МРНТИ:10.63.59
УДК:331.109

Ye.A. Buribayev[1], Zh.A. Khamzina[1]
[1] Abai Kazakh National Pedagogical University

ACCESS TO JUSTICE: UPDATING THE PROBLEM OF INDIVIDUAL LABOR DISPUTES

Abstract

The idea of the research is to develop proposals, recommendations for improving the current model of judicial protection of the labor rights of the individual. We presented the author's position on the content of urgent problems of access to justice in resolving social and labor conflicts. Separate new approaches to solving urgent problems of resolving labor disputes have been developed. The obtained results of the review allow presenting an original academic view of the Kazakh practice of judicial settlement of labor disputes, which may be of interest to legal scholars and researchers. The analysis of compliance with the standards of accessibility of litigation in the field of protection of the labor rights of the individual is made, and specific problems of applying for judicial protection inherent in individual labor disputes are identified. The authors identified the following problems with access to justice: the existence of a barrier in the form of conciliation commissions for free recourse to judicial protection; weak implementation of international human rights standards in the field of labor disputes; the vulnerable position of workers in social and labor conflicts in relation to the position of employers; a steady downward trend in the number of labor disputes ended by the conclusion of an amicable agreement, either in connection with the conclusion of an agreement on the settlement of a dispute through mediation, or in connection with the conclusion of an agreement on the settlement of a dispute through a participatory procedure. The recommendations and conclusions of the study will stimulate discussion on ways to improve a justice system that operates in accordance with universal standards of human rights in the workplace.

Keywords: labor dispute, court, conciliation commission, mediation, justice

Е.А. Бурибаев[1], Ж.А. Хамзина[1]
[1]Абай атындағы Қазақ ұлттық педагогикалық университеті

СОТ ТӨРЕЛІГІНЕ ҚОЛ ЖЕТКІЗУ: ЖЕКЕ ЕҢБЕК ДАУЛАРЫ БОЙЫНША МӘСЕЛЕЛЕРДІ ЖАҢАРТУ

Аңдатпа

Зерттеуде біз әлеуметтік және еңбек жанжалдарын шешу кезінде сот төрелігіне қол жеткізудегі өзекті мәселелердің мазмұнына авторлық ұстанымды ұсындық. Осы зерттеуден алынған нәтижелер заңгер-ғалымдар мен зерттеушілер үшін кең қызығушылық тудыруы мүмкін, еңбек дауларын сотта шешудің қазақстандық мәселелері өзіндік академиялық көзқарасты таныстыруға мүмкіндік береді. Жеке адамның еңбек құқықтарын қорғау саласындағы сот талқылауының қол жетімділік стандарттарының сақталуына талдау жасалды, жеке еңбек дауларына тән сот қорғауына жүгінудің нақты проблемалары анықталды. Авторлар жеке еңбек даулары бойынша сот төрелігіне қол жеткізудің мынадай мәселелерін атап көрсетті: сот қорғауына еркін жүгіну үшін келісу комиссиялары нысанындағы тосқауылдың болуы; еңбек даулары саласындағы халықаралық құқық қорғау стандарттарының әлсіз орындалуы; жұмыс берушілердің жағдайына қатысты әлеуметтік-еңбек жанжалдарындағы қызметкерлердің осал позициясы; бітімгершілік келісім жасасу арқылы не дауды медиация тәртібімен реттеу туралы келісім жасасуға байланысты не дауды партисипативтік рәсім тәртібімен реттеу туралы келісім жасасуға байланысты аяқталған еңбек дауларының санын азайтудың орнықты үрдісі. Зерттеудің ұсынымдары мен қорытындылары еңбек саласындағы адам құқықтарының әмбебап стандарттарына сәйкес әрекет ететін сот төрелігі жүйесін жетілдіру жолдарын талқылауды ынталандыратын болады.

