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ДОСТУП К ПРАВОСУДИЮ: АКТУАЛЬНЫЕ ПРОБЛЕМЫ ИНДИВИДУАЛЬНЫХ ТРУДОВЫХ СПОРОВ

Аннотация

Результаты обзора позволяют представить оригинальный научный взгляд на казахстанскую практику судебного урегулирования трудовых споров, который может представлять интерес для ученых-юристов и исследователей. Проведен анализ соответствия стандартам доступности судебных разбирательств в области защиты трудовых прав личности, а также выявлены специфические проблемы обращения за судебной защитой, присущие индивидуальным трудовым спорам. Авторы выявили следующие проблемы с доступом к правосудию: существование барьера в виде согласительных комиссий для свободного обращения к судебной защите; слабая имплементация международных стандартов в области прав человека в области трудовых споров; уязвимое положение работников в социально-трудовых конфликтах по отношению к позиции работодателей; устойчивая тенденция к снижению числа трудовых споров, завершившихся заключением мирового соглашения, либо в связи с заключением соглашения об урегулировании спора посредством медиации, либо в связи с заключением соглашения об урегулировании спора посредством процедуры участия. Рекомендации и выводы исследования будут стимулировать дискуссию о путях совершенствования системы правосудия, действующей в соответствии с международными стандартами прав человека на рабочем месте.

Ключевые слова: трудовой спор, суд, согласительная комиссия, правосудия, судебная защита, медиация.

Introduction

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

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

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 the social and labour rights of an individual in Kazakhstan; an analysis of documents and statistical data of courts; an analysis of international universal standards of access to justice in labour disputes.

Discussion

Despite Kazakhstan’s 2016 introduction 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. At the same time, since 2018, there has been a tendency to reduce the number of claims for labour disputes, which can be conditionally qualified as a stable factor. The conditionality is stipulated by us due to the insufficiently studied negative impact of the COVID-19 pandemic on access to justice in 2020–2021.

The introduction of the institute of conciliation commissions, which previously consider disputes, was supposed to provide the parties with the opportunity to resolve individual labour conflicts in a short time within organisations, as well as to relieve the courts. The information shows that in 2016, in comparison with the previous 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; there is a stable line of reduction.

If the introduction of the commissions were sent to unload ships from the consideration of labour disputes, this objective has been achieved in part. However, the question arises whether the objectives are justified in the field of justice reform to reduce the burden on the judicial system. Can the emphasis on economic feasibility as the main indicator of reforming the judiciary be an argument for transformation? ? We believe that this approach is wrong from the start and that it distorts the purpose of the judicial branch. Judicial forms of dispute resolution are guaranteed by law, a reasoned decision, the execution of which is ensured by coercive mechanisms of the state. The advantage of legal protection is to implement it on the basis of the constitutional principles of justice, the independence and professionalism of judges, their non-alignment to the parties to the dispute and the parties of 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, in any case, shall not be restricted. Creating required institutions of pre-trial settlement of disputes, obviously, violates the right to judicial protection, which, in contrast to other personal rights guaranteed by the Constitution (Article 1, paragraph 39), cannot be restricted by law. Unlawfully limiting the extent necessary to protect the constitutional order, public order, human rights and freedoms, health and morals. That is, the right to judicial protection – it is an absolute value, is not subject to any restriction [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 Labour 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 or her own will but forcibly observes the pre-trial procedure. An individual is deprived of the opportunity to dispose of the right to apply to the commission at his or her own discretion and is obliged to act within the framework of mandatory regulations in order to have access to the possibility of the 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 the representation of the parties to labour relations, fixed in the LCRK. 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 is in fact 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 neutralisation, an end must be put to the continuing violation of the Basic Law. We refer this conclusion to all mandatory institutions, a pre-trial appeal to which is mandatory for the emergence and implementation of the right to a judicial form of the protection and 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 or her 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 fulfil the goals of justice. Obviously, the extra-judicial measures and mechanisms

should be supported and may claim the status of institutions that guarantee the fundamental right to justice. However, the person should have the right to choose in the exercise of the fundamental right of access to justice: an appeal to the courts or to the jurisdiction of alternative institutions. The basic right to a remedy may not be restricted by the mandatory requirement of prior recourse to extra-judicial means. We believe that all non-judicial means should exist as a complement to the resources of the judicial proceedings, the choice of which must be provided with the free will of the individual, not the coercive power of the state.

