Decision 17/2014 (V. 30.) AB

on finding the wording of Section 65 (5) of Act I of 2012 on the Labour Code "before the notice was given" to be contrary to the Fundamental Law and on its subsequent annulment

In the matter of a petition by the Commissioner for Fundamental Rights seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of certain legislative provisions, with concurring reasoning by Dr. Imre Juhász, Dr. Béla Pokol and Dr. László Salamon, Justices of the Constitutional Court, the Constitutional Court, sitting as the Full Court, , has adopted the following

decision:

The Constitutional Court holds that the wording "before the notice was given" in Section 65 (5) of Act I of 2012 on the Labour Code is contrary to the Fundamental Law and therefore annuls it.

Section 65 (5) of Act I of 2012 on the Labour Code shall remain in force with the following wording:

"The provisions of points (a) and (e) of Subsection (3) hereof shall apply only if the employee has informed the employer thereof."

The Constitutional Court shall publish its decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. On 14 December 2012, the Commissioner for Fundamental Rights filed a petition seeking the consideration and annulment of Section 65 (5) of Act I of 2012 on the Labour Code (hereinafter referred to as the "Labour Code") on the basis of Section 2 (3) of Act CXI of 2011 on the Commissioner for Fundamental Rights and Section 24 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"). The contested provision imposes an obligation to provide information before the notice of termination of employment is given as a condition for invoking the prohibition of notice of termination of employment in respect of pregnancy or participation in a human reproductive procedure.

[2] 2. Pursuant to Article 24 (2) (e) of the Fundamental Law, the Constitutional Court shall, *inter alia*, at the initiative of the Commissioner for Fundamental Rights, review the conformity of legislation with the Fundamental Law. Accordingly, the Constitutional Court Act provides that the Constitutional Court shall review the conformity of a statute with the Fundamental Law on the basis of a petition of the Commissioner for Fundamental Rights containing an explicit request if, in the opinion of the Commissioner for Fundamental Rights, the statute is contrary to the Fundamental Law.

[3] In his petition, the Commissioner for Fundamental Rights objected that Section 65 (5) the Labour Code restricts the right to human dignity and privacy of the persons concerned without any constitutional justification and is therefore contrary to Article II and Article VI (1) of the Fundamental Law.

[4] The Commissioner for Fundamental Rights has explained that 65 (3) (a) and (e) of the Labour Code , the guarantees of protection against dismissal are a duty of the State to protect institutions under Article L (2), Article XV (3) and (5) and Article XVII (3) of the Basic Law (obligation of institutional protection), and not a fundamental right enforceable against the State. Thus, the State is essentially free to choose the manner in which it provides women with children with additional protection in the world of work. Accordingly, access to benefits and additional entitlements may be subject to conditions, such as the notification of the employer of the circumstances giving rise to the benefit in the case of positive entitlements requiring actual action (e.g. working time allowance). The employer cannot otherwise become aware of this during the first period of pregnancy, in the absence of any external signs, unless the employee so indicates. It is therefore up to the employee to decide whether she wishes to make use of the benefits to which she is entitled and, to this end, to inform the employer of the sensitive private information. However, according to the Fundamental Rights Commissioner, the rule on protection against dismissal is a different type of protection with a different structure. It is a potential type of protection mechanism that does not presuppose notification, since it is "activated" if and only if the employer wishes to dismiss the employee. Since protection against dismissal by the employer does not require any specific action by the employer, the declaration cannot be automatic. In the case of protection against dismissal, the requirement to make a declaration must be duly justified by the State, since it concerns information relating to the employee's most personal internal sphere, his or her health and family status. According to the Commissioner for Fundamental Rights, there is no such constitutional justification.

[5] The Commissioner underlined that protection against dismissal in the case of pregnancy can cause problems, especially in the first period of pregnancy, when pregnancy is often interrupted for a variety of reasons. In such cases, the requirement of prior notification is unduly humiliating for the woman who has lost her foetus, since she must also inform her employer of the interruption of the pregnancy. It is also in itself an affront to the dignity of the woman who is pregnant or undergoing a reproductive procedure to be forced to decide whether to accept to be informed of the termination of pregnancy or the failure of the procedure or to risk losing her job without being informed.

[6] The Constitutional Court obtained the opinion of the State Secretary for Employment Policy of the Ministry of National Economy.

II

[7] 1. The relevant provisions of the Fundamental Law read as follows:

"Article L (1) Hungary shall protect [...] the family as the basis for the survival of the nation. [...]

(2) Hungary shall support the commitment to have children.

(3) The protection of families shall be regulated by a cardinal Act."

"Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

"Article VI (1) Everyone shall have the right to have his or her private and family life, home, communications and good standing of reputation respected.

(2) Everyone shall have the right to the protection of his or her personal data [...]"

"Article XV (1) Everyone shall be equal before the law. [...]

(3) Women and men shall have equal rights.

(4) By means of separate measures, Hungary shall help to achieve equality of opportunity.

(5) By means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities."

"Article XVII (3) Every employee shall have the right to working conditions which ensure respect for his or her health, safety and dignity."

[8] 2. The provision challenged by the petition reads as follows:

"Section 65 (5) The provisions of points (a) and (e) of Subsection (3) hereof shall apply only if the employee has informed the employer thereof before the notice was given.."

