On Some Issues of Applying by Courts of the Legislation in Settling Labor Disputes

On December 19, 2003 the Supreme Court of the Republic of Kazakhstan passed the Normative Resolution, On Some Issues of Applying by Courts of the Legislation in Settling Labor Disputes (the "Resolution"), which is effective from January 15, 2004.

Below we provide a general characteristic of the Resolution and of the most important regulations contained therein.

General Characteristic of the Resolution

The Resolution was adopted for the uniform application in the court practice of certain rules of the labor legislation of Kazakhstan. The Resolution is one of the sources of Kazakh law, in other words, it is included into the current legislation.

The Resolution, in our view, plays an important role, since the Law on Labor in the Republic of Kazakhstan (the "Labor Law"), which is the basic normative act regulating labor relations, is of a rather general nature and there have been no official comments thereon to-date.

The Resolution clarifies a number of issues (including on termination of individual employment agreements, restoration of the employees who were illegally dismissed, separation of civil and labor relations, etc.) thereby filling to some extent the gaps of the labor legislation.

Basic Provisions of the Resolution

1. Right to Judicial Protection

The Resolution spotlights that the right to judicial protection of rights and liberty, which is stipulated by Article 13 of the Constitution of the Republic of Kazakhstan, shall also apply to labor relations.

In the case of any labor disputes arising out of individual employment agreements, the parties to such disputes may settle them in non-judicial procedure (through conciliation commission) or in the court. In doing so, a party to the labor dispute is entitled but not obliged to apply to the conciliation commission. If the parties to the labor dispute do not agree with the decision of the conciliation commission, they shall preserve the right to refer to the court, which should examine such labor dispute on the merits.

The general limitation period (of three years) as established by Article 178 of the Civil Code of the Republic of Kazakhstan shall apply to labor disputes. A claim on the labor dispute shall be accepted irrespective of the expiration of the said period; the limitation period shall apply only upon application of the party to the dispute.

The procedure of examining labor disputes has a peculiarity of exempting the claimants from any legal charges. However, the Resolution mentions that in the case of satisfaction of the claim, the court according to Article 116 of the Civil Procedure Code of the Republic of Kazakhstan shall collect from the defendant the state duty.

2. Separation of Civil and Labor Relations

Kazakh law admits the execution of both employment and civil and legal agreements between legal entities and individuals. As the case may be, the parties may choose such form of relations, which they intent to use for their mutual contractual rights and obligations.

However, in practice the judicial and controlling bodies often impugn the possibility of civil and legal relations between legal entities and individuals and consider that actually they have labor relations. The issue gave rise and still causes a wide interest and debate of both theorists and practitioners of law.

Indeed, it is sometimes difficult to qualify the legal relations between legal entities and individuals, furthermore, no official criteria, which would allow to separate labor and civil relations, were defined before the adoption of the Resolution.

The opinion of the Supreme Court on separation of civil and labor relations is as follows: "*The nature of labor relations may be evidenced by the circumstances when the employee performs the work on particular spec iality, qualification and in the position submitting under the internal labor policy and the employer pays to the employee the remuneration and provides the employee with the working conditions as described in the labor legislation.*"

3. Arising of Labor Relations

According to the Labor Law, the fact of arising of labor relations between the employer and the employee shall be confirmed by the individual employment agreement between them and by the order of employment. However, in practice it is rather often when the employer ignores the said legislative requirements and does not properly document the labor relations, meanwhile the employee started to perform his/her job responsibilities. Such system works but only to the first controversy between the employer and the employee. And the issue of existence of labor relations arises if no individual employment agreement and order of employment were executed.

The Resolution answers this question as follows: "*If notwithstanding the requirements of Article 12(1-3) of the Labor Law there is no employment agreement or it was not properly executed and there is no order of employment, then the beginning of performance by the employee of his/her job responsibilities shall be deemed the date of actual admission of him/her to work by the person who is authorized to give an employment or coordinate the work of the employee.* "

4. Deadlines for Termination of Employment Agreement

According to Article 25 of the Labor Law, upon termination of the individual employment agreement by one of the parties, the party on which initiative the agreement is to be terminated shall give a one-month written notice to the other party. At the same time, under Article 26 of the same Law, a one-month notice is required in termination of an individual employment agreement only in the cases when the employer is to be liquidated (terminates its activities) or reduces its staff or the number of its employees.

In view of the above, in practice one often questions how the requirements of the foregoing Articles of the Labor Law correlate.The Supreme Court clarifies this issue as follows: upon termination of an individual employment agreement a one-month written notice shall be required if the agreement is terminated on the initiative of the employee or on the initiative of the employer but only on the grounds as set forth in Article 26(1 and 2) of the Labor Law; the notice is not required in other cases.

5. Restoration at Work

The Resolution specifically spotlights the issue of restoration at work of the illegally dismissed employees. In particular, the Resolution mentions that the illegally dismissed employee is subject to restoration at work irrespective of the fact that the position does not recently exist (was reduced while the dispute examination). However, under such circumstances the court, upon the employee's request, may only issue a ruling on the recovery of the average salary for the time the employee was forced to be absent from work (but no more than for three months) and on the change of the ground – from dismissal to the resignation.

If it is impossible to restore the employee at work due to the liquidation of the employer, the court recognizes the dismissal as illegal and obliges the liquidation commission or the body, which took the decision on liquidation, and as the case may be, the successor or the assignee, to pay to the employee the average salary for the time of forced absent from work. At the same time, the court recognizes the employee as dismissed on the ground of liquidation of the legal entity.

6. Issues in Connection with Expiration of Term Agreements

The practice shows that there are situations when upon expiration of the term individual employment agreement the employee continues to perform his/her job responsibilities and the employer does not object to such performing. The Labor Law contains no provisions which would regulate such situations. Nevertheless, some lawyers were of the opinion that in such cases the employment agreement, which was primarily executed as a term agreement, transforms to the non-term agreement.

Now the said opinion has the force of the normative provision, since the Resolution expressly provides that "*in the cases where upon expiration of the term agreement it was not terminated and the employee continues to perform its job responsibilities with the employer's knowledge of it and such work was paid by the employer, then such agreement shall be deemed executed for a perpetuity term.*"□