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Origins of Labor Relations and Social Guarantees of the Employee

❖ Pre- Contractual Relations

- Exchange of Information Between the Parties

The employer has the right to check the accuracy of the information submitted by the candidate. In addition, in case of inquiry, the employee is obliged to provide actual information. For example, when the question concerns physical capabilities and the employee has not provided complete information to the employer, the employer is entitled to request the invalidity of the contract **on the basis of a fraudulent arrangement**. It should be noted, however, that a dispute is possible only if the hidden disability would affect the employer's views on future activities.

The scope of the employer's right to inquire about a candidate's state of health (illness) depends on **how closely it relates to the future labor relations**. Therefore, the right of the employer to ask is limited mainly to the following points: Is there an illness or health disorder that will interfere with future activities for a long time or with periodic recurrence? Is there a contagious disease that does not interfere with activities but poses a threat to future colleagues or users? Whether planned surgery, a prescribed course of treatment, or exacerbation of an illness is expected to result in incapacity for work at the start of work or in a predetermined period. Discrimination is not considered a necessity to differentiate between persons, which derives from the essence, specifics or conditions of its performance, serves a legitimate purpose and is a proportionate and necessary means of achieving it. [1]

Questions involving direct discrimination may not be justified by the interest of the employer. Such questions may include **questions about marital status**, **family** planning. The question of pregnancy can be assessed as indirect discrimination on the grounds of sex.

With regard to pre-contractual relations, it is important to note that the information contained in the job announcement plays an important role in the formulation of the Labor Contract. Subsequently, when disputing the terms of the Labor Contract, the employee can rely on the terms of the offer along with the document on the appointment. However, the terms set out in the announcement **do not directly represent the terms of the Contract, but rather it is by its legal nature an invitation to offer.**

- Release the employer from the obligation to substantiate its decision

According to Part 8 of Article of the Labor Code, "the employer is not obliged to substantiate his decision on refusal to hire a candidate." [2] Despite the existence of the above-mentioned record in the Labor Code, the employer is not fully released from the obligation to substantiate the decision on refusal of the employment. This is due to Article 2, Part 3 and Article 5 of the Labor Code, which deals with the prohibition of discrimination. Consequently, as we see, in certain circumstances, it is true that the employer will not be obliged to substantiate

[1] Z. Shvelidze, K Bodone, T. Todria, T. Khajomia, N. Gujabidze, K. Meskhishvili, Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 167.
[2] Labor Code of Georgia, Article 11.8.

its decision on refusal of the employment for a particular candidate, however, in the event of refusal of employment on a discriminatory basis or reasonable suspicion, **the employer might be imposed the burden of proof that the decision made was not discriminatory.**

It is true that the employer is released from substantiating the decision, however, it is possible to impose an obligation to compensate the damages based on the the Criminal Code 317.2. Particularly, the case when the pre-contractual stage (negotiations) lasts for the long period of time is very interesting. In such a situation, the employee may incur rather large expenses (e.g., plane ticket, hotel stay, etc.), but ultimately, the Labor Contract might not be concluded with him. **Clearly, the attitude of the potential employee towards the pre-contractual stage must be taken into account here. Also, a number of actions of the employer. The factual circumstances should give the objective observer a reasonable doubt / assumption that the Labor Contract will be concluded between the parties in the future.**

❖ Essential Terms of Labor Contract

- List of the Essential Terms

Based on the legislative changes of 2020, the list of essential terms of the Labor Contract has been clarified[3]. In particular: **A)** Information on the parties to the Labor Contract; **B)** Date of commencement of work and duration of employment; **C)** Working hours and rest time; **D)** Workplace - the legal address of the employer or, if necessary, the usual place of employment of the employer and information about the various workplaces, if the permanent or main place of employment of the employee is not specified. **E)** Position - the reference to rank, grade, category, etc. have been added (if any); **F)** Remuneration - salary and / or rate, premium, bonus, etc. have been added; **G)** Overtime pay procedure; **H)** Duration of paid leave, the length of unpaid leave and the procedure for granting such leave; **I)** Procedure for termination of employment by the employer and the employee; **J)** Provisions of collective agreements - in case the employment conditions of the employees are regulated differently by these provisions.

With the legislative changes, **the rule of termination of the Labor Contract and the provisions of the collective agreements were added to the** number of essential conditions**, if they regulate the labor conditions of the employees differently. As a rule, the essential conditions are determined by the Labor Contract (possibly also by internal regulations).**

- Specific characteristic of the essential terms of the Contract

The main feature of the essential terms of the contract is the mutual agreement of the parties. This implies that it is necessary for the employee **not only to get familiarized with the terms, but also to give consent**.

The employer has the right to notify the employee of certain circumstances of the performance of the work provided for in the Labor Contract, which do not change the essential terms of the Labor Contract. [4]

It should be noted that the changes of the essential terms of the Labor Contract, which is due to the change in the legislation of Georgia, **does not require the consent of the employee**. [5] However, the following circumstances shall not be considered as substantial changes: a) Change of place of work specified by the employer for the

[3] Labor Code of Georgia, Article 14.1.
[4] Labor Code of Georgia, Article 20.1.
[5] Labor Code of Georgia, Article 20.3.

employee, if it takes more than 3 hours per day for the employee to commute from the place of residence to the new place of work by public transport; ; B) Change of the start or end time of the work by not more than 90 minutes. **However, the simultaneous change of both circumstances** is considered to be a change in the essential terms of the Labor Contract. [6]

In addition, if the health condition of an employee who is pregnant, or with newborn or nursing, according to the medical report, does not allow her to perform the work provided for in the Labor Contract, she has the right, **within reasonable limits**, to request from the employer the performance of the work related to her health condition. [7]

❖ Probation Time

During the probationary period, the employer is entitled to terminate the probationary contract at any time. On the one hand, the Labor Code does not oblige the employer to substantiate the reason why he/she has not continued the labor relations with the employee, however, on the other hand, there are frequent cases in the case law when the Supreme Court imposed an obligation on the employer to substantiate. The practice is quite mixed, although both positions are quite substantiated.

In one of the cases, the Supreme Court imposed an obligation on the employer **to substantiate the grounds for termination** of the Labor Contract concluded for a probationary period. [8]

"The Chamber of Cassation notes that in order to properly resolve the dispute, it is important to determine the purpose of the normative regulation of the probationary period specified in Article 17 of the LCG. In the opinion of the Chamber of Cassation, Article 17 of the LC stipulates that the employer is not restricted and constrained by the application of Article 48 of the LC, which contains the rules for prior notification of termination of employment and the issuance of certain compensation. The employer has the obligation to substantiate the failure of passig the probationary period. Such a conclusion follows from the legislative definition of the probationary period itself, according to which **the purpose of temporary employment is to determine the suitability of a person for the job to be performed.** Therefore, before the end of the probationary period, even in case of dismissal, the employer must indicate the reasons why the employee did not meet the requirements for the job to be performed, because at this time, the employee is not allowed to complete this term, to fully disclose his professional capabilities. It is noteworthy that the dismissal of an employee during the probationary period is permissible in the event of unsatisfactory consequences for the employer, while the respondent employer is responsible for indicating the circumstances proving dissatisfaction and presenting relevant evidence.

* **Note**- Attention should be paid to the fact that the said decision refers to the case when the employee was fired directly during the probationary period and not after 6 months (unlike the second decision).

In contrast to the above, the Supreme Court also has a practice that precludes the obligation to substantiate. [9]

"The Court of Cassation does not share the conclusion of the Court of Appeals that the above-mentioned record of Article 17 of the Labor Code - on the right to terminate employment at any time - should be related to the

[6] Labor Code of Georgia, Article 20.5.
[7] Labor Code of Georgia, Article 20.6.
[8] Supreme Court of Georgia, Judgment, Case Nas 699-653-2017.
[9] Supreme Court of Georgia, Decision, case - № - 142-134-2017.

grounds for dismissal listed in Article 47 of the same Code. Such an interpretation of the norm does not follow from the content of either Articles 17 or 47 of the LC and is directly contrary to them.

Article 47 of the LC refers to the grounds for termination of the Labor Contract not during the probationary period, but after the successful completion of this period between the parties arising from the Labor Contract concluded in accordance with Article 17 - 3. According to the Supreme Court of Georgia, if the burden of proof LC was imposed on the employer after the end of the probationary period, indicating and proving that the grounds provided for in Article 47 of the of the employee, then the probationary period would have lost its purpose. The probationary period is the only period during which the legislature has given the employer the freedom not to continue the labor relations with the employee if he / she deems that he / she does not correspond to the work to be performed. Therefore, in case of termination of a labor contract concluded in accordance with Article 17.4 of the LC, the requirements provided for in Article 48 of this Law, including the obligation to provide a written justification of the grounds for prior notice, compensation and termination of the Labor Contract, also do not apply. In view of the above, the Court of Cassation clarifies that the dismissal of a person on probation does not apply to the grounds and the obligation to present the burden of proof as provided in Articles 47 and 48 of the Criminal Code.

A novelty of the Labor Code is the introduction of an internship institute. An internship is defined as the performance of certain work by a natural person in order to upgrade a qualification. Accordingly, this should be distinguished from the employment of a person on probation. The purpose of the latter is to determine the relevance of the person's skills in relation to the work to be performed.

It is interesting to consider the case of the extent to which the employer has the right to conclude a probationary Labor Contract after the end of the internship period. As mentioned, these two institutions are fundamentally different from each other. During the internship, a person acquires knowledge and practical experience, however, his / her responsibilities are small compared to the employees of the company. In the case of a probationary period, a person usually performs the same duties as a person employed under a fixed-term / perpetual contract. **Consequently, the degree of responsibility of the intern and the person appointed for the probationary period and the scope and content of the work to be performed are substantially different.** Also, the requirements for them are different. Therefore, after completing the internship, the contract will not be considered as a probationary period.

