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Employee's "Working Obligation" for a Certain Period or Alternative Costs' Reimbursement Resulting from Employer's Provision of Specific Training or Financing of Education

1. Introduction

The European Pillar of Social Rights (EPSR) was proclaimed on 17 November 2017 by leaders of the European Union's (EU) key institutions. It seemed remarkable at first sight, that the idea of promoting the well-being of the EU citizens and sustainable development of Europe, based on balanced economic growth and price stability, highly competitive social market economy aimed at full employment and social progress, where solidarity between generations is sought and social justice and protection are promoted, was to be achieved by an EU-wide Pillar of Social Rights.[1] The choice of words, such as social market economy, social progress, social justice, and solidarity, seems to indicate that the EU is heavily invested in safeguarding the legal position of its citizens, seeing solidarity and socialness as ends instead of means. This can be achieved by guaranteeing its citizens social rights as legal grounds upon which claims before national courts could be successfully made.

Unfortunately, by reading further, it becomes quickly clear, that this is not what the EPSR represents. A reader can promptly realise that, paradoxically, it expresses "principles

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1 See paragraph 1 of the Preamble to the EPSR.

and rights essential for fair and well-functioning labour markets and welfare systems". It adds "'new principles" and "for them to be legally enforceable, the principles and rights first require dedicated measures or legislation to be adopted at the appropriate level."[2] It is astonishing how many times the word "principles" is used, effectively expressing that the EPSR is merely a proclamation of already existing principles and the two are vastly different in its effects. Nevertheless, critique, although perhaps on point, can be understood by the overall institutional and constitutional design of the EU, that is, by the lack of competences and the complications arising out of political processes, where gaining the required majority or consent is sometimes best described as the Gordian knot.

Despite the limited scope of the EPSR, its effect for the future should not be underestimated, and any acknowledgement of some foundational key existing principles that are publicly promoted and respected is welcome. It is not a coincidence that among these 20 principles, some relate to education, training, and equal opportunities (also in accessing the labour market). More specifically, the first established guiding principle is that everyone has the right to quality and inclusive education, training, and life-long learning to maintain and acquire skills that enable them to participate fully in society and manage transitions successfully in the labour market.

It could be argued that education, learning, training, and vocational training (hereinafter "education" and/or "training")[3] as foundations for obtaining knowledge are the cornerstones of our society.[4] After all, this is evident through provisions in international (human rights) acts[5] or national constitutions.[6] Moreover, this content is quintessential

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2 Ibid., see paragraphs 14ff.

3 For the different meanings and connotations of education, training, and vocational training see Teršek, Medved, Pravica delavcev do dodatnega izobraževanja (2018), pp. II–V; and Korpič - Horvat, Izobraževanje, pravica in dolžnost delavca (2007), p. 43. In this contribution the nouns "education" and/or "training" will refer to either of these terms in their general sense, either as obtaining a higher level of officially recognised education; as professional, vocational training; as attendance at various seminars and other programmes designed towards obtaining knowledge; etc.

4 Some argue that education up until employment is not sufficient anymore, it is expected and desired that members of society undergo life-long education. Moreover, a well-established system of permanent education ought to be a political priority to ensure that knowledge has an everlasting status of a fundamental value. See Teršek, Medved, Pravica delavcev do dodatnega izobraževanja (2018), p. II. Very interestingly, the concept of long-life learning or permanent educational process (for adults) has already been discussed (and the idea broadly accepted) already in the 1970s. See Končar, Pravica, obveznost in odgovornost delavcev do izobraževanja (1978), pp. 167–168.

5 For a short overview of several (not only human rights) international sources of law referring to education, see Korpič - Horvat, Izobraževanje, pravica in dolžnost delavca (2007), p. 42; Franca, Med teorijo in prakso: vsebine izobraževanja in usposabljanja v kolektivnih pogodbah dejavnosti (2018), p. 612; and Teršek, Medved, Pravica delavcev do dodatnega izobraževanja (2018), pp. II–IV.

6 See, for instance, the guarantee of freedom of education in Article 57 of the Slovenian Constitution, Official Gazette of RS, No. 33/91-I, last amended in 2016. Some argue that knowledge is one of the

for the EU.[7] Knowledge is something that cannot be taken from an individual and makes up one's identity. Its value cannot be overstressed in the broadest general sense,[8] but also when looking for (desired) working opportunities. Education and training, construed in the light of qualification of employees, are in the present a "key factor of modern human resource management".[9] In other words, knowledge and qualifications are marketable products, meaning they are provided in exchange for earnings. Moreover, in an employment relationship, education, training and life-long learning can be perceived as a right and a duty of an employee that is generally financed by an employer when the knowledge obtained is of added value for the work performed.

2. Framing of the "Working Obligation"

What is relevant is that education and training costs money. It is not a rare occurrence that training provided costs a substantial amount of money, which employers are reluctant to "invest", if there are no precautions in place that would effectively safeguard their legal position. On the other hand, employees might be interested in training, but cannot afford to pay for it themselves, often turning to their employer for assistance. In such cases, employers seek some sort of a guarantee on their investment in the knowledge of their employee(s). They are prepared to do so under the condition that a special contract is concluded stating that the employee in return is *obliged to continue working for them for a certain period, otherwise they are required to reimburse (part) of the costs incurred*. Even though that education and training are generally the precondition for full participation in society and subsequent transitions in the labour market, issues may arise.

Firstly, and now the contribution is being presented in the context of this special issue, freedom of movement of workers, as one of the economic freedoms and foundations

most important values beneficial for the individual and the society as a whole. The Constitutional foundation does not relate merely to primary education of children or other educational schemes of youth, but also reflects the right to education of workers. See Šetinc Tekavc, Delovno razmerje in izobraževanje delavca (2001), pp. 251–252. Končar (1978, p. 178) sees the Constitutional right of education as a non-absolute subjective right, from which merely the obligation of the society arises to create educational opportunities for its members, especially also for workers, so that the needs and development of each individual is attained for him/her to become a valuable member of the society.

7 Education is perceived, alongside culture, as the key value in strengthening the European identity, while also striving for job creation, economic growth, social fairness, and unity. See, for instance, European Commission, COM (2017) 673 final, p. 1.

8 Education is perceived as an instrument aimed towards eliminating poverty, because its synergistic effects influence the increase of productivity. It also improves the realisation of the developmental problems, such as taking account of environment and its requirements, etc. See Svetličič, Konkurenčnost gospodarstva in vlaganje v izobraževanje (2006), p. 8.

9 Felten, Reply to an *ad hoc* request for comparative analysis (2017), p. 10.

of the Union, stipulated in Article 45 of the TFEU, may become relevant when pursing successful transition in the (cross-border European) labour market, where various restrictions in the form of "working obligations" or reimbursement duties, founded in the provision or financing of the training or educational programmes (by employers) exist. Therefore, it is assessed what kind of constitutional (a)symmetry exists in the framed context on the relation of the EPSR and the TFEU or, differently, between a social right and an economic freedom in (predominantly) employment relationships.

Since EU law binds first and foremost the Member States, statutory rules or schemes that serve as grounds for further contractual arrangements will be relevant. These are typical for employment relationships, where many aspects are regulated contractually (and not always statutorily). A second constitutional (a)symmetry may appear here, in this case in the national constitutional setting, which may apply also to statutory schemes. National Constitutions may, at least in the case of Slovenia, contain provisions related to freedom of work, including also free choice of employment with all its broad consequences. It is questionable if—and under which conditions—financing of one's education or training can be tied to an obligation to work for a certain time in this Member State (or for a specific employer) or alternatively be subjected to reimbursement of costs of the training or education provided.

