

THE EMPLOYEE'S RIGHT TO REINSTATE IN CASE OF ILLEGAL DISMISSAL

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Abstract. This article presents the institution of exercising the right to reinstatement of an illegally dismissed employee and the problematic issues of its application in the context of balancing the reasonable interests of the employee and the employer. Reference was made to the cases when an illegally dismissed employee cannot be reinstated in his previous job due to objective circumstances, the existence of a relationship of trust between the employee and the employer was discussed, as well as the possibility of the employee's reinstatement in his previous and equivalent job. Summing up the results of the study, we come to the conclusion that the legislator failed to regulate the institute of non-reinstatement of illegally dismissed employees to their previous jobs, giving the courts such wide discretion that in the same factual circumstances, irreconcilable judgments may be issued due to the judge's subjective approach. In order to resolve the existing uncertainty we suggest to clarify the scope of discretion of the courts not to restore illegally dismissed employees to their former jobs, conditioned solely by objective factors. This article presents the experience of foreign countries, doctrinal approaches, international legal standards and judicial practice.

Key words: *illegal dismissal; reinstate; former job; the right to reinstatement; an equivalent job; dismissal; expectations to be reinstated; labor law*

In case of illegal dismissal, one of the main expectations of the employee is to be reinstated in his/her previous position. As I.M. Ospichev rightly stated, the social significance of disputes regarding reinstatement in the previous position is very important because, for the majority of citizens, the employment contract is the main way to implement the right of free choice of work¹. On this view, labor law is a system of laws aimed at securing “justice” for employees by addressing the inherent imbalance of power between employer and employee².

* **Մանե Կարապետյան** – իրավագիտության թեկնածու, ԵՊՀ քաղաքացիական իրավունքի ամբիոնի դասախոս

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¹ **Оспичев И.М.**, Основания и последствия незаконного увольнения. <https://cyberleninka.ru/article/n/osnovaniya-i-posledstviya-nezakonnogo-uvolneniya> (25.10.2022)

² **Richard Mitchell**, ‘Where Are We Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change’ (2011) 24 Australian Journal of Labour Law 45, 48.

Nevertheless, if the legislator has clearly defined the obligation of the employer to pay forced idleness to illegally dismissed employees, the same cannot be said about the right of employees to be reinstated in their previous job. Of course, not in all cases, the work that the employee performed before being dismissed is available at the time of issuance of the court decision. In addition, there are cases when the restoration of an employee to his/her former job is objectively not justified.

From this point of view, we agree with the approach of the legislator that the court in each case has the right to discretion in paying monetary compensation to the employee instead of reinstatement to the previous job. However, granting such discretion to the court can be justified only when the limits of the exercise of that discretion are clearly predetermined.

This article presents the institution of exercising the right to reinstatement of an illegally dismissed employee and the problematic issues of its application in the context of balancing the reasonable interests of the employee and the employer.

One of the most important and traditional functions of labor law is the protection of employees, which, in turn, is due to the inequality of bargaining power between employers and employees³.

It is noteworthy that the reinstatement of the dismissed employee to his/her previous position is also very sensitive for the employer, who is essentially forced to pay wages and use the labor force of the person with whom he no longer wants to cooperate.

M.Yu.Gasanov said that the stability of society depends in many cases on the success of balancing the interests of the employee and the employer by labor legislation.⁴

Therefore, it is very important to ensure the right of an illegally dismissed employee to be reinstated to his/her previous position, as well as to protect the vital interests of the employer. Based on this starting point, not in all cases an illegally fired employee can be reinstated to his previous position, such an approach is also defined by the Convention No. 158 of the International Labor Organization.

Article 10 of the mentioned convention defines: if the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

The possibility of not reinstating an illegally fired employee to his previous job is also defined by the legislation of many developed and developing countries.

For example, in Finland, an illegally dismissed employee cannot be reinstated without the employer's consent⁵.

In Portugal, the organization can request the employee not be reinstated if it is a micro-sized or the employee has held a management position⁶.

Nevertheless, the approach of our legislator leads to the definition of the institution

³ Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 21.