III

[9] The petition is partially well-founded.

[10] 1. The Constitutional Court first reviewed the development of the employment protection legislation. Already Act XXII of 1992 on the Labour Code (hereinafter referred to as the "Former Labour Code") contained the legal instrument of the prohibition of dismissal. Section 90 (1) of the Former Labour Code provided as follows: (a) incapacity for work due to sickness, industrial accident or occupational disease; (b) sick leave for the purpose of caring for a sick child; (c) unpaid leave for the purpose of caring for a close relative at home; (d) treatment in connection with human reproductive procedures, pregnancy, three months post-natal leave or maternity leave; (e) unpaid leave for the purpose of caring for a child, or, even without unpaid leave, until the child reaches the age of three, (f) military service as a conscript or reserve, (g) total incapacity for work in the case of a person in receipt of a rehabilitation allowance or rehabilitation benefit, (h) six months from the date of placement in compulsory care for an employee intending to adopt a child, or, if the child leaves care before the end of the six-month period, during the period of compulsory care.

[11] Thus, the Former Labour Code also listed the duration of pregnancy and treatment in connection with human reproductive procedures among the cases preventing the employer from terminating the employment contract [Section 90 (1) (d) of the Former Labour Code]. The latter was introduced by Act LVII of 2005 amending Act XXII of 1992 on the Labour Code (hereinafter referred to as the "Amendment Act") on 3 July 2005. Section 166 of Act CLIV of 1997 on Health Care (hereinafter referred to as the "Health Care Act") contains a list of special

procedures for human reproduction and extends the protection against dismissal to the duration of the treatment in connection with such procedures, with the objective of promoting, from a social point of view, an increase in the number of births and, from an individual point of view, support for those who have children and who seek the assistance of advanced medicine to facilitate childbearing.

[12] The Labour Code retains the institution of the prohibition of dismissal. There are two types of protective situations: where the employer may not terminate the employment relationship by giving notice during the protection period (absolute prohibition of notice of termination of employment), and where the employer may terminate the employment relationship but the notice period does not begin until after a specified period (relative prohibition of notice of termination of employment). Absolute protection against dismissal applies during the following periods: (a) pregnancy, (b) maternity leave, (c) unpaid leave to care for a child, (d) actual voluntary military service in the reserve, and (e) the duration of a woman's treatment for human reproductive procedures under the law, but not more than six months after the start of such treatment [Section 65 (3) of the Labour Code]. Under the relative protection against dismissal, in the event of dismissal by the employer, the period of notice shall begin at the earliest on the day following the expiry of the period of: (a) incapacity for work due to sickness, but not more than one year following the expiry of the sick leave, (b) incapacity for work due to caring for a sick child, (c) unpaid leave for the purpose of caring for a relative at home [Section 68 (2) of the Labour Code]. In both cases, the prohibition applies to the unilateral termination of an employment relationship for an indefinite period for reasons related to the employee's conduct, ability or functioning of the employer in relation to the employment relationship. Section 66 (8) of the Labour Code of the Labour Code also allows for the termination of a fixed-term employment relationship during liquidation or bankruptcy proceedings for reasons based on the employee's ability or if the maintenance of the employment relationship becomes impossible due to an external cause beyond the employee's control. Accordingly, the prohibition of notice of termination of employment also applies to fixed-term employment. However, the prohibition of notice of termination of employment does not prevent the immediate termination of employment of indefinite duration in the event of a qualified breach of duty or impossibility of performance due to the conduct of the other party, or the termination of employment without cause during the probationary period, or the immediate termination of fixed-term employment without cause by the employer. In the event of termination by the employer within the above period, such termination shall be wrongful. The legal consequences of the wrongful termination of employment are set out in Sections 82 and 83 of the Labour Code.

[13] For the purposes of the application of absolute protection, the relevant date is the date of the notice of termination, or, in the case of collective redundancies, the date of the written notification at least thirty days before the notice was given [Section 65 (4) of the Labour Code].

[14] 2. The Constitutional Court, in its Decision 11/2001 (IV. 12.) AB, already stated in its review of the constitutionality of the statutory definition of the grounds for termination, the employer's obligation to state reasons and the prohibitions on termination that the right of free termination, which is enjoyed by both the employer and the employee, is the starting point

against which the statutory provisions containing the conditions for termination of employment and the technical legal solutions applied by the legislator in this context can be reviewed. The Former Labour Code already deviated from the principle of free termination of employment in favour of the employee on a number of points. These rules covered a broader or narrower range of employees, depending on the specific characteristics of each category, or restricted the employer's right to terminate the contract to varying degrees. in the view of the Constitutional Court, however, the legal provisions restricting the right of dismissal by employers must always be regarded as exceptional in relation to the general principle of the right of free dismissal (ABH 2001, 153, 158).

