Problems of legal regulation of the grounds for termination of an employment contract at the initiative of the employer

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The presented scientific article arises from the research of theoretical and practical problems of the legal regulation associated with the grounds and the procedure for termination of an employment contract at the initiative of the employer under a free market economy. The article substantiates a number of concepts, along with ideas and conclusions which are conceptual in theoretical terms and important for the legal practice. In particular, for the first time the classification of stages of development of the labor legislation regulating the procedure for termination of an employment contract at the initiative of the employer is given, characteristics of each of these stages are analyzed and defined. In addition, the article summarizes the expediency of bringing the norms of the national legislation on the dismissal of employees at the initiative of the employer in accordance with the conventions and recommendations of the International Labor organization, and substantiates the need to fix the amount of severance allowance depending on the grounds for dismissal of the employee and the length of current employment. There have been formulated proposals to specify the grounds for termination of an employment contract with an employee performing educational functions. Moreover, it is suggested to introduce in the labor legislation standalone grounds for termination of an employment contract at the initiative of the employer, namely: dismissal of the employee on completion of qualification testing; violation of labor protection rules by the employee, which resulted in serious consequences, including injuries and accidents; dismissal of the employee due to changes to essential labor conditions; deliberate violation by the employee of the obligation not to disclose the state, commercial and other secrets or information protected by law; provision of false information by the employee to the employer when concluding the employment contract; termination of business by the employer as an individual.

Keywords: right to work; employment contract; termination of employment contract; dismissal of the employee.

Introduction

In the process of building a rule-of-law state, the issue of reliable protection of citizens' labor rights is thrown into sharp relief. State guarantees of protection of citizens from illegal dismissal are enshrined in the Constitution of the Republic of Kazakhstan [1]. In order to properly ensure these guarantees, it is necessary to thoroughly update the labor legislation and bring its statutes in line with market relations and international standards. Corresponding changes are required for the legislation regulating the

peculiarities of the termination of an employment contract at the initiative of the employer.

Transition to a market economy, the formation of various forms of ownership, the emergence on their basis of numerous organizational and legal forms of legal entities leads to the introduction of new approaches to the problem of the termination of labor relations at the initiative of the employer and are central to the science of employment and the labor law.

The existing legislation on the termination of an employment contract at the initiative of the employer is

outdated and does not fully reflect the needs of legal regulation of social relations, including the relations that arise in the event of the termination of an employment contract at the initiative of the employer. Frequent and unjustified dismissals of employees on these grounds affect not only the interests of the parties to the employment contract, but also the interests of the society as a whole, because they cause such negative consequences as staff turnover and unemployment. In-depth study of the special grounds for termination of an employment contract is required for a full and complete implementation of the rights and legitimate interests of both employees and employers.

Research in this area is quite complex in nature and requires sound evidence-based and scientifically well-reasoned approaches.

It is necessary to improve the statutes of the labor legislation regulating the termination of labor relations and dismissals of employees, including those initiated by the employer. An important task in this regard is to increase guarantees for employees in order to protect them from illegal dismissal.

The purpose of this article is to identify and solve theoretical and practical problems associated with the termination of labor relations at the initiative of the employer, to develop specific proposals aimed at improving the current legislation and its implementation. In order to achieve this purpose, the doctoral dissertation addresses the following main **objectives**:

- to determine stages and to study peculiarities of development of legislation on the termination of labor relations at the initiative of the employer; to analyze the procedure of regulation of the grounds for termination of an employment contract at the initiative of the employer in international law acts and foreign legislation taking into account international standards, as well as best international practices in the labor law, which regulates the peculiarities of the termination of labor relations;
- to study the terminology for the procedure of the termination of employment;
- to classify the grounds for termination of an employment contract and identify the most significant characteristics of each of them;
- to define the guarantees and compensations provided in case of dismissal of employees at the initiative of the employer;
- to study the peculiarities of the employer's liability for pecuniary and non-pecuniary damage caused to an employee by illegal dismissal;
- to introduce proposals into national labor legislation to improve the legal statutes regulating the termination of an employment contract at the initiative of the employer.