Түйін сөздер: еңбек дауы, сот, келісім комиссиясы, медиация, сот төрелігі

Бурибаев[1] Е.А., . Хамзина[1] Ж.А
[1]Казахский национальный педагогический университет имени Абая

ДОСТУП К ПРАВОСУДИЮ: АКТУАЛИЗАЦИЯ ПРОБЛЕМЫ ИНДИВИДУАЛЬНЫХ ТРУДОВЫХ СПОРОВ

Аннотация

Идея исследования заключается в разработке предложений, рекомендаций по совершенствованию действующей модели судебной защиты трудовых прав личности. Представлена авторская позиция по содержанию актуальных проблем доступа к правосудию при разрешении социально-трудовых конфликтов. Разработаны отдельные новые подходы к решению актуальных проблем разрешения трудовых споров. Полученные результаты обзора позволяют показать оригинальный академический взгляд на казахстанскую практику судебного урегулирования трудовых споров, который может представлять интерес для ученых-правоведов и исследователей. Проведен анализ соблюдения норм доступности судебного разбирательства в сфере защиты трудовых прав личности, выявлены специфические проблемы обращения за судебной защитой, присущие индивидуальным трудовым спорам. Авторы выявили следующие проблемы с доступом к правосудию: наличие барьера в виде согласительных комиссий для свободного обращения за судебной защитой; слабое внедрение международных стандартов в области прав человека в сфере трудовых споров; уязвимое положение работников в социально-трудовых конфликтах по отношению к положению работодателей; устойчивая тенденция снижения количества трудовых споров, закончившихся заключением мирового соглашения, либо в связи с заключением соглашения об урегулировании спора в порядке медиации, либо в связи с заключением соглашения об урегулировании спора спор в порядке партисипативной процедуры. Рекомендации и выводы исследования дадут возможность для обсуждения путей совершенствования системы правосудия, функционирующей в соответствии с универсальными стандартами прав человека в сфере труда.

Ключевые слова: трудовой спор, суд, согласительная комиссия, медиация, правосудие.

Introduction. The purpose of the review is to develop individual proposals for improving the judicial form of protection of labor rights and interests of the individual; generalization of judicial practice, identification of trends in its development and development of recommendations for improving the legal regulation of the resolution of labor disputes.

Research objectives:

to assess the accessibility of justice as a criterion for the effectiveness of the judicial form of protection of labor rights;

to analyze the practice of permission by courts of citizens' appeals in connection with violation of their labor rights from 2013 to 2020 (special attention is paid to the last five-year period, which includes the entry into force of the new Labor Code of the Republic of Kazakhstan, hereinafter referred to as the LC RK), make proposals for improving legal norms;

to formulate proposals for a wider application in practice of substantiating judicial acts of the provisions of international labor law, including the ratified conventions of the International Labor Organization (ILO), International Covenants, on the basis that such an approach will ensure a more complete implementation of universal principles and norms in legislation and experience enforcement.

Methodology. In Kazakhstani legal science, there are no special studies in which the subject matter would be materials of judicial practice on labor disputes. From this position, at the disposal of the project group from the official open information databases, there was extensive data on the labor conflicts considered by the courts, which were analyzed and systematized.

Methodologically, the study is based on the position of identifying the shortcomings of the existing form of protecting individual labor rights, assessing the availability of judicial procedures, and ensuring effective mechanisms for protecting the rights of workers. In our work, we have sought to develop recommendations for expanding access to justice.

The research was carried out using traditional methods inherent in legal science: formal legal (dogmatic), social and legal, legal modeling method, as well as the critical legal method of legal knowledge.

The use of the socio-legal method made it possible to collect and process court decisions on labor disputes, to identify common claims, the dynamics of appeals to the courts, to build table 1 "Information on the consideration of disputes by the courts of first instance". The method of right modeling allowed us to evaluate the proposed measures to improve the legislation, to give a forecast of socio-economic, legal effects, allowed us to simulate the achievement of actual goals.

The methodology of collecting primary information is a desk study of law enforcement practice, reports related to the functioning of the judicial form of protection of social and labor rights of an individual in Kazakhstan; analysis of documents and statistical data of courts; as well as analysis of international universal standards of access to justice in labor disputes.

The following sources of primary information collection were identified:

statistical data on the consideration of civil cases by the Supreme Court of Kazakhstan (http://sud.gov.kz/rus/content/statisticheskie-dannye-o-rassmotrenii-grazhdanskih-del);

reports on the work of the courts of first instance on the consideration of civil cases, presented on the information service of the Committee on Legal Statistics and Special Records of the Prosecutor General's Office of Kazakhstan (qamqor.gov.kz);

the results of previous research on related issues with the project topic, including those published in peer-reviewed scientific publications;

ILO instruments, OECD special reviews.