⁴ Gasanov M.Yu. Labor Code of the Republic of Uzbekistan: issues of further improvement // Handbook of personnel issues. 2007, № 3, -p. 30.

⁵ https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158896/lang-en/index.htm (17.11.2022)

⁶ <https://europeanemploymentlaw.eu/tupe/Portugal-TUPE-Questionnaire.pdf> (17.11.2022)

of reinstatement of an illegally fired employee as a general rule, and only in exceptional cases does the legislator consider it possible to provide monetary compensation instead of reinstatement.

The relations of illegally dismissed employees to be reinstated to their previous jobs are regulated by Article 265.2 of the RA Labor Code which defines that for economic, technological and organizational reasons, or in case of impossibility of reinstatement of future employment relations between the employer and the employee the court need not reinstate the employee to his or her former office, making the employer obliged to pay compensation for the entire period of forced idleness in the amount of the average salary, prior to entry into force of the court judgment, and pay compensation in exchange for non- reinstatement of the employee to office in the amount of not less than the average salary, but not more than twelve-fold of the average salary.

The above-mentioned legal norm essentially allows not to reinstate an illegally dismissed employee in the following cases:

1. There are economic, technological and structural /organizational reasons, or
2. The restoration of further labor relations between the employer and the employee is impossible.

It is also important to note that according to the regulation mentioned above, the employee can be reinstated only in the previous position, that is, reinstatement is possible only when the employee's previous position is available.

➤ **The court's discretion is not to reinstate the employee in the previous position for economic, technological and organizational reasons.**

As a rule, quite a long time has passed between the day of the illegal dismissal the employee and the day of the judicial act entered into force. In some cases, the examination of labor disputes takes years. Reinstatement is a suitable remedy only if labour disputes are resolved expeditiously⁷.

In all cases where a labor dispute is investigated and an employee is reinstated by a court in his/her former job years later, it is not excluded that the work that the employee performed at the time of dismissal may not be available at the time of the court decision.

In addition, the reduction of the number of employees and/or the position is an independent basis for the termination of the employment contract. In this cases, there may be situations when the position held by the employee is eliminated and no longer exists, but the dismissal order is recognized as invalid due to other violations committed by the employer.

In the above-mentioned situations, it is obvious that there is an objective reason for not reinstating the illegally dismissed employee to his/her previous position, which is included in the context of economic, technological and organizational reasons.

Moreover, this institution was also interpreted by the RA Court of Cassation, which stated the following legal position: mentioned in Part 2 of Article 265 of the RA Labor Code.

In the conditions of the existence of grounds for not reinstating the employee to work specified in part 2 of Article 265 of the RA Labor Code, the court cannot impose such an obligation on the company, the actual fulfillment of which is objectively impossible,

⁷ **Geldenhuys J**, "The Reinstatement and Compensation Conundrum in South African Labour Law" PER / PELJ 2016(19), p. 8:

and in such cases, the court's failure to apply the above-mentioned article will result in an additional obligation for the employer to create a new structural unit, a new position, and the definition of such an obligation will lead to the limitation of the employer's, RA Constitution's, guarantee norms applicable to legal entities and the rights provided by the law... For this purpose, the legislator defined the legal possibility of the employer not reinstating the employee in Article 265, Part 2 of the RA Labor Code, reserving to the court the authority to assess the legality of that behavior to determine the impossibility of the reinstatement of the future employment relationship between the employer and the employee due to economic, technological, organizational or other reasons, based on the facts of the case⁸.

In our opinion, the approach of the legislator in this regard is legitimate and serves to balance the interests of the employee and the employer.

➤ **The court's discretion not to reinstate the employee in the previous job regarding the impossibility of restoring the future employment relationship between the employer and the employee.**

In this formulation of the legal norm, the term "impossibility" is used, from which it appears that the impossibility must be determined by objective factors and not, for example, by the subjective will of the employer. Nevertheless, in judicial practice, the word "impossibility" is also interpreted in the context of subjective factors.

Before addressing the issue of interpretation of the mentioned norm in the current edition, we consider it necessary to make a comparative analysis between the current and previous editions, taking into account the fact that the previous edition of the mentioned norm was interpreted by the RA Constitutional Court.

