Concerning the Practice of Application by Kazakh Courts of Some Labor Legislation Provisions

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Under the provisions of Article 24 of the Constitution of the Republic of Kazakhstan (ROK), everyone shall have the right to freedom of labor, and the free choice of occupation and profession and everyone shall have the right to safe and hygienic working conditions, to just remuneration for labor without any discrimination, and to social protection against unemployment. In other words, as provided for under the ROK Constitution, everyone can exercise their rights in different forms as hired labor, individual enterprise, or government service, as long as the free choice of a given type of occupation and profession is exercised on the basis of the individual citizen's free expression of will.

Legal employment relations, which arise in the course of the citizens' exercise of their constitutional right to free labor in the ROK, are regulated by the ROK Law "On Labor in the Republic of Kazakhstan" (hereinafter the "Labor Law") put into effect on 1 January 2000 as subsequently changed and amended on 27 December 2004.

Apart from the ROK Labor Law, employment relations concerning various categories of persons are regulated by special legislative acts or in particular by the ROK Laws "On Government Service," "On Internal Affairs Agencies," "On Public Prosecutions," and others.

The development of market relations and the ongoing economic and social transformation in the country have all led to changes in labor relations.

> *In his recent nationwide address to the people of Kazakhstan, President Nursultan Nazarbayev stated the need this year to pass a new Labor Code whose underlying concept should be in full accord with all international standards and requirements of the International Labor Organization and the World Trade Organization.*

The legislative branch of the government is now working in that direction. A new draft Labor Code is in the nation's Parliament.

In the ROK, labor disputes may be resolved either by a conciliation commission through an out-of-court procedure or directly in a court of law.

In order to promote a uniform application of legislative provisions involving the review and resolution of labor disputes by the courts, the Supreme Court of the ROK passed Regulatory Resolution No.9 "Concerning Some Issues of the Application by the Courts of Legislation in the Settling of Labor Disputes" dated 23 December 2003.

The overwhelming majority of labor disputes concern the grounds and procedures involved in the termination of individual employment agreements.

The grounds for termination or cancellation of an individual employment agreement are laid down in Article 25 of the ROK Labor Law. For instance, an individual employment agreement may be terminated on the following grounds: upon the expiration of the term of the agreement; for reasons beyond the parties control; by mutual agreement of the parties; on the initiative of one of the parties involved; and on other legal grounds as laid down in the legislation.

> *Where an individual employment agreement (contract) is made for an indefinite term, it cannot be terminated without giving the specific reasons for termination.*

This was the case with Ms. Doris Louise Bradbury who filed a lawsuit against the benevolent society Soros Foundation Kazakhstan seeking reinstatement in employment, payment of back wages during the time of forced absence from work, and compensation for moral damage.

Ms. Bradbury was appointed executive director of the Soros Foundation Kazakhstan by Mr. Aryeh

Neier, president of the benevolent trust Open Society Institute that had established the Soros Foundation Kazakhstan. However, the individual employment agreement between the Soros Foundation Kazakhstan and Ms. Bradbury failed to meet the established form requirements. According to Article 12 of the ROK Labor Law, in the absence of an individual employment agreement or in the event that the employer fails to properly implement an individual employment agreement, the agreement becomes effective on the date of the employee's actual admission to work. Doris Bradbury started work on 01.07.2002, and thus, making her individual employment agreement effective on 01.07.2002. Moreover, on the founder's decision she actually was admitted to work for an indefinite term.

Some five months after her admission to the office of executive director, she received a termination notice. The Soros Foundation Kazakhstan Directors actually endorsed their decision to dismiss Ms. Bradbury during a general meeting of the Foundation's employees, in the course of which she was accused of committing some negative actions. Consequently, Soros Foundation Kazakhstan dismissed Ms.Bradbury without lawful reasons, and as a result, committed a substantial violation of her employment rights.

Almaly District Court of the City of Almaty made a decision, which was later upheld by the Almaty City Court's Appellate Review Panel, to sustain Ms. Bradbury's claim, and she was reinstated in her former position of the Soros Foundation Kazakhstan executive director with the payment of back wages of 3,101,252 Tenge and compensation for moral damage.

> *An individual employment agreement may be terminated on the initiative of any one of the parties involved, provided, however, that the terminating party gives the other party a notice in writing within the time stipulated by the individual employment agreement concerned. The notice should be given by one party to the other at least one month prior to the termination of the employment agreement.*

However, this legal requirement is not always respected. Mr. A.T. Nogaibaev filed a lawsuit against the state-owned company AlmatyGorNPCzem seeking reinstatement in employment, payment of back wages, and compensation for moral damage on the grounds that on 27.11.2000, he was hired as deputy director for AlmatyGorNPCzem. The company signed an individual employment agreement with him on 03.01.2001. However, by a management order dated 05.07.2004, Mr. Nogaibaev was dismissed from employment on the grounds of personnel reductions.