Discussion. Since the judicial form has priority over other forms of restoration of violated rights, which is due to the constitutional right of everyone to judicial protection of their rights and freedoms, the judicial form plays a leading role in determining various forms of protection of the violated right, as a universal, historically established, regulated in detail by the norms of civil procedural law. This form provides reliable guarantees of the correct application of the law. Despite the introduction in Kazakhstan since 2016 of the practice of mandatory pre-trial settlement of individual disputes by conciliation commissions created at the workplace, the number of appeals to the court has not decreased fundamentally, Table 1.

Table 1. Information on the consideration of disputes by the courts of first instance

Calendar period, year	Applications received during the reporting period	Cases (proceedings) initiated	Reviewed with a decision	Considered by the court with a decision to satisfy the claim	The case is over due to the conclusion of a settlement agreement	The case is over due to the conclusion of a settlement agreement withthe court through mediation	The case is over due to the conclusion of an agreement on the settlement of the dispute in the order of the participatory procedure
1	2	3	4	5	6	7	8
2013	9492	7526	5286	2907	–	–	–
2014	10033	8141	5467	3200	–	–	–
2015	10120	8838	5464	3170	–	–	–
2016	8498	7083	4266	2755	289	959	8
2017	8445	7720	4011	2600	208	1510	31
2018	8047	7177	3712	2302	205	1155	27
2019	7855	6182	3421	1908	166	843	4
2020	7388	4838	2808	1554	141	605	12

In the three-year period before the introduction of conciliation commissions (2013-2015), an average of 9880 claims on labor disputes were submitted to the courts annually, civil proceedings were initiated on an average of 8179 claims, about 5400 applications were considered with decisions annually (average data according to Table 1).

In the period from 2016 to 2020, an average of 8000 claims on labor disputes were submitted to the courts annually, civil proceedings were initiated on an average of 6,700 claims, and about 3,600 applications were considered with decisions annually (average data according to table 1). At the same time, since 2018, there has been a tendency to reduce the number of claims for labor disputes, which can be conditionally

qualified as a stable factor. The conditionality is stipulated by us due to the not fully studied negative impact of the coronavirus pandemic on access to justice in 2020.

Since the beginning of 2016, Kazakhstan has introduced mandatory pre-trial settlement of individual labor disputes. There are some exceptions to the general rule for certain categories of claims that do not affect the overall analysis. The introduction of the institute of conciliation commissions, which previously consider disputes, was supposed to provide the parties with the opportunity to resolve individual labor conflicts in a short time within organizations, as well as to relieve the courts.

The information given in table 1 shows that in 2016, in comparison with the previous three-year period, there was a decrease in the number of disputes considered by the courts. The courts received 1,500 fewer claims in the average value; the number of proceedings ended with a decision decreased by 1,200 civil cases; 400 fewer decisions were made with satisfaction of the claim. In subsequent periods, the tendency to reduce the burden on the courts for all the criteria of civil proceedings listed in table 1 continued; there is a stable line of reduction.

If the introduction of the work of the commissions was aimed at unloading the courts from the consideration of labor conflicts, then this goal was partially achieved. But the question arises: are the goals of reforms in the field of justice justified by reducing the burden on the judiciary? Why are the economic goals of the functioning of the judicial system put at the forefront of reforms, and not its effectiveness, evaluation of the effectiveness of human rights protection? We believe that this is an initially incorrect approach that distorts the purpose of the judicial branch of government. The judicial form of dispute resolution guarantees a legitimate, reasoned decision, the implementation of which is ensured by the coercive mechanisms of the state. The advantage of judicial protection consists in its implementation on the basis of the constitutional principles of justice, in the independence and professionalism of judges, their non-connection with the disputing parties and participants in the case.