Article 265 of the RA Labor Code, former 2010 in the current edition, defined the following possibility of not being reinstated in the previous job - For economic, technological and organizational, or other reasons, or in case of impossibility of reinstatement of future employment relations between the employer and the employee the court is authorized not to reinstate the employee to his or her former position ...

The presence of the words "or for other reasons" in this wording, the RA Constitutional Court recognized as contrary to the Constitution of the Republic of Armenia and invalid by the decision SDO-902, July 7, 2010. With the mentioned decision, the RA Constitutional Court expressed the following position: "The study of legal practice proves that the reasons for the impossibility of restoring the future employment relationship between the employer and the employee are considered to be circumstances that have nothing to do with economic, organizational and technological reasons.

Meanwhile, the concept of "or other reasons" implies such circumstances, which by their nature should be closely related to the objective grounds characteristic of economic, organizational or technological reasons. This is also the requirement of Convention No. 158, Article 13 which allows illegally dismissed employees not to be reinstated if reinstatement is impossible for economic, technological, organizational or other similar reasons. Taking into account the above-mentioned feature of law enforcement practice, that the economic, technological or organizational reasons arising after the illegal

⁸ Զոյա Մատուրյանն ընդդեմ «ԱրմենՏել» ՓԲԸ-ի թիվ 3-496(ՎԴ) քաղաքացիական գործով ՀՀ վճռաբեկ դատարանի 30.03.2007 թվականի որոշումը):

dismissal of a person are considered as a justification for the impossibility of reinstatement, the Constitutional Court considers it necessary to emphasize that when applying the contested provision, in each specific case, the law enforcer must also assess whether This reason is not artificially created by the employer to prevent the possible reinstatement of the illegally dismissed employee based on the court's decision.

Based on the mentioned results of the study of legal practice, as well as taking into account the legal position of the European Court that guaranteeing the principle of predictability, certainty and clarity of the law, among others, is also intended to prevent, to exclude the "danger of arbitrariness" (see, in particular, Hilda Hafsteinsdottir v. Iceland, paragraph 56), the Constitutional Court considers that the inaccurate definition of the reasons for the impossibility of reinstatement in the law and the presence of the wording "other reasons" in the contested provision and the broad interpretation given to it practically create the danger of different treatment in the same situations.⁹

In our opinion, by removing the words "other reasons" from the text of the legal norm, no substantive change was made because the words "**in case of the impossibility of restoring the employee's future employment relations**" remained the same, from which it directly follows that the alleged impossibility must be due to reasons, which in turn differ from economic, technological and organizational reasons, because if they did not differ, the conjunction "or" would not be used.

Moreover, the RA Court of Cassation in its 25.12.2007 3-1946 (VD) decision expressed the following legal position: "The Court of Cassation considers that in this civil case is applicable clause 2 of Article 265 of the Labor Code of the Republic of Armenia, as the fact of strained relations between the employer and the plaintiff is proven in the case, as well as the fact of the impossibility of restoring normal labor relations, under which conditions it is impossible for the employee to perform his work duties".

In legal doctrine, there is the approach that when an employee is dismissed, the relationship between employer and employee generally deteriorates due to a lack of trust within the relationship¹⁰.

It is also obvious that the tension affects the loss of trust in one way or another, which is a necessary precondition for organizing effective work.

In management literature, trust is defined as a psychological state comprising the intention to accept vulnerability based on positive expectations of the intention or behavior of another¹¹.

Research shows that trust in employees plays a huge role in organizations because trusted employees are much more committed to their work and continue to work much longer than those who are not trusted¹². We agree that, although the formation of trust in

⁹ ՀՀ Սահմանադրական դատարանի որոշումներում արտահայտված իրավական դիրքորոշումներն ու դրանց իրացումը (ուղեցույց-ձեռնարկ), Գ. Դանիելյան, Ա. Գյուլումյան, Հ. Նազարյան, Վ. Այվազյան և Հ. Ենգոյան, ընդհանուր խմբագրությամբ Գ. Դանիելյանի, Եր., 2016, p. 645:

¹⁰ **Thabo Mongale**. Dispute Resolution Official-Kimberley.// <https://ceosa.org.za/re-employment-versus-reinstatement/#:~:text=Case%20law%20suggests%20that%20in,the%20dismissal%20did%20not%20occur> (28.10.2022).

