EUROPEAN UNION FOR ARMENIA

oxYGen

Protection of Rights Without Borders NGO

# ISSUES OF DISMISSAL OF EMPLOYEES ON THE GROUND OF THE LOSS OF CONFIDENCE

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This policy document and recommendations are based on the issues revealed based on the results of the monitoring conducted by the Protection of Rights without Border Non-Governmental Organization (hereinafter referred to as the Organization). The Organization conducted monitoring on administrative and civil judicial cases by labor disputes in 2021.

In the scope of the monitoring, 496 cases on employment relations were monitored, from which 384 decisions on civil and 112 decisions on administrative cases, as well as 123 decisions on discontinuation of the case. In 94 civil cases out of 384, the employment contract was terminated as a result of being subjected to disciplinary liability, moreover, 62 (66%) out of 94 applications in this regard were satisfied.

A common problem regarding the interpretation and application of the regulations concerning the dismissal of the employee on the ground of the loss of confidence in the employee was recorded by the monitored cases.

Thus, the Labor Code envisages the termination of the employment contract on the initiative of the employer on a number of grounds, including as a result of subjecting to disciplinary penalty.

According to the Point 6 of Paragraph 1 of Article 113 of the Republic of Armenia Labor Code (hereinafter referred to as Labor Code), in case of the loss of confidence in the employee, the employer has the right to rescind the employment contract concluded with the employee for an indefinite time limit, as well as the employment contract concluded for a fixed time limit before the end of the validity period.

According to the Article 122 of the Labor Code, the employer has the right to terminate the employment contract with the employee due to loss of confidence in the employee as envisaged by Part 6 of Paragraph 1 of Article 113 of the Labor Code, if the employee

1) while dealing with funds or goods, has committed acts that have made the employer incur material damage;

2) while carrying out teaching and educating functions, has committed an act that is incompatible with the continuation of the given task;
3) has released state, official, commercial or technological secrets or has informed the competing organisation about it.

39 cases (the majority, 41,4%) out of the monitored 94 cases on the termination of the employment contract due to the loss of confidence in the employee related to the appealing of the dismissal decision. 35 applications (90%) were satisfied.

This kind of high indicator of satisfaction shows that the dismissal on the mentioned ground is more problematic and needs additional regulation.

The Court satisfied the lawsuits both on the grounds of procedural violations, for example the failure to receive explanation or the failure to mention about the factual or/and legislation grounds in the dismissal decision and the wrong qualification of the violated subject based on the grounds of the unclear or incomplete duties.

- *Issue related to the employee as a subject to carry out certain functions*

The issue that the employee was not considered a subject of the violation in the context of the loss of confidence in employee was raised, while dismissing the latter conditioned by different factors.

*Being a subject of carrying out teaching and educating functions*

The courts attached different interpretation to the issue of being considered as a subject to carry out teaching and education functions. The lack of the explanation of the incompatible act interconnected to the realization of the teaching and education functions envisaged in any legislative acts also had different interpretations, for which the employers subjected the employees to disciplinary penalty and therefore dismissed.

Particularly, the courts interpreted the issues whether the director of the school is considered a subject to carry out teaching and educating functions differently. In one case,

for example, the Court recorded that the director of the school is considered a subject to carry out teaching and educating functions, however, made a reference to a concrete act, stating that the latter is not against the main moral norms, therefore does not make the future work of the applicant incompatible[1]. In another case, the Court stated, that the director of a school is not considered a subject to carry out teaching and educating functions by any legislative act[2].

*While dealing with funds or goods, committing such acts that have made the employer incur material damage*

By 20 cases out of 39 monitored cases on the dismissal on the ground of the lack of confidence in the employee, the employers dismissed the employees on the ground, that the latter committed such acts while dealing with funds or goods, as a result of which the employer had a material damage.

The applicants appealed this, stating that they are not considered a disposition subject, as envisaged by Paragraph 1 of Article 122 of the Labor Code or by stating that in the outcomes of the latter the employer did not carry any damage or the decision was adopted when the employee was in vacation, which is forbidden or again on the ground of the lack of legislative grounds or failure to take explanation and on the ground of other justifications.