[15] The Constitutional Court has previously reviewed the prohibition of dismissal in relation to temporary agency workers. In its Decision 67/2009 (VI. 19.) AB (hereinafter referred to as the "2009 Court Decision"), the Constitutional Court annulled the provision in Section 193/P(1) in the part worded "Sections 86/A to 96" of the Former Labour Code concerning Section 90 containing the prohibition of dismissal, which made the prohibition of dismissal inapplicable to temporary agency workers. As a consequence of the annulment of the exception rule, Section 90 of the Former Labour Code became applicable to temporary agency work. The 2009 Court Decision was based on the interpretation of Article 66 of Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter referred to as the "Former Constitution"), paragraph (1) of which ensured the equality of men and women in all civil and political, economic, social and cultural rights, paragraph (2) of which made the support and protection of mothers before and after the birth of a child obligatory under "special provisions", and paragraph (3) of which provided for the protection of women and young people in the performance of work, also by means of special rules. As held in the 2009 Court Decision, paragraph (1) contained a fundamental constitutional right, paragraph (2) specified the principle of equal opportunities, contained in Article 70/A (3), for women with children and mothers with young children, and paragraph (3) specifically for women in employment. It concluded from the above provisions that they gave constitutional authority to establish positive discrimination rules for pregnant women and mothers with children, relatively limited in time, according to the time of childbirth. Some of the provisions on protection against dismissal in labour law are based on the fundamental constitutional right enshrined in Article 66 (1) of the former Constitution, its paragraphs (2) to (3) and Article 67 (1) of the Constitution, by providing pregnant mothers and mothers with young children with additional protection, both before and after the birth of their child, against the possible disadvantages to the mother's health and the child's proper development resulting from the existential insecurity caused by the termination of employment. Since the way, the specific scope and the form of support and protection were not defined in the previous Constitution, mothers were entitled to special support and protection in all areas (e.g. health protection, social security, employment) where they could be disadvantaged compared to others because of having a child during the period of their condition (before and after the birth of the child), when they were in a situation which the previous Constitution had determined that they should be protected and supported (a typical example is absence from the labour market). The above provisions, therefore, as part of the complex protection provided by the former Constitution through its provisions on the rights of the child and the protection of the family (Articles 15, 16, 67 of the former

Constitution) to ensure the healthy development of children, have given the power to legislate to eliminate the potential negative effects on women in relation to childbearing (and indirectly on the proper development of children). However, this did not mean that the subjects of law concerned had a constitutional right to protection against dismissal [ABH 2009, 617, 659, 662].

[16] The Constitutional Court, having regard to the criteria set out in Decision13/2013 (VI. 7.) AB regarding the applicability of the provisions of the previous Constitutional Court decision, considered the statements of principle made in its above-mentioned practice to be applicable in the present case as well.

[17] 3. The fact that women require special protection because of their physical and psychological condition during and after pregnancy has been recognised in the legislation and case law of the European Union, as well as in international (labour) law. The Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, to eliminate risk factors which might adversely affect the health of such workers, including pregnancy and breastfeeding (temporary changes in working conditions, working hours, working tasks, exclusion of exposure which might jeopardise safety and health, maternity leave, protection against dismissal, etc.), and to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. For the purposes of the Directive, a pregnant worker is defined as a pregnant worker who informs her employer of her condition in accordance with national legislation or practice. The Court of Justice of the European Communities has previously ruled that Community rules on equality between men and women in the field of the rights of pregnant women and women who have recently given birth aim to protect women workers before and after childbirth (*see* Case C-191/03 McKenna 2005, ECR I-1357, paragraph 1). The principle of non-discrimination, and in particular Articles 2 (1) and 5 (1) of Directive 76/207/EEC, require that protection of women against dismissal be recognised not only during maternity leave but throughout pregnancy. Such dismissal can only affect women and therefore constitutes direct discrimination on grounds of sex (*see* e.g. judgment in *Brown* of 30 June 1998, C-394/96, paragraphs 24-27, judgement in *McKenna*, paragraph 47).

[18] The question of dismissal of women on the grounds of pregnancy, pregnancy-related illness or related "unavailability" has been addressed by the Court of Justice of the European Communities in several judgements cited in the 2009 Court Decision In so doing, it has held that, having regard to the risk that dismissal might jeopardise the psychological and physical well-being of pregnant workers and workers who have recently given birth or are breastfeeding, including the particularly serious risk that a female worker might voluntarily terminate her pregnancy, the Community legislature has provided for a right to dismiss in accordance with Article 10 (1) of Directive 92/85/EEC. Article 92/85/EEC, by imposing a prohibition on dismissal during the period from the beginning of pregnancy to the end of maternity leave (judgement in *Webb* of 14 July 1994 in Case C-32/93, paragraph 21; judgement in *Brown* of 30 June 1998 in Case C-394/96, paragraph 18; judgement in *Tele Danmark* of 4 October 2001 in Case C-109/00, paragraph 26, etc.).

[19] Following the above, the Charter of Fundamental Rights of the European Union, Annex 2 to Act CLXVIII of 2007 on the Promulgation of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, now set out in its Article 33 (1), states that the family shall enjoy legal, economic and social protection, and Article 33 (2) states that, to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