The purpose of the contribution is, therefore, to vividly illustrate the selected constitutional aspects by combining legislation with practice, i.e. outlining the regulatory provisions and case-law adopted. In the first part of the article, the judgments of the Court of Justice of the European Union (CJEU) are scrutinised and broader comparative perspectives (i.e. international and comparative outlook) are described. In the second (lengthier) part, regulatory (statutory and contractual) provisions and the national courts case-law are presented, where this is done for Slovenia as the author's home Member State (i.e. a national outlook).

3. Illustrative Case-Law of the CJEU

Interestingly, from an EU perspective, it has reportedly[10] been an ongoing process for the European Commission in receiving repeatedly complaints referring to various national schemes aiming to provide either education or specialised training and requiring the graduates or trainees to work for a certain period in this Member State or alternatively to reimburse the costs of training or education. Generally, the complainants perceive this obligation as an obstacle to EU free movement of workers' principles and an infringement of EU law, more specifically of Article 45 of the TFEU. Up until now, there were already some CJEU cases, where the issue of restrictions on the freedom of movement for workers was invoked, restrictions meaning that persons were under a certain level of

[10] Ibid., p. 9.

"control" of the current employer, and would face sanctions if they refused to continue to work for them after the period of training (or education). However, these sanctions are not always strictly linked to the reimbursement of costs of training. The idea is not to provide a lengthy case-law analysis but to offer some illustrative cases, which will enable an outline of relevant findings.

Two of the first cases in this respect were connected with football. In *Bosman*[11] case, a Belgian professional footballer, employed by RC Liege in Belgium, was employed there for two years (1988–1990) and previously trained there. Afterwards, he accepted an agreement with a French club US Dunkerque, but according to the transfer rules at the time, a compensation fee for training would have to be paid to the prior club, and due to doubts to the second club's solvency, an internationally valid transfer certificate was not issued. If he refused to sign with the prior club, RC Liege, who had offered him a new professional contract, he would, in the end, face the consequence of a suspension, be reclassified as an amateur and be allowed to a transfer without club's agreement after not playing for two seasons. Such level of control of his employer did not result in reimbursement of costs of training, but of loss of income due to inability to play professionally.

When the case was adjudicated by the CJEU in the form of answering preliminary questions, the CJEU explained that free movement of workers provisions preclude the rules of sporting associations, under which a professional footballer, who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training, or development fee. Even though the case concerned the sporting activity, as a *sui generis* activity, the fact that it presents an economic activity (for professionals or semi-professionals) was sufficient to fall within the ambit of the Treaties since they were in gainful employment or provided a remunerated service. Despite the fact that the rules at hand governed business relationships between employers (i.e. transfer rules) in a sector of (sporting) activity, this did not prevent the CJEU to decide that they nevertheless fell within the scope of the EU provisions relating to freedom of movement for workers, since their application affected the terms of employment of workers. Moreover, even though the rules on freedom of movement for workers typically require that equal treatment in the host Member State is ensured in comparison to nationals of that State (i.e. the discriminatory actions in France by their rules would normally be thought of in the concrete case), they also prohibit the Member State of origin from hindering the establishment or from engaging in gainful employment in another Member State (as in the present case).

The economic freedom of movement for workers is, however, not absolute and rules pursuing a legitimate aim compatible with the TFEU could be justified if pressing rea-

[11] Judgment of the Court of 15 December 1995, C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECLI:EU:C:1995:463.

sons of public interest are present. Even if that were the case, the application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose. In the present case, this was not so. It has to be mentioned that the CJEU in *Bosman* considered the social importance of sporting activities and in particular of football as such in the EU. The aims of maintaining a balance between clubs, by preserving a certain degree of equality and uncertainty as to results of encouraging the recruitment and training of young players, was accepted as legitimate. The prospect of receiving transfer or training fees was indeed likely to encourage football clubs to seek new talents and train young players. However, due to it being impossible to predict the sporting future of young players and because only a limited number of such players go on to play professionally, those *fees were by nature contingent and uncertain and were in any event unrelated to the actual cost borne by clubs of training* both future professional players and those who will never play professionally. The prospect of receiving such fees, therefore, could not be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.

A similar case—with some differences—is the case of *Olympique Lyon*.[12] This club had entered into an employment contract with Olivier Bernard as a trainee for the period of 1997–2000. According to the French Charter of football profession, players between the ages of 16 and 22, who were employed as trainees by a professional club under a fixed-term contract, had to sign their first professional contract with that club at the end of their training if the club required them to do so, or, failing that, be liable for damages corresponding to the loss suffered.

Mr Bernard had signed with an English club Newcastle United FC after his training employment contract in France ended. He was then sued for *damages in the equivalent of the remuneration received over one year if he had signed the contract offered* by Olympique Lyon. The disputed preliminary question mainly focused, again, on whether the need to encourage the recruitment and training of young (football) players constituted a justified restriction within the meaning of Article 45 of TFEU, i.e. freedom of movement for workers. It is indisputably an obstacle to freedom of movement for workers. Still, justification could exist within the line of requirements in *Bosman*, that is, if a legitimate aim justified by overriding reasons in the public interest would mean an application of that measure in such a way as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose, that is—being proportional.

The reasoning of the CJEU is very similar to *Bosman* and the conclusion the same. The scheme in the French Charter did not ensure the attainment of the objective of encouraging the recruitment and training of young players—especially important for small

[12] Judgment of the Court (Grand Chamber) of 16 March 2010, C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, ECLI:EU:C:2010:143.

clubs at the local level—and was disproportional. The main culprit for the decision was the fact that the liability was for damages that were based on criteria, which were not determined in advance and were *calculated in a way, which was unrelated to the actual costs of the training*.

Interestingly, it was in this case that the broader perspective related to the title of this article was highlighted and referenced. The Netherlands Government pointed out, in a more general manner, that reasons in the public interest exist related to training objectives, which could justify rules under which an employer, who provides training to a worker, is justified in requiring the worker to remain in his employment or, if he does not do so, to claim damages from him. When taking account of the proportionality, it was suggested that compensation should fulfil two criteria, namely that *the amount to be paid must be calculated in relation to the expenditure incurred by the employer in that training* and that *account must be taken of the extent, and for how long, the employer has been able to enjoy the benefit of the training*.

These observations are crucial, and this is (at least for the first part) confirmed in a rather recent case *Federspiel*.[13] The case concerned an Italian woman, who pursued from 1992 to 2000 full-time training as a medical specialist in neurology and psychiatry at the University Hospital of Innsbruck in Austria. During this period, she received a study bursary (i.e. scholarship) awarded to her by the Autonomous Province of Bolzano (in Italy). This was made possible by provincial legislation, which intended to seek and finance other specialist posts (in Italy and Austria) if none were available locally. According to mentioned provincial legislation in Italy, she was obliged to work for the public health service of the Bolzano province for 5 years over a 10-year period, or to repay 70 per cent of the scholarship awarded with statutory interest for failing to honour the contractual obligation, or proportionally less in the case of partial failure. In 2013, it was established that Mrs Federspiel had not practised in that province since qualifying as a specialist and approximately EUR 120.000 was then claimed from her.[14] Even though the case concerned a "student – future employer" relationship, it, in essence, relates to the same "working obligation" that is more commonly present in "employee – current employer" relationships.