According to paragraph 2 of Article 76 of the Constitution, judicial power is exercised on behalf of the Republic of Kazakhstan and is intended to protect the rights, freedoms and legitimate interests of citizens and organisations, the enforcement of the Constitution, laws and other normative legal acts, international treaties of the Republic. Not a single piece of legislation specifies that the purpose of the functioning of the judicial system is to reduce the number of appeals to the courts, reducing the number of pending cases. Why does a significant part of the reforms in this field, initiated by the highest judicial body, pursue these objectives? The introduction of a mandatory pre-trial settlement of labour disputes before a conciliation commission has led to a reduction in the actual number of claims for the restoration of labour rights. Obviously, the number of actual conflicts has not decreased, but it is increasing due to the unfavourable economic and social background, but the number of appeals to the courts is reduced. In our view, this result is due to several aspects: some conflicts are really settled in commissions. The next part of the debate is exhausted because of the refusal of commissions to deal with disputes in which the plaintiff is forced to look for an organisation, a commission, or because of the Commission's unlawful decision or a decision that does not satisfy the plaintiff, but the plaintiff has exhausted the moral and material resources for further recourse to the courts. Another reason for conflicts remaining unresolved is the reluctance of the plaintiff to apply to the Commission, acting on the company's former employer, the reluctance to (once more) go through the difficulties of communication with them and former colleagues, especially since these procedures are associated with additional material and time costs. That is established that in 2016 the passage of pre-order the sequence of labour disputes in conciliation commissions actually reduced guarantees of access to justice.

The institution of conciliation commissions belongs to the sphere of so-called informal justice. The organisation 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; the excessive and unjustified liberalisation of labour legislation regulating the activities of commissions; the low competence of the commission members regarding the procedure, methods of resolving labour disputes, the content of legislation, their dependence on employers, which generates bias as well as incompetence; the insufficient quality of the current labour legislation regulating the procedures for resolving conflicts in commissions; additional costs for the employer for organising 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.

The assessment of access to justice in the settlement of labour 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 labour 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 they issued 999 decisions, in 2018 – 529 decisions, in 2019-179 decisions applying the Covenant, in 2020 – 45 decisions [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 labour rights.

In accordance with paragraph 6 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of 10 July 2008 No. 1, *On the Application of the Norms of International Treaties of the Republic of Kazakhstan*, ratified international treaties that have a 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 Labour 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 42,500 tenge and the subsistence minimum is 34,302 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 organisation 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.

In modern conditions, the key elements of the Kazakhstan Law on Trade Unions of 2014 are in separate contradictions with the ILO Convention No. 87, *On Freedom of Association*, and this is one of the most important documents of the organisation. For instance, 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. We believe that the hierarchical system of trade unions established by the legislation with subordination to a single centre is in dissonance with the principle of the prohibition on monopolisation of the trade union space, guaranteed by the ILO acts. We believe that the hierarchy of trade unions with a single republican centre, with state control and the absence of independent trade union associations established by law in Kazakhstan violate the guarantees of the Convention.

The appeal of the Kazakh courts to international labour 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 labour law, there is no judicial practice of law enforcement of ratified ILO acts.

This trend revealed that there are objective reasons. 'Despite the massive regulatory legal acts, the law is no exact guidance and answers to questions of practical importance of correct application of international treaties and generally accepted rules. This is one of the reasons that the jurisprudence developed inconsistently, and the application of international law is often incorrect or even false. Not all international norms are applicable, and not all treaties have precedence over laws. There are certain legal conditions for the application of international treaties, the conditions for their predominance over the law, and there is the use of the procedure, which must comply with courts dealing with specific cases' [8, 9]. At the same time, Kazakhstan, for a long enough time of the formation of the national legislation and practice, does not have a tradition of appealing to international human rights standards.

The assessment of access to justice in social and labour disputes should include an analysis of the subject directly applying for the protection and restoration of violated rights. This subject 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% of all claims on labour 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]. Wage labour is a category of the non-recoverable, which cannot be returned in kind in the event of termination of the employment contract. If the employment contract is declared invalid or illegal, it is impossible to bring the parties to the contract to their original position [10].

Former employees are a vulnerable party in social and labour conflicts. If they are assessed relative to the situation of former employers, these are the following vulnerabilities: the limited financial basis for applying for highly qualified legal assistance; the lack of free access to legal assistance; low organisational capabilities in collecting and providing evidence; weak material security for long-term conduct of procedural proceedings of conflicts; dependence on the need for further employment and continued employment, which do not favour 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 indicates that in Kazakhstan over the past three years there has been a steady trend of reducing the number of labour 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 labour sphere of Kazakhstan.

Results

The reform of access to justice in individual labour 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 labour disputes, the specifics of the functions of labour 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 labour disputes as a new basis for refusing to accept a statement of claim was desirable for the courts. Since 1 January 2016, the courts have had a legal opportunity not to accept statements of a 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 labour 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? The evaluation is definitely negative. This is 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 labour conflicts in conciliation commissions is a procedure for resolving a case in which the objectivity of the members of the commissions, their independence, the 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 labour 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 it also led to an increase in the cost of the entire 'legal infrastructure', including the sphere of representation, it 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 labour conflicts. The progressive content of universal labour standards restricts their application in judicial practice, and 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 the social and labour 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 labour 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 taken the position that conciliation commissions are an effective institution for resolving labour disputes. It is no secret that the leading motive for changes in the civil process has recently become increasingly necessary: 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. However, 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 labour 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 labour 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, the weak implementation of international human rights standards in the field of labour disputes, the vulnerable position of employees in social and labour conflicts regarding the situation of employers; there is a steady tendency to reduce the number of labour 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.

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