

KJI NEWSLETTER ***February 2006***

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the Kosovo Judicial Institute (KJI). This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo.

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CASES FROM THE COURT PRACTICE ON THE LABOR RELATIONSHIP DISPUTES

Observing from the scope of issues that comprise the structure of labor relationship it could be said that labor relationship represent a series of complex commercial and social relationships.

The applicable law defines the labor relationship as contractual relationship which is brought to life with the employment contract.

It is evident that in this legal relation the employer is considered as stronger contractual party because of its more favorable position. For this reason in order to prevent the abuse of the stronger position in detriment of the employee, the lawmaker has clearly defined the rights and obligations of the parties in this legal relationship and has at the same time guaranteed implementation and protection of parties by establishing mechanisms for this purpose.

The applicable laws clearly define the rights and obligations of the employee in the labor relationship such as: the right on a monthly

salary, the right on a certain working schedule, the right on annual leave, and other types of leave, the right to be absent from the work, the right on protection and security at work etc.

The type and nature of the litigations from the field of labor relations that were treated by the court indicate that there are a lot of cases in which the employers infringe the rights of employees which are guaranteed by laws and relevant bylaws.

The most frequent cases of violation of employee's rights in the labor relations are related to the termination of the employment contract, temporary suspension of employees, failure to pay salaries and other income etc.

Because in most of the cases the employees are not successful in protecting their infringed rights at the respective body of the employer, they initiate judicial litigations for protection of their rights.

The vast majority of labor disputes that are initiated by the employees are related to the termination of the labor relationship contract, respectively termination of the employment contract.

This is considered as natural because, the termination of the working relationship is the severest measure that could be imposed on an employee, such measure consequently produces grievous consequences of social and economical nature for the employee and his or her family.

The termination of the labor relationship is related to almost all the other similar legal grounds of termination of this relationship such as: premature retirement, breach of working duties, misconduct, insufficient performance of working duties, expiry of employment contract etc.

We will mention some of the cases from the Pristina Municipal Court practice in which the labor disputes have been initiated because of breach of the labor relationship rights.

A number of court litigations have been initiated for premature retirement of employees. In these cases the claim suit is related to the assessment of decisions made by employers for retirement of employees who are aged 60 or those who have over 35 years of working experience.

With respect to the cases when the claim suits were considered as lawful, the court often had the following legal position: The employer has wrongfully assessed the issue of termination of working relationship and the issue of retirement of employees. This because these two legal issues are very

separated from each other and are regulated through special laws and provisions which are implemented in a totally different conditions and procedure. The working relationship pursuant to the Law on Labor relationship in its Article 172 par. 1 sub par 3 provides that the employee's labor relationship may be terminated without his or her consent when the legal conditions are met (the employee has 40 years of experience and insurance covered, or 65 years of age and 15 years of insurance covered), whereas the right to retirement is realized upon a request by the party pursuant to the applicable provisions for pension and invalidity-insurance in a special procedure which is implemented by the competent body for retirement issues.

A considerable number of litigations from the field of labor relationship are related to the termination of the working relationship because of violations of working duties, respectively because of misconduct by the employees or because of unsatisfactory performance in the working duties.

As to what is considered misconduct and what unsatisfactory performance of working duties and what is the procedure for termination of the contract of employment, all these are foreseen in the UNMIK Regulation 2001/27 on the Substantial Labor Law.

In the vast majority of the cases that were initiated in which the judicial procedures were conducted, it has been assessed that the employment contract with the employee was terminated without going through the procedure foreseen in the mentioned regulations.

For these reasons and heaving into consideration that lack of implementation of the legal- procedural provisions in every procedure, in this case when terminating a contract of employment makes the decision for this action invalid, the court has always annulled such a decisions.

With respect to these cases the court has taken the legal position that when the procedure determined in the law is not respected and the violation with which the employer is charged with cannot be verified, respectively the responsibility of employer can not be verified, meaning that there is a lack of legal grounds for termination of contract of employment with the employer the decision is always found to be unlawful.

In some cases the decisions for termination of the contract have been taken by the disciplinary commissions of the employer and have therefore imposed the disciplinary measure of termination of working contract based on the disciplinary documents against the employee, although the legislation in power completely regulates the procedure that is to be followed by the disciplinary commissions in a case of determining the disciplinary responsibility of the employee, in the vast majority of the cases it is assessed that this procedure has not been respected and therefore it results with the annulment of such decisions as unlawful.

With respect to the implementation of the procedure for the responsibility of the employee the court has taken a legal stand point according to which: “regardless which of the procedures is implemented it will be deemed as equally valid provided that they are in consistency with provisions of the applicable law”.