According to paragraph 2 of Article 13 of the Constitution of the Republic of Kazakhstan, everyone has the right to judicial protection of their rights and freedoms. By virtue of paragraph 3 of Article 39 of the Constitution, the rights and freedoms provided for in article 13 of the Basic Law are not subject to restriction in any cases. The creation of mandatory institutions for pre-trial settlement of disputes, of course, infringes on the right to judicial protection, which, unlike other personal rights guaranteed by the Constitution (article 39, paragraph 1), cannot be restricted by laws. It is illegal to restrict to the extent necessary for the protection of the constitutional order, the protection of public order, human rights and freedoms, health and morals of the population. That is, the right to judicial protection is an absolute value that is not subject to restriction in any form.

The norm of paragraph 2 of Article 13 of the Constitution “Everyone has the right to judicial protection of their rights and freedoms” means the right of any person and citizen to apply to the court for protection and restoration of violated rights and freedoms [1].

At the same time, paragraph 1 of article 13 of the Constitution establishes the right of everyone to protect their rights and freedoms in all ways that do not contradict the law. One of these methods is the consideration of disputes by conciliation commissions, provided for by the Labor Code. The appeal to the jurisdiction of the conciliation commissions is an imperative duty, and not the right of the individual: the person in this case does not act of his own will, forcibly observing the pre-trial procedure. An individual is deprived of the opportunity to dispose of the right to apply to the commission at his own discretion and is obliged to act within the framework of mandatory regulations in order to have access to the possibility of judicial protection of rights and interests.

The Conciliation Commission is not a priori an institution of the judicial system, and its members do not have the status of judges. The Commission is not established by law: its composition is determined according to the rules of representation of the parties to labor relations, fixed in the LC RK. The appeal to the commission is not based on an agreement of the parties to the employment relationship, the basis of the commission's activities is not the mutual consent and will of the parties.

The activity of the commissions is not carried out on a permanent basis, but in fact is an additional administrative obstacle that must be overcome by the disputing party in order to finally get the opportunity to go to court. This barrier requires neutralization, an end must be put to the continuing violation of the Basic Law. We refer this conclusion to all mandatory institutions, pre-trial appeal to which is mandatory for the emergence and implementation of the right to a judicial form of protection, restoration of violated rights and freedoms.

According to article 2, paragraph 3 b), of the International Covenant on Civil and Political Rights, each State Party to the Covenant undertakes to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

That is, the Covenant gives priority to the judicial form of protection of rights, obliges States to develop the possibilities of judicial protection. At the same time, the right to effective judicial protection, which is an absolute constitutional value, does not exclude the existence and expansion of alternative forms of dispute resolution. In a broad sense, alternative institutions allow for the restoration of violated rights and legitimate interests, to stop illegal actions, to compensate for damage, to return the parties to the conflict to their original position, that is, to achieve the restoration of justice, to ensure the rule of law, that is, to fulfill the goals of justice. Of course, non-judicial means and mechanisms must be supported and can claim the status of institutions that guarantee the fundamental right to justice. However, an individual should have the right to choose when exercising the basic right to access to justice: to apply to the judicial authorities or to the jurisdiction of alternative institutions. The fundamental right to judicial protection cannot be limited by the imperative requirement of prior recourse to non-judicial means. We believe that all non-judicial means should exist as a supplement to the resources of judicial proceedings, the choice of which should be provided by the free will of the individual, and not by the coercive force of the state.

According to paragraph 2 of Article 76 of the Constitution, the judicial power is exercised on behalf of the Republic of Kazakhstan and has the purpose of protecting the rights, freedoms and legitimate interests of citizens and organizations, ensuring the implementation of the Constitution, laws, other regulatory legal acts, international treaties of the Republic. No legislative act states that the purpose of the functioning of the judiciary is to reduce the number of appeals to the courts, to reduce the number of cases under consideration. Why does a significant part of the reforms in this area initiated by the supreme judicial authority pursue these goals?

The introduction of mandatory pre-trial settlement of labor disputes by conciliation commissions has led to a decrease in the actual number of lawsuits for the restoration of labor rights, of course, the number of real conflicts has not decreased, but only increases due to the negative economic and social background, but appeals to the courts are decreasing. In our opinion, this result is related to several aspects: some of the conflicts are really resolved in the commissions; the next part of the disputes exhausts itself due to the refusal of the commissions either to consider disputes when the plaintiff is forced to seek the organization, creation of the commission, or due to the commission making an illegal decision or a decision that does not satisfy the plaintiff, but the plaintiff runs out of moral and material resources for further appeal to the court; third conflicts remain unresolved due to the plaintiff's unwillingness to apply to the commissions that operate at the former employer's enterprise, unwillingness to go through the difficulties of communicating with them and former colleagues again, especially since these procedures are associated with additional material and time costs. That is, the existing sequence of passing the pre-trial procedure for considering labor disputes in conciliation commissions since 2016 has actually reduced the guarantees of access to justice.