¹¹ **Rousseau, D. M., Sitkin, S. B., Burt, R. S., & Camerer, C.** (1998). Not so different after all: A cross-discipline view of trust. *Academy of Management Review*, 23(3) pp. 393–404.

¹² **Weibel, A., Den Hartog, D., Gillespie, N., Searle, R., Six, F., & Skinner, D.** (2016). How do controls impact employee trust in the employer? *Human Resource Management*, 55 (3), pp. 437–462. Weick, K. E. (1995).

the relationship between an employee and an employer takes some time, it can be lost very quickly.¹³

Research reveals that when employee's trust is damaged, employees become unwilling to apply trust-based behaviors promoting effective functional activities such as cooperation, discretionary effort, knowledge sharing, and effective problem solving¹⁴.

Many researchers indicate that trust in work relationships can be repaired,¹⁵ although repaired trust is structurally different from the pre-violation or pristine trust¹⁶.

Of course, trust is an important guarantee for the organization of normal work, and in this regard, it is necessary to balance the interests of employers, in cases where the question of reinstatement of an illegally dismissed employee to his/her previous job is discussed. Nevertheless, the balancing of interests cannot imply giving an advantage to one of the subjects of the legal relationship. Research reveals that Employers frequently rely on the loss of trust and confidence to argue that reinstatement is inappropriate.¹⁷

The key conclusions of this analysis are that whether reinstatement should be denied due to a loss of trust and confidence is a largely subjective concept¹⁸ that can be lost by both objective and subjective factors.

Especially if, in fact, the employer no longer trusts the employee, but is conditioned by subjective factors, then this fact cannot be confirmed by any evidence.

Consequently, if the requirement to refuse to restore the "loss of trust" or "strained relations" at the previous job is taken as a basis, no employee will be reinstated in court at the last job, since the employer will present his unwillingness as a loss of trust or strained relations.

On the other hand, it cannot be completely excluded as a factor.

There are cases when the employer's trust is lost for objective reasons, but the dismissal decree is issued, for example, in violation of the procedure for imposing disciplinary sanctions on the employee, which is the basis for declaring the dismissal decree invalid.

For example, if an employee has published information about a trade secret, the employer may terminate the employment contract concluded with the employee on the basis of loss of trust but is obliged to comply with the procedure for applying disciplinary sanctions. In such circumstances, even if it is proved during the trial that the employee

¹³ **Robinson, S. L.** (1996). Trust and breach of the psychological contract. *Administrative Science Quarterly*, 41(4), pp. 574–599.

¹⁴ **T.Kahkonen, K.Blomqvist, N.Gillespie, M.Vanhala.** Employee trust repair: A systematic review of 20 years of empirical research and future research directions.//*Journal of Business Research* 130 (2021) pp. 98-109:

¹⁵ **Bottom, W. P., Gibson, K., Daniels, S., & Murnighan, J. K.** When talk is not cheap: Substantive penance and expressions of intent in rebuilding cooperation.// *ORGANIZATION SCIENCE*/Vol. 13, No. 5, September–October 2002, pp. 496-513:

¹⁶ **Lewicki, R., & Bunker, B. B.** (1996). Developing and maintaining trust in work relationships. In R. M. Kramer, & T. R. Tyler (Eds.), *Trust in organizations: Frontiers of theory and research* (pp. 114–139). SAGE: Thousand Oaks, CA.

¹⁷ *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* [2000] FCA 627 (12 May 2000) ('AMIEU'); *Nguyen v Vietnamese Community in Australia* [2014] FWC 4314 (8 July 2014) ('Nguyen'); *Farmer v KDR Victoria Pty Ltd*, [2014] FWC 6539 (22 September 2014) ('Farmer'); *Goodwin v Shanaya Pty Ltd* [2016] FWC 4317 (7 July 2016) ('Goodwin'); *Millard v K & S Freighters Pty Ltd* [2017] FWC 105 (6 January 2017) ('Millard').