In its review of the case, the trial court established that the respondent had committed several breaches of the existing labor legislation. More specifically, in breach of the provisions of Article 25 of the Labor Law, the claimant was unaware of the management order concerning the planned personnel reductions. A protocol confirming the claimant's refusal to accept a copy of that management order was made in breach of the established one-month time limit. That amounts to a breach by the respondent of the provisions of Article 27.1, ROK Labor Law, which lays down specific dismissal procedures.

Almaly District Court of the City of Almaty made a decision to sustain the claimant's petition; that decision was later upheld by the Almaty City Court's Appellate Review Panel.

> *In the case where an individual employment agreement is terminated upon the expiration of the term of the agreement, a notice is required to be given to the employee concerned.*

Ms. Z.H. Syzdykova filed a lawsuit against the company Ishikawajima Harima Heavy Industries seeking reinstatement in employment, payment of back wages during the time of forced absence from work, and compensation for moral damage on the basis of the claim that according to the work contract dated 29.06.1998 she had been offered the position of the manager's translator-secretary for a period of three years. Changes made to her employment contract at a later date reduced the term of the contract making it last through 31.10.2000. Following the expiration of the aforementioned contract, she continued to work for that company. On these grounds she felt that the term of her contract had become indefinite, and her dismissal from work on 03.04.2004 was unlawful.

Ms. Syzdykova's claim was rejected by the decision of the Eastern Kazakhstan Oblast Court dated 23.12.2004; that decision was later upheld by the ROK Supreme Court's Civil Cases Review Panel in a ruling made on 15.02.2005. The decision was based on the fact that the individual employment agreement had been concluded for a fixed term lasting through 31.03.2003 and was terminated upon the expiration of that term as per the agreement. The company's failure to advise her of the management's order concerning the termination of employment relations was not considered a major breach of the law given that she was familiar with the conditions of her employment

contract. Furthermore, under the provisions of Article 25.1 of the ROK Labor Law addressing the termination of individual employment agreements, no advance notice is required to be given to the employee concerned in such a case.

No advance notice is required either in the event of an employee's dismissal on the grounds stipulated in sub-paragraphs 9-12 of Article 26 of the ROK Labor Law in the following cases: commitment by an employee of a single gross violation of his/her work duties; commitment of guilty actions by an employee directly involved in the handling of cash valuables or valuable merchandise; commitment of amoral offense by an employee performing educational functions; and disclosure of information constituting state, official, commercial, or other secrets protected by law.

Before the introduction of changes and amendments to Article 10.1, the ROK Labor Law had provided for the following three types of individual employment agreements: the indefinite-term agreement, the fixed-term agreement, and the agreement made for a time required to perform a specific job or for a time required to replace a temporarily absent employee.

> *The ROK Law dated 23.12.2004 made substantial changes to the above referenced Article, and as a result, an individual employment agreement may now be concluded for a definite period of not less than one year.*
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> *In the event that an additional similar contract is concluded with the concerned employee, the contract shall be considered to have been concluded for an indefinite term.*

In connection with this amendment, a practical issue emerged, namely, as to what to do in cases where employment contracts with a given worker has been concluded twice for a fixed term, with the second term ending after the introduction of the above referenced changes in Article 10 of the ROK Labor Law. In such a case, the question arises whether the employer may dismiss the concerned employee upon the expiration of the second term of the agreement or should the contract be considered as having been extended for an indefinite term.

> *In a specific case reviewed by the ROK Supreme Court's Supervisory Appellate Review Panel, it was ruled that the amendments made to Article 10 of the Labor Law shall apply to individual employment agreements made after the said amendments' introduction and entering into force (following their publication) on 7 January 2005.*

Ms. A.A. Mukanova was dismissed under the provisions of sub-paragraph 1 of paragraph 1 of Article 25 in the ROK Labor Law in connection with the expiration of the term of her agreement. She filed a lawsuit against Halyk Bank of Kazakhstan JSC seeking reinstatement in employment, payment of back wages during the time of forced absence from work, and compensation for moral damage arguing that pursuant to Article 10 of the ROK Labor Law, the second individual employment agreement should have been considered as being concluded for an indefinite term, and she should not have been dismissed from employment.