The institution of conciliation commissions belongs to the sphere of so-called informal justice. The organization and activity of the commissions has a number of obvious shortcomings that have not been overcome in the entire practice of their existence. These are unjustified delay in the consideration of disputes by commissions that do not operate on a permanent basis for the vast majority of employers; excessive and unjustified liberalization of labor legislation regulating the activities of commissions; low competence of the commission members regarding the procedure, methods of resolving labor disputes, the content of legislation, their dependence on employers, which generates bias, as well as incompetence; insufficient quality of the current labor legislation regulating the procedures for resolving conflicts in commissions; additional costs for the employer for organizing the work of commissions [2]. It is logical that the institution of informal justice, which has the listed disadvantages, cannot claim to be qualified as an effective tool that guarantees the right of access to justice.

Judicial practice needs to be brought into compliance with the requirements of international standards. Despite the fact that the judicial authorities at the national level have the right to be guided by the provisions of international legal instruments when making decisions, in practice such cases are extremely rare.

The assessment of access to justice in the settlement of labor disputes also includes such an important aspect as improving the implementation of legislation in accordance with international human rights standards. Kazakhstan's ratification of international human rights instruments should determine the relevant efforts of the State in terms of implementing the provisions and rules in this area. At the same time, the

courts rarely apply the provisions of ratified international acts guaranteeing the social and labor rights of an individual when justifying their decisions. Information on accounting for the application of international treaties in the practice of judicial proceedings has been introduced in statistical forms since 2016. Thus, in 2016, Kazakhstan's civil courts issued 46 decisions applying the International Covenant on Economic, Social and Cultural Rights, in 2017 – 999, in 2018 - 529, in 2019 - 179 decisions applying the Covenant, in 2020 – 45 [3]. Given that the Covenant on Economic, Social and Cultural Rights is the most important international standard of guarantees in this area of human rights, its enforcement in legal proceedings should be more extensive; the clearly expressed tendency to include the Covenant in the content of the motivation and justification of court decisions is negative regarding the assessment of access to justice in cases of violation of social and labor rights.

In accordance with paragraph 6 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated July 10, 2008 № 1 "On the application of the norms of international treaties of the Republic of Kazakhstan", ratified international treaties that have direct effect and do not require the publication of laws for their application, are used as norms of substantive (except for the areas of criminal and administrative relations) or procedural law when resolving cases, in particular when considering civil cases, if international treaties of Kazakhstan establish rules other than laws, which regulate the relations that have become the subject of judicial review.

Compliance with the requirements of the Covenant on Economic, Social and Cultural Rights would require Kazakh courts to proceed from the fact that a person has the right to work, and not to freedom of work, as it is enshrined in the Labor Code of the Republic of Kazakhstan and the Constitution of the Republic of Kazakhstan. It would be necessary to ensure in the decisions of the courts the right to remuneration guaranteed by the Covenant, which ensures, at a minimum, a satisfactory existence for all workers for themselves and their families. In comparison with international standards, the minimum wage in Kazakhstan is low [4, 5, 6, 7]. Being at the level of about 18% of average earnings, the minimum wage is lower than similar indicators in any OECD member countries and many countries with developing economies. Such a low level does not solve the problem of poverty of working people, as well as their families. The minimum wage in 2021 is 42500 tenge, and the subsistence minimum is 34302 tenge. These amounts clearly indicate that the guaranteed minimum wage does not ensure the "right to remuneration proclaimed by the Covenant, which ensures, at a minimum, a satisfactory existence for all workers for themselves and their families".