❖ Regulated Working Hours

- General Definition

At first glance, working time qualifies only for the actual performance of the job. Typically, the basic part of the work involves consistent actual performance of the work. At the same time, some jobs, given their specifics, may not always require actual work. This is the case when the employee is obliged to be at the workplace during working hours and at the same time he / she has no personal right to leave the workplace. For example, working in shifts as a firefighter, doctor, during which the employee is physically present at the workplace and is constantly ready to perform work duties, according to the relevant demand and need. Thus, working time in one case is considered to be the period of actual performance of the work, as well as the period of time when

the employee is physically present at the workplace, not actually performing the work, **although he/she is at the disposal of the employer.**

In addition to the above, there are cases where an employee does not actually perform the job, is not present at the workplace, but remains at the disposal of the employer. This is the so-called "on-call" regime. In such a case the employee is present at a place designated by him (e.g. home), however he is required to be at the disposal of the employer in such a way as to be accessible to the employer.[10]

- Regulated Working Hours of Specific Enterprises

The Constitutional Court explains[11] in its decision: "This norm applies to enterprises that, **due to their specifics of work, require continuous work for more than 8 hours, and the continuity of the labor process significantly contributes to the normal functioning of the enterprise.** And the violation of continuity will be associated with the disruption of the production process. At the same time, the norm indicates not only the continuity of production, but also the continuity of the labor process, which **implies that there should be a need for continuity of the labor process in relation to a particular employee. After 8 hours, its replacement must be associated with a significant delay in the efficiency of the work process. The mere fact that the enterprise is operating continuously is not sufficient to extend the 48** - working hours to all its employees, and the violation of continuity will be associated with delays in the production process. The existence of a specific enterprise defined by a given norm depends on the nature of the production process and not on the volume of the work week voluntarily determined by the employer. For the purposes of the disputed norm, the enterprise is specific, within which the specifics of the work to be performed by the employed person require a continuous working regime of more than 8 hours. "

Accordingly, the norm does not stipulate the obligation of the employee to work 48 hours a week, but does not restrict the right of the parties to agree on a 48-hour work schedule per week, and the exact amount of working time is determined by the contract between the parties. More specifically, the Constitutional Court notes that the norm does not impose an unequivocal obligation on employees of a special regime enterprise to work 48 hours a week. It establishes the right of the parties to enter into a contract providing for a 48-hour working week.

The entity may qualify as an enterprise with a specific work regime, although the maximum time regime of 48 hours per week is not automatically applied to all persons employed in this enterprise.

❖ Break and Rest Time

- Essence and Definition of the Right to Break

It is important to assess a case where an employee does not do the job during the break time but is required to stay at the workplace. On the one hand, the employee is not required to perform the work, on the other hand, **since the employee has no right to leave the workplace, he is restricted in his freedom to plan and use his time**. It should also be noted that the employee is free to use the break time, but due to the short duration of the break, he/she does not have the opportunity to leave the workplace, although he/she is entitled to rest in or around the workplace. The employer may give the employee the right to take time off, but may request to stay at or near

[10] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 195.

[11] Constitutional Court of Georgia, Judgment of 19 April 2016, Case №2 / 2/565.

the workplace so that it can be used if necessary. In all the cases described above, it is determinant whether the employee is at the disposal of the employer. Under the ILO No. 1 and No.30 Conventions, **if an employee is required to perform work or be at the employer's disposal during the break, this period is considered to be working time[12].**

Until 2021, the Labor Code contained an indication that working time was not considered to be break time, although the Code did not set a minimum length of break time. That is why the court used the established practice of the labor market in its explanation. Following the legislative changes, a direct record was made and it was determined that if the working time during the working day **is less than 6 hours**, the duration of the break time should be **at least 60 minutes**.[13]

- *Essence and Definition of the Right to Rest*

The use of the right to rest is manifested in the following cases: a) Continuous 12-hour rest between working days; B) 24 hours of continuous rest per week; C) Days off defined by the Contract; D) Days off established by the Labor Code; E) Holidays defined by a government decree.

It should be noted that the law allows the redistribution of working weeks, including weekends, e.g. for 7 calendar days. In such a case, the maximum limit of normalized working hours limited by the Labor Code and the minimum limit of rest between working days must be observed.

Depending on the specifics of the work and the agreement of the parties, it is allowed to work on weekends. Pursuant to Article 30 (3) of the Labor Code, the performance of work by an employee on weekends is considered overtime work and must be remunerated in accordance with the rules established for overtime pay.

❖ Full-Time and Part Time Employment

A part-time employee is an employee whose standard working time during the week is **less than the normal working time of a full-time employee under similar conditions**. A full-time employee is an employee who, under the same form of Labor Contract, performs **the same or similar work for the same employer** and is employed in the same direction, in the same department or service. In the absence of such person, a full-time employee in the same field of activity should be considered. [14]

It is prohibited to treat a person employed part-time differently in relation to working conditions than a person employed full-time under similar **conditions simply because that person is employed part-time. For example**, an employer has set a cash reward for employees who have been employed by the company for 10 years and have been successfully performing their duties all this time. In addition, it has both full-time and part-time employees who meet the above prerequisites. In this case, if the employer pays cash reward to only full-time employees, and part-time employees with 10 years of experience are refused to be paid on the grounds that **they have not yet met the above experience**, this action is considered discriminatory.

[12] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 202.
[13] Labor Code of Georgia, Article 24.5.
[14] Labor Code of Georgia, Article 16.1.

❖ Working in Shifts

The legislation emphasizes that when setting a timetable for shifts, it is essential that the parties strictly comply with the imperative requirement of the Labor Code - adhering to a minimum rest period of at least 12 hours between shifts. In addition**, the employer must provide the employee with adequate rest time during the work hours**[15]. For example, when the shift schedule provides for an employee to work 18 or 24 hours a day, the employee must have a minimum of 18 or 24 hours of rest after the end of the shift. That is, when working 24-hour shifts, when working hours end at 9 a.m., the next shift should not begin until 9 a.m. on the next calendar day in such a way as to provide the employee with adequate rest time. In other words, the legislature's approach is that the rest time between shifts should be adequate for the time worked, though not less than 12 hours. [16]

However, the Code sets a strict requirement, in particular, it is forbidden to work in two shifts in a row.

In addition, the Labor Code does not provide for a maximum limit for working shifts during a calendar day. Accordingly, the Labor Code allows for a 24-hour shift schedule.

Since it is not possible to calculate a normal working week in the presence of a change schedule, the rule of **summary accounting should be used** in such cases. According to Article 16 of the Labor Code, in accordance with the working conditions, when it is impossible to maintain the duration of daily or weekly working hours, it is allowed to introduce the rule of summary accounting of working hours. For example, George's shift schedule provides for a 24-hour work shift and a 48-hour break between shifts. On average, George's shift for one calendar month involves 10 working days. Let's say that in the first calendar week, Giorgi works a total of 72 hours, in the second week - 48 hours, in the third week - 48 hours, in the fourth week - 72 hours. Accordingly, George's working time during the working month is 240 hours, of which 160 or 192 hours should be considered normal (depending on whether he is employed in a specific regime), and, accordingly, the remaining time 80 or 48 hours should be considered overtime.[17]

❖ Regulating Holidays

Holidays are envisaged in both the Labor Code and, in some cases, by government decree, although they are subject to different remuneration regimes.

Holidays established by the Labor Code include mandatory holidays for both the private and public sectors. If the employee works on a day off established by the Labor Code, **the employer is obliged to be remunerated for the work performed overtime.**

In contrast to the above, it is true that the employee is entitled to rest on a holiday determined by a government decree, however, in case of rest, **he/she must perform the work on the days of rest provided for in the** Labor Contract**.** And if he / she does not wish to do the work on the weekends, his / her performance according to the decree and the work performed will be remunerated in accordance with the remuneration agreed in the Contract.

[15] Labor Code of Georgia, Article 25.1.
[16] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 204.
[17] Same, pg 205.

Section 4 of Article 30 of the Labor Code explicitly states that overtime work will be remunerated only on weekends established by the Labor Code.

❖ Leave and Rule of Granting Leave

- Essence and Purpuse of the Leave

Leave is the right to rest based on the time already worked by the employee - the work done, during which the employee will be paid even though he/she does not do the work during the leave. It is inadmissible to **exclude from the Labor Contract the right to annual** paid leave or **to replace it with monetary compensation**.

- Types of Leave

The employee is entitled to paid leave of at least 24 working days per year. In addition, the employee has the right to take unpaid leave - at least 15 calendar days a year. This norm is imperative. The Labor Code stipulates that the Labor Contract may specify different terms and conditions of paid and unpaid leave, which should not worsen the condition of the employee. An Labor Contract may provide for paid leave, for example, in the amount of 26 working days, but not less than 24 working days, for example, agreeing to a paid leave of 22 working days may not be agreed. In addition to the above, an employee working in heavy, harmful or hazardous work is given additional paid leave - 10 calendar days a year. The list of hard, harmful and dangerous jobs is approved by the **Order N147 / N** of the Minister of Labor, Health and Social Affairs of Georgia, 2007.

The employee is granted 126 calendar days of paid leave due to pregnancy and childbirth upon his / her request, and 143 calendar days in case of complications of childbirth or birth of twins. The employee is granted 604 calendar days of child care leave at his / her request, and in case of complication of childbirth or birth of twins - 587 calendar days. 57 calendar days are reimbursed from this leave. **Child care leave can be used in whole or in parts by both the child's mother or father.** While, the use of maternity leave is an exclusive right of the mother of the child, **the father of the child has the right to enjoy those days of leave which have not been used by the mother of the child.**

- Rules of Using Leaves

When taking unpaid leave, the employee is obliged to warn the employer about taking leave **2 weeks in advance**[18], unless warning is not possible due to urgent medical or family circumstances. The Labor Code does not provide the relevant norm on the employer's prior warning about the use of paid leave by the employee. Naturally, the employer must be informed of the employee's right to leave within a reasonable period of time. **Pursuant to Article 46 (3) of the Labor Code, an employee must submit a request for suspension of employment on the basis of paid leave to the employer.** [19]

- Transfer of Leave

If the granting of paid leave to an employee in the current year may adversely affect the normal course of work, with the consent of the employee it is permissible to transfer the leave to the following year. The Labor Code

[18] Labor Code of Georgia, Article 33.

