Employment Law -Termination, Organizationl Changes

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The Ruling of the Supreme Court of Georgia, November 10, 2017, Case No.As-1189-1109-2017

Subject: Termination of employment contract,
Organizational changes.

Defined norms:
Article 37, I, a) of Labour Code (LC)[2]

Important facts of the case:

Claimant I.G. had been employed on various positions at defendant Non-entrepreneurial (Non-commercial) Legal Entity Senaki Municipality Sport Association (hereinafter – N(N)LE, cassator, appellant) since 2007. S/he worked as a Public Relations Specialist on the basis of open-ended employment contract concluded between the parties on January 27, 2016, and his/her monthly salary was 400 GEL.

Staff list and salary rates of the defendant N(N)LE were approved under the Order No. 55 of March 28, 2016 of the director of the N(N)LE, by which 10 staffing position were reduced including one of the specialists in public relations affairs. On 26 February, 2016, the plaintiff was warned about a possible dismissal from the current position due to organizational changes on the basis of Article 37, I, a) of the Labor Code ("LC"). By the Order No.64 of March 30, 2016, the claimant was dismissed from his/her position on April 1, 2016, with the final payment - compensation equal to one-month salary.

The staff reduction made by the N(N) LE's management was preceded by the letter of January 18, 2016, from Senaki Municipality Governor to defendant's administration. The letter was stating that N(N)LE should have taken appropriate measures to allocate the amount not envisaged in the budget, viz. 10380 GEL for implementation of infrastructural projects in the Senaki Municipality in 2016 according to the ordinance No.594 of the Government of Georgia of November 25, 2015. The author of the letter requested to obtain aforementioned amount within the framework of the Sports Promotion Program. On the same day, the Senaki Municipality Administration was notified in writing that the necessary amount - 16 000 GEL was allocated through reduction of staffing position.

I.G. filed a lawsuit against the employer by which s/he requested annulment of defendant's Orders No. 55 of March 28, 2016 and No. 64 of March 30, 2016 and reinstatement in work, as well as remuneration of lost earnings - 400 GEL per month until reinstatement in work.

Court interpretations:

According to the decision of the court of first instance, I.G.'s claim was partially satisfied, in particular, the appealed orders were annulled only regarding the reduction of the plaintiff's position, s/he was reinstated in work and N(N)LE was imposed in favor of I.G. to remunerate lost earnings. This decision was also fully agreed by the appellate and cassation courts.
The first instance court imposed on the employer a burden of proof that the dismissal of the employee was lawful. However, the employer failed to do this in the dispute.

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[2] 2010 Georgian Obraganic Law No.4113-RS Labour Code. Available at <https://matsne.gov.ge/document/view/1155567?publication=12>.

During the trial the court examined whether the defendant organization was reorganized, if the employer had necessity of reduction of the claimant's position and whether it was an abuse of right from the employer or not. The court answered on these questions unequivocally, that the claimant was wrongfully dismissed from the job as a result of abusing of the right by the employer.

The court of first instance considered that in the dispute the circumstances indicated and the evidence submitted by the employer did not substantially imply reorganization and the employer did not face necessity to reduce staff and dismiss employees from work. In particular, the Court found that in order to allocate the certain amount of money within specific program, staff downsizing and dismissal of employees by referring to reorganization was contrary to national legislation, as well as the international acts, which protect employee from employer's illegal actions and dismissal from the job without any justification.

As for appellate court, according to its reasoning, "in case of real reorganization of an enterprise (changing the structure or legal form, alteration, transformation), the administration of the enterprise is obliged to prove the necessity of reduction, in order to avoid a formal downsizing of the staff and reorganization not to become statutory ground for making improper decisions."