General-Theoretical Framework for the Study

In the process of research there were used general scientific and special methods of cognition of legal phenomenon: a dialectical method, an Aristotelian method, a system and structural method, a historical method, a normative and comparative method and others.

The dialectical method allowed us to consider the raised problems of the grounds for termination of an employment

contract at the initiative of the employer in their development and interrelation within the employment and the labor law. The use of the historical method allowed us to show the development of the legislation regulating the grounds for termination of an employment contract at the initiative of the employer, and the development of the theory regarding the dismissal of employees, as well as to justify the need for further research into this problem. The Aristotelian method contributed to the identification of contradictions in the terminology for the procedure of the termination of labor legal relations at the initiative of the employer and helped to formulate conclusions and recommendations, which are based on such principles of logic as certainty and sequence of judgments.

The analysis of scientific research allows us to state that there is a sufficient research base in the study of the problems of the termination of an employment contract at the initiative of the employer.

Among major monographic works, it is necessary to mention the work by N.V. Demidov *Dismissal at the Initiative of the Employer: Theory, History, Practice* [2], which analyzes the legal regulation and theoretical aspects of dismissal of an employee at the initiative of the employer. The historical development of separate grounds for termination of an employment contract is considered, comparison with foreign experience of legal regulation of similar relations is made, problems of theoretical understanding of these or those grounds are stated. The regularities of the development of the institute of dismissal of an employee are summarized, the practice of implementation of the statutes on the termination of an employment contract is studied, some elements of continuity of both separate legal statutes and principal approaches of the legislator are traced. The research is based on extensive historical and legal materials, works of pre-revolutionary and Soviet scientists, and works of modern lawyers.

Another important monographic is the work *Legal Regulation of the Termination of an employment contract: by Mutual Consent of the Parties and at the Initiative of the Employee* by T.V. Abayeva [3], where the detailed analysis of the most common grounds for termination of an employment contract is given, the legal consequences of the termination of an employment contract are studied, the system of guarantees provided to employees in connection with the termination of their employment contracts, as well as the procedure and execution of records of dismissal of the employee by mutual consent of the parties and at the initiative of the employee are analyzed. The work analyzes the judicial practice of resolving labor disputes related to the termination of an employment contract by mutual consent of the parties and at the initiative of the employee.

In the science of the labor law of the modern period the monograph by G.A. Agafonova *Termination of an Employment Contract at the Initiative of the Employer on the Grounds not Related to the Fault of the Employee* [4] is a study which defines the peculiarities of the termination of an employment contract at the initiative of the employer without cause, and identifies the corresponding loopholes in the current labor legislation.

Foreign authors pay special attention to the peculiarities of the termination of an employment contract at the initiative of the employer. There are also special

monographs on the protection of workers' labor rights in the event of dismissal. One of the most complete and detailed works on problematic aspects are *Firms Get Plenty of Practice at Layoffs, but They Often Bungle the Firing Process* by Alexander S. [5]; *Employment Law for Business Students* by Stephen Hardy and Robert Upex [6]; *EC Employment Law* by Barnard C. [7]; *Introduction to the Law and Legal System of the US* by Burnham W. [8]; *Employment Law* by Collins H. [9]; *Employment Law Statutes 2003/04* by Malcolm S. [10]; *Law, Business and Society* by McAdams T. [11]; *Cases and Materials on Employment Law* by Painter R.W., Holmes A. [12].

Recognizing the importance of scientists' contribution to the development of issues of legal regulation and theoretical aspects of dismissal of an employee at the initiative of the employer, their legal guarantees, it should be mentioned that these works and findings require additional study of the multifaceted problems in the context of a democratic civil society and rule-of-law state formation in accordance with international law acts on protection of labor rights.