[20] The International Covenant on Economic, Social and Cultural Rights, promulgated by Decree-Law No 9 of 1976 and adopted by the United Nations General Assembly at its Twenty-first Session on 16 December 1966, provides for the protection of mothers and children under the rule of law, Article 10 of which provides that special protection shall be granted to mothers for a reasonable period before and after the birth of a child, during which time working mothers shall be granted paid leave or leave with appropriate social security benefits. Article 8 of the European Social Charter, promulgated in Hungary by Act C of 1999, which under the heading "The right of working women to protection" provides for the granting of working time allowances to nursing mothers, the prohibition of dismissal during maternity leave, the elimination of various forms of harm resulting from dangerous, arduous and unhealthy work, in addition to leave before and after the birth of a child. Even more specific requirements are laid down in Convention No 183 on the Protection of Motherhood, adopted by the General Conference of the International Labour Organisation at its 88th session, amending Convention No 103 adopted at the 35th session of the International Labour Conference in 1952 (hereinafter referred to as the "Convention"), promulgated by Act CXI of 2004. The Convention provides for the protection of pregnant and breastfeeding women against work harmful to the health of the mother or the child, the granting of maternity leave, special leave in the event of illness or complications arising from pregnancy or childbirth, and the granting of cash benefits during such leave, during pregnancy and during related leave, or during the period after taking up employment, within a period to be determined by the Member States, the prohibition of interruption of employment for reasons connected with pregnancy, childbirth and its consequences or breastfeeding, the granting of working time benefits in connection with breastfeeding, etc. provides for the right not to.

[21] 4. The Fundamental Law has already expressed its commitment to the family and the nation as the most important framework of coexistence in the National Creed. Accordingly, Article L (1) of the Fundamental Law lays down the obligation to protect the family as the basis for the survival of the nation, and Article L (2) lays down the obligation to support the bearing of children. Article XV (3) of the Fundamental Law, in addition to the general rule of equality, specifically emphasises the equal rights of men and women. Article XV (4) states as an exception to the general prohibition of discrimination that "[b]y means of separate measures, Hungary shall help to achieve equality of opportunity." Pursuant to this provision, positive discrimination in order to achieve equality in substance and to eliminate inequality of opportunity is permissible, as explained in the explanatory memorandum to the proposed Fundamental Law. And Article XV (5) singles out families, children and women as a group in need of special care and protection alongside children.

[22] Thus, the Fundamental Law does not contain the provisions of Article 66 (2) of the Former Constitution, which, by giving specific expression to the principle of equal opportunities, would explicitly make the support and protection of mothers before and after the birth of a child compulsory, but it still ensures, in accordance with international legal obligations, the equal rights of men and women, contains a general mandate for measures to eliminate inequalities of opportunity, and explicitly singles out families, children and women in the designation of the group to be protected by special measures [Article XV (3) to (5) of the Fundamental Law].

[23] The Constitutional Court finds that the above provisions, in the light of Article L (1) and (2) of the Fundamental Law, establish the State's obligation of institutional protection of women who have children, which is manifested in the fulfilment of various State obligations, but the form, manner and extent of which are not apparent from the constitutional provisions. The State's obligation of institutional protection, as provided for in the Constitution, is further specified in other legislation.

[24] The general rules on the protection of families are laid down in Act CCXI of 2011 on the Protection of Families (hereinafter referred to as the "Family Protection Act"). The preamble to the Act emphasises that the family is Hungary's most important national resource, without the growth of which there can be no sustainable development and economic growth, while at the same time having children must not result in the family falling into poverty. The State therefore helps reconcile work and family life. The Family Protection Act provides a framework in that it sets out the direction of the State's responsibilities and obligations in relation to the family and marriage as recognised and protected institutions. Section 16 of Chapter III (Protection of the family and maternity in the field of employment) of the Family Protection Act lists the benefits to which pregnant mothers are entitled in connection with employment (change of place of work, access to extraordinary or night work, work in other premises, time allowance for medical reviews in connection with pregnancy, employment in a job suitable for the state of health). Section 18 of the Family Protection Act states that a parent is protected by a special law against dismissal, inter alia, if she is pregnant or undergoing treatment in connection with a human reproductive procedure. The above provisions of the Family Protection Act are intended to strengthen the conditions already existing in labour law to ensure reconciliation between work and family.

[25] Women who have children are particularly protected in the field of employment by the Labour Code, including the prohibition of dismissal. In addition, the Labour Code contains other prohibitions and exemptions to protect women who have children. Thus, a worker may not be obliged to work in another place of work from the time she becomes pregnant until the age of three without her consent [Section 53 (3) (a)]. The employee is exempted from her obligation to be available and to work for the duration of treatment in a health care institution in connection with the human reproductive procedure as provided for by law and for the duration of her compulsory medical examination [Section 55 (1) (b) to (c)]. A compulsory medical examination is also a medical examination required in view of the pregnant woman's condition [Section 294 (1)]. Article 113 (1) of the Labour Code, the rules on working time and rest periods apply by way of derogation from the date on which the employee is found to be pregnant until the child reaches the age of three years or, in the case of an employee bringing

up a child alone, until the child reaches the age of three years. In the above cases, unequal working hours may be applied only with the worker's consent, weekly rest days may not be unequally distributed, and no extraordinary working hours or on-call time may be ordered. No night work may be ordered for the worker. Except in cases where the ordering of extraordinary working hours is not restricted (Section 108 (2) of the Labour Code), extraordinary working hours or on-call time may be ordered for a worker who is bringing up a child alone from the age of three until the age of four only with the worker's consent.