Cassation court agreed with reasoning made by courts of a lower instances and added that, while deciding dismissing employee from job for any reason, including reorganization, the employer is obliged to follow a reasonable and substantiated criterion, which excludes the basis for doubt in the decision-making process and does not violate legitimate interest of the employee, his/her labor rights unreasonably. Inasmuch as the claimant was appointed on the position of public relations specialist without fixed term, s/he was employee of cassator since 2007, during this time, the violation of labor discipline, incompatibility with the position, lack of qualification was not proved, the employer was constantly continuing employment contract with him, even if the reorganization had been carried out from the objective point, s/he could not have been dismissed from the work, as "even if there are actually preconditions of Article 37, I, a) of the LC, dismissal of an employee should be connected with the incompetence and/or misconduct of the employee and b) based on the operational requirements of undertaking, establishment or service".

Commentary:

The main parts of the aforementioned judicial opinions are reasonable, since, indeed, in practice, employers get rid of the subjectively undesirable employees due to completely wrongful motivations while grounding their decision on reorganization, and in fact, concealing unequal treatment under organizational changes. Nevertheless, we cannot agree with the court's reference to the criteria by which it explains that if there were real organizational changes in the enterprise, in making the choice employer should have based the order together with preconditions provided by Article 37, I, a) of the LC on two criteria - a) incompetence and/or misconduct of the employee and b) the operational requirements of undertaking, establishment or service – while terminating contract with the employee. These criteria not only cannot ensure protection of a balance between labor rights and freedom of entrepreneurship, when actually there is a reorganization situation in the enterprise and cannot properly protect the employee's rights, but, at the same time, they undermine legal centainty in reasoning termination of employment contract by the employer, since, while repudiating the contract due to industrial reasons, the employer is required to draw up his/her/its

decision about termination of the contract not on the justification of operational reason, but on a necessity of termination of the contract with the particular employee.[3]

First of all, we should start reviewing from the fact that incompetence and/or misconduct of the employee is not related to reorganization at all. Independently from reorganization, Article 37, I, g) and (h) are separate, autonomous grounds for the termination of labor agreement. And Article 37, I, a), is the case of "industrial necessity". "Industrial necessity is a valid ground which in certain cases, if preconditions prescribed by law are met, justifies repudiation of the employment contract by the employer."[4] It is the basis that is coming from the employer's sphere, while the incompetence and/or misconduct of the employee comes from the employee.[5] Hence, cumulating of the aforementioned criteria ("and" conjunction is used in the cited decision) with enterprise's operational needs for termination of the labor agreement is absolutely contrary to the purpose of the Article 37, I a) and, in fact, makes it impossible to dismiss the employee who is qualified or does not violate contractual obligations, that dooms to bankruptcy the employer, which faces severe financial problems and reduction number of employees is the last measure to mobilize essentially vital material resources; This is a situation when employer has a real and serious economic reason, the company is operating at a deficit and needs to safeguard its economic position that is in jeopardy.[6] Furthermore, such a strict approach proposed by the court is contradictory with the freedom of entrepreneurship guaranteed by Article 26, IV of the Constitution of Georgia as one of the reflections of labor freedom and economic freedom, which[7] also per se combines the freedom to determine personnel policy. Despite the fact that in accordance with the provisions of the Constitution protecting this sphere, the employers are granted a wide range of powers to recruit employees they prefer. The business decision may not become subject to judicial review, but the decision of the entrepreneur should not be clearly irrational, unsubstantiated or indicating abuse of the right.[8] The defendant was not an entrepreneur in the present case, however the court generalized these interpretations regarding relationships regulated by the Labor Code and describes as the preconditions of Article 37, I, a) of the LC. As it is obvious from abovementioned, employer does not need to wait for the risk of the financial collapse before reorganizing the workforce and dismiss an employee for this reason, but to justify the termination of the labor agreement it is sufficient to show what advantages or benefits such policy will bring; that the changes can either alleviate the problem, improve the business or maximise its potential.[9] This should be proven by evidence confirming necessity of reorganization[10] and most importantly, the work of a particular employee is no longer required and other means for preventing the termination, inter alia shorter hours or reduced overtime, cannot reasonably be

[3] *Sturua, N.*, Termination of Employment Contract, Journal of Law, Ivane Javakhishvili Tbilisi State University Press, Tbilisi, No.1, 2015, 229.