Findings and Discussion of the Study

The transition to market relations, the change in the direction of economic development, fundamental changes in property relations, privatization and denationalization have caused unemployment, sharpening of disagreements between the employer and the employee, and a drop in the demand for labor. The situation with legal regulations of the protection of the constitutional right of citizens against illegal dismissal can hardly be recognized as proper. The rules on the termination of employment contracts at the initiative of the employer should characterize the high level of labor rights of citizens and be a reliable guarantor against illegal dismissals.

In our opinion, the research and analysis of the process of historical formation and development of the institute of an employee dismissal at the initiative of the employer is extremely relevant now. It is impossible to find the mechanism of protection of employees from illegal dismissals which would be adequate to modern requirements to build a rule-of-law state; or to improve the current mechanism of protection of employees from illegal dismissals without research of its historical origins and analysis of experience on the given problem. The current labor legislation regulating legal relations in the field of an employee dismissal was generally formed in the post-Soviet period and does not fully meet the constitutional provisions of protection against illegal dismissal.

The first stage of formation and improvement of the legislation on the termination of labor legal relations is connected with the adoption of the Labor Code of the RSFSR of 1918 [13,458-459] and ends with the first codification of the labor legislation of the Kazakh SSR. The grounds for dismissing an employee were laid down in Article 46 of the Labor Code of the RSFSR of 1918.

The second stage of the legislation development and improvement begins in the early 20s, when the country changed course. The new codification of the labor legislation of 1922 was intended to replace the Labor Code of 1918 with a new Code designed to regulate labor relations in the conditions of transition to a market economy. In connection

with the formation of the USSR and the adoption of the Constitution of the USSR in 1924, there arose an issue of the division of powers and jurisdictions of the USSR legally represented by its supreme bodies and Union Republics, as well as the adoption of the all-Union legislation. Before the adoption of the nationwide labor laws, all the Union Republics were covered by the Labor Code of the RSFSR of 1922, which was in effect in each republic under the name of the Labor Code of the respective republic.

The third stage of development of the legislation on the termination of labor legal relations is conditioned by the adoption on July 15, 1970 of the Fundamentals of Labor Legislation of the USSR and the Union Republics, which were put into effect on January 1, 1971 [14,265], and the Labor Code of the Kazakh SSR of July 21, 1972. Generally, the new Code reproduced the structure of the Fundamentals of Labor Legislation of the USSR and the Union Republics, however its provisions became more specific, informative and somewhat better protected employees from possible illegal dismissal. Significant changes were made to the legislation governing the legal status of seasonal and temporary workers, and specifically with regard to the dismissal of these categories of employees. In addition to obtaining the consent of the trade union committee, additional requirements were set for the dismissal of certain categories of employees in order to protect their labor rights.

The fourth stage, which was the introduction of the subsequent changes and additions to the statuses governing the termination of labor legal relations, was related to the perestroika (a complex series of reforms to restructure society and the economy) that began in the USSR. In order to strengthen the material responsibility of employees for the damage caused to a legal entity, and to strengthen the control over the receipt of non-labor income the Labor Code of Kazakh SSR was supplemented by another ground for dismissal of employees at the initiative of the administration – misappropriation (including petty theft) of State or public property at the place of work. The new labor legislation provided for benefits and compensations to the redundant employees, and in case of the termination of their employment contracts in connection with the implementation of measures to reduce the number of employees or the staff, the redundancy payment in the amount of the average monthly earnings was paid, as well as the average salary was paid until employment, but not more than two months from the date of dismissal, taking into account the redundancy payment. Thus, the perestroika stage (1986-1990) is characterized by the subsequent changes and additions to the statuses governing the termination of labor legal relations at the initiative of the employer.

The new (fifth) stage in the development of the legislation on dismissal of employees at the initiative of the employer begins with the declaration of independence of the Republic of Kazakhstan and with the transition to the market economy. This fifth stage is characterized by the expansion of the provision of benefits and compensations to redundant employees; by the restriction in the groups of employees with whom an employment contract may be terminated due to a single gross violation of work commitments; by the increase in the amount of severance pay; by the maximizing of the liability for pecuniary damage of the owner or their

authorized body to the employee in the event of illegal dismissal or transfer to another job, by the introduction of compensation of non-pecuniary damages to the employee by the owner or their authorized body.