[26] In addition to the above, Decree No 33/1998 (VI. 24.) NM of the Minister for National Economy on the Medical Examination and Opinion on Fitness for Work, Occupational and Personal Hygiene (hereinafter referred to as the "Decree") provides special criteria for determining the fitness for work in the employment of women. In accordance with Section 10 (1), it shall be taken into account in the review and assessment of the fitness for work that women (in particular women of childbearing age and pregnant women, including those in the early stages of pregnancy, recently delivered babies, nursing mothers, breast milk suppliers) are unfit or fit only under certain conditions to work under working conditions involving a risk to health or hazardous workloads. Annex 8 contains a tabular list of potentially harmful work activities which may be prohibited for vulnerable groups, including pregnant women. And Section 10 (2) explicitly imposes on the employer the obligation to carry out a risk assessment and to determine the measures to be taken to ensure, inter alia, the health and safety of pregnant women where the working conditions listed in Annex 9 exist.

[27] 5. In his petition, the Commissioner for Fundamental Rights criticised the fact that Section 65 (5) of the Labour Code restricts the right to human dignity and privacy of the persons concerned without any constitutional justification and is therefore contrary to Article II and Article VI (1) of the Fundamental Law. The Commissioner for Fundamental Rights started from the premise that the guarantees of protection against dismissal are an obligation of the State to protect the institution and that, accordingly, the use of the additional rights may be subject to a condition. She considers that the notification of the pregnancy to the employer is a reasonable condition in the case of positive entitlements requiring actual action (e.g. working time allowance). In his view, a distinction should be made between this and protection against dismissal of a potential nature, which does not require any specific action by the employer.

[28] 5.1 whether the reference to the protection against dismissal in Section 65 (3) (a) and (e) of the Labour Code infringes the fundamental rights referred to in the petition. In doing so, it took as its starting point the definition of the scope of protection of the fundamental rights relied on.

[29] The Constitutional Court interpreted the right to privacy and its relation to the right to human dignity in its Decision 32/2013 (XI. 22.) AB. It stated that Article VI (1) of the Fundamental Law, in contrast to Article 59 (1) of the Former Constitution, comprehensively protects the private sphere: the private and family life, home, relationships and reputation of the individual. With regard to the essence of privacy, the Constitutional Court continued to uphold the general statement of the Constitutional Court in its previous practice that the essence of privacy is that it is not possible for others to enter or be seen by others against the will of the person concerned [Decision 36/2005 (X. 5.) AB, ABH 2005, 390, 400]. It pointed out that there is a

particularly close link between the right to privacy guaranteed by Article VI (1) of the Fundamental Law and the right to human dignity guaranteed by Article II of the Fundamental Law. Article II of the Fundamental Law establishes the protection of the inviolable sphere of privacy, which is completely excluded from any state interference, as it is the basis of human dignity. However, the protection of privacy under the Fundamental Law is not limited to the internal or intimate sphere, which is also protected by Article II of the Fundamental Law, but extends to the private sphere in the broad sense (relationships) and to the spatial sphere in which private and family life unfolds (home). In addition, the image of an individual's life (right to reputation) is also protected in its own right (Reasoning [82] to [84]).

[30] The protection of the rights guaranteed by Article II and Article VI (1) of the Fundamental Law is concretised in Article XVII (3) of the Fundamental Law in relation to employment: "Every employee shall have the right to working conditions which ensure respect for his or her health, safety and dignity." The health and safety of workers are guaranteed by Act XCIII of 1993 on Occupational Safety and Health, the dignity of workers is guaranteed by Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, and in the course of employment by the provisions of the Labour Code guaranteeing the protection of personal rights and by Act V of 2013 on the Civil Code (hereinafter referred to as the "Civil Code"), Sections 2:42 to 2:54. Section 9 (1) of the Labour Code lays down the general requirement of the protection of personality rights.. The Civil Code defines personal rights, including the right to privacy and the right to the protection of personal data [Section 2:43 (b) and (e) of the Civil Code]. The protection of personal rights in labour law is of particular importance, according to the reasoning of the Labour Code, primarily because of the subordination of the content of the employment relationship. Section 10 (1) of the Labour Code provides that an employee may only be required to make a statement or disclose information which does not infringe his or her right to privacy and which is relevant to the establishment, performance or termination of the employment relationship.

[31] In view of the fact that the Section 65 (3) (a) and (e) of the Labour Code constitute personal data, the Constitutional Court also recalled the relationship between the right to privacy and the right to the protection of personal data guaranteed by Article VI (2) of the Fundamental Law, as established in its previous case law. The Constitutional Court has interpreted the right to the protection of personal data not as a traditional right of protection, but also taking into account its active aspect, as a right of informational self-determination [Decision 15/1991 (IV. 13.) AB, ABH 1991, 49, 42]. The right to informational self-determination is closely related to the right to privacy, as it involves the decision when and within what limits an individual discloses data relating to his or her person. The limitation of the right to informational self-determination, unlike the right to privacy, is not primarily based on the nature of the data, but on its use. The right to informational self-determination protects the personal data of an individual in a comprehensive manner, regardless of how they came into the possession of the controller. {Decision 32/2013 (XI. 22.) AB, Reasoning [88] and [89]}

