GETSADZE & PATEISHVILI

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Regulation of Labor-legal Relations in accordance with Liberalized Labor Code

As you are aware, modification of norms regulating labor-legal relations was performed through a new Labor Code, which liberally affected essential and important institutions of labor relations. It is interesting to found out as to whose interests were more influenced by the liberalization of labor-legal relations?

For this purpose it is interesting to evaluate legal norms of fundamental nature of a new Labor Code.

It is worth noting that the liberalization of the Labor Code deals with the duration of working hours. If an old Code strictly fixed the duration of working week, the new Code entrusted this issue to the parties to decide, however the new Code imperatively established that the duration of days-off between working days shall not be less than 12 hours.

The same non-mandatory approach is set up by the legislator with respect to the overtime work. "Overtime work conditions shall be defined by the mutual consent of the parties" (Article 17 § 4). Nevertheless, here we face with two exceptions, when overtime work is compulsory to fulfill while: 1. prevention/elimination of calamities; 2. prevention/elimination of accidents. In the second case the employer shall compensate to the employee for the work conducted, however the Code does not stipulate for the standard of remuneration of overtime work – proportionate to the wage or by the rate established by the employer. I believe that the determination of this rule by the Code is essential in order to avoid the abuse of power by the employer and setting up of unfavorable standard for remuneration of overtime work to the employee. Pursuant to the labor legislation of the European countries, overtime work is subject to double remuneration. The old Labor Code regulated this issue according to that rule; nevertheless the new Code avoided the definition of remuneration issue. It should be noted that there exists no international convention in this field, which would oblige the Georgian side to take into consideration fair remuneration for overtime work, acceptable for both parties.

Liberal approach is demonstrated by the reservation made in Article 20 § 2 "an employee is authorized to request other rest-days instead of the regular holidays established by the present law." The part of the holidays established by the Code is related to religious holidays, however the employee may not recognize a certain holiday or/and be a representative of other religious belief. Stemming from freedom of religion and belief, international acts obliged the states parties to support freedom of religion and belief in their legislation.

Article 31 § 3 constitutes an innovative norm of the Code and in this case defending the interests of the employee, which obliges the employer to pay to the employee 0,7% of the amount delayed for the delay in payment of any remuneration. The old Code does not stipulate for the similar situation, consequently the delay in payment of any remuneration did not entail any responsibility of the employer. It is true that the new Code provides for the possibility of imposition of penalty, though it established a rather low statutory interest rate. Yet the parties are authorized to fix higher rate by the contract.

The legislator granted a possibility to the employer to apply financial sanctions, in particular, deduct from a remuneration, amount of which shall not exceed 50% of the remuneration. This norm is disadvantageous for the employee; on the one hand, the employer is empowered to apply the maximum amount of deduction and, on the other, the Code does not provide for legal grounds of deduction. If the Code does not determine a general rule and ground for deduction, there is a great likelihood that the employer deducts from the remuneration of the employee for minor disciplinary violation.

In order to assess the level of democratic nature of the liberalized Code, it is vital to evaluate the most fundamental institutions, in particular, grounds for suspension-termination of labor relations and mechanisms for regulation of disputes. One of the most important innovations of the Code is the establishment of rules for termination of labor relations. The Code imperatively determined the legal grounds for termination and did not set those legal sanctions, which may follow the termination of labor relations. A slight uneasiness is created by the nonpayment of remuneration during the termination of labor relations conditioned by the employee. However, here the legislator left to the parties the possibility to choose and made a reservation, that "In case of termination of labor relations, an employee shall not be paid remuneration, unless otherwise provided by the legislation of the labor contract" and what is the most important, termination of labor contract is not permitted during the termination of labor relations. Certainly, there is an essence in this attitude of the legislator; however, it is absolutely rebutted by the grounds of termination of labor relations. The thing is that during the selection of grounds for termination of the contract the legislators have chosen an extremely radical method; firstly, the legislator established entirely imperative norms with regard to the termination and secondly, simplified not only the procedure for termination, but also the substantiation. Exactly this part of the Code constitutes a major threat, which completely casts a doubt to the democratic nature of the Code, as well as the fundamental principle of the law-abiding state "to protect human rights and fundamental freedoms." The problem is that in the course of establishing the grounds for termination, the legislator merely applied the idea of lobbing the interests of the employer and temporarily forgot about the labor rights of the employee, recognized by the constitution. In fact there are nine grounds determined by the Code for termination of labor relations, in particular, fulfillment of the work stipulated in the contract, expiration of the contract, violation of the contract terms by the other party, terminating of the contract on the initiative of a party, agreement between the parties, effective court judgment/decision eliminating the possibility to fulfill the work, long-term disability, liquidation of the employer, and death of an employee. Among these grounds, exceptional threat is posed by the breach of the terms of the labor contract and termination of the contract on the initiative of one of the parties.