Differently than in the previous two cases, CJEU did not determine that provision stipulating free movement of workers precluded the national legislation in question, but instead invoked the outlined exception above. The pursued objective in the public interest, in this case, was to guarantee for the population of that province specialised medical assistance of high quality that was balanced and accessible to all while maintaining the financial equilibrium of the social security system. The Court recalled that human health

[13] Judgment of the Court (Third Chamber) of 20 December 2017, C-419/16 *Sabine Simma Federspiel v Provincia autonoma di Bolzano and Equitalia Nord SpA*, ECLI:EU:C:2017:997.

[14] The 70 per cent of the scholarship amounted to EUR 68.515 and the interest amounted to EUR 51.418.

and life rank foremost among the assets and interests protected by the TFEU. Not only that the risk of seriously compromising the financial equilibrium of a social security system constitutes an overriding reason related to the public interest capable of justifying an obstacle to the fundamental freedoms in the TFEU, the grounds of public health are also important, with the objective of maintaining sufficient and permanent access to a balanced range of high-quality medical treatments and to ensure cost efficiency and prevention (as far as possible) of any wastage of financial, technical, and human resources.

The Court also found measures to be proportionate, meaning that they did not go beyond what was necessary. Mrs Federspiel agreed to such obligation, the amount of statutory interest was the natural consequence of late payments, the principal payment consisted of scholarships awarded to her (i.e. the costs of training as such), the required working period was shorter than the training, the obligation was somewhat flexible within a period of 10 years, etc. Moreover, the measure aimed at ensuring that there was a sufficient number of specialists, who were bilingual in the province and there had been no alternative measures available that would have enabled the province in question to recruit the required number of specialists practising in Austrian and Italian language.

To sum up the findings of these cases, on the relation between free movement of workers (as economic freedom) and the right to (quality and inclusive) education, training and life-long learning to maintain and acquire skills that enable persons to participate fully in society and manage successfully transition in the labour market (as a social right of the EPSR), in the case of a "working obligation" or an alternative reimbursement of costs incurred, such schemes' restrictions can be accepted if they pursue a legitimate aim compatible with the TFEU and are justified by overriding reasons in the public interest, so long as the application of such measures is to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.

The legal standard is, therefore, "stretchy" (which is from a constitutional law perspective usually the norm), making it difficult and elusive to generalise since the standard is used on a case-by-case basis by weighing the (legal and factual) importance of concrete circumstances.[15]

[15] It could be interesting to reflect that the accepted restriction on free movement of workers by the CJEU temporally coincides with the broader perspective of limiting free movement rights (of EU citizens) in the area of social rights (e.g. social security benefits and other social benefits), where the case-law changed somewhere in the proximity of year 2011. See an excellent perspective on this issue in Thym (ed.), Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU (2017). For limited access to social assistance benefits for different categories of EU citizens see also the contribution of Luka Mišič in this volume.

4. Broader Comparative Perspectives

It has been stressed in the first part, dealing with some CJEU cases, that in a more general manner, there are reasons in the public interest related to training objectives, which could justify rules under which an employer, who provides training to an employee, is justified in requiring the employee to remain in his employment or, if he does not do so, to claim reimbursement (or damages) from him.

In identifying such reasons, Slovenia is no exception in comparison to other Member States. Throughout the EU, the Member States have adopted various approaches, founded by their historical and cultural development. While some Member States provide for specific statutory legislation on educational schemes that include the "working obligation", predominantly regarding employees in the public sector (for instance, to soldiers or army members, border guards, prison officers, judges, and prosecutors or medical practitioners), other Member States regulate this phenomenon with private agreements. These can be concluded within the limits that are set out in the legal framework for such private agreements, or by applying general principles of civil law (for instance, through a "fairness test" or a "penalty clause test").[16]

Observing this phenomenon in essentially all Member States is nothing spectacular, as the law regulates societal relations and these are (very) similar in the region. Since positive legal (national) rules apply within domestic borders, the legal differences are most often more of a technical nature (for instance, the different maximum periods for which such "working obligation" can be agreed upon). What seems to be interesting is that Slovenia, as a small Member State, has nevertheless made use of the majority of these various approaches adopted abroad, and has some sort of a hybrid model, where statutory legislation and private agreements are foreseen, the latter generally regulated in the Slovenian Employment Relationships Act (hereinafter the Labour Act)[17] and to some extent in collective agreements, where in practice civil law rules (and principles) are applied in their assessment. This finding also makes the Slovenian model relevant, since, even though it is coming from a national perspective, other EU citizens may find it interesting when attempting to compare their own system more broadly, in a comparative setting. On the grounds of these reasons, Slovenian national provisions and case-law are looked at in more detail in the following segments of this contribution.

[16] Felten, Reply to an *ad hoc* request for comparative analysis (2017), p. 11. For a detailed overview, see p. 11ff.

[17] Employment Relationships Act (ZDR-1), Official Gazette of RS, No. 21/13, last amended in 2019.

5. National (Slovenian) Constitutional Dimension

Before proceeding to more detailed statutory provisions, fundamentally, another constitutional dimension of this "working obligation" phenomenon exists; however, this time in the sphere of national constitutional provisions. Obligation to work (or be employed) at an employer, even after the provision of training or financing of the education by this employer had been finished, under the threat that the (proportional) costs of it are to be reimbursed otherwise is in essence primarily a restriction on the freedom of work (and its element of free choice of employment), which is, at least in the Slovenian Constitution, placed in the chapter regarding fundamental human rights and freedoms as being one of them in Article 49.[18] This may concern predominantly employees, but also students who are receiving a company scholarship during studies.[19]

Moreover, by being or remaining employed by a particular employer for a specified period, freedom of an economic initiative stipulated in Article 74 of the Slovenian Constitution, is limited. Not only that an employee is then subject to the statutory prohibition of competitive activity in Article 39 of the Labour Act, it is also difficult to be self-employed and conduct one's own business on top of remaining employed.[20]

Since there are no explicit constitutional restrictions foreseen in relation to freedom of work, the general rule contained in Article 15 of the Slovenian Constitution, which allows the restriction of fundamental rights and freedoms by the rights or freedoms of others, is nevertheless applicable. In this regard, the financing of one's (i.e. employee's or student's) education by an employer is safeguarded by his right to private property in Articles 33 and 67, which stipulate that a statute regulates the acquisition and enjoyment

[18] Article 49 of the Slovenian Constitution states that freedom to work is ensured (by prohibiting forced work), that everyone is free to choose their employment and that each working place is accessible to everyone under the same conditions. For more information about the development of these elements in connection with international labour law, see Končar, in: Kaučič, Nova ustavna ureditev Slovenije (1992), pp. 83–84. Interestingly, *sedes materiae* of other social and economic rights or freedoms related to labour law are in the chapter Economic and Social Relations, following the chapter on fundamental rights.

[19] A scholarship contract, where a student is obliged to remain in employment for a defined period after obtaining his or her degree is not rare and is similar to a contract of education. These contracts are often standardised, although the definition of a future post is crucial to determine whether the scholarship holder (i.e. future employer) has fulfilled his or her contractual obligation or not. If the employer then wishes to conclude an employment contract under different conditions (for example for a lower pay or a fix-term employment contract), the student is free from having to accept this proposal and free from having to reimburse the costs of received scholarship. See Šetinc Tekavc, Delovno razmerje in izobraževanje delavca (2001), pp. 260–261. This could *a simile* apply also to contract of education, when a different post is foreseen after the completion of an education or a training programme.