Moreover, only two lawsuits filed by the applicants who were subjected to disciplinary liability were rejects: one appeal was rejected on the ground of the lack of guilt in the act and the other on the ground of missing the deadline to file an application to the court, respectively[3].

*Releasing of state, official, commercial or technological secrets or informing about the latter to the competing organisation.*

[1] See, for example: ԱԼԴ/3713/02/20, http://datalex.am/?app=AppCaseSearch&case_id=38843546786192492
[2] See, for example: ՇԴ/1079/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=29554872554720303
[3] See, for example: ԵԴ/26219/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204064506

Two decisions were adopted by the above-mentioned ground and the submitted applications to appeal the decisions were both satisfied by the Court[4]. By both cases, the Court highlighted that the employer should justify the circumstance that the secret has been published or has been transferred to the competing organization, otherwise the dismissal by the above-mentioned ground is considered unjustified.

It should be mentioned, that the Court practically does not detect the outcomes of the deed, the works carried previously and other factors, and the employer implies the strictest penalty, only because the latter has the right to do so[5].

It is also important to highlight, that in Paragraph 3 of Article 122 of the Labor Code, that is the releasing of the secret, which caused a damage to the employer, there is no statement about the outcomes of the damages and, respectively, the availability of the consequence of other parts of Article 122 are considered obligatory to dismiss the employee on the grounds of the aforementioned article.

- *Availability of the obligation to carry out certain functions*

In a group of the monitored cases, the Court referred the issue whether the employer had certain obligations, as a result of failing to carry out the latter, the employer suffered damage[6].

*Justification of the availability of the damage*

By a number of cases, the Court satisfied the appeals and recognized the decisions on dismissing the employees in a line with Paragraph 1 of Article 122 of the Labor Code annul on the ground of the failure to prove the circumstances of the material damage

[4] See, for example: ԵԴ/10397/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204024812, ԿԴ1/3511/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=16325548649310079

[5] See, for example: ԵԴ/39170/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421203988582

[6] See, for example: ԵԴ/10332/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204024510

caused to the respondent[7], the existence of the illegal behavior of the person, who caused the material damage, the lack of cause and effect between the illegal action of the alleged person who caused the material damage[8], etc.

The Court highlighted the justification of the cause of the real damage and in cases, when the employer failed to justify it, the Court recorded that in a line Paragraph 6 of Part 1 of Article 113 of the RA Labor Code, the grounds to dismiss the employee were missing[9].

Among other issues, as a ground for the Court's decision that no material damage was recorded was the fact, that no monetary asset (during the calculation of the final settlement) was confiscated from the salary of the applicant as a compensation for the damage caused to the employer[10].

- *Lack of guilt in the act*

In the monitored cases, the Court did not apply a unified approach in terms of the allocation of the burden of proof justifying the lack/availability of the guilt, in one case putting the guilt in the act of the employee on the respondent and satisfying the appeal and in the other cases putting the presumption of guilt of the application on the ground of rejecting the appeal, unless the applicant proved his lack of guilt in a line with the regulation of the RA Civil Code[11].

- *Application of disciplinary penalty without taking explanation*

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[7] See, for example: ԵԴ/10332/02/20,http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204024510; ԵԴ/15812/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204038995;ԵԴ/16267/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204039998;ԵԴ/21070/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421203956105:

[8] See, for example: ԵԴ/21070/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421203956105

[9] See, for example: ԵԴ/15812/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204038995

[10] See, for example: ԱՐԴ1/2415/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=38843546786165477

[11] See, for example: ՍԴ/1558/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=35465847065593372; ԱՎԴ2/2892/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=27303072741048745

Pursuant to Article 226 of the Labor Code, before the application of disciplinary penalty, the employer is obliged to demand a written explanation on the violation from the employee, by providing the latter a reasonable deadline. If the employee, without reasonable ground doesn't present written explanation within prescribed time frame, the disciplinary penalty can be applied without written explanation.