[4] *Chachava, S.*, Termination of Labour Agreement depending on the intent and independent from the parties' intent - the new classification, adopted by the amendments of June 12, 2013, Legal Aspects of the Latest Changes in labor law, Ed. Chachava S., German Corporation for International Cooperation GmbH (GIZ), Tbilisi, 2014, 99.

[5] Id, 99, 102.

[6] *Sands, R. S.*, National Report - France, Employment Law (The Comparative Law Yearbook of International Business), *Campbell, D.*, Ed., *Alibekova, A.*, Volume Ed., Special Issue, Kluwer Law International, the Netherlands, 2006, 215.

[7] *Putkaradze, I.*, Commentary to Article 30, Commentary to the Constitution of Georgia. Chapter two, Georgian Citizenship. Basic Rights and Freedoms of Human, Ed. Turava P., the First edition, N(N)LE The Regional Centre for Research and Promotion of Constitutionalism, German Corporation for International Cooperation GmbH (GIZ), Tbilisi, 2013, 373.

[8] *Santagata, R.*, Article 37, Commentary to the Labour Code of Georgia, Ed. Borroni A., Georgian Edition Ed. Zaalishvili V., Meridiani Publishing, Tbilisi, 2016, 360.

[9] *Lockton, D. J.*, Employment Law, *Cremona, M.* Ed., Fourth Edition, Palgrave Macmillan, Wales, 2003, 283.

[10] *Bone, A., Suff, M.*, Essential Employment Law, Second Edition, Cavendish Publishing Limited, London, Sydney, 1999, 135.

expected to be in the best interest of the parties.[11] Indeed, such an approach ensures reasonable and fair balance between the employer and the employee's interests in a democratic state, and at the same time, in accordance with favor prestatoris principle, it allows the Court to control that the employer's wide discretion is not infringing the employee's right to "maintain, retain, and leave a job; To be protected from unemployment… from unreasonable, arbitrary and unfair dismissal".[12]

In addition, the court's reference to the insufficient qualification of the employee is completely contradictory. In particular, the Court emphasizes that I.G. has worked at defendant organization for a long time (since 2007) and there was no proof of his being unqualified. This reasoning is not relevant to an employee's dismissal due to organizational changes, as far as if the I.G. lacked qualification before reorganization, we get the conclusion that his/her dismissal was caused not by the reorganization, but the incompatibility of an employee's qualifications or professional skills with the position held/work to be performed by the employee or violation, according to Article 37 g)/h) of the LC. This is a completely independent basis for termination of the labor agreement. Consequently, it would be better for the Court to review this criterion differently and evaluate if there was any redistribution of functions after the changes that would cause the incompetence or incompatibility of the employee with a functionally renewed working position. The latter case would be deemed to be a valid basis for termination of the contract, however checking the employee's behavior and qualification before organizational changes, as it has been made in this decision of the court, actually does not provide any effective result for the purposes of Article 37, I, a) of LC.

As it was noted, the employee's improper behavior is separately stipulated under Article 37, I, g) and (h) of the LC. During making the choice no reasonable employer will need to apply ground of reorganization in case of misconduct by the employee, as if there is violation by the employee, s/he falls in less favorable situation, namely the contracting party becomes entitled to dismiss him/her without observation of the terms and compensation prescribed by the Article 38, I, II, that is equalizing mean to the reorganization ipso facto the ground is originated from the employer's sphere.