[19] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 215.

establishes exceptional cases of paid leave transfer when: a) the granting of paid leave to an employee in the current year may adversely affect the normal course of work; B) the employee agrees to transfer the leave. It is noteworthy that the transfer of leave in labor relations for a minor to the following year is prohibited, and according to the Labor Code, the transfer of leave twice in a row is not allowed. For example: if x has been employed by y Company since January 1, 2018 and he was not able to take 10 days off from his paid leave (24 working days) in 2020, x will have paid leave for 2021 for 10 working days and in 2021 he can take leave in total of 34 working days. And if he still can not use the above 10 days in 2022 he will no longer switch to the remaining days of leave and will use only this year's leave (24 working days).[20]

- *Paid Leave*

In case of monthly **fixed** remuneration, the employee's remuneration is determined according to the **remuneration of the last month**. If the fixed amount of remuneration is not specified in the Labor Contract, the employee's remuneration shall be determined from the average remuneration of the previous 3 months of leave. And if the working time is less than **3 months from the beginning of work** or after the last leave, the leave pay is determined from **the average salary of the working months**. [21]

Leave due to pregnancy and childbirth, leave due to child care and leave due to adoption of a newborn shall be reimbursed **from the state budget of Georgia** in accordance with the rules established by the legislation of Georgia. The total amount of financial assistance to be paid for maternity leave and for adoption of newborn paid maternity leave is **not more than GEL 1,000**.

- *Unused leave and its reimbursement*

The practice established by the Supreme Court of Georgia is that the right to claim unused leave applies only in the case **of termination of employment at the initiative of the employer**. For example, in case of termination of employment at the initiative of the employee, the employee is not entitled to claim compensation for unused leave. According to the court, "the right to leave arises only in the conditions of labor relations. When an employee leaves the job voluntarily, **he / she voluntarily terminates the labor relationship with the employer and at the same time does not use (refuses) paid leave**, thus, the right to receive leave compensation cannot be used after termination of employment, because in this case there is no necessary pre-condition - legal relationship of labor. Exceptions are some of the grounds on which the employer terminates the legal labor relationship with the employee on his own initiative. The obligation to pay for unused leave refers to both unused leave for the first year of employment and unused leave in proportion to the duration of the labor relations for the following year. However, it is inadmissible for the employee to claim compensation for unused leave in case **of termination of employment on the expiration of the Labor Contract**.

- In the conditions of the world pandemic, **the issue of granting leave to employees without forced remuneration** has become relevant. On a similar issue, the Supreme Court clarifies (AS-593-2019) that the Labor Code does not allow an employer to enter into such an agreement with an employee that an employee would have to be on unpaid leave against his or her will.

[21] Labor Code of Georgia, Article 36.

❖ Regulations

- Specifics of the Regulations

The employer is entitled, without mutual agreement with the employee, to set certain conditions related to the work unilaterally and in advance. For example, the time of payment of remuneration, the duration of paid leave and the procedure for granting it; Duration of unpaid leave, etc.

In order for the labor regulations to acquire binding force, it is necessary to indicate in the contract that it is an integral part of the contract. As a rule, the company has single labor regulations, which includes all the important general conditions, and in addition, depending on the specifics of the work, several types of contracts. However, since the labor regulations are unilaterally developed general document, the provision of the latter that is contrary to the Labor Code, the individual labor contract or the collective agreement is considered invalid.

The employer is obliged to inform the employee in writing about the labor regulations before concluding the Labor Contract, and the employee is obliged to get acquainted with and agree to the terms of the labor regulations.

- Change in the terms of the regulations and the obligation to notify

It is true that the employer unilaterally sets the terms of the labor regulations, however, in case of a change in it, the employer is obliged to inform the employee of the change in the labor regulations within 14 calendar days after its submission. Otherwise, the employee is released from the obligation to comply with this condition. [22]

It is important to note that if the labor regulations include any of the essential conditions set out in the Labor Code, the consent of the employed person will be required for this particular condition.

In addition, it is true that in relation to the terms of the labor regulations, the employer is not limited in determining its content, although this does not imply absolute freedom. In practice, a dispute may arise as to the validity of the provisions of the Labor Regulations when the terms unilaterally offered by the employer are **detrimental to the employee, or vague**. In such cases, the norms of the Civil Code of Georgia regarding the **invalidity of standard conditions** and the rule of interpretation may apply.

Discrimination in Labor Relations

❖ 2020 Legislative Changes and General Overview

- Concept and Forms of the Discrimination

Discrimination is the deliberate or negligent discrimination or exclusion of a person by race, skin color, language, ethnic or social origin, nationality, origin, property or rank, employment status, place of residence, age, sex, sexual orientation, Because of a disability, health status, affiliation with a religious, social, political or other association (including trade union), marital status, political or other views or other grounds that seek or cause the denial of equal opportunity or treatment in employment or occupation; or encroachment.[23]

[22] Labor Code of Georgia, Article 14.3.
[23] Labor Code of Georgia, Article 4.1.

In order to assess whether an action is considered discriminatory, it is necessary to have an **object of comparison**. In accordance with the case law of the Constitutional Court of Georgia (Decision of 27 December 2010), it must first be determined whether comparable persons (group of persons) are substantially **equal / substantially unequal**. It is necessary for the mentioned persons to meet in a similar category, in similar circumstances and to be essentially equal in view of the specific circumstances and legal situation.

The comparison can be both **real and hypothetical**. For example, in a discriminatory pay dispute where there is no comparable employee, it is acceptable to assume what would be, for example, a male pay. Clearly, however, in terms of evidence, it is better to have a comparable object.

Discrimination is direct when a person is treated **unequally in relation to another person who is in the same or similar situation, was or could have been the object of more favorable treatment due to any of the signs established by the Labor Code**. Accordingly, it consists of the following elements: the differential treatment of persons in a substantially similar situation, unless this treatment has an objective and reasonable justification. However, it must be established that other persons who are in a similar or substantially similar situation are treated better or worse, and this distinction is discriminatory. [24]

Indirect discrimination is when a certain action / norm / requirement / condition is seemingly neutral in form, but substantially discriminatory and has a negative impact on specific groups. The peculiarity of indirect discrimination is revealed in the fact that, as a rule, an action (inaction) does not contain the prohibited characteristics of discrimination. For example, we have a case of indirect discrimination on the grounds of sex, when the employer determines at least 1.60 m height as a condition of getting a job for the candidate. In this case, it is true that all men and women can get a job, but it indirectly discriminates against women whose height does not exceed 1.60 m. [25]

Workplace harassment (including sexual harassment) is one form of discrimination. It includes actions aimed at **violating the dignity of the employee, creating a terrifying, hostile or abusive environment for him/her**. This form is characterized by certain specifics. In particular, in the case of harassment, **it is not necessary to have a comparative object**, since the implementation of the above actions already indicates its illegal content.

- *Reasonable Accommodation*

In order to protect the principle of equal treatment of a person with disabilities, in particular the principle of reasonable accommodation, the employer is obliged to take appropriate measures if necessary. The aim of this action is **to create equal opportunities** for a person with disabilities in terms of employment, career advancement and professional development. It is important to note that taking certain measures for a person with a disability does not discriminate against other employees, as it is caused by an urgent need. However, the employer is relieved from the obligation to make reasonable accommodation when it imposes a disproportionate burden on him. For example, it is associated with large costs, and the company does not have good financial condition or resources

[24] Labor Code of Georgia, Article 4.2.

[25] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 127.

❖ Practical Examples of Discriminatory Treatment

- Differential treatment, which is not considered discrimination

In order for differential treatment to be considered justified, it must serve a legitimate purpose and the **proportionality** between the objective achieved and the means used must be maintained.

There are works in public life, the essence or specificity of which requires the employment of a person because of his/her **specific characteristic** or this is **essentially related to the specifics** of the work to be performed. For example, for a woman in a fashion show, gender is considered a job characteristic of a model, or gender is a determinant for an actor to play the role of "Romeo" in a theater. In such cases, the restriction is not considered discrimination. In addition, for example, if the vacancy indicates the minimum height of an employee, the employer may argue that a significant job requirement is height, since the height of the employee is required to work on a particular machine. [26]

- Equal pay for equal work

The employer is obliged to ensure equal pay for female and male employees in case of equal work. The principle prohibits the distinction between remuneration when **a lower paid category employee performs a higher value job.** Consequently, a comparison is made with a job of lower value for which the employer pays a higher wage. The principle of equal pay is not limited to a specific enterprise, with the works comparable within the employer.

- Burden of Proof

With regard to discrimination disputes, the most important issue is the burden of proof. In particular, the employee (plaintiff) is relieved of the evidence and the employer (defendant) has an obligation to prove that no discriminatory action has taken place on his part. **This is due to the fact that the plaintiff does not have adequate access to the evidence necessary to prove discrimination.** On the contrary, it is under the control of the employer.

Thus, in order for the burden of proof to be borne by the employer, the cumulative existence of the following conditions is necessary: a) an obligation to indicate circumstances; B) the obligation to submit evidence on the mentioned facts; (C) The facts and evidence presented by the plaintiff must give the court a **reasonable presumption** that a discriminatory act has been committed. [27]

In addition, the burden of referring to the "object of comparison" rests with the plaintiff. The plaintiff must not only define the circle of comparable persons, but also substantiate substantial equality between the said persons. In addition, they must make a reference to the **prohibited sign**.

There are cases where different treatment is justified by the existence of a legitimate aim. In such a case, the employer is obliged to prove that the act (omission) committed by him is **an exception to the rule** prohibiting discrimination.