The Republic of Armenia Court of Cassation recorded, that the norm envisaged by Article 226 of the RA Labor Code has an imperative (obligatory) nature, according to which, it is obligatory for the employer to demand a written explanation from the employee before the application of the disciplinary sanction and that it is obligatory to demand the explanation from the employee before applying the disciplinary liability by defining a reasonable deadline for its submission[12].

In a group of cases, the Court referred to the failure to receive an explanation or the failure to provide reasonable deadline to give an explanation.

In a number of cases, the applicants highlighted the circumstance, that their right to give explanation was not ensured. In some cases, the Court satisfied the lawsuit by only recording the circumstance of the failure to take the explanation[13] and sometimes the \court recorded other grounds to annul the decision[14].

It is notable, that Article 226 of the Labor Code does not contain any information through what kind of means the written explanation can be demanded from the employer, which, in its turn led to controversial interpretations.

Particularly, the Court satisfied the appeal, stating that on the ground of Article 226 of Labor Code, before the application of a disciplinary penalty, the employer was obliged to demand a written explanation from the employee and define a reasonable time. And in some cases, by one of the overturned cases[15], both the Court of Appeal and the Court of First

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[12] See, for example: ԵԿԴ/2998/02/12, the decision of the RA Court of Cassation by civil cases, dated 26.12.2013
[13]See, for example: ՇԴ/3290/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=29554872554726809
[14] See, for example: ԱՐԴ1/2415/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=38843546786165477
[15]ՇԴ/5419/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=29554872554731976

Instance[16], respectively declared the approach, that by Article 226 of the Labor Code it is it not highlighted, through what kind of means the employer can demand a written explanation from the employee. As stated by the Court, the law does not define concrete means (postal, electronic delivery, etc.) to file the explanation, therefore, any means can be applied, including also the means as defined by the employer[17].

- *Lack of factual or/and legal evidence*

In 8 cases (21%) out of 39 cases, respectively on the loss of confidence in the employee, the Court recognized the decisions on dismissal on the grounds, that the latter did not contain the necessary legal or/and factual grounds, particularly, one of the points of Paragraph 1 of Article 122 of the Labor Code, by which the person could be subjected to liability and get dismissed or grounded evidence was not presented to the Court[18] or the Court recorded, that the respondent failed to carry out the factual circumstances of the disciplinary penalty[19].

By the examination of this kind of judicial cases it is not clear on what kind of ground the employee was dismissed: for causing material damage, releasing of secret or for example for carrying out teaching and education functions[20].

As stated by the Court, Part 6 of Paragraph 1 of Article 113 of the Labor Code, without the same Article 122 of Labor Code, cannot be considered a legal ground to terminate the employment contract on the initiative of the employer, since only by the enforcement of the latter, it is not possible to determine whether the conditions, factual grounds are available, in case of which the employer can adopt a legal individual legal act to

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[16]ԵԴ/4792/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204012728
[17] ԵԴ/4792/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204012728
[18]ՏԴ/1621/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=32369622321763201
[19]ԵԴ/16498/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421203946470
[20]ԱՎԴ1/2424/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=27303072741045306; ԵԴ/8126/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421203928734; ՏԴ/1621/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=32369622321763201; ԱՎԴ1/0048/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=27303072741026200; ԳԴ4/1514/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=33495522228629911:

unilaterally terminate the employment contract, therefore, by mentioning Part 6 of Paragraph 1 of Article 113 of the Labor Code, without referring to the Article 122 of Labor Code, including the relevant point, the employer does not ensure the requirement in terms of obligatory statement about the legal grounds as envisaged by Point 1 of Paragraph 2 of Article 214 of the Civil Procedure Code, which led to the respective consequence, as envisaged by the aforementioned legal provision.

Moreover, the Court recorded, that regardless the circumstance whether the party witnesses about the violation as prescribed by the norm or not, regardless the circumstance whether the respondent with its position furtherly explains the factual ground or not, the Court is obliged to recognize the decision annul, if the factual ground to terminate the employment contract is not mentioned in the decision. Only mentioning the title of the article in the decision cannot be considered a factual ground, since the employer is obliged to mention in the decision, which factual circumstances were considered while deciding that the employer has lost confidence in the employee: the case, the act and other information should be mentioned, respectively[21].