During the judicial disputes in most of the cases it has been assessed that although the responsible party has submitted their objection respectively appeal against the decision, employees have been sacked based solely on the decisions of the first instance, by doing so the employers have constituted violation of provisions in Article 212 par 5 of the Labor Law which provides that an appeal against the decision shall stop its execution.

With respect to these cases the court has rendered a legal stand point that when the petitioner appeals against the decision for termination of employment contract in which the responsible party has not rendered any decision, the decision can not be executed because of the suspensful effect of the objection or appeal against it. However since the decision for termination of the employment contract of the petitioner is already executed and the petitioner has been sacked from his job, the petitioner has the right to require return in the working place pending the decision on his appeal.

In some of the cases the decisions for termination of labor relationship for violation of employment duties don't contain the factual description of the violation with which the employee is charged, neither the legal qualification of the violation.

The shortcomings that were mentioned are of material nature that are related to the existence of the violation with which the employee is charged with, therefore its existence makes the decision unlawful and in such cases the decisions of the employer are annulled by the courts.

Termination of the labor relationship because of the expiry of contract lately is the frequent cause of initiation of judicial litigations.

Observing from a formal and legal aspect the expiry of a contract represent one of the grounds for termination of a labor relationship, however from the arguments that are offered in these cases it is not too hard to conclude that these grounds are abused in most of the cases by the employer because, in such cases besides the fact that a contract has expired there is no further argument as to why isn't the contract extended further although in some cases the contract has permanent character.

For these reasons in order to guarantee a grater legal security for the employees we consider necessary to take the solutions of0 the judicial practice.

Judicial disputes that are related to the salaries of the employees in most of the cases they make a request for execution of the judgment with which the unlawful decisions of the employers have been annulled and with which the employees labor relationship was terminated, the disputable part is the salary which the employee is not receiving because of unlawful termination of labor relationship (the so called lost profits)

Many times in these disputes the petitioner as evidence for existence of the legal grounds for material compensation offer the judgment of the respective court which is not compete in the formal point of view because besides the decision on annulment of the decision of the employer to return the

employee in his or her previous working place does not contain any other obligations for the employer.

For these reasons the court when deciding on the material claim suit, needs to also assess the consequences of the unlawful decision of the respondent which resulted in termination of labor relationship because of expiry of the contract of the petitioner. These issues ought to have been decided with the final judgment.

With respect to what was mentioned above I consider necessary to add that the courts when deciding on the request for annulment of an unlawful decision for termination of labor relationship should also verify the time dimension of the effects of this decision and should set the time limit for acknowledgement of the rights of employee, this would facilitate the decision related to the material claim suit of the petitioner.

When speaking about the salaries the courts have expressed other legal positions and it is worthwhile to mention some of them:

-The employees are entitled on a wage in accordance with the results achieved during their work.

-The employee is entitled on a payment for the work performed regardless to the fact that he does not have the sufficient professional education foreseen for that post.

-The level of the salary is not determined according to the hours which in an abstract manner are set the working schedule but, according to the professional engagement in the work, regardless if he or she has worked overtime.

The above legal standpoints are actual even today, because they express the acceptable principle of equivalence between the value of the work performed and the salary level for that post.

With respect to remuneration of the work in salaries the judicial practice instructs that when the existence of grounds for remuneration is verified, the level of remuneration is set based on the

professional expertise or based on the data provided by the professional service of the employer.

With respect to other rights from the labor relationship such as the right to leave and absence, appointment of the working schedule etc. The cases were very rare in which the judicial litigations were initiated or better say none, therefore we can not speak of any judicial practice on such situations

KJI Training Activities February 2006

Workshop on Code of Ethics - Gjilan Region

On 2 February 2006 KJI organized the above mentioned training which benefited judges and prosecutors of Gjilan Region. The training aimed at providing a detailed overview on the experience and practice in the cases when the independence of judges may be worrying. The workshop focused mainly on the position of the judge as a single decision maker or a decision maker in the panel. This workshop focused mainly on the responsibility of the judge for the rule of law and order in the light of the codes of conduct and disciplinary sanctions that are foreseen in these codes.

The workshop is based on the experience gained in the previous training with the same topic organized by KJI in cooperation with NCSC held all the regions of Kosovo during 2005. Some of the new elements that will continue to be presented to the participants of trainings during the 2006 are the techniques for improving the skills of judges for communication with the public and media.

Training methodology: lectures, case studies, and group work.

