commits an act of theft, embezzlement, disclosing technological or business secrets or infringing the intellectual property rights of the employer, in the case of force Majeure that the employer could not give the advance notice.

Secondly, VLC needs to gain the period of advance notice to at least 15 days. The period of 3 working days stipulated in section 2 Article 38 VLC is too short to find a new job.

• ***Addition the term of grant time off***

The term of grant time off regulated in EECA is a very improvement one that VLC should be adding in the cancelling labour contract procedure. Within the period of advance notice time, the employee must have the right to be off for taking part in a new recruitment procedure.

• *Renewing compensation/allowance regulations*:

Firstly, for cases where employees lose their jobs completely without their fault except the reasons for force majeure, the employee needs to be paid the amount of money as a compensation for being terminated the labour contract. In the cases of redundancy which are regulated at Article 44,45 VLC (Article 41,42 Draft), the employer must have to pay compensation to the employee. This regulation will affect the employer in considering the case of redundancy. Especially for the type of labour contract that defines the time limit to be regulated in the direction of compensation for the remaining time of the contract. This provision will limit the signing of the type of labour contract to determine the actual duration, which means to ensure the stability of work for employees in the market.

Secondly, VLC should release the obligation to re-employ the employee in case the employer cancels the labour contract base on the legal ground but violates the advance notice. The obligation to re-employ the employee in all cases of illegal cancellation the labour contracts is too strict to the

[40] The cases that the employer has the right to cancel employment contract which is stipulated at subsection a, b Section 1 Article 38 VLC

employer in the concept of flexicurity. Actually, in the case of violating the regulation of advance notice, the employer has the right to cancel the employment contract at the end of the advance notice period. Because the employer canceled the employment contract before the notice period expires, the contract is violated until the time of termination of the contract. therefore, employers only need to compensate for wages during the unannounced days.

CONCLUSION

In general, EECA gives the employer much more flexible in cancelling labour contracts and also gives more security of work or/and income for the employee in comparing with VLC. In estimating the balance between the flexible of the employer and the security of the employee in the situation of Vietnam, the authors of this article give some recommendations to reform VLC on the regulation of cancelation of the employment contract at the initiative of the employer.

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