In the course of the changes in the enterprise, indicating at employee's misconduct by the employer is suspicious for foreign judicial practice, too. E.g. in case - Timex Corp. v. Thomson[13] dismissal of a person was deemed unlawful by Employment Appeal Tribunal of England and Wales (EAT) in the following situation: shortly before the employee was dismissed, he had been appointed to the managerial position. The company implemented re-organization and the three management jobs decrease to two positions. The new positions required engineering qualifications that the dismissed employee did not possess, and so he was selected for redundancy. The company also maintained that, as well as lack of qualifications, the decision to dismiss had also been influenced by the employee's general unsatisfactory performance. The tribunal held that the dismissal was unfair, as the company had failed to establish whether the reason for dismissal was redundancy due to organizational changes or lack of capability. EAT stated that even where there is a redundancy situation, it is possible for an employer to use such a situation as a pretext for getting rid of an

[11] *Glaser, R., Kolvenbach, D. W.*, National Report - Germany, Employment Law (The Comparative Law Yearbook of International Business), *Campbell, D.* General Ed., *Alibekova, A.* Volume Ed., Special Issue, Kluwer Law International, the Netherlands, 2006, 267.

[12] Decision of October 26, 2007 of the Constitutional Court of Georgia on No.2/2/389 Case – Citizen of Georgia *Maia Natadze* and others v. the Parliament of Georgia and the President of Georgia, II, par. 19.

[13] Timex Corp. v. Thomson (1981), EAT, text is available at: https://swarb.co.uk/timex-corporation-v-thomson-eat-1981/ [11.04.2019 11:00].

employee he wishes to dismiss. In such circumstances, trying to present evidence of unsatisfactory performance raises a doubt that redundancy was indeed created as a pretext to dismiss the employee, and was not the operative reason for the dismissal.[14]

The issue of problematic interpretation made by the Supreme Court in this ruling cannot also be mitigated by an argument of grammatical inaccuracy of the phrase. Even if we assume that the court mistakenly has used “and” conjunction instead of "or" conjunction which is used in some other decisions,[15] situation still cannot be solved, because violation as a ground coming from the employee’s party does not have a connection to the reorganization. Supposedly, these criteria are cited by the Supreme Court from No.158 Convention[16] of June 22, 1982 of International Labour Organization (ILO) which provides the concept of “valid reason” for termination. The principle of "validity" should be reflected in the domestic law of all States. According to Article 4 of the Convention, the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." These provisions of Article 4 are not self-fulfilling norms: their implementation requires the existence of a domestic legal act or norm.[17] The aforementioned norm is directed to the State and not to individual persons and stipulates for its transposition in the labour legislation of the contracting states.[18] These provisions are fully reflected in Article 37, I f), g), h) and a) of LC. In order to solve the problem raised in the case, the Court intended to explain the additional conditions that allow the employer to make a choice on the grounds for dismissal of the employee.

[14] *Barrow, C.*, *Duddington, J.*, Briefcase Employment Law, Second Edition, Cavendish Publishing Limited, London, Sydney, 2000, 95-96.

[15] See the ruling of the Supreme Court of Georgia of April 8, 2016, case No.AS-115-111-2016; the ruling of the Supreme Court of Georgia of January 26, 2018, case No.AS-1493-1413-2017.

[16] No.158 Convention of 1982 of International Labour Organization (ILO) concerning Termination of Employment at the Initiative of the Employer. text is available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158> [02.01.2019 15:30].

[17] *Aleksidze, L.*, Contemporary International Law, Updated and revised edition, Publishing “World of Lawyers”, Tbilisi, 2015, 33.

[18] Georgia is not a contracting state of this Convention, but it still has a duty to implement a "valid reason" principle in accordance with international customary law and Article 6 of the International Covenant on Economic, Social and Cultural Rights (*Kasradze, L.*, Minimum Obligation of State and "Valid Reason" Principle in case of dismissing an employee: Standard of International Labour Organization, International Standards for Human Rights Protection and Georgia, Korkelia K. Ed., German Corporation for International Cooperation GmbH (GIZ), Tbilisi, 2011, 111).