

No: U.no.139/2005 ¹

Date: 21.12.2005

On the basis of Articles 110 and 112 of the Constitution of the Republic of Macedonia and Article 70 of the Book of Procedures of the Constitutional Court of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia”, no.70/1992), at its session held on 21 and 22 December 2005, the Constitutional Court of the Republic of Macedonia made the follow

DECISION

1. Article 102 paragraph 2 in the part: “as high as 70% of the lost remuneration« and Article 102 paragraph 5 in the part: as high as at the least three, and at the most 12 average monthly salaries of the employee paid in the last 12 months” of the Labour Law (“Official Gazette of the Republic of Macedonia”, no.62/2005) ARE REPEALED.

2. This decision generates legal effects from the date of its publication in the “Official Gazette of the Republic of Macedonia”.

3. The Constitutional Court of the Republic of Macedonia with its Resolution U.no.139/2005 of 9 November 2005, upon the initiative of Todor Plakov from Veles, instigated a procedure for the appraisal of the constitutionality of Article 102 paragraphs 2 and 5, in the parts noted, of the Labour Law.

The procedure was initiated since there was a well-founded question put before the Court as to the concordance of the disputed provisions with the Constitution.

4. At its session, the Court has established that under Article 102 paragraph 1 of the Labour Law, if the court takes an effective decision defining that the worker had his/her employment terminated illegally, he/she has the right to be re-employed, if he/she wishes that.

The contested paragraph 2 of this Article of the Law regulates that in addition to the re-employment, the employer is obliged to pay the employee a compensation of damage as high as 70% of the lost remuneration, pursuant to law, collective agreement and the job contract and to pay him/her contributions for compulsory social insurance.

¹ Source: the web site of the Constitutional Court of the Republic of Macedonia (available at the following URL: <http://www.ustavensud.mk/domino/WEBSUD.nsf>).

Under paragraph 3 of this Article, the compensation of damage decreases for the sum of the income which the employee has realised on grounds of work, following the termination of his/her employment, and under paragraph 4 of this Article, the employee who challenges the notice may request that the court, temporarily, until the conclusion of the dispute, orders that he/she return to work.

Paragraph 5 of this Article stipulates that if the court, with an effective decision, finds that the worker had his/her employment terminated illegally, while for the worker is unacceptable to remain employed, upon the worker's request the court shall determine the date of termination of employment and shall render compensation of damage in the amount of three at the least, and 12 average monthly salaries at the most paid to the worker in the last 12 months, depending on the duration of the employment, his/her age, social status and the obligation for support that the worker has.

5. In accordance with Article 8 points 3 and 4 of the Constitution, the rule of law and the division of state powers into legislative, executive and judicial are the fundamental values of the constitutional order of the Republic of Macedonia.

Under Article 9 paragraph 1 of the Constitution, citizens of the Republic of Macedonia are equal in their freedoms and rights irrespective of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status.

Under paragraph 2 of this Article, citizens are equal before the Constitution and laws.

Under Article 32 paragraph 1 of the Constitution, everyone has the right to work, to free choice of employment, protection at work and material assistance during temporary unemployment. Under paragraph 2 every job is open to all, under equal conditions, while paragraph 3 defines that every employee has a right to appropriate remuneration, and paragraph 5 of this Article of the Constitution provides for that the exercise of the rights of employees and their position are regulated by law and collective agreements.

Under Article 6 of the International Pact for Economic, Social and Cultural Rights, to which our state has acceded pursuant to the Decision on the Accession of the Republic of Macedonia to the international-legal documents for fundamental human rights and freedoms, ("Official Gazette of the Republic of Macedonia", no. 57/1993), the Parties to this Pact recognise the right to work which includes the right that every person has and the possibility for remuneration through a freely chosen or accepted job and undertakes measures for the protection of these rights, while under Article 7 of this International Pact, the Parties recognise the right of each person to use the just and favourable conditions for work which in particular

provide reward that ensures a minimum to all employees, just remuneration and equal reward for work of same value, as well as a decent life for them and for their family, pursuant to the provisions of this Pact.

Article 4 of the European Social Charter (“Official Gazette of the Republic of Macedonia”, no.89/2004) stipulates that with a view to ensuring the correct application of the right to a just remuneration, the Parties comit themselves, inter alia, to recognise the right of the employees to a remuneration sufficient to provide for them, and for their families, a decent living standards.