[32] 5.2 The Constitutional Court has held that it is of particular importance for the present case that the intention to have a child, the treatment undertaken in connection with a human reproductive procedure for this purpose, and the pregnancy that results from it or occurs

naturally, as long as there are no external signs of it, belong to the intimate sphere and as such are excluded from any state intervention. Given, therefore, that pregnancy and participation in a human reproductive procedure are clearly private or intimate circumstances for the woman who commits herself to having a child, that is to say, the nature of the data and not their use is the determining factor, the legal requirement to provide employers with such data constitutes an intrusion into the private sphere. The invasion of privacy is particularly serious in the case of a requirement to provide information about participation in a reproductive procedure, since it is in any event intended to disclose a circumstance which falls within the sphere of intimate relations. Under Section 167 (1) of the Health Care Act, a reproductive procedure may be carried out on persons who are in a spousal or same-sex partnership and who, because of a health condition (infertility) of one of them, cannot have a naturally healthy child as a result of the relationship. Reproductive treatment is therefore a treatment for infertility, in which case the intention to have children is only manifested by external signs if the reproductive treatment is successful. In the light of the foregoing, the Constitutional Court reviewed whether the imposition of compulsory information in the contested provision was necessary in order to safeguard another fundamental right or to protect a constitutional value.

[33] The provision of data is linked to the subordinate relationship between employer and employee and, although the employer apparently gains access to the employee's private sphere with the employee's consent, it is clearly not voluntary. The legislator interferes in the employer-employee relationship in such a way that the provisions of Section 65 (3) (a) and (e) of the Labour Code, the employer is prohibited from dismissing the employee in the light of the objective circumstances set out in Section 65 (3) (a) and (e) of the Labour Code. Section 65 (5) of the Labour Code provides a binding obligation on the employee to behave in a manner which is necessary for the employer to be protected against dismissal from the employee's point of view. The specific obligation to provide information imposed by the contested provision is not provided for by Section 65 (3) (a) and (e) the Labour Code is a condition for the exercise of the protection against dismissal provided for in Section 65 (3) (a) and (e). Under the phrase "shall only apply" in the contested provision, in the absence of information, the protection is not applicable, since the employee cannot rely on it.

[34] Section 6 (2) of the Labour Code sets out the general requirements of mutual cooperation and Subsection (4) the general obligation to inform. Under the general obligation to inform, employers and employees are obliged to inform each other of all facts, data, circumstances or changes in them which are relevant to the establishment of the employment relationship and the exercise of the rights and the performance of the obligations laid down by law. The information must be provided at a time and in a manner that enables the exercise of the right and the performance of the obligation [Section 18 (2) of the Labour Code].

[35] Section 65 (5) of the Labour Code, according to the State Secretary of the Ministry of National Economy responsible for employment policy, specifies the general duty of cooperation in the form of a special rule. The reason for regulating the duty to inform is that the information given to the employer may make it clear to the employer that he is prohibited from terminating the employment relationship by giving notice.

[36] The legislator in Labour Code By limiting the employer's right to terminate the employment relationship freely, the legislator recognised the vulnerable situation of employees due to the fact that they are having children, which affects their position on the labour market and their chances of finding employment, and considered it to require increased protection against termination of the employment relationship. The facts giving rise to the prohibition relate to a condition or situation in life which places them at a disadvantage in the world of work and in employment. The protection is aimed at ensuring that the temporary hindrance in the fulfilment of the main obligation arising from the employment relationship (work) for reasons beyond the control of the employee does not result in the loss of employment for the persons concerned, and that the fear of this does not influence women in their decisions to have children, while at the same time excluding the dangers and negative effects that dismissal may have on the physical and psychological condition of women who have children. Protection against dismissal is a preferential rule for the additional protection of women who have children, to which no one has a substantive right. The above provisions on protection against dismissal were adopted on the basis of the legislator's power to legislate on positive discrimination under Article XV (4) of the Fundamental Law, the right to ensure equality between men and women under Article XV (3) of the Fundamental Law and, in the case of pregnancy, the right to equal treatment and, in the case of pregnancy, in order to comply with the State's institutional duty to protect life as a value, which derives from Article II of the Fundamental Law on the objective (material) aspect of the right to life. The State enjoys fundamental freedom in the way in which it provides women who have children with additional protection in the world of work. And the woman who commits herself to having a child is free to decide whether or not she wishes to benefit from this additional protection, in the case of pregnancy, with a view to protecting the foetus. Accordingly, access to such protection may be subject to conditions, but these must not lead to unnecessary and disproportionate restrictions on the worker's fundamental rights. In imposing conditions, the limits of State interference are defined by the requirements set out in Article I (3) of the Fundamental Law: "A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right.."

[37] In the present case, the subjective right to privacy of employees committing themselves to having children is in conflict with the obligation of the State to protect the interests of the institutions, which protect the interests of employees committing themselves to having children in the abstract. In order for the obligation to protect the institution, which takes the form of protection against dismissal, to be effectively implemented, it is essential, as in the case of other benefits provided by the Labour Code, that the employer be informed of the circumstances giving rise to the benefit. In this respect, it is irrelevant whether the additional protection is positive (e.g. working time allowance) or negative (prohibition). What is relevant for the restriction of a fundamental right is whether it is strictly necessary for the purpose of the State's obligation of institutional protection, whether it is proportionate to the objective pursued or whether it does not infringe the essential content of the fundamental right. The Constitutional Court has concluded that, as stated above, the provisions of Section 65 (5) of the Labour Code is in itself necessary for the purposes of the protection against dismissal. In

the absence of a specific provision to that effect, a specific obligation to provide information in relation to participation in treatment relating to pregnancy and human reproduction would also follow from the rules of the Labour Code providing for a general obligation to provide information and for mutual cooperation. The worker, in particular during the first stage of pregnancy, when there are no external signs of pregnancy, or during human reproductive treatment, can assert the protection to which she is entitled only if she provides the required information. However, since the obligation to provide information restricts the right to privacy of workers who have children, it cannot be dissociated from the objective pursued, which is to ensure additional protection. Accordingly, information on private data is only required if the relevant event for the purposes of the protection against dismissal (notice of dismissal) occurs, but at least the employer's intention to terminate the employment relationship is manifested.