We believe that with further improvement of the labor legislation, it is advisable to provide an appropriate mechanism to protect employees from illegal dismissal, and it is necessary to take into consideration the historical experience of formation and development of the institution of termination of labor legal relations. However, in order to develop the concept of the legal regulation for termination of an employment contract at the initiative of the employer it is not enough only to analyze the previous and current employment legislation, along with that it is necessary to analyze the norms of legal regulation of an employee dismissal of at the initiative of the employer in international law acts in order to determine the compliance of the national legislation with international standards and to borrow the best practices.

The current period of legal reforms is marked by a tendency to use the experience of foreign countries in the field of legal regulation of labor legal relations, including issues related to their termination. When studying the legal regulation of an employee dismissal at the initiative of the employer in some countries, it should, in turn, be classified into: the legal regulation for termination of labor legal relations at the initiative of the employer in some highly developed countries (France, Germany, Italy, etc.); in developing countries (Vietnam, China); in countries of the former socialist type with transition economies (Bulgaria, Hungary); and in some CIS countries.

All the employer-initiated terminations in Western European countries can be subdivided into three main groups: 1) economic and production factors; 2) removal without cause if the employee is unfit for the position; 3) termination for cause which makes the employee further presence in the labor collective impossible.

In most Western European countries, a lawful excuse (except of a short dismissal) and, as a rule, giving notice to quit are mandatory for dismissal of an employee at the initiative of the employer. The concept of the "lawful excuse" is defined variously in different countries: it is established by the legislation, by collective employment agreements and by court practice. For example, French labor legislation provides for the general principle of termination for a good cause, but the content of justifiability is determined and clarified by the courts in specific cases. Basically the lawful excuses recognized by the courts are the misconduct of an employee, as well as the business needs [15, 18-19]. In other countries (Spain, USA), the nature of the lawful excuses for dismissal is mainly disclosed in the legislation itself or in collective employment agreements [8, 512-513]. In Germany, any dismissal, both regular (with giving notice to quit) and special (without giving notice to quit), must be legitimate and grounded. When dismissing with notice to quit, the parties must adhere to a set period of dismissal, which is established by the legislation or the contract. Regular dismissal should be "socially legitimate", i.e. based on the grounds related to the employee's personality, behavior or proper business needs [16, 126-127].

In the United Kingdom, the grounds for dismissal of an employee at the initiative of the employer, providing that the

notice to quit was given, are enshrined in Article 57 of the Consolidate Employment Protection Act of 1978, which are incompetency (including for health reasons), misconduct, redundancy, illegal employment, and any other substantial reason. The definition of "any other substantial reason" is defined by the British courts in specific cases, including the refusal of employees to renew their employment contract. If an employee commits a gross disciplinary misconduct, which makes it impossible to continue the labor legal relations, under British law they are subject to dismissal without giving notice to quit [16, 149].

An interesting way to study foreign experience of the legal regulation of individual dismissals is to study the grounds for termination of an employment contract at the initiative of the employer in such countries as China and Vietnam [17, 433-435]. In these countries, dismissals of employees at the initiative of the employer is possible with or without giving notice to quit, but in the latter case only if there are reasons provided for in the labor legislation. The following grounds for dismissal without giving notice to quit are recognized by Chinese labor legislation: unsatisfactory completion of qualification testing; gross violation of labor discipline or internal labor regulations; serious losses to the enterprise due to the violation of employee's work commitments and duties; violation of a criminal law against the employee. In China, an employer has the right to dismiss an employee by giving him or her 30 days' notice on the following grounds: incompatibility of the position held or work performed due to insufficient qualification, even after completion of the relevant retraining or transfer to another job; impossibility to prolong the validity of the labor legal relations in the presence of objective factors, if the parties have not agreed to change the terms of the concluded contract.