By its decision of 21.07.2005, Uralsk City Court rejected Ms. Mukanova's claim; that decision was later upheld by the Western Kazakhstan Oblast Court's Civil Cases Review Panel in a ruling made on 06.09.2005. In making its decision, the Court stated that Ms. Mukanova's fixed-term employment agreement was made in 2004, while the provisions of Article 10 of the ROK Labor Law only applied to employment agreements made subsequent to 07.01.2005.

In the meantime, in breach of the requirements of sub-paragraph 2, of paragraph 1 of Article 10 in the ROK Labor Law, there have been cases where employers have implemented individual employment agreements (contracts) for a three-month period.

In some cases, employees have been dismissed from work by the employer's order before the expiration of the employment agreement term. This act contravenes the provisions of Article 26 of the ROK Labor Law. In other cases employees have been dismissed from work after the expiration of the employment agreement term.

Mr. B.K. Kenzhaliev had worked as the director of the state-owned Institute of Metallurgy and Mineral Dressing since 12.10.1999. The last individual employment agreement between Mr. Kenzhaliev and the ROK Ministry of Education and Science was made on 15.09.2003 to last through 01.03.2004. By the respondent's order, the claimant was dismissed from employment on 02.03.2004.

In deciding to reinstate the claimant in his former job, the court ruled quite correctly that the contract could not be terminated after the expiration of that fixed-term agreement, given that Mr. Kenzhaliev continued to perform his work duties. Consequently, the agreement should be considered to have been extended for an indefinite term.

Moreover, according to Clause 6 of that individual employment agreement dated 15.09.2003, if none

of the parties notified the other party of the contract termination one month prior to the expiration of the term of the agreement, the contract was considered to have been extended for an indefinite term. The claimant was given no such advance notice.

> *In the event of change of proprietorship or reorganization of a legal entity acting as employer, the employment relations shall continue unchanged.*

Mr. N. Abuov, Mr. N. Keulimzhayev, and others filed a lawsuit against the company Petro Kazakhstan Overseas Inc. seeking reinstatement in employment, payment of back wages during the time of forced absence from work, and compensation for moral damage arguing that they had performed work as machine operators for Petro Kazakhstan Overseas Inc. pursuant to their respective work contracts. Upon the expiration of the term of their first agreement, 01.01.2005, they started to work on the basis of new contracts that established a three-month probationary period for them as new employees. Later, they were all dismissed as having failed to pass the three-month probation.

However, testifying before the court, the respondents failed to produce any evidence to support their contention that the claimants had found jobs in another organization. In spite of that and in violation of the provisions of Article 24 of the ROK Labor Law, the claimants were dismissed from work.

The petitioners' claim was sustained by the decision of Kyzylorda Oblast Court dated 06.07.2005; that decision was later upheld by the ROK Supreme Court's Civil Cases Review Panel in a ruling made on 08.09.2005.

> *Some disputes have arisen in connection with the observance of the provisions governing job transfers.*
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> *All transfers to another job or all transfers to another work location within a given organization are only allowed following the employee's written consent with appropriate changes being made to the provisions of their respective individual employment agreement.*

Ms. A. Aidarova filed a lawsuit against the company ZhaiykMunaiGas seeking reinstatement in employment and payment of back wages during the time of forced absence from work arguing that prior to 01.01.2004 ZhaiykMunaiGas had signed an individual employment agreement with her whereby she was appointed the head of the section. During the period from 10.11.2003 through 10.12.2003, she underwent medical treatment. During Ms. Aidarova's illness, a certain Ms. A. Khalidullina was appointed to fill her position. Ms. Aidarova filed a request to be transferred to the position of petroleum production operator. However, on 19.12.2003, the personnel director issued an order transferring her to the position of research operator. In doing so, management committed a breach of the requirements of Article 17 of the Labor Law.

Ms. Aidarova's subsequent court petition was rejected by the decision of Isatai District Court (Atyrau Oblast); that decision was later upheld by the Atyrau Oblast Court's Appellate Review Panel. In the subsequent supervisory judicial review process, both lower courts' decisions were overturned by a higher judiciary authority and the case was ordered for a retrial.

According to the provisions of Article 29 of the Labor Law, a worker reinstated in employment following an unlawful termination of his/her individual employment shall be entitled to the payment of average earnings for the entire period of forced absence from work, but not for more than for six months.

It should be noted that pursuant to the provisions of Article 27 of the ROK Labor Law termination of an individual employment agreement on the employer's initiative shall not be allowed in the following situations: during the worker's temporary incapacity, with the exception of incapacity periods of more than two months; during the employee's leave of absence including child-care leave and leave without pay, except for the cases of company liquidation and cessation of business of the individual employer; and with expectant mothers or persons raising a child below eighteen months of age, with the exception of cases provided for under sub-paragraphs 1, 5, 8-12, and 14 of Article 26, ROK Labor Law.