[38] 5.3 In addition to regulating at the statutory level the special obligation to inform in the case of protection against dismissal for reasons of pregnancy or participation in a human reproductive procedure, in contrast to the previous legislation, Section 65 (5) of the Labour Code.

[39] Judicial practice under the Former Labour Code, in the absence of a specific duty to inform, elaborated the latest time when the employee may provide information, based on the duty to cooperate. According to the judicial practice, the employee is obliged to cooperate with his employer in the employment relationship in accordance with the requirements of good faith and fairness, and the deliberate concealment of a fact relevant to the prohibition of dismissal does not meet these requirements. In one case, the Supreme Court found that the reference to pregnancy as a ground for non-termination was well founded, despite the fact that the public employee had not informed the employer of the fact of which she was aware, even when she was given notice of her dismissal. According to the Supreme Court, it was not established that the employee had not disclosed the pregnancy in order to obtain an undue advantage (Judgement No Mfv.I.10.372/2009/3). In another case, however, the Supreme Court ruled that an employee who, when the employer did not inform the employer of the real reason for the absence when the employer was called to account for the unjustified absence, could not rely on the treatment in connection with the human reproductive procedure because of a breach of the duty of good faith and mutual cooperation (Judgement No Mfv.I.10.551/2008/2). However, according to the judicial practice, if the employee was not aware of her pregnancy at the time of the notice of termination, the subsequent finding of pregnancy results in the unlawfulness of the termination. The prohibition related to pregnancy at the time of the notification of the normal notice of dismissal is objective in nature (BH 2004, 521). Pregnancy at the time of the notification of the notice of termination of employment constitutes a prohibition of dismissal even without the knowledge of the employee and the employer. Therefore, if the claimant employee did not know of her pregnancy at the time of the employer's ordinary notice of termination, she could legitimately claim that the measure was unlawful on the basis of the prohibition of notice of termination of employment based on that prohibition in the proceedings at first instance (ECJ 2005, 1242; BH 2005, 366).

[40] 5.4 The Constitutional Court found that the wording of Section 65 (5) of the Labour Code reading "before the notice was given" makes information mandatory irrespective of any form

of expression of the employer's intention to terminate the employment relationship. The Labour Code does away with the previous provision that an employee must be given the opportunity to defend himself against objections raised against him before termination by the employer on the grounds of his work or conduct, unless, in all the circumstances of the case, it was not reasonable to expect the employer to do so [Section 89 (5) of the Former Labour Code]. The reason for not doing so, according to the reasoning of the draft Act, is that the employer did not hear the employee before terminating the employment relationship because he feared that the employee would become incapable of working in the period between the hearing and the notification of the termination notice. The consequence of the absence of a hearing is that the employee is only informed of the employer's intention to terminate the employment relationship when the notice of termination is given, or, in the case of collective redundancies, when the decision to terminate is communicated. In the light of the foregoing, the wording of the contested provision "before the notice was given" precludes the possibility that the employee may decide to disclose private data when he expresses his employer's intention to terminate the employment relationship in order to benefit from the protection of protection against dismissal, except in the case of collective redundancies. In the case of collective redundancies, the employee should in principle have the possibility to opt for the protection of the right to be informed of the termination of employment 30 days before the notice of termination is given, pursuant to the provisions of Section 75 (1) of the Labour Code, the employee is entitled to inform the employer of the existence of pregnancy or treatment in connection with a human reproductive procedure at the time of the communication of the notice of termination "before the notice was given". However, in all cases where the dismissal does not take place in the context of collective redundancies, the contested provision excludes the invocation of the protection against dismissal at the time of the notification of the dismissal.

[41] The above wording, with regard to Section 24 of the Labour Code, cannot be interpreted as meaning that the employee can still inform the employer of the circumstances in his / her relationship that give rise to a prohibition of notice of termination of employment at the time of the notice of termination (at the time of the physical delivery of the termination document). As a unilateral legal declaration, the notice of termination becomes effective upon communication to the addressee, in accordance with Section 24 (4) of the Labour Code, and may only be modified or withdrawn with the consent of the addressee. The employer is obliged to give reasons for the termination in writing, except in the case of a retired employee [Section 66 (9) of the Labour Code] [Section 22 (5), Section 66 (1) of the Labour Code]. A written legal notice is deemed to have been communicated when it is given to the addressee or another person entitled to receive it or when the electronic document becomes accessible to them. The communication is effective even if the addressee or other person entitled to receive it refuses or intentionally prevents its receipt [Section 24 (1) of the Labour Code]. In the case of delivery by post, the communication is also deemed to be valid if delivery to the addressee at the address notified by the addressee has failed due to the addressee's ignorance or absence [Section 24 (2) of the Labour Code].