The legal regulation of individual dismissals in Vietnam is regulated by the Labor Code and has much in common with similar Chinese labor legislation. However, in my opinion, some of the statutes are popularized, which is characteristic of employment and labor law under developed market economies. When studying Vietnamese labor legislation there should be noted another legislative ground for dismissal which is a natural disaster or other force majeure led to the decline in production and staff redundancy, despite all the measures taken by the employer to prevent such dismissal [17, 431-433].

The legal regulation of dismissals initiated by the employer in connection with changes in the organization of production and labor management in most foreign countries includes determining the procedure (criteria) for the redundancy of employees and giving notice to quit by their employer.

Under Hungarian labor legislation, an employer may terminate an employment contract with an employee by giving a timely notice to quit. Such period may be from 30 days to one year and depends on the length of service of the employee to be dismissed. The employer has to justify the grounds for the dismissal of the employee. Such grounds may be related only to the abilities and skills of the employee, his or her conduct in the performance of his or her duties, and the employer activities.

The Hungarian Labor Code provides for the legal consequences of illegal dismissal of an employee at the

initiative of the employer. At the request of the employee, the court may reinstate him/her at work and recover the salary for the entire period of forced absenteeism and other losses. However, if the employer strongly recommends against the employee's reinstatement, the court may not insist on it, provided that the employee is paid double the severance allowance. If the employee does not wish to be reinstated at work, the court, having found the dismissal at the initiative of the employer to be illegal, awards the employee additional pecuniary compensation (double severance allowance, compensation of losses) [17, 407-408].

According to the Bulgarian Labor Code, the employer has the right to terminate an employment contract with the employee with or without giving notice to quit. The notice to quit is mandatory: in the event of liquidation of the business, staff redundancy; in the event of work stoppage for more than 30 days; in the event of incompatibility of the position held or work performed due to insufficient qualification or health condition; in the event of refusal of the employee to transfer to other locality with the business; in the event of reinstatement of the employee who had previously performed this work. Termination of an employment contract with the executive employee is allowed provided that he or she is given notice to quit two months in advance.

Under Bulgarian labor legislation, such a notice is not necessary if the dismissal is related to the employee's misconduct. Disciplinary short dismissal provided for in Article 190 of the Bulgarian Labor Code may be applied to an employee: in case of being late for work or early leaving (at least one hour); for systematic violation of labor discipline: absenteeism from work within two consecutive working days, abuse of the employer's trust and dissemination of information entrusted to them, and for other major violations of labor discipline. The dismissal of pregnant women, women with children under the age of three, the wife (husband) of a conscript serviceman, an engagement employee sent to work or an employee on leave is permitted only upon prior permission of the labor inspectorate. The consent of the labor inspectorate is also required in the event of the dismissal of the said persons in the event of reorganization of business or reduction of the scope of work, staff redundancy, as well as in the event of disciplinary short dismissal [18, 148-149].

The labor legislation of the CIS countries plays a significant role in the development of Kazakhstani labor legislation.

According to Article 100 of the Labor Code of Uzbekistan, which came into force on April 1, 1996, an employee may be dismissed for a single gross violation of his or her work commitments and duties, except the grounds known to Kazakhstani labor legislation. The list of such violations is determined by the statutes of internal labor regulations, by the employment contract between the owner and the head of the business, and by the regulations and charters on discipline in respect of certain categories of workers. In addition, the employment contract with the manager is terminated at the initiative of the employer due to the change of the ownership of the corporate property; as well as with part-time employees when hiring another employee who is not a part-time employee.

A single gross violation of an employee's work commitments and duties is also a specific ground for

termination of the employment contract at the initiative of the employer in accordance with Article 119 of the Labor Code of the Kyrgyz Republic, which was adopted on October 4, 1997 and came into force by the Decree of October 4, 1997. The legislation of this country includes as a single gross violation of an employee's work commitments and duties the following: absence from work; reporting to work under the influence of alcohol, drugs or toxins; voluntary waste or theft of the employer's property; violation of safety rules which caused serious consequences, including injuries and accidents; disclosure of information constituting a State or commercial secret.