The inclusion of the Covenant in the motivational parts of judicial acts would make it possible to appeal to the implementation of the guarantees of the right of every person to form trade unions for the implementation and protection of their economic and social interests and to join such unions of their choice, provided that the rules of the relevant organization are observed. The exercise of this right is not subject to any restrictions other than those provided for by law and which are necessary in a democratic society in the interests of State security or public order or to protect the rights and freedoms of others. To demand the exercise of the right of trade unions to function freely without any restrictions, except those provided for by law and which are necessary in a democratic society in the interests of State security or public order or to protect the rights and freedoms of others.

In modern conditions, the key elements of the Kazakhstan Law on Trade Unions of 2014 are in separate contradictions with the ILO Convention № 87 "On Freedom of Association", and this is one of the most important documents of the organization. For example, the law provides for the mandatory entry of branch or territorial trade unions into a national trade union, which, in our opinion, contradicts the right of employees to join a trade union of their own choice. The hierarchical system of trade unions established by the legislation with subordination to a single center, we believe, is in dissonance with the principle of the prohibition on monopolization of the trade union space, guaranteed by the ILO acts. We believe that the hierarchy of trade unions with a single republican center, with state control, and the absence of independent trade union associations established by law in Kazakhstan violate the guarantees of the Pact.

The ratified universal international acts require extensive and systematic work to bring the labor legislation of Kazakhstan in accordance with international standards. A wider participation of Kazakhstan in the ratification of the universal standards of the ILO would allow the country to make significant progress in ensuring minimum decent working conditions.

The impact of the International Labor Organization on national legislation in Kazakhstan is manifested both in the modification of laws under the influence of cooperation of legislative authorities with the ILO, and in court decisions taken in accordance with ILO Conventions. At the same time, the appeal of the

Kazakh courts to international labor standards when deciding judicial acts, including the ILO conventions, is still extremely insufficient and is still not the rule, but the exception, despite the priority of international ratified acts over national legislation. In many areas that are subject to the regulation of labor law, there is no judicial practice of law enforcement of ratified ILO acts.

Of course, there are objective reasons for the revealed trend. "Despite the massive body of laws and regulations, there are no precise reference points and answers in the legislation to practically important questions of correct application of the international treaties and generally recognized rules. This is one of the reasons why judiciary practice is developing inconsistently, and the application of International Law is often incorrect or even wrong. Not all of the international norms are applicable, and not all of the treaties have priority over laws. There are certain legal conditions for the application of international treaties, conditions for when they prevail over laws, and also there is a procedure of application which should be observed by Courts trying particular cases" [8, 9]. At the same time, in Kazakhstan, for a rather long period of formation of national legislation and law enforcement practice, the tradition of appealing to international human rights standards has not been created.

The assessment of access to justice in social and labor disputes should include an analysis of the subject directly applying for protection and restoration of violated rights, this is, as a rule, a former employee. It is the former employees who are the main initiators of court proceedings, this conclusion is confirmed by the statistics of civil proceedings. About 70 percent of all claims on labor disputes are applications for the reinstatement of dismissed employees, for the payment of wages and other payments, for challenging orders to impose disciplinary penalties [3].

Labor law is fundamentally different from civil law, the general provisions on the contract developed by civil law are not applicable to individual and collective labor relations. It is impossible to consider wage labor only as a commodity on the labor market, since it is not separable from the person's personality. The subject of the employment contract is hired labor. Wage labor is a category of non-recoverable, which cannot be returned in kind in the event of termination of the employment contract, if the employment contract is declared invalid, illegal, it is impossible to bring the parties to the contract to their original position [10]. An employee in an employment relationship is a dependent or weaker party relative to the employer. At the same time, it is the employees who, in the vast majority of cases, are the applicants in court with claims for violations of social and labor rights.

Former employees are a vulnerable party in social and labor conflicts, if they are assessed relative to the situation of former employers, these are the following vulnerabilities: limited financial basis for applying for highly qualified legal assistance; lack of free access to legal assistance; low organizational capabilities in collecting and providing evidence; weak material security for long-term conduct of procedural and procedural proceedings of conflicts; dependence on the need for further employment and continued employment, which do not favor involvement in dispute resolution processes.