[20] This is, however, not prohibited, and in Slovenian regulatory regime, treated exceptionally, at least in the fields of social security and income taxation.

of property in such a way that also its economic function is ensured, which essentially means that the employer's financial "investment" in the knowledge of an employee ought to pay (financial, economic) results by the work performed thereafter. In this sense, where fundamental human rights and freedoms clash, the proportionality should be sought and achieved.

6. Slovenian Statutory Legislation

6.1. The Labour Act and the Obligations Code

In the legal framework of this constitutional dimension, the Slovenian legislature enacted several statutes containing applicable rules for employees undergoing education or training programmes, and a multitude of contractual relations have taken place. First of all, some limits (or prohibitions) to a "working obligation" need to be highlighted. The Slovenian Labour Act regulates the training or education of employees in Articles 170 and 171, and it can be perceived as an employee's duty and a right[21] simultaneously, the intent of which is to preserve and enhance the competences for performing contractually agreed work, to maintain employment, and to improve the notion of employability. The duration and the process of education or training and mutual rights and obligations between employee and employer ought to be addressed in a special contract of education (Slovenian *pogodba o izobraževanju*)[22] or a collective agreement. However, when the needs of a working process so dictate, or if education or training makes it possible that dismissal on the grounds of incompetence or business reasons can be avoided, the employer is obliged to ensure such training or education.[23] Since this is his obligation, the financial

[21] It can be understood that, when an employee wishes to take up education or training in his own interest, this is his right. However, when an employee is referred to training by an employer due to requirements of the working process, this is his or her duty. See Teršek, Medved, Pravica delavcev do dodatnega izobraževanja praksi (2018), p. V.

[22] Often, such contract of education stipulates parties, type, duration, and the process of education or training, in whose interest the education or training is undertaken, costs of education (such as tuition, transport costs) and/or their reimbursement, obligation to work and the determination of working time or absence from work and compensation of pay, rights and obligations of an employee after completion of education or training, reimbursement duties if obligations are not fulfilled, etc. See Pisnik, Izobraževanja delavcev na delovnem mestu (2018), p. 18; Scotegagna - Kavčnik, Pogodba o izobraževanju (2018), p. 24; Korpič - Horvat, Pogodba o izobraževanju med delavcem in delodajalcem (2006), p. 24; and Korpič - Horvat, Izobraževanje, pravica in dolžnost delavca (2007), p. 44.

[23] Furthermore, it is the duty of an employer to ensure that employees are trained to perform their work safely. This obligation relates to various moments, either when concluding an employment relationship, before reassignment to a different post, before new technology is introduced or when other changes take place that could result in a change of safety at work. See Article 38 of the Slovenian Health and Safety at Work Act (ZVZD-1), Official Gazette of RS, No. 43/11.

burden of such training or an education programme is on the employer,[24] meaning that *no additional obligations with regard to financing can be placed on the employee* and effectively prohibiting a "working obligation" provision in the form of continued performance of work for this employer. This rule relates merely to one segment of financed education or training programmes undertaken by the employees and paid by the employers.

In other cases, *a contrario*, financing of such a programme by an employer would mean incurrence of a "debt" by the employee, which should be "repaid" by continuing to work for an employer for some time afterwards. This is applicable to a higher degree when the interest is solely or predominantly in the employee's domain. An education of an employee in his or her own interest can be something that is not related to the working process, and the employer might not even (have to) know about it. An example of this is learning new foreign languages, which is usually merely a manner in which one's leisure time is spent and has no connection to the employer. Only when an employer finances such education or a training programme, they wish to ensure that their financial assistance is "insured" and this can be seen as completely ordinary.[25] Whether the employer will do so, depends on his understanding of the content of the relevant education or training programme. Even though he cannot prevent employees from educating themselves (since this is their constitutional right), he is not obliged to its financing.

An employer will likely only do so either to assist an employee or when such training or education programme is to some extent beneficial for the company as well. The latter case is likely prevalent, and it has to be kept in mind that generally, new knowledge or title or vocational competence attained by an employee is an investment in the employee himself or herself, which will (almost always) positively correlate to a more quality provision of work due to new experiences, etc.[26] Furthermore, an employer has to be aware that only a technically and technologically educated employee can contribute to improved business results in a highly competitive market. This can simultaneously benefit the employees as well, as they can improve their chances of remaining employed, being promoted and/or ease and improve their respective workloads.[27]

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[24] See Article 170 of the Slovenian Employment Relationships Act, especially Paragraphs 1 and 2.

[25] See Šetinc Tekavc, Delovno razmerje in izobraževanje delavca (2001), p. 255; and Pisnik, Izobraževanje delavcev na delovnem mestu (2018), pp. 18–19.

[26] See Pisnik, Izobraževanje delavcev na delovnem mestu (2018), pp. 18-19.

[27] See Teršek, Medved, Pravica delavcev do dodatnega izobraževanja (2018), p. II; Bardutzky, Pogodba o izobraževanju (2005), p. 20. This is one of the reasons why employees are usually very interested to continue their education or training programmes to further improve their professional competences. See Šetinc Tekavc, Delovno razmerje in izobraževanje delavca (2001), p. 261. Due to beneficial factors for both employment relationship parties, costs of education or training programmes is sometimes also shared financially between both parties (without express determination of a further working obligation phenomenon). See Korpič - Horvat, Pogodba o izobraževanju med delavcem in delodajalcem (2006), p. 23.

From a theoretical labour law perspective, there could be no legal issues if an employer obliges himself to finance training or education programmes with no additional reimbursement duties for the employee if the employment relationship ceases to exist. The contractual arrangements can always be more favourable for an employee in comparison with statutory provisions; merely the opposite is (generally) prohibited. Labour law is in part *ius cogens* as it intends to safeguard the subordinate position of the employee in an employment relationship, therefore limiting the autonomy of the parties. In other words, only when training or education-related contractual arrangements would be disproportionate to the detriment of the employee, would this be problematic. However, the answer to the question whether the contract of education in Slovenia is really a special contract of labour law is not uniform. Korpič - Horvat sees it as such, noting that it is mentioned expressly in the Labour Act (which regulates employment relationships), even though that rules of civil law apply sensibly (i.e. in a manner that takes into account protective function of labour law).[28] Šetinc Tekavc, differently, sees it first-hand as a civil law contract. Even though an employer is a superior party in a contractual employment relationship, neither the Labour Act nor collective agreements do not entail specific safeguarding provisions that would guard employees from the conclusion of such contracts that would be different to their interest.[29] In the currently applicable Labour Act, the contract of education is (still) seen solely as a measure for determining more precise rights and obligations.

Irrespectively of the stance that is taken in answering this dilemma, it is presumed that most of the time, the proportionality between an employer and an employee is sought in contractual relations. When assessing this proportionality, a plethora of factors may be relevant.[30] Illustratively, a Slovenian Supreme Court case can be referenced here, where these factors are clearly outlined. The case VIII Ips 320/2010[31] concerned a female employee, who was absent from work for 16 months (consisting of periods of study, sickness and leave) to prepare for the Slovenian (legal) bar exam. She received full pay in the meantime without having an obligation to work and was then obliged to remain employed at the same employer for a subsequent period of 5 years, or having the duty to reimburse the proportional amount of costs borne by the employer during the study period if she decided to leave. She invoked the argument that the "working obligation" period can be proportional only if it is of the same duration as the duration of the study, i.e. 16 months in the relevant case, taking as grounds for analogy Slovenian State Legal Exam Act,[32] where such a ratio is established (but for different kinds of cases, outli-

28 Korpič - Horvat, Izobraževanje, pravica in dolžnost delavca (2007), p. 43.

29 See Šetinc Tekavc, Delovno razmerje in izobraževanje delavca (2001), p. 253.

30 One of them, perhaps the most important one, is to whom does such training or education benefit the most and has the interest in pursuing it.