Under Article 38 of the Labor Code of the Republic of Azerbaijan, which was adopted on January 1, 1999 and entered into force on July 1, 1999, an employment contract may be terminated with an employee not only in cases of liquidation, reorganization of a legal entity and staff redundancy, but also in cases of a change of the ownership of the corporate property.

Thus, having studied the national statutes of labor law regulating the legal basis for dismissal of employees at the initiative of the employer with similar statutes of foreign countries, we can come to the conclusion that they are compatible with the relevant statutes of the international law, also they testify, in some cases, to the highest level of protection of our citizens from illegal dismissals. The legislation of Kazakhstan does not provide for reaching the retirement age as a ground for dismissal of an employee at the initiative of the employer, however in many foreign European countries such grounds are enshrined in the relevant provisions of the labor legislation.

Conclusion

The problem of the legal regulation of the grounds for termination of an employment contract at the initiative of the employer is one of the important and complex problems in the theory and practice of labor law. Constitutional guarantees of citizens' protection from illegal dismissal make the employers to be especially responsible in applying the statutes regulating termination of employment contracts.

One of the guarantees of the right to work is that an employment contract can be terminated at the initiative of the employer only in special cases defined by law. An employee may be dismissed only under the conditions established by law, subject to the restrictions imposed on such dismissal and the procedure for its execution. The Labor Code of the Republic of Kazakhstan must become the basis for further reform and development of the labor legislation, including with regard to the legal regulation of the termination of employment contracts at the initiative of the employer.

The study of the problems of the legal regulation of the termination of employment contracts at the initiative of the employer allowed us to analyze the current legislation, summarize judicial practice and make a number of proposals aimed at improving its individual statutes.

The main scientific and practical results of the study are the following conclusions:

1. In the history of the development of the national labor legislation regulating the grounds for termination of labor legal relations, there can be identified five main stages.

2. The statutes regulating the grounds and procedure for dismissal of employees at the initiative of the employer shall be in accordance with the ratified provisions of the International Labor Organization conventions on the issues specified, international treaties and agreements.

3. Introduction of foreign experience should not be the main way to form the institute of termination of employment. The national employment and labor law statutes, which define the legal grounds for dismissal of employees at the initiative of the employer, are compatible with the relevant statutes of the international law, also they testify, in some cases, to the highest level of protection of our citizens from illegal dismissals. The legislation of Kazakhstan does not provide for reaching the retirement age as a ground for dismissal of an employee at the initiative of the employer. However, in many foreign European countries such grounds are enshrined in the relevant provisions of the labor legislation. At the same time, it should be noted that certain statutes of the legal regulation of termination of employment contracts at the initiative of the employer should be implemented in the national legislation.

4. The term "termination of an employment contract" is the broadest generic concept and covers all cases of termination of the employment contract. The termination of the employment contract is the termination of labor legal relations as a result of conscious activity of people and their expression of will. The term "dismissal" defines the very technical procedure of termination of an employment contract.

5. To the legal grounds for termination of an employment contract at the initiative of the employer belong a disciplinary misconduct committed by the employee, provided that the employee has been subjected to disciplinary measures at least twice before.

It is suggested to provide in the Labor Code for standalone grounds for termination of an employment contract at the initiative of the employer, namely: dismissal of the employee on completion of qualification testing; violation of labor protection rules by the employee, which resulted in serious consequences, including injuries and accidents; dismissal of the employee due to changes to essential labor conditions; deliberate violation by the employee of the obligation not to disclose the state, commercial and other secrets or information protected by law; provision of false information by the employee to the employer when concluding the employment contract; termination of business by the employer as an individual.

Other conclusions and proposals have been made to help overcome the contradictions and obstacles to the codification of the national labor legislation, as well as the legal regulation of the grounds and procedure for termination of employment contracts at the initiative of the employer in the new Labor Code of the Republic of Kazakhstan.

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