[42] On the basis of the above, the Constitutional Court held that the wording of the contested provision "before the notice was given" obliges a woman committing herself to having a child of her own to inform the employer of circumstances relating to her private or intimate sphere,

irrespective of the notice of termination. Given that the obligation to inform is thus divorced from the employer's intention to terminate the employment relationship, the employee is obliged to provide the employer with the information required by the contested provision immediately on the day on which the reproductive procedure begins or after becoming aware of the pregnancy in order to be able to invoke the protection against dismissal.

[43] The Constitutional Court notes that the employer has the possibility to be informed of the circumstances giving rise to the protection against dismissal even immediately before the notice of dismissal is given, and in certain cases he is obliged to do so because of other employment protection provisions. In addition, the employer may also become aware of the above circumstances when granting other benefits (e.g. family contribution allowance, working time allowance). However, the State may not interfere by legislation in the private sphere of workers who have children without a constitutional justification. Section 65 (5) of the Labour Code, by imposing on employees an obligation to provide information on private data irrespective of the employer's intention to terminate the employment relationship, imposes an unnecessary restriction on the right to privacy and human dignity of workers with children and therefore infringes Article VI (1) and Article II of the Fundamental Law.

[44] 5.5 The case of a pregnant woman who is unaware of her pregnancy, which is typical of the early stages of pregnancy, is different. In this case, there can be no question of a violation of privacy. In this case, the legislator distinguishes between pregnant women according to whether or not they are aware of their condition. Given that the protection of protection against dismissal is not a fundamental right, the constitutionality of the wording of the contested provision "before the notice waqs given" must therefore be assessed in the light of the general rule of equality. Article XV (1) of the Fundamental Law expressly lays down the general rule of equality, which was absent from the previous Constitution and which has been developed in the case-law of the Constitutional Court. The link between human dignity and equality is maintained regardless of this, because the ultimate basis of equality is human dignity {Decision 42/2012 (XII. 20.) AB, Reasoning [22] to [26]}. In view of the fact that the Commissioner for Fundamental Rights referred to Article II of the Fundamental Law, the Constitutional Court also reviewed the constitutionality of the above text from the perspective of the general rule of equality. In doing so, it considered its practice in relation to the general rule of equality to be authoritative. The Constitutional Court has consistently held that (arbitrary) discrimination without constitutional justification between legal entities subject to the same regulatory regime, which places certain legal entities at a disadvantage, is prohibited. On the other hand, it cannot be considered as discrimination if the legal regulation lays down different provisions for a group of persons with different characteristics, because contrary to the Fundamental Law discrimination is only possible within a comparable group of persons belonging to the same group. However, it is not only contrary to the Fundamental Law to apply different rules to a group (in the same situation) within a given regulatory concept without a constitutional justification, but it is also discriminatory if the given regulatory concept applies in the same way to groups in substantially different situations from a constitutional point of view, i.e. this circumstance is ignored [Decision 6/1997 (II. 7.) AB, ABH 1997, 67, 69.] Therefore, the Constitutional Court reviewed whether the legislator, in determining the temporal condition of

the obligation to provide information, takes into account individual considerations to the same extent.

[45] The Constitutional Court has held that, from the point of view of the regulatory concept, pregnant workers belong to a homogeneous group. However, in the first period of pregnancy, women are often unaware of their pregnancy. However, Section 65 (5) of the Labour Code provides for an obligation to inform the employee "before the notice was given" irrespective of whether the woman employee has knowledge of the condition giving rise to protection against dismissal.. Those who are not aware of their pregnancy cannot subsequently claim protection against dismissal because of the clause "before the notice was given". As the Constitutional Court has already stated above, the legislator has a wide margin of discretion as to the scope and manner of the protection against dismissal. However, if it imposes conditions for the enforcement of the protection against dismissal, it must do so with due regard for the potentially different individual considerations of the persons concerned. The legislature has imposed impossible conditions for the exercise of protection against dismissal by workers who have not yet become aware of their pregnancy. That condition does not follow either from the requirement of cooperation between the parties or from the purpose of the information. Since the legislature, by disregarding individual considerations, made a distinction between pregnant women and pregnant women for an unreasonable reason, in the light of an objective assessment of the protection against dismissal, the application of the principle of equal treatment in the employment relationship is contrary to the principle of equal treatment in the employment relationship. The wording “before the notice was given” in Section 65 (5) of the Labour Code is contrary to Article XV (1) of the Fundamental Law.

[46] Section 41 (1) of the Constitutional Court Act obliges the Constitutional Court, if it finds that a statute or a statutory provision is contrary to the Fundamental Law, to annul the statute or statutory provision in its entirety or in part. Given that the Constitutional Court found the wording of the contested legislation "before the notice was given" to be contrary to the Fundamental Law, it concluded that the consequence of the unconstitutionality by conflict with the Fundamental Law was partial annulment.

[47] The Constitutional Court calls upon the legislator to review the regulation of employment relationships in the public sector and, in all cases where there is a provision with the same content as the annulled provision, to eliminate the infringement of the Fundamental Law not inconsistent with the constitutional principles set out in this Decision.

[48] 6. The Constitutional Court ordered the publication of its Decision in the Hungarian Official Gazette with regard to the partial annulment of the legislative provision, pursuant to Section 44 (1) of the Constitutional Court Act.

Budapest, 27 May 2014

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