Termination of labor relations by one of the parties in the course of the breach of the terms of the contract is far more risky for the employee. As a rule, deriving from the employment difficulties in Georgia, if an employer does not seriously breach the terms of the contract and by it infringes the interests of the employee, indisputably, the employee will in rare circumstances take a risk to terminate the contract. This ground of termination will be useful for the employer

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in the course of labor relations. First, nothing is said in the Code as to what kind and level of violation is considered as the ground for termination of the contract and since this issue is not in details referred to by the legislator, there is a great risk that the employer will dismiss the employee for a minor breach and without any compensation.

The main problem is the existence of Article 38, which provides for unmotivated termination of the contact. In this case, the mere initiative is sufficient and the employer terminates the contract with the employee without any prior notification and ensures the payment of only one-month compensation. The existence of this Article is the illustration of the fact that the labor relations acquire rather an unstable character, the feeling of instability and the constant fear of dismissal, I think, will have a negative affects on the quality of the work. Unquestionably, the majority of the employers will actively apply this statutory possibility. Legalization of similar possibilities i.e. their existence in the legislation is an extremely negative influence on the development of employment market. It is true that in a number of European countries (Germany, France) similar mechanisms of the termination of the contract exist, however they entail numerous reservations, which eliminates the desire of the employer to terminate the contract without grounds. If we consider the court practice of Germany, while termination of a labor contract before expiration of the labor contract term, the employer is obliged to remunerate to the employee the whole amount of the contract i.e. even the period, when the employee was to conduct a work. As regards the situation in Georgia, the desire of the employer is enough for the employee to be left unemployed, i.e. here the priority is given to the interests of the employer. Obviously, for the developed factory a paramount importance is attached to the selection of qualified employees and constant development of the selection process. Nevertheless, permanent change of employees goes against the management principles.

Regulation of labor-legal relations and the role of settlement of disputes are carried out by different institutions in different countries. In England there operates Industrial Tribunal, Appellate Tribunal for Employment, numerous Commissions, diverse function of which implies the revision of the labor legislation and assistance rendered to the employees. Exactly these diverse institutions transform this field into dynamic and varied one. Changing the nature of the field is, actually, very significant, since the relations between the employer and employee is not solid, but daily obtains increasing and developing character.

A range of procedures for settlement of labor-legal disputes have been introduced by the new Labor Code of Georgia. However, pursuant to the Code, simply the procedures for regulation of disputes become diverse, but bodies regulating the disputes remained unchanged. The procedures for considering the disputes cover different hierarchical steps. The dispute is deemed to be arisen when the party sends a written notice about the disagreement to another party. Hence, the existence of a dispute is revealed by the written notice. The settlement of a dispute is possible by means of conciliatory procedures, through individual negotiations or court. These three alternative approaches derive from each other and the legislation requires that the parties put together their efforts to accomplish conciliatory procedures. Exactly the conciliatory procedures represent the innovation in our legislation. At the beginning of conciliatory procedures a party sends out to the other party a written notice, which shall precisely define the reasons and demands of the dispute.