31 Supreme Court of the Republic of Slovenia, No. VIII Ips 320/2010 of 3 April 2012.

32 State Legal Exam Act (ZPDI), Official Gazette of RS, No. 83/03, last amended in 2012.

ned a tad later). On the other hand, the employer argued that such temporal equality did not equate financial equality, where her productiveness would have had to improve substantially (by 100 per cent), so that the costs incurred for education (in the interest of the employee in the concrete case) would have been returned in the same period. The employer argued that his calculations established a period of 5 years during which costs would be "returned" from an investment perspective.

In its judgment, the Supreme Court upheld this line of reasoning. It clearly stated that *the duration of a "working obligation" is not the only criterion that has to be taken into account when deciding on a case-by-case basis*. When the permissible period, for which an employee has to remain in employment (or he bears the obligation to reimburse the costs of education), is being determined, it is also important to consider the *costs of such education*,[33] *facts as to whether the employee has to fully or partly work while undergoing education, in whose interest the education is undertaken*, etc. The Court stressed that looking at these agreements from *a civil law perspective is not incorrect*.[34] In this regard, the civil principle of equivalence of obligations[35] is the principle to be applied, and in the Slovenian court case-law, this is assessed through financial estimations – i.e. what is the required period of employment after undergoing education that the wages and other benefits paid based on an employment relationship will off-set or balance the payment (i.e. investment) of education or training by the employer.

This case-law was later reaffirmed by another judgment of the Slovenian Higher Labour and Social Court,[36] where the Court decided that a "working obligation" (or the reimbur-

[33] For instance, training or education can be relatively short and very expensive, such as in the case of pilots or soldiers. On the other hand, training or education can be lengthy and rather inexpensive, for instance by taking up learning of a foreign language.

[34] This judgment of the Supreme Court deviated from and changed the judicial practice of two previously adjudicated cases by the Slovenian Higher Labour and Social Court (Pdp 1164/2009 of 11 March 2010 and Pdp 1033/2005 of 15 February 2007). In those two previous cases, the Court argued that a provision of a contract of education is void, due to it being contrary to the Constitution's Article 49 guaranteeing freedom to work. In those two cases, contractual provision imposed an obligation to remain in employment for the duration, which was more than four times (5 years versus 13 months of education) or three times as long as duration of education, respectively.

[35] Contained in Article 8 of the Obligations Code (OZ), Official Gazette of RS, No. 97/07, last amended in 2018.

[36] Judgment of the Higher Labour and Social Court Pdp 393/2013 of 18 July 2013. Although focusing more on performance of obligations reflecting specifics of some contracts of education, mention can be made of some newer court cases, that is Judgment of the Higher Labour and Social Court Pdp 406/2017 of 17 August 2017, Judgment of the Higher Labour and Social Court Pdp 166/2017 of 24 August 2017, Judgment of the Higher Court in Ljubljana I Cp 2300/2017 of 17 January 2018, and Judgment of the Higher Labour and Social Court Pdp 963/2017 of 12 April 2018.

sement of costs of education) lasting 10 years[37] (which was twice as long as the duration of education)[38] in an employment relationship was not contrary to the notion of freedom of work as guaranteed by the Slovenian Constitution, because it did not prohibit the person from resigning and taking employment elsewhere. It simply meant that in such a case an employee was required to reimburse the costs of education and this was, according to case-law, not considered as being forced labour, which is prohibited (in Slovenia, without exceptions). It was clearly stated that such a contractual provision is not void unless it is treated as a usurious contract provision (for which a requirement is not only disproportion but also exploitation of distress, poverty, inexperience, recklessness, or dependence).[39]

6.2. State Legal Exam Act

In Slovenia, contractual arrangements related to education or training programme(s) of employees financed by employers are not regulated merely by the Constitution, the Labour Act and the Obligations Code. Several other statutes relate to this phenomenon. One of these statutes is the above-mentioned State Legal Exam Act, which has led to several case-law decisions. It regulates a "working obligation" of a trainee after the completion of the state legal exam (as a uniform exam for future advocates, judges, prosecutors, notaries, etc.). Article 11(a) of the State Legal Exam Act states that a trainee, who has performed judicial training as an employee at a court, at a State's prosecutor's office, or a State's attorney's office, has to conclude an employment relationship after passing the state legal exam for a suitable post at a court, State prosecutor's office, or State attorney's office. It has to be concluded for the same duration or for a shorter period as that of the training and is determined by the Ministry of Justice in its call. The trainee is free from his or her obligation if such a call is not made within 30 days after the completion of the

[37] The contractual provision regarding obligation to remain in employment for 10 years or reimburse the costs of education was not determined to be void also in another judgment of the Higher Labour and Social Court, Pdp 139/2012 of 6 September 2012. The claimant was a medical specialist registrar whose specialisation lasted for 4 years (hence, the ratio was 10 to 4).

[38] Such provisions were sometimes concluded contractually in practice already in the 1990s and were not perceived as troublesome in older literature. See for instance Plešnik, Obveznosti po pogodbi o izobraževanju (1998), p. 26.

[39] If the contract of education is not assessed as a usurious contract, disproportionality between contractual obligations could be grounds for annulment due to an impermissible threat, a mistake or due to deceit. In some cases, the institute of clear disproportion regulated in Article 118 of the Slovenian Obligations Code could be invoked. An annulment of a contract would be possible if a party did not know and was not obliged to know the true value at the time; however, if the other party offered to supplement towards the true value, the contract would remain in force. Concretely, this would result in a modification of a working obligation period. Such a period should be "reasonable". See Scotegagna - Kavčnik, Pogodba o izobraževanju, pp. 24–25; Korpič - Horvat, Izobraževanje, pravica in dolžnost delavca (2007), p. 45; and Korpič - Horvat, Dobri zgledi vlečejo (2005), p. 50.

state legal exam. If the trainee refuses to conclude an employment contract when such a call is made, he or she is obliged to reimburse the costs of training, which is the *sum of gross wages received during the duration of the training*.

This statutory provision has already been invoked by individuals as incompatible with the Slovenian Constitution. For instance, in the judgment of the Higher Labour and Social Court Pdp 850/2008 of 13 January 2009, the Court opined that a judicial trainee was obliged to reimburse the sum of net wages received during the training because the trainee refused to conclude an employment contract after the completion of such training. Obligation to reimburse the sum of net wages (and not gross as is stipulated by the State Legal Exam Act) was because the concluded contract for the duration of training stipulated an obligation of reimbursement of "net" wages. In a subsequent case, in the Higher Labour and Social Court judgment Pdp 764/2012 of 26 September 2012, the Court decided that a judicial trainee was obliged to reimburse the sum of gross wages received during the training because the trainee refused to conclude an employment contract after the completion of the training. The Court relied on Article 11(a) of the State Legal Exam Act, which in its view determines more precisely the balance of constitutional provisions (stated above). Not long before this decision, the Decision of the Slovenian Constitutional Court,[40] with proceedings initiated in 2010 and decision rendered in March 2012, assessed the constitutionality of the statutory provision of Article 11(a) the State Legal Exam Act.

