Dismissal for activities outside working hours 3/37/23

A worker is subject to the employer's procedures and orders. In addition to a contract of employment that lays down the parties' mutual rights and duties, the worker also has to comply with his job description and the employer's internal rules, terms of business, and code of ethics in certain cases. If the rules of conduct described in these documents are seriously breached during working hours, this may lead to dismissal. In this article we will find out if it's possible to terminate employment because the worker's breach involves activities outside working hours.

Prohibition of additional employment

According to the commentaries on the Employment Act, the employment contract and the employer's internal rules cannot normally operate to restrict the worker's activities outside the employment contract. Although employment is a relationship of subordination, this subordination is limited to the agreed working hours. The worker is not liable to comply with the employer's internal rules outside working hours. However, relevant case law finds exceptions to this rule, one of which makes it illegal for the worker to take up another job.

In general, the Employment Act permits the worker to enter into an employment contract with multiple employers or to be otherwise employed, unless the employment contract or the collective agreement provides otherwise. Yet practice shows that employers seek to protect their interests and insert a clause in employment contracts stating that the worker cannot take up another job without the employer's written consent. Having received the worker's request for permission to work elsewhere, the employer may evaluate how this additional job will affect the existing job, including whether it's possible to combine the main job with the additional job in view of permissible normal working hours, whether the additional job affects or may affect the worker's performance adversely, whether there is the threat of undesirable competition, etc. The case law states that in a dispute started by the worker, the onus is on the employer to show that the restriction on additional employment is justifiable by the employer's reasonable and protected interests. However, where the employer's termination is based on a breach of the agreed restriction on additional employment, the employer has to demonstrate that the breach is serious.

If the worker has entered into another employment contract without obtaining the required permission, he should be aware that his main employment may be terminated because he is considered to have committed a serious breach of the employment contract or of the employer's internal rules without good cause. This approach is upheld by the Latvian Supreme Court in its case law: taking up additional employment despite an agreed prohibition may generally form a basis for the employer's termination under section 101(1)(1) of the Employment Act because, although the additional work is not carried out (no breach is committed) during the main employment, it's covered by the restriction imposed by the employment contract, which has been agreed between the parties and goes beyond the agreed working hours.

When it comes to settling a dispute over a dismissal's compliance with section 101(1)(1) of the Employment Act, the court is to make the following findings:

1. The worker is in breach of the employment contract or of the employer's internal rules.
2. The breach has been committed without good cause.

3. The breach is a serious one – it has or could have caused a loss or affected the normal course of business, or it has or could have brought about some other adverse consequences.

Section 101(2) of the Employment Act states that in the case of a dispute the court is to verify that the condition of proportionality is met. All these conditions are cumulative – if one of them is missing, termination is recognised as invalid.

However, the nature of litigation means that the solution to a particular dispute often depends on the circumstances of the case. For example, one lawsuit saw a worker being employed by multiple other employers outside working hours without the main employer's written consent. When the employer found out, he terminated the employment contract, yet the court recognised this termination as invalid. The court heard that the employer had previously permitted the worker to work for other employers outside working hours on many occasions, without using the employer's resources. The termination was not based on a claim that the worker's performance or diligence had diminished because of his employment elsewhere. One of the employer's protected interests is to prevent undesirable competition on the part of the worker, which may raise doubts about his loyalty. Yet this termination was based solely on the fact that the worker was using the knowledge acquired from the employer for private activity. Thus, although the worker had not met the employment contract's requirement and had not obtained written consent to additional employment, the court did not recognise this as a serious breach under section 101(1)(1) of the Employment Act.