According to the researchers, one of the methods of improving access to justice is the development of alternative dispute resolution mechanisms. "The birth of the ADR industry, and the development of a professional class of mediators, not necessarily trained in the law and serving the interests of harmony and non-adversary social control, had transformed the issue of access to justice, by limiting as much as possible access to courts of law. This was accomplished by creating an alternative system not based on justice but on harmony and, most importantly, a system that was almost entirely privatized. These general transformations of Western law, involving a variety of aspects of the legal system, including the rehabilitative ideal (itself very expensive) in criminal law and more generally the target of pursuing social justice through law, were exported worldwide, incorporated into the "Structural Adjustment Programs" and other vehicles for the diffusion of "global" legal thinking" [11].

"Alternative dispute resolution (ADR) was introduced both in developed and developing countries as a panacea for weaknesses within state court systems. ADR generally includes arbitration, mediation and conciliation, and is often claimed to incorporate customary methods of dispute settlement. Because of its many varieties, it is difficult to make general assessments regarding ADR's capacity to aid access to justice for the poor. An important hypothesis that needs testing is that ADR functions best between equally powerful parties who share an interest in restoring and preserving their relations" [12].

The information given in table 1 indicates that in Kazakhstan over the past three years there has been a steady trend of reducing the number of labor disputes that ended with the conclusion of a settlement agreement, in connection with the conclusion of an agreement on the settlement of a dispute through mediation, as well as in connection with the conclusion of an agreement on the settlement of a dispute

through a participatory procedure. These data are not encouraging, they do not demonstrate the success of ADR in the social and labor sphere of Kazakhstan.

Results. The reform of access to justice in individual labor disputes was carried out, we believe, without a proper analysis of the problems that their addressees will face on the way to restoring justice and legality. The special status of applicants and defendants in labor disputes, the specifics of the functions of labor law, and an overview of existing restrictions on access to justice were not taken into account.

In general, the study of judicial practice showed that the consolidation of mandatory pre-trial settlement of labor disputes as a new basis for refusing to accept a statement of claim was desirable for the courts. Since January 1, 2016, the courts have had a legal opportunity not to accept statements of claim if the claim is subject to mandatory pre-trial consideration in the conciliation commission. The legislator turned the procedure for considering disputes in the commission from an alternative form of claim proceedings into a mandatory one, and in a large number of cases involving violations of individual labor rights. How should we evaluate the granting of such a significant "status" to the commission, which, in fact, is put by the legislator on a par with the judicial authorities? Definitely negative. And at least because there is no law enforcement in full compliance with the law and the requirements of justice in the conciliation commissions.

The resolution of labor conflicts in conciliation commissions is a procedure for resolving a case in which the objectivity of the members of the commissions, their independence, validity and legality of the decisions made are not guaranteed. To make an appeal to the conciliation commissions mandatory means to create obstacles for citizens in the exercise of their constitutional right to access to justice.

The following main factors determining access to justice are problematic in resolving labor disputes: the introduction of mandatory pre-trial appeals to the commission significantly increased the duration of the processes for the restoration and protection of violated rights, and also led to an increase in the cost of the entire "legal infrastructure", including the sphere of representation, entailed a complication of the rules of the judicial process. In addition, our research allows us to state the underdevelopment of public institutions that provide legal protection for employees, the decline in the practice of dispute resolution using ADR institutions. The limitation of access to justice is affected by the vulnerability of the plaintiff, who in the vast majority of cases is a former employee, regarding the advantages of the employer in the field of providing evidence, material and time costs, using access to highly qualified legal assistance. The authors came to the conclusion that the provisions of the International Covenants and ratified ILO acts are applied by the courts to a limited extent when making decisions on social and labor conflicts. The progressive content of universal labor standards restricts their application in judicial practice, the lack of their full implementation constrains the context of the experience of their use as human rights instruments.

Conclusion. When assessing access to justice, it is necessary to proceed from the dominant and special role of the judicial form, the multiplicity of violations of social and labor rights and legitimate interests of a person, and the low effectiveness of the mechanism for their protection. Improving the current practice of implementing the judicial form of protection of social and labor human rights will have a positive effect on the legal system and the judicial system as a whole.