[27] Shvelidze Z., The scope of civil claims in the dispute of labor discrimination, Tbilisi, 2019, 201.

Remuneration

❖ Forms, Amounts and Methods of Payment of Remuneration

Remuneration includes basic or minimum remuneration, or wages or any other remuneration paid in cash or in kind, received directly or indirectly from the employer in exchange for the performance of the work. The term **"any remuneration"** means cash award/ bonus. Accordingly, any remuneration received by an employee from the employer in exchange for the work performed is considered to be remuneration.

The amount of remuneration and the procedure for its issuance are determined by an individual contract with the employee. With regard to salary, it should be noted that it should be issued at least once a month. While the frequency of remuneration for other types of remuneration, such as a bonus, depends on meeting the conditions set out in the contract for its receipt (eg **successful completion of a job**).

Section 3 of Article 41 of the Labor Code indicates that the employee is obliged to pay the employee any compensation if he / she pays 0.07% of the delayed amount for each day of delay in payment. This provision **does not apply to cases of illegal dismissal of an employee**. In particular, if the court finds that the employer's dismissal order is void, the employee may not claim 0.07% of the amount receivable from the date of dismissal until the order is declared void. This provision of the Labor Code applies only in the process of employment. For example, when the contract stipulates that the employee's salary must be credited on the last business day of the reporting month, in the event of a delay in enrollment, the employee is entitled to claim 0.07 per cent of the amount due on each overdue day.

However, it should be noted that in case of forced waiting for the employee due to the fault of the employer, the employee will be paid in full. And, forced waiting caused by the employee's fault will not be compensated. For example, when an employee does not report for work for an unreasonable reason, or leaves the job early.

❖ Deduction Power of the Employer

The employer is entitled to deduct the overpaid amount from the employee's salary, or any other amount that the employee has paid to him / her due to the labor relations. However, the total amount of one-time deductible should not exceed 50% of the remuneration.

This provision of the Labor Code applies to cases where an employee receives a certain amount of unpaid remuneration from the employer, this may be both a salary and a bonus. For example, if an employer awarded a bonus to an employee in exchange for a successful job, it was later found that the employee had successfully performed the job not through his or her own efforts but in unscrupulous ways. In such a case, the employer is entitled to deduct 50% from the salary. If the one-time deductible does not cover the amount of the bonus paid, the employer is entitled to deduct it for the following months until the amount paid by him is fully reimbursed.

❖ Recording Working Hours

The employer is obliged to record the working time of the employees in writing and / or electronically on the working day. Registration of working hours is mandatory for employers provided by the Labor Code of Georgia (natural or legal person and / or association of persons).

The employer is obliged to introduce the monthly document for recording working hours (working hours) to the employee, and the employee is entitled to request the employer to get acquainted with the document for recording the hours worked by him. The information is reflected in the working time recording form once, at

the end of each month and / or periodically, throughout the month. Its closing date is set by the employer, but no later than the 10th day of the following calendar month. [28]

When working in shifts, **the shift time form must be accompanied by a shift schedule approved by the employer in accordance with the legislation of Georgia**. If the shift schedule has changed during the reporting period, a document reflecting the change will be attached to the shift time form, along with the shift schedule.

The working time recording form, as a monthly document, completed and signed in the form of a final written and / or electronic document, is kept for 1 year with the employer or a structural subdivision / person designated by him / her. [29]

The form of working time registration shall be determined by the Minister of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs of Georgia after consultation with the social partners. The form of accounting for working time established by Annex 2 approved by this Order shall include at least the data specified in this Rule, although the employer is entitled to indicate other additional information or record working time in any other form subject to the minimum data specified in this Rule.

It is true that the Labor Code and the order of the Minister impose on the employer the obligation to record working time, however, this can be excluded when, due to the specifics of the organization of work, it is impossible. The law does not set specific criteria by which the employer will be released from the obligation. Therefore, individual assessment and analysis of job specifics is necessary in each case. However, the burden of proof is on the employer. He must argue that in the given circumstances it is objectively impossible to record working time. The question is, specifically which activities can be attributed to exceptional cases. For example, an accountant who does not carry out his professional activities on a daily basis and at the same time, he provides services to several companies. In this case, it is clearly impossible for the employer to keep track of his daily work. It is also important to note cases where the employee's activities are **related not to a specific (fixed) work time but to the outcome of the work to be performed.** Under the given conditions, the employed person may not perform the work on a daily basis, although he / she will perform the specific duties assigned to him / her at the end of the working week.

❖ Remuneration for Overtime Work - Practice and Existing Arrangements

Overtime work means the performance of work by an employee in a period of **time duration of which exceeds the normal working time**. Overtime work is remunerated by an **increased amount of the hourly wage rate**. [30] And the amount of remuneration is determined by an agreement between the parties. It must be remunerated in addition to the monthly wage.

In order for the work performed to be considered overtime, it is necessary to have an agreement between the parties. In case the employee voluntarily stays at the workplace and performs the work, this is not considered overtime, as the employer was not informed about it.

[28] Order of the Minister of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs of Georgia №01-15 / n, February 12, 2021, Article 2.4.
[29] Order of the Minister of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs of Georgia №01-15 / n, February 12, 2021, Article 4.1
[30] Labor Code of Georgia, Article 27.2.

As a rule, the employer is obliged to notify the employee in writing **one week in advance** about the overtime work performed. However, there are exceptions when an employer may require an employee to work overtime without meeting this deadline. For example, **when due to an objective need, his advance warning was impossible** [31] (suddenly the machine broke down, which completely determines the employee's ability to do the job; suddenly the next day a very important conference meeting was scheduled, etc.).

In order to prevent a natural disaster or to eliminate its consequences, the employee is obliged to perform overtime work without any remuneration. The liability also applies to the prevention of an industrial accident, in this case, by overtime pay.

Clearly, the record of the Labor Code stating that remuneration is determined by agreement of the parties does not give the employer complete freedom. As a "strong side", it has an obligation not to abuse its rights and to adhere to the standard of good faith and courtesy. It is essential that the **employee receives adequate and proportionate remuneration for the work performed.**

Overtime work may not be limited to the non-working time of the employee, but also the fact that he / she has performed the work. The burden of proof for these circumstances, in accordance with Article 102 of the Code of Civil Procedure, rests with the employee, in particular, he/she must indicate and, in case of dispute, present evidence, the analysis of which will lead the court to conclude that due to industrial necessity, its performance during the working hours was objectively impossible. The fact that you are at work after working hours does not in itself prove the need for additional time to perform the work (Supreme Court decision, June 3, 2019).

Interesting is the case where **the interest rate for overtime pay is not agreed between the parties**. [32] One of the decisions of the Supreme Court of Georgia is based on the following factual circumstances: According to the plaintiffs, they worked in excess of the established working hours, ie they performed their official duties both after working hours and on non-working days. The employer fired the plaintiffs after the expiration of the contract and did not reimburse them for overtime work. Accordingly, the plaintiffs sought to impose a sum of money on the defendant. In the context of this dispute, the Tbilisi City Court **considered the hourly rate for overtime work to be 1.5 percent**. The coefficient and at the same time indicated that in order to consider the work performed by the employee as overtime, its performance needs to be agreed between the parties and exceed the threshold defined by law. This approach has been shared by both the Court of Appeals and the Supreme Court. The court clarified that since the parties did not agree on the amount of overtime pay, according to the first part of Article 325 of the Civil Code of Georgia, these **conditions should be determined on the basis of fairness**. Given that the plaintiffs performed overtime work on a regular basis and were also active on weekends, the Chamber found that the City Court had fairly determined the amount of compensation to be paid for overtime work.

Termination of the Labor Contract

❖ Grounds for Termination of Labor Contract

Article 47 of the Labor Code defines the grounds on which the labor relationship between the employer and the employee is terminated. It is important to consider the practical manifestation of each of them:

[31] Labor Code of Georgia, Article 27.4.

[32] Supreme Court of Georgia, Decision of December 16, 2019.

A) Economic circumstances, technological or organizational changes that make it necessary to reduce the workforce (so-called reorganization)

The development of free enterprise, or the economic situation in the country in some cases, requires a change and renewal of the ongoing processes in the company. This may be manifested in the modernization of the field of activity, the invitation of qualified specialists, the reduction of staff, etc. It is true that business development and competition for other companies are important, but **all this should not infringe on the legal rights of employees.**

Therefore, it is necessary for the workforce reduction process to be carried out in full compliance with the law, which implies the existence of a legitimate aim and the use of proportionate means to achieve it. In particular, in order for a termination of a contract on the above grounds to be considered lawful, it is necessary to have two cumulative conditions: **a) economic circumstances, technological or organizational changes; And (b) the need to reduce the workforce.** It is important to focus on the second premise. In some cases, there may be organizational or technological changes, although it does not require a reduction in the workforce. Therefore, it is necessary to clearly state the inevitability of termination of the contract.

In many cases, reorganization is a hidden leverage for the dismissal of an employee or employees in the hands of the employer. As an example, it should be noted that the reorganization of an enterprise or its structural unit is illegal when in fact there was no reorganization, the same structural unit remained in formal terms, or new structural units were introduced instead of canceled, which differ in formal form but carry the same function. Accordingly, reorganization is an internal organizational change that can be the basis for dismissal of a person only if the dismissal of the person was caused by the consequences of reorganization and not directly by the reorganization process. Otherwise, the employer will always be able to dismiss the employee on the grounds prohibited by law and the so-called process. Justification by "internal organizational change".[33]

Reorganization can be considered legal when **the specifics of the work to be performed are completely changed**. For example, when the closure of a service center is caused by the transition to "self-service". In a similar situation, it is established that changes in the organization expose the employer to the need to dismiss an employee from a particular position. [34]

When we talk about reorganization, it is necessary to analyze the issue of redistribution of the burden of proof between the parties. The Supreme Court clarifies that under the general rule for the distribution of the burden of proof in procedural proceedings, each party must prove the circumstances on which it bases its claims and counterclaim. In labor disputes, the distribution of the burden of proof is characterized by certain peculiarities, which is due to the unequal opportunities of the employer and the employee in terms of presenting evidence. The plaintiff, an employee appealing for unlawful dismissal, cannot prove the illegality of his dismissal. Accordingly, the plaintiff's reference to the fact that he or she was unlawfully dismissed returns the burden of proof to the employer, who imposes an obligation to prove the employee's dismissal. This finding is based on the following fundamental principle: in particular, an employer has the probative advantage of presenting to the

[33] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 228.