The Constitutional Court firstly emphasised that the judicial traineeship is carried out according to a special programme, in a lengthy, particular and demanding manner; therefore being very different from training in other sectors. Moreover, such programme is intended to train someone for the performance of professions in the field of the judiciary (i.e. judge, attorney, prosecutor, and notary). Therefore, it is legitimately treated differently than traineeship in general by the Labour Act. Moreover, judiciary trainees are trained for taking a State legal (bar) examination by attending court sessions and hearings, drafting judgments and other judicial documents, accepting the minutes of the parties' files and drafting minutes. These tasks are aimed at acquiring special knowledge, and the Constitutional Court saw the judicial traineeship as being fundamentally educational since the task of trainees is primarily their own training for the passing of the exam. Regarding the constitutionality of Article 11(a) of the State Legal Exam Act and its (in)compatibility with the Constitution's Article 49 regulating freedom to work (especially its aspect of free choice of employment), the majority decision was that the first is compatible with the second.[41]

[40] Decision of the Slovenian Constitutional Court U-I-174/10-11, Up-944/10-7 of 1 March 2012.

[41] It might be interesting to mention that the voting was 6 versus 3. One of the three judges against this decision was also judge Etelka Korpič - Horvat, who predominantly focuses on and is expert in labour law.

The reasoning was that such an obligation (based on the State Legal Exam Act) is inserted and agreed upon in an employment contract, which means that it is not solely imposed, but agreed upon between the parties. It also can not be treated as forced labour or it being absolute, since a facultative substitute option of reimbursing the costs of training exists. It is also temporally limited up to the duration of the traineeship. From an overall perspective, the Court saw the contractual obligations of both parties as evenly distributed and in line with the principle of equivalence of obligations, as one of the key principles of the Slovenian Obligations Code. Moreover, this notion was seen as supported by the fact that employment for the period of traineeship in the judiciary in Slovenia is only one of the options available, other two being voluntary traineeship or traineeship at court, where the trainee is already employed elsewhere (for instance, at an attorney's office). In the latter two cases, no payment for employment is received and, consequently, no working or reimbursement obligations exist afterwards.

The decision can be critically assessed, since the applicable statutory provision requires the reimbursement in the sum of *gross wages*, although the employee does not receive them in full since social security contributions and income tax are deducted from them. Due to spatial restrictions, a list of arguments as to why this is problematic is left out and perhaps an opportunity for a separate contribution elsewhere. What can be said very briefly is that fundamentally, from fairness or an equivalence standpoint, it is unjust that a trainee is obliged to pay more than what he or she receives. It is questionable whether the Court had overlooked this, since the grounds for a constitutional appeal and an initiative was made by an applicant, who in the concrete case had the duty to reimburse the net wages (and is perhaps linked to the aforementioned case of the Higher Labour and Social Court Pdp 850/2008 of 13 January 2009). There is also no use of the word "gross" (Slovenian *bruto*) in the decision. Another provocative speculative thought could be made. It is often said that the legal arena might not always be about the law and justice but is often faced with reality factors. It could be questionable whether the Constitutional Court, as part of the judiciary as such, would really turn their back on (regular) judiciary when assessing the (un)constitutionality of a statute, which enables the judiciary to handpick the (likely best) candidates, who have passed the State legal (bar) exam, and obliges them to remain in the judiciary for (up to) two years.

It could be argued that the proportionality aspect that has been developed in the case-law of the CJEU and the Slovenian Supreme Court is still slightly, but incorrectly, overlooked. Several illustrative examples could be mentioned, either on a contractual case basis[42] or as statutory proposals. Only the latter is relevant within this subsection and is,

[42] For instance, a one-year training period valued in the range of EUR 5.000 as grounds for a 10-year working obligation at the employer. See Scortegagna-Kavčnik, 2018, pp. 24–25. Moreover, the cost of education higher than EUR 400 could be grounds for a working obligation period of at least 2 years. See Teršek, Medved, Pravica delavcev do dodatnega izobraževanja (2018), pp. VII–VIII. It

therefore, outlined in more detail. In autumn of 2017, the Slovenian Ministry of Justice had the idea to amend the State Legal Exam Act and accommodate the exam accordingly. With relevance to the topic of this contribution, the obligation of the (employed) candidate after the examination was to be changed.[43]

The current statutory obligation to remain employed for the same period as the training lasted, where the period to contact the candidate is 30 days after the successful completion of the exam, was proposed to be changed in the following manner. The period for contacting the candidate was to be extended to one year, and the "working obligation" was proposed to last for the period of (a minimum of) four years, i.e. at least twice as long as before.[44] Not only was the temporal dimension now possibly disproportionate, but a one-year period is also vastly too long. Being obliged contractually to accept proposals offered in a short timeframe (of 30 days) after the exam's completion is rational and less problematic. However, a year is a long period and a person could find a new job in the meantime, move closer to the place of work, buy real-estate or conclude a rent agreement for a longer fix-term period, have a child and conclude a day-care agreement with a kindergarten, etc. Having the capacity to one-sidedly influence the multitude of various elements of one's life-style for a lengthy period, leaving him or her in doubt as to which choices to make, essentially altering their life after the completion (in most cases) of their last exam ever to be undertaken, is not proportionate. In this respect, it seems positive that the statute has not yet been amended (to the detriment of trainees).

6.3. Other Relevant Statutory Acts

In the preceding few paragraphs, significant attention was given to the Slovenian State Legal Exam Act for various reasons, among them also due to the existence of the case-law. However, the State Legal Exam Act is not the only statute in Slovenia stipulating a "working obligation" or a reimbursement duty. Another important statute is the Medical Practitioners Act,[45] which contains a special provision in Article 25(4). It states:

> "A specialist registrar,[46] who, after the conclusion of a specialist training, refuses to conclude an employment relationship for the same period as was the duration of the specialist training at a public medical institution for the provision of health

is questionable whether any proportionality exists in such cases between rights and obligations of both parties from the financial perspective and enshrined in the principle of equivalent obligations.

43 The text of the statutory proposal from 19th October 2017 was also sent to the Faculty of Law, University of Ljubljana, in order to receive comments on it, since this is one of the faculties to whom this statute is related.

44 Ibid., see Article 23. The reimbursement duty of payment of all gross wages received during the training remained in the proposal.

45 Medical Practitioners Act (ZZdrS) Official Gazette of RS, No. 72/2006, last amended in 2018.

46 A medical doctor receiving advanced training in a specialist field of medicine.

services in the region, for which the specialist training was performed, shall reimburse all the costs incurred regarding the specialist training, except for the wages and other types of income from the employment relationship."

The reimbursement here does not relate to wages, but to other costs incurred regarding specialist training, for instance, used training material, mentoring costs, etc. The importance of the statute is notable in Slovenian public healthcare system since the medical doctor's trade union has voiced wishes in the previous few years to raise their wages stating that they are comparatively lower than in other (western) Member States. This provision is one aspect of why Slovenia has been, to a larger extent, able to retain its medical doctors in the public system, although some already make use of freedom of movement and pay-off the reimbursement amount on the grounds of higher pay in other Member States.