From 01.02.2002, Ms. Z.Z. Yergalieva had worked for the company International Support Services Limited. In due time, she was granted maternity leave followed by additional child-care leave. By a management order dated 01.06.2004, the company's workers employed at that facility were discharged from employment due to the completion of the work. With her consent, the claimant was transferred to another job until 31.12.2004. On 31.12.2004, she was dismissed from work upon the expiration of the term of the agreement. Believing that the Company was still in business, Ms. Yergalieva filed a lawsuit seeking reinstatement in employment and payment of back wages.

By decision of Western Kazakhstan Oblast Court dated 18.08.2005, Ms. Yergalieva's claim was

sustained in terms of the payment of back wages. Given that the procedure and conditions governing the termination of her individual employment agreement were laid down in her employment agreement and were in conformity with the requirements of sub-paragraph 1 of paragraph 1, Article 25 of the ROK Labor Law, the court made a reasoned decision not to sustain the part of the claim seeking reinstatement in employment.

> *Pursuant to the ROK Law "On Labor Unions" and the above-mentioned Regulatory Resolution of the ROK Supreme Court, on its initiative, management (employer) may terminate an employment contract with a worker who is a union member only when approved by the appropriate labor union committee, unless otherwise provided for under the law.*

By itself the absence of a labor union committee's decision at the time of termination of an individual employment agreement is not considered to be sufficient grounds for reinstatement in employment. Having established that the dismissal has been made without the labor union committee's decision, the court should postpone its determination in the matter until the labor union committee makes its decision on the matter. Only then the court will proceed with its consideration of the case on its merits. The labor union committee's approval is not required where an employee is not affiliated with the labor union operating in that organization, unless otherwise provided for under the respective collective bargaining agreement. Elected union officials may not be dismissed from employment on the management's (employer's) initiative other than in the case of liquidation of the organization concerned. Nor can union officials be subjected to disciplinary measures or transferred to another job without the preliminary approval of the labor union with which they are affiliated.

Issues have now been settled concerning termination of union members' individual employment agreements on the grounds stipulated in Article 26 of the Labor Law under the following subparagraphs: 2) personnel reduction; 3) nonconformance to the skills or health requirements; or 8) repeated failure to perform one's work duties without a valid reason. This means that in all such cases, termination ***shall take into account the reasoned opinion of the labor union committee.***

> *The labor union committee's opinion or approval, however, is not required in cases of termination on other grounds.*

> *Another issue of some concern in legal practice has been the matter concerning the legal recourse time allowed for workers seeking reinstatement in employment.*

Previously under the provisions of Article 211 of the Kazakh Soviet Socialist Republic's Labor Code, the legal recourse time limit equaled one month. The present ROK Labor Law does not lay down any specific time limits for judicial recourse. Pursuant to paragraph 4 of Article 1 of the ROK Civil Code, civil legislation provisions shall apply to legal employment relations in cases where such relations are not regulated specifically by labor law.

Consequently, legal employment relations shall be subject to the three-year time limitation as provided for under paragraph 1, Article 178 of the ROK Civil Code. The courts shall only apply the statute of limitations where there is a specific request to do so from a party to the dispute. The court may extend the deadline for claims where it was missed for a valid reason.

> *Even provided that the court finds a breach of the workers' employment rights, when the legal recourse time is missed without a valid reason, the court shall reject the petition on the grounds of failure to respect the deadline, which in itself, is sufficient grounds for rejecting a petition.*
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> *Pursuant to the amendments made to the ROK Civil Procedure Code by the ROK Law dated 30 December 2005, labor disputes involving an international or foreign-based organization as a party to the dispute shall be resolved by the district or municipal courts having jurisdiction over the location of the respondent (legal entity's agency or the place of residence of an individual being the respondent in the case).*

In view of the above analysis of the court's application of some provisions of Kazakh Labor Law, individual citizens are more frequently seeking defense of their rights in a court of law with legal recourse becoming an increasingly more reliable and efficient form of protection of the Kazakh citizens' employment rights. This is because to seek a legal redress of a labor grievance guarantees a fast and proper resolution of a labor dispute, and furthermore, provides for the restoration of the infringed rights or interests not only of the wage and salary earners but also of the employers themselves. The advantages of judicial protection are rooted in the constitutional principles underlying the organization and functioning of the judicial branch and further in the judiciary's independence and courts' impartiality towards the contestant parties and other lawsuit participants. □