[34] Supreme Court of Georgia, Decision of December 24, 2020 Case Nas-1009-2020.

court evidence in favor of him that his employee has breached his job duties, which has manifested itself in specific actions rather than the employee failing to objectively .

B) Expiration of the Labor Contract

The Labor Code considers the possibility of concluding **two types** of fixed-term contracts:

A. The contract is concluded for a specific calendar period; When concluding a term contract, the term is indicated only in a calendar, without any purpose or basis. The Labor Code sets **a minimum 1-year term** for such a contract. **It is not allowed to sign such an agreement for a period of less than one year**. The contract must unequivocally agree that the expiration of the entire contractual relationship shall terminate upon the expiration of this period.

B. Determining the term of the contract is associated with a certain purpose. Termination of a fixed-term contract depends on the occurrence of a future event. Such a fixed-term contract is when the duration of the contract relates to the type, purpose and content of the work performed. The circumstance to which one of the parties to the contract relates to the termination of the contractual relationship is definite and characteristic of that relationship, but **the exact time of termination of the contract is unknown**. When concluding a fixed-term contract, this purpose must be clearly stated in the contract. It should be read from the contract that the will of the parties is aimed at determining the duration of the contract under this condition, and that this condition is included in the contract by both parties. It should be clearly and unequivocally stated that the labor relations should end when this condition arises. The Labor Code considers the following cases of a fixed-term contract concluded for a specific purpose: a) work of a specific volume is to be performed; B) seasonal work is to be performed; C) the volume of work is temporarily increased; D) an employee temporarily absent from work is replaced on the grounds of termination of employment; E) there is another objective circumstance that justifies the conclusion of the contract for a certain period of time. [35]

It is important to note that if the term of the Labor Contract is **more than 30 months**, or if the labor relations continues as a result of concluding a fixed-term Labor Contract **two or more times** and its duration exceeds 30 months, an indefinite Labor Contract is considered concluded.

However, in practice, there were frequent cases when the employer entered into a contract with the employee for a definite period of time (for example, 5 months), although there was no specific basis under the Labor Code to justify concluding a contract for a fixed period. Based on the legislative changes, it has been directly explained that if a fixed-term Labor Contract is concluded without any of the grounds provided for in Article 12 (3) of the Labor Code, it is considered that a permanent Labor Contract has been concluded. Consequently, the employer will not be entitled to terminate the contract on the basis of expiration.

C) Performance of work provided for in the Labor Contract

D) The employee resigns voluntarily on the basis of a written application

E) Written agreement of the parties

[35] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 176.

F) incompatibility of the employee's qualifications or professional skills with the position / job to be held

The labor relations with the employee may not be terminated due to unsatisfactory performance of the work, unless the employer has issued **appropriate instructions and written notice** to the employee, and the employee continues to perform the duties unsatisfactorily after a reasonable period of time has elapsed to improve performance.

According to the ILO Committee of Experts, when an employee's performance is unsatisfactory due to a lack of qualifications or skills required to perform a particular job, the employee may be provided with certain protection mechanisms for termination on a reasonable basis. This may be to **carefully evaluate the work performed, to warn the employee about the quality of work performed by him / her and possible negative legal consequences, to give the employee the opportunity to demonstrate his / her skills, to provide the defined opportunities to improve the job**. The employer should use all measures to avoid termination of the Labor Contract with the employee. These can be: a) transfer to another job; B) training or continuing educational activities; C) Offering a vacant position that is relevant to the employee's knowledge and skills.[36]

G) Gross violation by the employee of the obligation imposed on him / her by an individual labor contract or a collective agreement and / or internal labor regulations

The Labor Code does not specify which action is considered a "gross breach" of an obligation. Whether a breach of an employee's obligation under an Labor Contract **is "gross" it is the subject of an individual assessment in each individual case and must be assessed in the light of all the specific circumstances of the case**. The same action, which in one case constitutes a non-substantial violation, may in another case be equated with gross disturbance. In order to assess the severity of an offender's act (or omission), the purpose of the service in which the employee works, and **the function and responsibilities of the employee** in that service, must first be examined.

With regard to the termination of the contract on the grounds of gross breach of obligation, it should first be noted that the principle of **Ultima Ratio** - in labor law should be observed. Maintaining a legal labor relations has priority over its dissolution. Accordingly, each violation committed by the employee must be assessed in terms of the frequency, severity and, most importantly, the consequences. Accordingly, the principle of "Ultima Ratio" in labor law requires the employer to evaluate his actions before the dismissal of the employee in terms of cause and effect, violation (misconduct) and dismissal, maintaining a moderate balance. It is noteworthy that according to the same principle, when committing a violation (misconduct) by the employer, measures should be taken that will correct the existing situation, improve the employee, improve the qualification, force him/her to behave more prudently and carefully. Therefore, in terms of expediency, a proportionate punishment mechanism should be chosen in case of misconduct, which, in turn, in addition to punishing the offender, will motivate him/her and other employees to work more effectively.

It is clear that for a misdemeanor committed by an employee, or for improper performance of professional obligations, such a severe measure as termination of employment (except for exceptions) without the observance of certain procedural preconditions may not be used directly. If the employee has improperly performed or failed to perform a job, the employee should be given a reasonable period of time and instructions to rectify the

[36] Shvelidze Z., Bodone K, Todria T., Khajomia T., Gujabidze N., Meskhishvili K., Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 238.

situation. Therefore, it is not permissible to dismiss an employee **without notice and explanation**. The exception is a serious misconduct, which makes it inappropriate to extend the Labor Contract with him, and therefore there is no need to get a fair response from the employee. This is the case when, for example, the damage caused to the enterprise by the employee is quite severe and **it is obvious that hearing his prior warning and explanation is inappropriate;**

According to one of the facts of the ruling of the Supreme Court of Georgia, the employer directly terminated the labor relations with the employee without any prior notice. In the present case, the court had to determine: 1. What led to the dismissal of the employee **without any notice**, whether it was inappropriate to give an prior warning to the employee. 2. **What was the consequence of the employee's dismissal** for an unreasonable reason, whether all this resulted in damage, or may not have resulted in damage due to certain objective circumstances, **but this action of the employee may have had serious consequences**. Therefore, in relation to the above questions, the Chamber of Cassation clarifies that in the event of an employee being absent from work for an unreasonable reason, only the number of days missed (missing one or several days for an unreasonable reason) does not have a qualifying value. In addition to missing a job for an unreasonable reason, it is important to determine what the consequences of that mistake were, or what the consequences might be for the employer. In addition, the specifics of the job should be taken into account, due to the nature of the misconduct, it is advisable to apply the measure of direct termination of employment to the person dismissed without prior notice and explanation from the latter. These facts indicate the severity of the misconduct and, consequently, the validity of the measure used. (For example, on the job of a gauge's gauge: for 15 minutes due to unreasonable absence, the gripper delayed moving the gauge arrow, in the second case the archival employee did not show up for work for 3 days due to unreasonable reason, etc.). It is possible that these cases result in varying severity, therefore, **the number of hours or days of absence alone is not sufficient to draw legal conclusions.**

Interestingly, the issue of drugs. According to the Supreme Court, the mere fact that the employer used a drug in an uncertain circumstance, and not during the work process on the territory of the enterprise, **was not sufficient to conclude that he had grossly violated his labor duty**. The grounds for termination must be related to the labor relations. In the present case, the employee would have the right to terminate the employment if the court applied administrative detention in the form of an administrative penalty to the employee, which excluded the possibility of performing the work. The legislator thus emphasized that not only an administrative offense, but even a crime is not a sufficient ground for termination of employment, if it does not lead to non-performance of labor duties.[37]

There are many cases when an employee makes a statement about the employer on a social media (for example, expressing his / her opinion; disclosing an attitude; slander). It is interesting whether this case is considered a "gross violation" of the obligation. Due to the labor relations, freedom of expression in a social media may be restricted **if the disclosure of commercial secrets, the dissemination of unfounded statements that are harmful to the employer or the employee.** Thus, only expressing a public opinion about the subject with whom the person is in an labor relations, even if this statement was not approved by the employer, can not be a ground for termination of employment if the above circumstances do not exist. According to the Supreme Court, the statement spread by the employee on the social network, which did not contain the identifying information of the employer, did not cause any damage to the business reputation of the company or any other damage,

[37] Shvelidze Z., Georgian Court Practice on Labor Disputes, Tbilisi, 2020, 199.

moreover, the public dissatisfaction expressed by the employee, the extent of which is unknown [...] , was caused by the action of the employer himself/herself, when he/she was unjustifiably refused to use his/her due leave, which should be considered in the context of the right to work guaranteed by the Constitution. [38]

The plaintiff's reference to the fact that he was unlawfully dismissed returns the burden of proof to the employer, who is obliged to prove the dismissal of the employee. Duties were violated, which manifested itself in specific actions, rather than an employee who could not objectively present evidence that he/she had duly performed the obligation.