It should be noted that recently, more and more supporters (mainly among current judges) have appeared in the position that conciliation commissions are an effective institution for resolving labor disputes. It is no secret that the leading motive for changes in the civil process has recently become increasingly needs: to reduce the burden on judges, to reduce the material costs of considering cases, as well as to speed up legal proceedings, while the parameters for assessing the improvement of the quality of justice are taken into account last of all. But when the legislator replaces justice with an alternative procedure that does not guarantee the correct resolution of the case, this is fundamentally wrong.

It seems that the regulation in the labor and civil procedure legislation of the mandatory pre-trial procedures in conciliation commissions for a large number of cases subordinate to courts of general jurisdiction, and the lack of solutions to numerous practical problems of the work of commissions, the existence of which has long been indicated in the literature, make appeals to the competence of the commissions extremely dangerous. In this regard, we believe that the most correct way is to return to the situation that existed when the applicant had the opportunity to choose between the claim proceedings and applying to the conciliation commissions, provided that the latter's activities were qualitatively improved.

When resolving individual labor disputes, the following problems with access to justice can be identified: the existence of a barrier in the form of a conciliation commission for free access to judicial

protection, weak implementation of international human rights standards in the field of labor disputes, vulnerable position of employees in social and labor conflicts regarding the situation of employers; there is a steady tendency to reduce the number of labor disputes that ended with the conclusion of a settlement agreement, in connection with the conclusion of an agreement on the settlement of a dispute through mediation, as well as in connection with the conclusion of an agreement on the settlement of a dispute through a participatory procedure.

This research is funded by the Science Committee of the Ministry of Education and Science of the Republic of Kazakhstan (Grant № AP09259109).

References

1. On the official interpretation of paragraph 2 of Article 13, paragraph 1 of Article 14, paragraph 2 of Article 76 of the Constitution of the Republic of Kazakhstan. Resolution of the Constitutional Council of the Republic of Kazakhstan № 7/2 of March 29, 1999. [Electronic. Resource] – URL: https://adilet.zan. kz/rus/docs/S990000007 (дата обращения: 15.05.2021).

2. Khamzina Zh. A. Labor disputes: a legal structure for consideration. [Electron. resource]. – 2017. – URL: https://online.zakon.kz/Document/?doc_id=31823326#pos=6;-106 (дата обращения: 15.05.2021).

3. Reports on the consideration of civil cases by the courts of first instance. Statistical data on the consideration of civil cases of the Supreme Court of the Republic of Kazakhstan. [Electron. resource] – URL: http://sud.gov.kz/rus/content/statisticheskie-dannye-o-rassmotrenii-grazhdanskih-del (date of application: 15.05.2021); Reports on the work of the courts of first instance in civil cases on the information service of the Committee for Legal Statistics and Special Accounting of the Prosecutor General's Office of the Republic of Kazakhstan. [Electron. resource] – URL: https: //qamqor.gov.kz (date of application: 15.05.2021).

4. Dickens R. How are minimum wages set? // IZA World of Labor. – 2015. – №. 211.

5. Belser P., Sobeck K. At what level should countries set their minimum wages? // International Journal of Labour Research. – 2012. – T. 4. – №. 1. – P. 105.

6. Schulten T. Towards a European minimum wage policy? Fair wages and social Europe // European Journal of Industrial Relations. – 2008. – T. 14. – №. 4. – P. 421-439.

7. Bronkhorst R. Concepts Derived from the Human Rights: Living Wage and Living Income // The Economics of Human Rights. – Palgrave Macmillan, Cham, 2020. – P. 11-22.

8. Marochkin S. Y. International law in the courts of the Russian Federation: practice of application // Chinese Journal of International Law. – 2007. – T. 6. – №. 2. – P. 329-344.

9. Chipea L. The Courts Competent to Deal with Individual Labor Disputes; Proposals to Reform the System // AGORA Int'l J. Jurid. Sci. – 2013. – P. 145.

10. Khamzin A. Sh., Khamzina Zh. A. Labor law of Kazakhstan. The general part. Textbook. Edition 3. - Almaty: LEM. – 2018. - 208 c.

11. Holbrook J. R. The Effects of Alternative Dispute Resolution on Access to Justice in Utah // Utah Law Review. – 2019. – T. 2006. – №. 4. – P. 1017-1038.

12. Hammergren L. Envisioning reform: conceptual and practical obstacles to improving judicial performance in Latin America. – Penn State Press, 2007.