It should be mentioned, that not in all cases the Court referred the issue of mentioning about legal and factual grounds. In some cases, the Court did not refer the obligation of the employer to mention the factual and legislative grounds of the decision, did not apply Article 214 of the Civil Procedural Code, as a result rejecting the presented appeal[22].

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[21] See, for example:ԵԴ/42071/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421203995134 ԵԴ/16367/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=45880421204040011, ՏԴ/1621/02/20, http://www.datalex.am/?app=AppCaseSearch&case_id=32369622321763201, ԱՎԴ1/2424/02/19, http://datalex.am/?app=AppCaseSearch&case_id=27303072741045306

[22] See, for example: ՇԴ3/0259/02/19, http://www.datalex.am/?app=AppCaseSearch&case_id=29554872554719924

## RECOMMENDATIONS

*On legislation*

- Review the regulations on dismissing the employee due to the loss of confidence in the employee as envisaged by Part 6 of Paragraph 1 of Article 113 and by Article 122 of the Labor Code, respectively, enlarging the cases, the grounds, the subjects for the loss of confidence in the employee, including permission of such violation of order of work duties or disciplinary rule, as a result of which the employer had a material damage or damage was caused to the employer's business reputation or a danger was caused to the lives or the health of the latter.
- Besides the aforementioned, differentiate the subjects in charge of conducting educational, administrative, teaching and education functions, the concepts incompatible with the functions of carrying out educational, administrative, teaching and education functions in education institutions, clarify the subject of violation while dealing with funds or goods.
- Make amendments in the Labor Code, defining the means for demanding explanation in case of being subjected to disciplinary liability.
- Make a supplement in Article 226 of the Labor Code, defining, that by providing a reasonable deadline for the submission of written explanation, the employer should take into consideration the nature, severity and outcomes of the alleged disciplinary violation, as well as the opportunity to submit an explanation by the employee.
- Envisage in the Labor Code the obligation of the employer to adopt the individual legislative act on subjecting the employee to disciplinary liability, which will satisfy the preconditions of legality, justification and proportionality, including the definition of demand to refer the evidence submitted by the explanation of the employee, recording the legislative and factual grounds for subjecting the employee to disciplinary liability, as

well as to justify the proportionality of the applied disciplinary penalty in regard to the disciplinary violation (the severity, outcomes, etc.).

- Clearly envisage by legislation the requirements for the content of the decisions adopted by the employer.
- Clearly envisage in the Labor Code the obligation of the employee to adopt individual legislative acts, which include the necessary legislative and factual grounds and justifications for their adoption.

*For the purpose of awareness raising*

- For the implementation of the activities of the Labor and Healthcare Inspection body, elaborate samples of decisions for the obligatory preconditions on subjecting to disciplinary penalty or on dismissal to comply the employer's practice and the judicial practice to the legislation.
- Discuss the problems of the decisions on the dismissal and the subjecting to disciplinary liability, the obligatory preconditions of notification with the employers, employees and their representative during the seminars organized for the latter.
- Ensure the awareness raising among the employers and elaborate guiding materials on the legislative documentation on the requirements presented for the decisions adopted by the latter.
- Elaborate sample forms of decisions adopted by the employers for the regulation of the practice.

*Regulation of judicial practice*

- Ensure a unified approach in terms of maintaining the requirements envisaged by Article 214 of the RA Civil Procedure Code.
- Ensure the evaluation of the evidence by the labor disputes presented by the parties in a line with rules of the distribution of the burden of proof. Ensure the justification

of the verdicts by the calculation, that the act shall include the procedure of the court in terms of the evaluation of the evidence, confirmation of the evidence and the application of the right, the conclusions stemming from the latter so that the objective third party has a clear vison about the grounds of the justification or rejection of the appeal, respectively.