H) Violation of the obligation imposed on the employee by an individual labor contract or collective agreement and / or internal labor regulations, if during the last 1 year any measure of disciplinary liability provided by the individual labor agreement or collective agreement and / or internal labor regulations has been applied to him;

This norm does not specify in what specific cases it is possible to terminate a contract when a person will be disciplined for two different actions within 1 year, if it is necessary for the employee to perform the same action twice. (Which entails disciplinary liability). The Supreme Court has made an important clarification on this problematic issue. [39] In particular, it is necessary to assess repeated violations, as the basis for liability under this article can only be the recurrence of the same violations. Uniformity of action is essential in relation to the recurrence of the violation. In view of the principle of good faith inherent in civil turnover and the prohibition of abuse of the right, termination of employment should be applied only if the violation is of a material nature. Termination of employment in the presence of the same non-essential violations is not allowed. In addition, for the purposes of dismissal, in addition to non-performance within the time period prescribed by law, it is necessary to check its nature and nature (eg severity, significance), determine the degree of violation, guilt. It should be assessed whether it is reasonable, necessary, proportionate and proportionate to terminate the labor relations in relation to these violations, whether it is possible to apply a lighter measure of disciplinary responsibility. The Supreme Court of Georgia has clarified in a number of decisions that.

There are frequent cases when an employee repeatedly violates the obligations under the internal regulations. The Supreme Court of Georgia pointed out [40]that since in this case there was no doubt that the employee had been subjected to repeated disciplinary measures (repeated remarks and severe reprimands) for one year due to repeated violations of labor regulations, as well as misconduct. The Court of Appeals rightly assessed the plaintiff's actions as violations of a nature against which it was not recommended by the employer to take additional precautionary measures to correct the employee. This precluded the application of less severe disciplinary measures against the employee and, in accordance with Article 47 (1) (h) of the Labor Code, provided the basis for termination of the Labor Contract and dismissal of the employee.

It is inadmissible for the employer to simultaneously reprimand and terminate the contract for one misconduct. The case law clarifies that the employee did not fulfill the obligation under the Labor Contract and for this he was severely reprimanded as a disciplinary sanction, while the employer punished the employee for committing the same violation and dismissed him ten days later, which is unjustified. The purpose of applying a disciplinary sanction is to prevent a re-violation that can initially be achieved by using a relatively light sanction.

[38] Shvelidze Z., Georgian Court Practice on Labor Disputes, Tbilisi, 2020, 204.
[39] Supreme Court of Georgia, Case - №as-1350-2019.
[40] Supreme Court of Georgia, Case №as-783-750-2016.

In relation to the application of several disciplinary sanctions on the same day, the court found that this is contrary to the principle of "Ultima Ratio" in labor law, which, as mentioned above, provides for measures to correct the situation, improve the employee, make the employee better. In such a situation, the plaintiff is deprived of the opportunity to realize the gravity of the misconduct and to correct his own behavior, which forms the basis for dismissal - deemed unreasonable. Accordingly, the dismissal order must be considered null and void.

I) Unless otherwise provided by the Labor Contract - long-term incapacity for work, if his term exceeds 40 consecutive calendar days or the total term exceeds 60 calendar days for 6 months, in addition, the employee has used the leave provided for in Article 31 of this Law;

J) Entry into force of a court judgment or other decision that excludes the possibility of performing the work;

K) Decision taken by a court in accordance with paragraph 3 of Article 67 of this Law and entered into legal force to declare a strike illegal;

L) Death of the employer or a natural person;

M) Commencement of liquidation proceedings of the employer legal entity;

N) Other objective circumstances that justify the termination of the Labor Contract.

The existence of the above grounds in the Labor Code does not imply that the employer is entitled to associate any event with an "objective circumstance" and, consequently, to dismiss the employee. In case of dismissal on this ground, it is necessary that the termination of the contract be carried out lawfully and, at the same time, should not contradict the principle of conscientious exercise of rights and obligations between the parties. For example, the complicated relationship between the employee and the employer, which makes it unbearable to continue the labor relations.

The notion of "objective circumstances" does not apply to a case where an employee dismisses a person due to **the appointment of a staff reinstated by a court**[41]. The risk to the employer when considering a labor dispute is the case when he / she dismisses a person illegally and does not declare the vacancy of the position during the court hearing. In such a situation he must assume managerial responsibility for enforcing the decision. In the case-law, when restoring an employee to his or her original job, there were several difficulties in enforcing a decision when a person was legally appointed to a position determined by the decision. Enforcement of the decision violated the rights of the new employee as **a bona fide contrahent**. According to the case law, it is permissible to change the means of enforcement of a decision and if the position at the stage of its execution is no longer available or vacant, Article 48.8 of the Labor Code should determine the existence of an equivalent position or the subject of this decision - the employee should be compensated in a reasonable amount.

❖ Rule of Terminating Labor Contract

In case the employer terminates the contract with the employee on **own initiative**, it is obliged to warn the employer at least **30 calendar days in advance** by sending a prior written notice and to give him / her compensation in the amount of at least 1 month salary. In addition, the employer is entitled to warn the

[41] Supreme Court of Georgia, Decision of June 30, 2020, case CAS-1552-2019.

employee 3 days in advance instead of 30 calendar days, however, in the presence of these conditions, it is obliged to pay **at least 2 months' salary**.

Like the employer, the **employee has the obligation** to notify the employer of the termination of the Labor Contract on his/her own initiative by sending a prior written notice at least 30 calendar days in advance.

If the Labor Contract is terminated at the initiative of the employer, the employee is entitled to request **reimbursement of unused leave**. The employee loses this authority if he / she leaves the service on his / her own initiative. In the present case, it is implied that the employee refuses to continue the labor relations and therefore he / she refuses to enjoy the rights (in this case, the right to rest) arising from the existing labor relations.

❖ Legal Consequence of Annulment of the Dismissal Order

Georgian labor law recognizes the obligation of legal restitution of an illegally dismissed person. According to Part 8 of Article 48 of the Labor Code, in case the court annuls the employer's decision to terminate the Labor Contract, the employer is obliged to reinstate the person whose Labor Contract was terminated, or provide him / her with equivalent work or compensation in the amount determined by the court.

It should be noted that of these three alternatives, preference is given to reinstatement at work, although this clearly does not imply an obligation on the part of the employee to return to the old job position. For example, when it is morally very difficult for the given employee to continue working / working with an employer. In addition, if a new person is appointed to the position of a dismissed employee, his / her reinstatement is inadmissible, as this is contrary to the principle of good faith.

The annulment of an illegal termination of the contract imposes an obligation on the illegally dismissed employee to provide an equivalent position when the original job no longer exists or exists, however, a third party is employed and his employment is motivated by objective need and the employer is conscientious. At the same time, it should be noted that the reinstatement of an employee who has been unlawfully dismissed from an equal position should be in the interests of the employee himself. He must consider that his rightful restitution takes place by offering an equivalent position. Based on the evidence presented, the court must determine the existence of an equivalent position, its equal nature in relation to the original job from which the employee was illegally dismissed, as well as the employee's desire to be employed illegally in the equivalent position and his / her functional or competent compliance with the position. To this end, he should examine what human resources the employer possesses, what equivalent vacancies he holds, and what functional similarities there are between the initial and equivalent positions. At the same time, the court must reconcile the results of the investigation with the will, interest and ability of the unlawfully dismissed person to hold a particular equivalent position.

Experience and compensation must be separated from each other. Injured employee will be given in case of reinstatement. It includes all the financial income (salary, service supplement, etc.) that the employee would have received during the period of illegal dismissal and could not have received through the employer. By giving a damn, the employer fulfills his / her labor obligation, in particular, he / she pays the employee on the basis of the actual Labor Contract, the termination of which was annulled by the court on the grounds of unlawfulness. However, if the illegally dismissed entity worked elsewhere during the disputed period, it is possible that the salary received during that period will be subject to deduction.

In contrast, labor compensation simultaneously covers the material loss suffered by a party through unlawful dismissal and what it, on average, suffers before finding a suitable job, as well as the moral damage caused to it by unlawful dismissal. At the same time, the age, competence, job prospects, marital status, social status, as well as the financial status of the employer, etc. should be taken into account. Sh.

With regard to the consequences of the employer's decision to terminate the contract, the new regulation provides for a very important provision, which leads to a change in court practice and, as a result, imposes a rather large burden on businesses. In particular, the case law until 2021 prohibited the obligation to impose compensation on the employer in addition to the compensation for the loss. However, due to the amendments, according to Article 48.9 of the Labor Code, the employee has the right, in addition to the payment of compensation, to claim compensation for compulsory damages from the date of termination of the Labor Contract up to date. Consequently, the employer may suffer a very large material loss. In this case, there is a risk that the employee will resort to all measures that will prolong the proceedings, which will eventually lead to an artificial increase in the amount of compensation for the loss. The Court considers these risks, however, with regard to the issue at hand, there is no case law at this stage. Accordingly, the employer must dismiss the person from the workplace with the utmost care, with a legitimate indication and on the basis of the relevant legal justification.

However, it should be noted that according to established case law, violation of procedural issue / issues by the employer during the dismissal process (for example, 3 days notice and 1 month compensation payment) does not invalidate the decision and precludes the right to lost income / compensation.

- ❖ Force-Majeaure

Force majeure is a case where a party is not liable for failure to perform an obligation if he proves that the obstacle is beyond his control and that it was unreasonable to expect him to consider, avoid, or deal with the obstacle. Therefore, we must distinguish the elements characteristic of force majeure, which must necessarily act cumulatively: 1**. Absolute impossibility** to fulfill the obligation; 2. **Impossibility** of its foresight; 3. **Inability** to avoid or deal with it. If it is determined that we do not have one of the listed items, the event cannot be evaluated as force majeure. In the presence of the latter, a necessary condition is the **obligation to notify the employer as soon as possible**. In the event of a breach of the notification obligation, the party will be liable for damages.

It should be noted that the event alone is not force majeure. Force majeure is the result of events. It must completely exclude or temporarily suspend the performance of the obligation. With regard to Covid-19, it should be noted that **this particular event can no longer be considered force majeure**. The reason is that it does not meet one of the most important elements of the above preconditions - the impossibility of foresight. As of today, every employee in the world is clearly aware of this event and therefore it is predictable for the party. However, the risks of a Covid-19 epidemic are unforeseen.