Continuous training for lay judges – Pristina region

On 7 February 2006 KJI organized an advanced training for lay judges in all the regions of Kosovo under a special program prepared specifically for their specialized training needs. This program includes topics which were subject to debate during 2005 but, this program has been refreshed with some elements that were seen as necessary after the discussions with lay judges during 2005.

The training treated topics that focused on the review of cases from the judicial practice, related to the lay judges, code of ethics and professional conduct for lay judges, the position and responsibilities of the lay judge in the panels and cases that involve juveniles.

Workshop on the Labor Law, the jurisprudence of the Independent Oversight Board on the labor relationship cases.

This workshop was held on 14.02.2006 and has provided relevant discussions for the participants on the most frequent problems on the field of labor and employment relationship. General aspects of the labor law and legislation of civil service in Kosovo were also treated and discussed during this training.

Workshop – Cooperation in the pretrial procedure between the prosecutor and police

On 17.02.2006 KJI organized a workshop. Target group of this workshop were judges prosecutors and the judicial police. The purpose of this training was to provoke a discussion between the prosecutors and police so that they can jointly treat issues of mutual relationship and take the necessary guidelines for improving the cooperation and harmonization of their stand points in the light of the new codes and the court practice accumulated until now from the application of these codes. During this workshop a special focus was given to the role of the court in improving this relationship, harmonization and improvement of the cooperation between the public bodies in the initial acts of the procedure as they are crucial for heaving a proper flow of the criminal judicial procedure.

Training on PCPCK: Simulation of a Trial

Target Group: Judges from the criminal field and prosecutors – Prishtina/Pristina Region

The simulation of a trial was held on 21.02.2006. According to the opinion of judges and prosecutors of Pristina Region the simulation was proven to be one of the most efficient and preferred forms of the training. The above mentioned session was a simulation of the entire judicial procedure. The moderators of this session were trainers from KJI, the president of the District Court, District Prosecutor's Office in Prishtina/Pristina.

Workshop on the Civil Field – Compensation of the material and nonmaterial damage

On 23 February 2006 KJI organized a workshop on the above mentioned topic. One of the resources of the obligations is the existence of the damage. The damage may be caused in material and non-material form. The damage comes together with the obligation for compensation of the damage. These and other issues related to the altitude of the compensation of the damage, responsibilities and types were subject of the seminar.

Workshop on PCPCK detention on remand, detention of persons with mental incapacities

On 28 February KJI organized a workshop on detention on Remand, detention of persons with mental incapacities.

Target group of this workshop were judges and prosecutors who treat relevant field during their work.

Forthcoming events

Practical Skills Training/Simulation of Trial

Target group: Judges hearing Criminal cases and Public Prosecutors

KJI will continue with the next part of the field practical skills training program. The training session will be organized in Gjilan/Gnjilane as a simulation of a main trial. Several judges and prosecutors will actively participate in the simulation which will be followed by a discussion with all participants.

Planned date: 3 March 2006

Practical Skills Training/Simulation of Trial

Target group: Civil Law Judges

KJI is planning a practical training/Simulation of Trial for Civil Law Judges from Prizreni/Prizren region. The case already selected will focus on compensation of damages. The participants will discuss the problems related to the civil procedure in such or similar cases.

Planned date: 9 March 2006

Seminar on Juvenile Justice Code

Target group: Judges hearing juvenile cases

The Seminar will focus on the Punitive Order and the alternative punishments in accordance with the Juvenile Justice Code. Cases from the judicial practice will be presented and discussed.

Planned date: 14 March 2006

Training for Minor Offences Court Judges

In 2006 KJI will continue with the organization of specialized training sessions for Minor Offence Court Judges. The first

training event will focus on the minor offence court procedure with a special emphasis on the minor offence liability, the co-liability of natural and legal persons and the collection of evidences during the procedure.

Planned date: 16 March 2006

Seminar: Combating trafficking in human beings.

Target group: prosecutors and judges hearing criminal cases.

The Seminar aims to examine some of the practical aspects of the combat against the trafficking in persons in Kosovo. The programme of the Seminar would be focused on the development and specific characteristics of the Trafficking in Human Beings as a phenomenon, as well as on the practical aspects of the investigation, international cooperation, and protection of witnesses in such cases. The implementation of Kosovo Anti-Trafficking Action Plan will be also a matter of discussion.

Planned date: 17 March 2006

Seminar on Execution of Civil Judgements

Target group: Civil Law Judges

The Judicial Training Needs Assessment made by KJI last year proved that one of the most problematic areas is the Execution of Judgements. There are many dilemmas and practical problems related to the procedure and its implementation. The participants will have a discussion based on case studies.

Planned date: 23 March 2006