Another important statute is also the Civil Servants Act.[47] According to Article 101 titled "Education in the Interest of an Employer", a civil servant has the right to candidacy for a referral to education for attainment of additional knowledge or the level of education in the interest of an employer. The selection and referral are made with an internal tender if sufficient financial resources exist. In the case of a referral, an agreement is concluded between the civil servant and the head of a public department. This civil servant has to remain in an employment relationship for the same amount of time, as was the duration of education. If this is not the case, the employer has the right to demand the reimbursement of a proportional amount of costs incurred for the education provided. This provision has not been problematic in the case-law, at least through research carried out by analysing publicly accessible judgments (of regular appeal and revision courts and the Constitutional Court case-law). Nevertheless, it is questionable whether the division of duties is proportional here since the attainment of additional knowledge or the level of education is in the "interest of an employer". When a civil servant is a candidate for an education programme, obviously, he or she expects benefits from it, but overall, only the temporal perspective is followed here. According to the previously highlighted Supreme Court judgment, several other factors should be considered in assessing the parties' duties in light of the principle of equivalent obligations (i.e. in whose interest the education is, its costs, the added value of such education for work performed afterwards, work carried out full-time or part-time during the education process, etc.). Obviously, it is easier to regulate one phenomenon with a uniform provision. However, the legal reality is that all cases should not be "gathered and thrown in the same basket" since various minor factual circumstances can often completely change the outcome. Since the publicly accessible case-law is non-existent on the issue, there is no need to discuss it any further.[48]

47 Public Employees Act (ZJU*)*, Official Gazette of RS, No. 63/2007, last amended in 2012.

48 Diverging opinions exist as to what happens if a civil servant resigns and is then re-employed in a different State institution. Some do not see this as a problem since they are still employed by the

From a Slovenian statutory perspective, two more acts regulate the idea of imposing a "working obligation" or a reimbursement duty after the training or education had been completed. They both relate to armed forces in the area of defence. The first is the Defence Act,[49] which stipulates in Article 90 that persons, who have concluded a scholarship agreement with the Ministry of Defence, shall perform army service training after their educational training in line with the legislation. Once the education and army service training had been completed, they shall conclude an employment contract with the Ministry of Defence and this establishes them as members of the permanent composition of the Slovenian army. If they refuse to enter into the above-mentioned employment relationship, they have to reimburse all income received during and for educational and army service training. If such an employment contract is concluded, Article 93 of the Defence Act further regulates the rights and obligations of parties during the validity of the employment contract. According to Article 93(2) of the Defence Act, a member of the permanent composition of the army may resign, but has to reimburse a proportional amount of costs of the basic army vocational training if the resignation is done before the lapse of 10 years since that employment contract has been agreed upon. The proportional amount of costs is determined by calculating the costs of basic army training for the period of 10 years (as if the employment contract has been concluded for such a timeframe) and subtracting the amount of time that a person has already been employed as a member of the permanent composition of the army. The reimbursement of the costs of training shall not apply to cases in which resignation is a consequence of valid health reasons for the employee.

The second statute relating to armed forces is the Service in the Slovenian Armed Forces Act,[50] which contains a provision on referral to education or vocational training in Article 57. An army person[51] can be ordered to attend educational or vocational training that can last for more than a full year. Rights and obligations of an army person for the duration of the training are defined in an agreement if the training lasts for more than 30 days or if its costs are higher than the last average monthly wage in Slovenia according to official statistical data. An army person that has concluded such an agreement shall remain in an employment relationship in army service for at least twice as long as

Republic of Slovenia. See Bardutzky, Pogodba o izobraževanju (2005), pp. 20–21, for more about the particularities in the public sector tied to contract of education.

49 Defence Act (ZObr), Official Gazette of RS, No. 103/2004, last amended in 2015.

50 Service in the Slovenian Armed Forces Act (ZSSloV), Official Gazette of RS, No. 68/2007, last amended in 2008.

51 According to Article 3(1)(2) of the Service in the Slovenian Armed Forces Act, an army person is a person who, as a soldier, junior officer, officer or an army employee, professionally performs army service or a soldier during the period of army service or a member of the reserve composition, if he or she is called up for army service.

the duration of the educational or vocational training provided.[52] In the case of an early resignation by the employee, he or she has to reimburse the proportional amount of the costs of the training provided and other income received during the period of training.

7. Collective Agreements as Sources of Regulatory Labour Law Provisions

It is interesting that such "working obligation" is not stipulated only by the statutes as one of the sources of the labour law rules in Slovenia. These are, to some extent, regulated also in three sectoral collective agreement(s).

The first example concerns the Collective Agreement for the Sector of Education in Slovenia,[53] which entails a smaller subsection regarding education (Slovenian *izobraževanje*) in the interest of an employee. According to Article 55(a) of the collective agreement, the institution at which an employee is employed shall allow the employee to pursue additional education knowledge in line with its abilities. Article 58 further states that an employee who is sent to an education programme by an institution (i.e. the employer) is obliged to remain employed in this institution for the same period as was the duration of the education programme. There are no additional provisions with respect to reimbursement of costs of education or wages or anything of such kind.

The second example is the Collective Agreement for Research Activities,[54] which stipulates in Article 39 that an employee who was sent to undertake an education or training programme must remain at the institute (i.e. the employer) on its demand for a period that is twice as long as the duration of the education or training but not longer than 8 years.[55]

The last example is the Collective Agreement on the Slovenian Banking Sector.[56] According to Article 113, an education, training, or vocational training contract is to con-

[52] This does not apply when a special agreement is not concluded, i.e. if the training is shorter than 30 days or costs less than the amount of last average monthly wage in Slovenia according to official statistical data.

[53] Collective Agreement for the Education Sector in the Republic of Slovenia, Official Gazette of RS, No. 52/1994, last amended in 2018.

[54] Collective Agreement for Research Activities, Official Gazette of RS, No. 45/92, last amended in 2018.

[55] A "working obligation" in the duration that was twice as long as the duration of an education or a training programme was very common in the past, more specifically somewhere up until the new millennium. This was also accepted in the case-law at the time. See Šetinc Tekavc, Delovno razmerje in izobraževanje delavca (2001), pp. 257–258. The relevant collective agreement was adopted in 1992.

[56] Collective agreement on the Slovenian banking sector, Official Gazette of RS, No. 5/11, last amended in 2018.

tain a period when the employee is obliged to remain to perform work for the employer after completing his or her education, training, or vocational training programme. This period is dependent on the amount of employer's expenses for the programme, which includes, in addition to direct costs, also wage compensations and other expenses.

There is also plenty of collective agreements (in total 24 out of 26 sectoral agreements in the private sector) that contain provisions regarding education or training of employees, but the majority of them from a more general perspective without an express "working obligation" provision foreseen.[57]

8. Concluding Thoughts

From a national perspective, it cannot be overlooked that statutes expressly regulating the "working obligation" phenomenon tie employees with an obligation to continue working for their employer after an education or training programme has ended to its duration. This is a reflection of the legal thought from a few decades ago where it was common to have the "working obligation" for the duration that was twice as long as the training lasted.

The legal reality, however, is not uniform and straightforward. Education or training programmes can be very different, meaning that they can be short and expensive or lengthy and inexpensive. Moreover, it may vary who the main beneficiary of the training is since this often benefits both parties of an employment relationship. Whether the employee works in full or in part during the training period can also be relevant. In the last decade, changes in the Slovenian case-law can be observed, most importantly from the judgment of the Slovenian Supreme Court VIII Ips 320/2012, where these factors were outlined, and the idea that the duration of a "working obligation" is not the only criterion that has to be taken into account when deciding on a particular case was stressed.