It is true that a separate event Covid-19 is no longer considered a force majeure and does not release the party from liability, however, we may face the fact that a new circumstance has arisen on the basis of Covid-19, which will make it impossible to perform the work under the contract. To do this, we must insure every possible risk under the contract. Employees should be encouraged not to point out their inability to perform. If such a

provision is indicated in the contract, the said case is interpreted not as an impossibility of performance, but as a complication of the performance of the obligation, which does not release the person from liability).

❖ Adaptation of the Contract to the Changed Circumstances

The existence of circumstances impeding the performance of the **obligation should not automatically** be considered as force majeure. As mentioned above, force majeure is a case where the fulfillment of the obligation is completely ruled out and at the same time, it was impossible to predict it. Accordingly, the delay in fulfilling the obligation should be considered as a complication of the fulfillment of the obligation. In this case, the parties to the contract **have an obligation to adapt the contract** to the changed circumstances.

This requires the **cumulative existence** of the following conditions: If: 1. Altered circumstances are to cause an extreme aggravation of the obligation; 2. The circumstances must obviously change after the conclusion of the contract; 3. Reasonable change of circumstances should not be possible at the time of concluding the contract, ie the changed circumstances should not be within the control of the injured party; 4. The contract shall not provide for the imposition of a risk of change of circumstances on the aggrieved party. Otherwise, the contractual condition is valid and the application of Article 398 is inadmissible; 5. The complication of the performance of the contract must be caused due to the obviously changed circumstances, ie there must be a causal connection. [42]

Adaptation of the contract to the changed circumstances can be done not only in case of complication, but **also in case of drastic simplification of performance**.[43] The apparent change in circumstances also implies an impairment of legislative performance. If a change in **circumstances has resulted in a loss of interest in the performance** that the creditor is to receive, the latter may request that the contract be adjusted to the changed circumstances. Article 398 protects the interests of both the creditor and the debtor. Thus, a clear change in the circumstances given in the article under consideration should not be construed as merely a complication of performance, an aggravation. Such an explanation will create a particularly significant problem in the performance of a monetary obligation if there is a sharp decline in the purchasing power of money - inflation. The lender must be able to adjust during inflation so that the debtor, based on the principle of nominalism, does not receive unfair benefits.

❖ Authorities and Scope of Labor Inspection

Based on the legislative changes of 2020, **the role of the Labor Inspection Service has been increased**. In particular, the scope of authority has increased. Companies will be subject to strict monitoring and in addition, in case of detection of a violation, they will be subject to a sanction that is directly related to the annual turnover of the enterprise income.

The Labor Inspection is authorized to ensure the compliance to the Constitution of Georgia, international treaties of Georgia, this Law, the Organic Law of Georgia on Labor Safety, the Law of Georgia on Public Service, the norms of Georgian legislation prohibiting forced labor-trafficking, decrees of the Government of Georgia, orders of the Minister, labor Effective application of the norms of any other normative act of Georgia on rights

[42] G. Jugheli, L.Nadaraia, D. Tabatadze, G. Kekenadze, G. Kherkheulidze, D. Kochishvili, G. Kajashvili, Review of Business Law of Georgia, 2nd Edition, Tbilisi 2013. 33.
[43] Same, pg 34.

and working conditions, Labor Contracts, collective labor agreements, as well as agreements reached as a result of mediation in collective disputes and **arbitration decisions**.[44]

With this record, the Labor Inspection has been granted the authority to examine the content of the Labor Contract concluded with the employee and to check whether the provisions of the Labor Contract are in compliance with the Labor Code of Georgia.

In case of violation of the norm provided by the Labor Code or the Law of Georgia on Civil Service, each violation will result in a **warning** or a **fine**: A) In the case of an employer with an income up to 100,000 GEL - no less than 200 GEL, but no more than 400 GEL, B) In case of an employer with 100 000 GEL income or more according to the previous calendar year - not less than 300 GEL, but not more than 800 GEL; C) In the case of an employer (other than a natural person) registered as a VAT payer, by whom the total amount of VAT taxable transactions carried out during the previous 12 consecutive calendar months does not exceed GEL 100,000 - not less than GEL 300, but not more than GEL 800; D) In the case of an employer (other than a natural person) registered as a VAT payer, whose total amount of VAT taxable transactions carried out during the previous 12 consecutive calendar months exceeds GEL 100,000, but does not exceed GEL 500,000 - not less than GEL 400; But not more than 900 GEL; E) in the case of an employer (other than a natural person) registered as a VAT payer, by whom the total amount of VAT taxable transactions carried out during the previous 12 consecutive calendar months exceeds 500,000 GEL - not less than 600 GEL, but not more than GEL 1,000; F) In the case of any other employer, including a person who is not registered as a VAT payer (other than a natural person) - in the amount of not less than GEL 200, but not more than GEL 400.[45]

Deciding which measure should be applied to the offender is at the discretion of the labor inspection (warning or fine).

It is important to note that several of the above violations are subject to severe sanction. These are: a) **Violation of the principle of non-discrimination** (direct discrimination; indirect discrimination; harassment and sexual harassment on the spot; principle of decent pay; equal pay for equal work) will result in **warning or fine** with the **triple amount of the find** (it also depends on the annual income of the Company) B) Forced labor (unless it contains signs of a criminal offense) will result in a **fine in the amount of three times** of the relevant fine. Repeating this action in 1 year will result in **doubling the fine** imposed for the relevant violation. Accordingly, in case of violation of the principle of prohibition of discrimination, the employer may only receive a warning and not be imposed a sanction, although a violation of the principle of prohibition of forced labor will automatically result in a fine.

In addition, the imposition of an administrative penalty on an employer under the given law by the Labor Inspection shall not release the enterprise of any other liability that the employer may be imposes in civil proceedings.

[44] Labor Code of Georgia, Article 75.1.
[45] Labor Code of Georgia, Article 77.

❖ Facilitate the Provision of Information and Consultation between the Employer and the Employee

Based on the legislative changes, the employer was **obliged to consult** with the employees. This applies only to enterprises with **no less than 50 employees** on a regular basis.

The information may be provided through an **employee representative**. In particular, it may be a representative of the Labor Union (if any), or an **authorized representative of the elected employees**.

The question is, what kind of information do employers have a duty to consult. This includes information on the activities and **economic situation** of the enterprise, as well as information on the employment status, structure, possible development and planned activities of the enterprise, **which may have a material impact on remuneration** and working conditions and / or threaten the continuation of the labor relations.

It is natural to ask questions about this issue, although there is no case law at this stage. It is interesting to know what limits the court will set and specifically what type of information obligation will be imposed on the employer. The economic situation is purely in the field of management, as it is the management that is most thoroughly familiar with the company's finances and resources. On the one hand, it is unclear what is the purpose of imposing an obligation to provide information on the economic situation. Businesses are naturally characterized by certain risks and crisis situations, although this **does not mean that serious consequences are inevitable**. For example, if the financial situation in the enterprise deteriorates and the employer informs the employee about it, the employee may refuse to extend the Labor Contract for fear of losing his/her job in the future. However, in reality the financial situation is subject to improvement. Consequently, **providing insider information** to an employee **may harm** both the employee (fear of losing the job) and the employer (reduction of the workforce). Therefore, it is necessary to have a court explanation that will draw the line between necessary and unnecessary information for the employee.

In addition, it is important to emphasize the issue of privacy. In particular, Article 72 of the Labor Code stipulates that employees' representatives **have no right to disclose confidential information provided to them by an employer or a third party within the legitimate interests of the enterprise.** The explanation of the court will be interesting and important in this regard as well, as it is very difficult for the employer to control the extent to which the employee fulfills his / her duty of confidentiality.

The second part of Article 72 of the Labor Code may be interpreted in favor of the employer, which indicates that the employer has the right to refuse to provide information or to consult if the **objectively substantiated reason significantly impedes or damages the functioning of the enterprise**. Accordingly, if the employer substantiates and indicates on an objective basis, he will be released from the obligation to provide a specific type of information.

Labor Dispute

❖ Freedom of Association

Everyone has the right to form and to join trade unions. Its purpose is for the entities of labor relations to collectively protect their economic and social interests. Freedom of association gives direction to the conflict between the entities of the labor relationship and, consequently, instead of confrontation, the relationship

continues within the negotiation. In addition, it aims to ensure social dialogue at the state level. Employees and employers are not required to obtain prior permission to establish an organization.[46]

❖ Forms of Labor Dispute

Dispute is a disagreement arising during the labor relationship, the resolution of which is in the legitimate interests of the parties to the Labor Contract. In order for it to be considered as originating, it is necessary for the party to send a written notice of disagreement to the other party. Obviously, the basis for the dispute is different in each case, but it is mainly: violation of human rights and freedoms under Georgian law; Violation of an individual labor contract, collective agreement or working conditions; Lack of justification of the order / decision issued by the employer.

The current regulation of the Labor Code defines individual and collective disputes. Individual disputes must be resolved through conciliation procedures between the parties, which involve direct negotiations between the employee and the employer. As for the procedure, the party shall send a written notice to the other party on the commencement of the conciliation proceedings. This notice must clearly state the basis for the dispute and the requirements of the party. The other party is obliged to consider the written notification and notify its decision in writing to the party within 10 calendar days after receiving the notification. It is important to note that the parties or their representatives make a written decision that becomes part of an existing employment contract. Written form plays a big role in any contractual relationship. It gives legal force to the decision, which is reflected in its binding nature. If the negotiations do not lead to the desired result, the parties may agree to submit the dispute to arbitration.

As for collective dispute, the Labor Code restricts the subjects of collective dispute and these are the employer and the trade union. As well as an employer and at least 20 employees as a group of employees. The Labor Code requires that both individual and collective disputes be resolved through conciliatory procedures between the parties. The party initiating the collective dispute is obliged to send a written notice to the other party on the commencement of the conciliation proceedings, which must specify the grounds for the dispute and the requirements of the party.