The other party shall consider the written notice and inform the party in writing of its decision within 10 days after receiving the notice. Written notice becomes a part of existing labor contact if, of course, the agreement between the parties and the attitude towards the disputed matter is envisaged in this decision. If in the case of a contractual dispute an agreement cannot be achieved during 14 calendar days, or if either party avoids participating in the conciliatory procedures, the other party shall have a right to appeal to a court or arbitration. The rights to appeal to a court is not a novelty, however the right to apply to arbitration represents an innovation in settlement of labor disputes. Basically, arbitration courts established in Georgia on the bases of the law on Arbitration examine property and civil disputes. Firstly, it is necessary to achieve an agreement between the parties regarding the application of arbitration mechanism and secondly, to broaden the competence of arbitration in the field of settlement of labor disputes. It might be underlined that the reservation made in Article 48 § 5 "to appeal to a court or arbitration" necessitates certain amendments in the law on Arbitration and it is of significance that the parties, on the basis of the labor contract or other additional written agreement, select arbitration as a body examining the dispute. The role of arbitration in various countries is considerably increasing. In fact this tendency has determined the introduction in the Labor Code of Georgia of arbitration as an institution examining the disputes. Nevertheless, Georgian legislator could not finalize this task and, in practice, if the parties to the labor contract comply with the first requirement and indicate in the contract arbitration as the body competent to examine the dispute, this rights will not be actually realized, provided that it will appear that arbitrations registered in Georgia are not competent to examine labor disputes in accordance with a specialized law under which they operate.

Strike and Lockout, regulated in details in the Labor Code, could be considered as one of the achievements of the Code in a procedures point of view. It is true that the right to strike constitutes one of the fundamental rights recognized by the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights and the employees have been enjoying the right to strike in past times as well, however pursuant to the old legislation, this right was not so carefully implemented from international acts. Strike is a temporary and voluntary refusal of employees to fulfill their labor liabilities either completely or partially during a dispute on rights. Lockout is the right of an employer to keep an employee out of his/her workplace in the same circumstances. The Code provides for holding a warning strike and lockout and other procedural issues related to the realization of this right, which may not be criticized at this stage, in particular, until the time when the immediate practice discloses certain gaps.

Since the adoption of the new Labor Code in Georgia, when it became evident that the risk of unemployment is rather high, given that, the contract may be terminated only based on the initiative of the employer without any reason and substantiation, the government became concerned with respect to insuring these risks and proposed some initiatives to the insurance companies. This process carried a secret nature and finally the decision of only one company was disclosed. It was decided that the company would insure the unemployment risk as a pilot project. Legality requires to be pointed out that this risk is not likely to gain a great success in terms of its insurance. It is a simple principle of the insurance not to insure the risk, the occurrence of which is enormously high and can be easily foreseen. I assume that insurance of this risk in a private insurance market, while there are no hindering objective circumstances for termination of the contract, will not expectedly gain recognition, since the insurance company is not determined to

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work for loss. I consider that as European countries undertook a responsibility to provide social protection to the unemployed people, similar protection shall be carried out in Georgian and the employment policy shall be improved.

By means of assessing innovative institutions envisaged in the Labor Code, the level of democratic and liberalized nature of the Code became more or less obvious. It should be generally emphasized that adoption of the new Code is deemed to be a positive step in Georgia. In case the legal act is not oriented towards protection of human rights and freedoms and gives a priority to corporative interests, it is hard to talk about its positive character generally, and specifically. Current attitude that the Code will actually work in practice is rather pessimistic; however, there exist one part of the government who can positively apply one or another norm of the Code and interpret it as beneficial for the employee. This part of the government is justice. Decisive role in terms of the effectiveness and flexibility of the Code lies on the court and exactly the practice of the court shall interpret those vague norms, which pose a threat to the employees and the courts shall reveal those norms, which immediately infringe fundamental rights of the employees.

As to sum up, it is to say that the Labor Code is a final word of the legislator in this field. It is true that the labor legislation has changed only in 2006 since the communist regime; however, if the court practice, society and the interested persons will reveal unlawful nature of certain norms, I believe that the legislator will be made to act in support of employed physical persons, given that Georgia has an aspiration to develop a democratic state. Democracy is nothing without protection of human rights and giving priority importance to it.

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