Whether these statutory provisions are, in the currently applicable legal framework, proportionally built around the principle of equivalence of obligations, as one of the key principles of the Slovenian Obligations Code, is questionable. Even if they were to be accepted as constitutional, where by default neither employment contract party has an advantage over the other in a national constitutional setting, it is questionable how an assessment of these schemes would in cross-border settings fare before the CJEU where the workers' freedom of movement is the general rule and rights of others (i.e. employers in the public sector), established through the prism of public interest, the exception.

[57] For a lengthy, precise, up-to-date and multi-faceted analysis see Franca, Med teorijo in prakso: vsebine izobraževanja in usposabljanja v kolektivnih pogodbah dejavnosti (2018), pp. 618–626. Nevertheless, the "working obligation" was not the subject of her analysis.

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Delavčeva obveznost nadaljnje zaposlitve za določeno obdobje ali povrnitev stroškov, povezanih z delodajalčevim financiranjem usposabljanja ali izobraževanja

Avtor obravnava razmerje med pravicami in obveznostmi strank v delovnem razmerju, ki so odraz financiranja izobraževanja oziroma usposabljanja zaposlenih s strani delodajalca. Delodajalci tipično želijo vlagati v razvoj in/ali nadgradnjo sposobnosti delavcev, pri čemer iščejo varovalne mehanizme za uživanje sadov pridobitve novih znanj, kar se pogosto izkaže s pogodbeno obveznostjo delavcev, da morajo biti še določen čas zaposleni pri delodajalcu ali pa povrniti stroške izobraževanja oziroma del teh stroškov (tako imenovana delovna obveznost). Ustavni (a)simetriji sta tako lahko dvojni. V okviru prava EU se (v okviru konteksta) presoja, koliko je pravica do izobrazbe, usposabljanja in vseživljenjskega učenja, z namenom ohranitve ali pridobitve znanj, ki posameznikom (delavcem) omogoča polno vključenost v družbo in uspešen prehod na trgu dela (kot socialna pravica) (ne)združljiva z (ekonomsko) svobodo gibanja delavcev. Z vidika nacionalne ustavne ureditve pa so presojane meje med omejevanjem svobodne izbire zaposlitve (kot socialne svoboščine) in varstvom delodajalčeve (ekonomske) pravice do zasebne lastnine. V luči prava EU je ideja s primeri Sodišča EU ponazoriti, da je ekonomska svoboda gibanja delavcev splošno pravilo in so izjeme le redko sprejete. To je pomembno, saj so primerjalnopravno pravzaprav v vseh državah članicah v taki ali drugačni obliki predvidene možnosti za pojav »delovne obveznosti«. Ta problematika je v Sloveniji podrobneje urejena na različne načine, ki se pojavljajo tudi primerjalnopravno, natančneje pa je to urejeno v področnih zakonih, na primer ZPDI, ZZdrS, ZObr in ZSSlov (v vsakem nekoliko drugače), in tudi v nekaj kolektivnih pogodbah na ravni dejavnosti. Ni mogoče spregledati dejstva, da se »delovna obveznost« v večini teh virov povezuje (zgolj) z obdobjem programa izobraževanja ali usposabljanja. V zadnjem desetletju je v Sloveniji mogoče opaziti razvoj v sodni praksi Vrhovnega sodišča, ki je presojalo pogodbene (in ne zakonske) določbe. Jasno je poudarjeno, da so taki pogodbeni dogovori lahko presojani v luči civilnopravnih pravil, kjer je ključno načelo enake vrednosti dajatev. V tem smislu so pravice in obveznosti obeh strank pravzaprav presojane skozi finančno prizmo, kar pomeni, da »delovna obveznost« lahko traja (le) tako dolgo, da se »naložba« delodajalca njemu (finančno) povrne. Pri tem je treba poleg dolžine programa izobraževanja ali us-

posabljanja upoštevati tudi strošek izobraževanja, ali je zaposleni v tem času opravljal delo (polni ali krajši delovni čas), v čigavem interesu je bilo izobraževanje itd. Vprašanje je, koliko so zakonska pravila v Sloveniji skladna z argumentacijo in obrazložitvijo Vrhovnega sodišča. Poleg tega, tudi če bi bile zakonske določbe ocenjene kot ustavno skladne, je vprašanje, ali bi enako oceno (z vidika prava EU) sprejelo Sodišče EU, ki bi delavčevo svobodo gibanja dojemalo kot splošno pravilo ter pravice drugih (razumljeno kot javni interes) kot izjemo, ki jo je treba razlagati ozko.

Ključne besede: izobraževanje, usposabljanje, obveznost nadaljnje zaposlitve, povrnitev stroškov, sorazmernost.

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Employee's "Working Obligation" for a Certain Period or Alternative Costs' Reimbursement Resulting from Employer's Provision of Specific Training or Financing of Education

The author focuses on the interplay between rights and obligations of the parties in the employment relationship stemming from provision and financing of educational or training programmes for employees. In contemporary labour law, employers wish to invest in their employees while seeking safeguards to recoup the benefits, often resulting in obliging the employees to continue working for them for a certain period or otherwise be required to reimburse (part of) the costs incurred (hereinafter "working obligation"). Constitutional (a)symmetries can in this case be two-fold. In the ambit of EU law, it is assessed (within the framed context) to what extent is the right to education, training, and life-long learning to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market (as a social right) (in)compatible with the (economic) freedom of movement for workers. From a national constitutional law perspective, boundaries between the restriction of free choice of employment (as a social freedom) and the protection of employer's (economic) right to property are assessed. Within the EU law framework, the idea is to show, through vividly illustrated CJEU cases, that economic freedom of movement for workers is the general rule and exceptions are rarely accepted. This is important, as comparatively, practically all Member States provide for some form of a legal framework towards the existence of the "working obligation" phenomenon. The framed topic in Slovenia is regulated through more or less all pathways that can be identified comparatively, which can be observed in several specific statutes—the State Legal Exam Act, the Medical Practitioners Act, the Civil Servants Act, the Defence Act and the Slovenian Armed Forces Act (each with their own specifics), and also in some sectoral collective agreements. It cannot be overlooked that majority of these tie employees with an obligation to continue working for their employer after an education or training programme has concluded (only) in relation to its duration. In the last decade, changes in the Slovenian case-law can be observed, most importantly from judgment(s) of the Slovenian Supreme Court, which assessed contractual (and not statutory) provisions. It is clearly stressed that such contractual

arrangements may be examined from a civil law perspective where the key principle of equivalence of obligations is relevant. In this sense, rights and obligations of both parties are (to be) assessed from a financial point of view, meaning that the "working obligation" should only last so long that the employer's "investment" is recouped. Alongside duration of the training, it is important to also consider the costs of such education, whether the employee has to fully or partly work while undergoing education, in whose interest the education is undertaken, etc. It is questionable to what extent are Slovenian statutory rules still in symmetry with the argumentation and reasoning provided by the Supreme Court. Furthermore, even if they were to be accepted as constitutional, it is questionable how assessment of these provisions would fare before the CJEU where the workers' freedom of movement is the general rule and rights of others (seen as public interest) the exception that needs to be understood restrictively.

Keywords: education, training, work obligation, reimbursement of costs, proportionality.