At any stage of the negotiations, the party has the right to send a written notice to the Minister on the appointment of a dispute mediator to initiate mediation in order to reach an agreement. This notice will be delivered to the other party to the dispute on the same day. In addition, at any stage of the dispute, the Minister has the right, in the presence of high public interest, to appoint a mediator of the dispute on his own initiative, without the written request of the party. The parties are obliged to participate in the conciliation procedures and to attend the meetings held by the dispute mediator for this purpose. As in the case of an individual dispute, in the case of a collective dispute, at any stage, the parties may agree to submit the dispute to arbitration.

❖ Strike and Lockout

There are often cases when no agreement can be reached between the parties, which eventually leads to employee strike. A strike is a temporary voluntary refusal of an employee to perform all or part of the obligations

[46] Z. Shvelidze, K Bodone, T. Todria, T. Khajomia, N. Gujabidze, K. Meskhishvili, Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 274.

under the Labor Contract in the event of a dispute. As for the subject of the strike, the main purpose of the strikes in Georgia was to improve working conditions and demand overtime pay.

Strikes can not be the main method of protecting the rights of employees - they should be the last resort to resolve conflicts of interest. Thus, strikes are an extreme means of resolving labor disputes. Its use is advisable only when lighter methods have already been used and because of their ineffectiveness, there is no other reasonable way to resolve the dispute. However, lighter methods do not include appealing to a court.

In a collective dispute, the right to strike or the right to lockout shall arise upon the sending of a written notice to the Minister or upon the appointment of a mediator by the Minister on his or her own initiative within 21 calendar days. In the event of a collective dispute, the parties shall notify each other and the Minister in writing of the time, place, nature and information of the strikers or the number of strikers no later than 3 calendar days prior to the commencement of the strike or lockout. In the event of a strike or lockout, the parties are obliged to continue the conciliation procedures. In case of a strike or lockout, the employer is not obliged to pay the employee wages.

The form of the strike is not strictly defined, therefore, the protest by the strikers can take any form. For example, a comprehensive strike - a full-scale strike of employees in the country; Complete strike - the entire contingent of employees of the company or industry is on strike; Partial strike - strikes part of the employees, separate structural units, branches; Spot or Wave Strike - Shifts in different structural units of a company or industry.[47]

Here are some examples of actions that, if implemented, would make the strike illegal. These include: actions based on physical or mental coercion, threats, humiliation, or degrading treatment of other persons (for example, employees who do not participate in a strike); Blockade of the employer's real or movable property, obstruction of use; Obstructing the employer's business partners or customers from establishing a business relationship with the employer (for example, barring customers from entering the store and purchasing a product).[48]

It is inadmissible to use the right to strike in full by the employee who performs the work that envisages carrying out such activities that include the complete cessation of the work process of which poses an obvious and imminent threat to the life, personal safety or health of the whole society or a certain part of it. The list of vital services is determined by the Minister after consultation with the social partners. Vital employees have the right to strike if they provide a minimum of service.

If the life and health of a person, the safety of the natural environment, as well as the activities of a vital service are endangered, the court has the right to postpone the start of the strike or lockout for not more than 30 days, and to suspend the strike or lockout for the same period. In this regard, it is important to cite one of the current litigation. In particular, before the decision to go on strike, the trade union "Unity 2013", most of which are subway drivers, wrote to the employer and demanded an improvement of working conditions, including an increase in the hourly rate. Despite the involvement of a mediator in the process, the parties failed to reach an agreement, which is why the trade union decided on May 3 to exercise its constitutional right to strike and notify the relevant parties in writing of the start of the strike. On May 1, 2018, Tbilisi Transport Company Ltd. applied to the Tbilisi City Court and in accordance with Article 50 of the Labor Code of Georgia, requested the postponement / suspension of the strike of the employees of the Tbilisi Transport Company for a period of 30

[47] Sachaleli S., The Right to Strike, Labor Law (Collection of Articles) II, Tbilisi, 2014, pg 73.
[48] Same, pg 74

days. On the same day, without an oral hearing, the court granted the plaintiff's request and adjourned the strike for 30 days.

The court shared the plaintiff's argument that holding the strike without delay would have disastrous financial consequences for both the company and the paralysis of the capital's transport infrastructure (the court indicated 327,000 metro customers), which, among other things, would have hampered the movement of health, fire, safety and other vital services by vehicles and endangered the lives and health of the capital's population. Accordingly, the strike of the metro employees was assessed as a threat to the activities of the vital service and, at the request of the applicant, the strike was postponed for a period of 30 days. Thereafter, before the expiration of the 30-day period, the Tbilisi City Court ruled on May 18, 2018, in accordance with the disputed norms, to prohibit the plaintiffs from the right to strike during working hours and indicated the possibility of an alternative assembly of employees in non-working hours.[49]

The Labor Code does not contain a provision prohibiting the right to strike for public servants, however, the list of activities related to human life and health safety approved by the Order N01-43 / N of the Minister of Labor, Health and Social Affairs of Georgia of December 6, 2013 includes some public services. These include: Working in the judiciary and in the country's defense, law enforcement agencies. As the Committee of Experts on the Prohibition of the Right to Strike in the Civil Service notes, given that continuous work of all three branches of government is ensured, the state may restrict the right to strike for public officials. In this case, the official authority and function of the public servant is defined. The ban may apply only to public officials who exercise authority on behalf of the state. The Freedom of Association Committee considered that for the purposes of the given prohibition the civil servant should be construed narrowly to exclude the widespread prohibition of the right to strike. For example, the Committee on Freedom of Association has asserted that authority on behalf of the state is exercised by officials working in the justice administration system and employees of the judiciary.[50]

The list of vital services is not absolute, as activities that do not belong to the vital service can qualify as vital if the strike lasts for a certain period of time or goes beyond a certain limit, endangering the life, personal safety or health of the whole or a certain part of society. It is important to cite one example of foreign court practice.[51] The plaintiffs were the Federation of North Sea Oil Workers' Trade Unions and its members. Following the unsuccessful conclusion of negotiations on a new wage package in the sector, trade unions announced a strike that lasted 36 hours. Following this, the government issued an interim injunction that the wage dispute should be resolved through mandatory arbitration in the National Wages Council, and work suspension and picketing were prohibited.[52]

In the course of the dispute, the European Court of Human Rights focused on the fact that the interim injunction came into force after the trade union and its members had been able to exercise their right to strike for 36 hours. The strike began after failed collective bargaining and mandatory mediation. Consequently, by the time the ban was introduced, union members had already used several means to protect their professional rights. The interim injunction had a legal basis in national law and a legitimate aim. As for the necessity in a democratic society, the

[49] https://constcourt.ge/ka/judicial-acts?legal=1910

[50] Z. Shvelidze, K Bodone, T. Todria, T. Khajomia, N. Gujabidze, K. Meskhishvili, Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 295

51 Labor Rights (Review of International Standards and Practices), Tbilisi, 2019, 109.

[52] Z. Shvelidze, K Bodone, T. Todria, T. Khajomia, N. Gujabidze, K. Meskhishvili, Georgian Labor Law and International Labor Standards, Tbilisi, 2017, 294

trade union strike affected all members of the trade union and the installation fixed to the Norwegian continental shelf, causing significant damage during the week. The interim order was issued on the basis that, according to preliminary estimates, the extraction of Norwegian oil and gas would result in a loss of approximately 2.5 billion Norwegian kroner (approximately 0.34 billion euros); Would damage energy supplies to EU countries and Norway's reputation as an energy supplier. The strike would have negative consequences for the state budget as well. Moreover, the technical equipment was in danger of damage if not used for a long time, which posed a threat to health, safety and the environment. Consequently, in addition to the economic damage, the strike would have other serious consequences. In exceptional cases, such as the present case where the impugned measure was used for reasons which were not merely economic, the national authorities could rightly have resorted to circumstances sufficient for compulsory arbitration and the interference with the plaintiffs' right to association was proportionate to the legitimate aim pursued.

The court decision on declaring the strike illegal shall be notified to the parties immediately. The court decision must be carried out immediately, which means that the strikers must stop the strike as soon as the decision is made known to them. In addition to these legal consequences, an illegal strike can have even more serious consequences. First of all, in terms of criminal liability. Violation of the strike rule by the organizer, if it has caused serious consequences, according to Article 348 of the Criminal Code of Georgia, is punishable by a fine or restriction of liberty for up to two years and / or corrective work for up to one year. It should be noted that the employer is also entitled to sue by requesting the imposition of civil liability. In particular, pursuant to Article 992 of the Civil Code, which states that a person who causes harm to another person through unlawful, intentional or negligent action is obliged to compensate him for such damage. It should be noted that merely declaring a strike illegal is not enough to impose civil liability. It is necessary to determine the unlawful nature of the action, the charge and the causal link between the action and the outcome.[53]

The process of unsuccessful negotiations between the parties does not end with an employee strike alone. It is possible for the employer to refuse to perform the duties. In particular, a lockout is a temporary voluntary refusal of an employer to perform all or part of the obligations under an employment contract in the event of a dispute. It may not last longer than 90 calendar days. In case of a strike or lockout, the employer is not obliged to pay the employee wages. However, it should be noted that a strike or lockout is not a ground for termination of employment. And in case the court finds the lockout illegal, the employer is obliged to restore the employment relationship with the employee and compensate him for the missed working hours.

Cases of employer lockout are unknown to Georgian case law, so we will cite the case of Denmark in 2013, related to the employer offering changes to a collective agreement.[54] In particular, these changes gave teachers more time for training and working hours. The teachers' union refused to sign the deal. As a result, the employers actually declared 69,000 teachers' lockout for 25 days and consequently 556,000 children could not go to school for a month. To solve the problem, the Danish Parliament in the process of emergency proceedings changed the legislation, which defined the working conditions of teachers.

53 Sachaleli S., The Right to Strike, Labor Law (Collection of Articles) II, Tbilisi, 2014, 79.

[54] Local Authorities Association (Public employer) supported by central left government vs. Danish Teachers' Union