From the constitutional provisions noted in the part of fundamental economic, social and cultural rights, as well as from the provisions in the international acts mentioned, it derives that the right to remuneration, that is, salary is an essential right of the employee who is employed on a contract basis, and which right enables him/her and his/her family a decent living standard.

From the analysis of the Labour Law it stems that the employment relations are voluntary contractual relations between the employer and the employee which the employee joins in an organised process organised in advance by the employer, with a view to obtaining a salary and other types of compensation. In case the employee is prevented from obtaining a salary with work because of unlawful acts or actions by the employer, the employee suffers damage, that is, his/her property status is violated.

The issue as to compensation of damage and lost remuneration as a generally accepted legal principle is also regulated by the Law on Contractual and Other Obligations.

Namely, under Article 141 of the Law on Contractual and Other Obligations the person who causes damage to another person is obliged to compensate it, in case he/she fails to prove that the damage was not his/her fault.

A damage represents decrease in somebody's property (ordinary damage) and prevention of its increase (missed advantage) as well as infliction of another physical or psychological pain or fear (non-material damage Article 142).

Under Article 174 of the Law on Contractual and Other Obligations, the responsible person is obliged to restore the condition that was prior to the occurance of the damage. In case the restoration into the former condition does not remove the damage entirely, the responsible person is obliged to provide pecuniary compensation for the rest of the damage.

When the restoration into former condition is not possible, or when the court considers that it is not necessary for the responsible person to do that, the court

shall determine that it pays the damaged party a corresponding sum of money as compensation of damage.

The court shall render the damaged party a pecuniary compensation when he/she requests so, unless the circumstances of the case concerned justify the restoration into former condition.

Article 178 of the said law governs the issue of the extent of the compensation of material damage (ordinary damage and missed advantage).

Under Article 179 of the Law on Contractual and Other Obligations, taking into consideration also the circumstances that occurred after causing the damage, the court shall render compensation to such extent as is necessary to restore the material status of the damaged party into the status it would have if there had not been a detrimental action or miss.

Nevertheless, despite the described provision of the Law on Contractual and Other Obligations as well as the provision of Article 159 of the Labour Law, under which if an employee has been caused a damage while working or in connection with the work, the employer is obliged to compensate the damage to him/her, the Court has appraised that the contested legal provisions deviate from the general rules for compensation of damage and envisage a different way, that is, extent of compensation of damage for the employee who has had his/her employment terminated because of the employer's fault.

Hence, given the above-noted, the Constitutional Court has judged that when it comes to the issue of compensation of damage suffered by the employee as a result of an unlawful termination of employment, in the sphere of employment as a specific obligation, the legislator has no right to define upfront a percentage or an absolute sum of the damage that the employee suffers but that it should be established by the court, for the purposes of which a procedure is conducted before it. Namely, the court is the one which in each concrete case appraising the circumstances as a result of which the employment was terminated, as well as the fact that the employer's decision is unlawful because of a violation of the procedure for termination of employment with the employer or violation of the material provisions of the laws and the collective agreements, shall define the amount of the damage that the employee has suffered while being removed from work without his/her fault.

Namely, in the opinion of the Court, the purpose of conducting the court procedure is not only the re-employment of the employee, but also the establishment of the material status which would be as if the employee had not had his/her employment terminated, that is, approximately the same status as the other employees with the employer who were enabled to work and to have a salary.

Taking into consideration Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, under which in the consideration and determination of his/her civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law, the Court has judged that this way of regulating the issue of the right to compensation of damage excludes the general principle that citizens are entitled to realise their civil rights before a court.

At the same time, the Court considers that the involvement of the legislator in the determination of the amount of the compensation of damage only in the case when the employee has had his/her employment terminated upon the employer's fault, puts the contracting partners, that is the employee and the employer in an unequal position and thus violates Article 9 of the Constitution.

6. On the basis of what has been stated, the Court has decided as in item 1 of this Decision.

7. The Court has passed this decision with majority votes in the following composition: the President of the Court Mrs Liljana Ingilizova – Ristova, and the judges: Dr Trendafil Ivanovski, Mr Mahmut Jusufi, Mrs Mirjana Lazarova Trajkovska, Mrs Vera Markova, Mr Branko Naumoski, Dr Bajram Polozani, Mr Igor Spirovski, and Dr Zoran Sulejmanov.

U.no.139/2005

21 and 22 December 2005

S k o p j e

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PRESIDENT

of the Constitutional Court of
the Republic of Macedonia

Liljana Ingilizova – Ristova