¹⁸ **Elizabeth Shi and Freeman Zhong** Rethinking the reinstatement remedy in unfair dismissal law. *AdelLawRw* 14; (2018) 39(2), p. 328.

actually published information about a trade secret, but the rules for applying disciplinary sanctions were violated, the dismissal order is invalid. In this case, we do not consider it right to restore the employee to his previous job as a consequence of the invalidity of the dismissal order, since the employer objectively no longer trusts the employee, it is impossible to continue normal labor relations.

The loss of confidence can also be caused by the behavior of the employee, which is not directly related to the performance of his/her work duties. For example, in the leading case, *Perkins v Grace Worldwide (Aust) Pty Ltd* ('Perkins'), in the international judicial practice regarding the demand for reinstatement in the previous job. In this case, the employee was dismissed based on allegations that he had supplied marijuana cigarettes to two other employees.

The decision of the court of first instance held that the allegations were unfounded and the dismissal was unfair. However, it denied reinstatement. The employer successfully argued that it had lost trust and confidence in the employee. The employee lodged an appeal to the superior court, which reversed the decision and ordered his reinstatement. In doing so, it set out what has now become the leading statement of principle on the trust and confidence consideration. The Court, constituted that, trust and confidence is a necessary ingredient in any employment relationship ... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based¹⁹.

Here, it is very important to emphasize that the court did not consider the loss of trust as a necessary condition for non-reinstatement in the former job but stated that the loss of trust is essential when examining the claims for reinstatement in the former job. Even in cases where the employer declares that he has lost confidence, it is not necessarily followed by the rejection of the request for reinstatement in the previous job. Loss of trust is a subjective category, and it depends exclusively on the attitude of one person towards another and the fact of loss of trust can be present even in cases where it is not substantiated and reasoned in any way. However, an unjustified loss of confidence cannot result in non-reinstatement.

In addition, loss of confidence is an estimable category. There are very rare cases when there is absolute trust in another person.

Loss of trust and confidence is not by itself enough to justify denying reinstatement, even if it is rationally based; it must be a loss of trust and confidence that makes the employment relationship unworkable.

It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case.²⁰

Finally, there are also separate grounds for the termination of the employment contract, in which the relationship of trust is very important. For example, if the

¹⁹ *Perkins* (1997) 72 IR 186, 191.// <https://jade.io/article/318991> (17.11.2022)

²⁰ Elizabeth Shi and Freeman Zhong Rethinking the reinstatement remedy in unfair dismissal law. *AdelLawRw* 14; (2018) 39(2), p. 379:

employment contract with a person performing educational functions is terminated in violation of the order established by law or without a legal basis, it turns out that this person, for example, after working hours is engaged in activities that are not consonant with the function of teaching and raising children, then the employer will reasonably lose confidence in him, but in this case, the thesis that decision-makers consider every matter which is objectively relevant to his or her decision²¹, in our opinion, it will not act, and the court must also discuss circumstances that do not directly follow from the employment relationship, but exclude restoration to the previous job, due to the loss of trust on the part of the employer.

In our opinion, as we have already mentioned, the interpretation of the term "impossible" in the phrase "it is impossible to restore the labor relations between the employer and the employee" should be based on an exclusively objective criterion, and it should not be conditioned by subjective factors in any way.

In the opposite approach, the interpretation is nothing more than giving discretionary powers to the court without defining the possible extent of the exercise of discretion. Even the exercise of discretionary powers must be exercised within certain limits.

Francis Bennion identified the defining features of a discretionary power as follows:

Discretion is applied where the empowering enactment leaves it to the chosen functionary to make a determination at any point within a given range ... In reaching a decision, D [the decision-maker] is not required to assume there is only one right answer²². On the contrary, D is given a choice dependent to a greater or lesser extent on personal inclination and preference. A purported exercise of discretion outside that range will be unlawful²³.

In this context, the legislator's approach of giving the courts discretion not to reinstate an illegally dismissed employee is reasonable, but the limits of such discretion must be delineated by reasonable and measurable circumstances.

➤ **The institution of reinstating the employee to an equivalent job instead of the previous job and its applicability in the context of Article 265 of the Labor Code.**

Article 265 of the Labor Code, in its current version, defines the term "former work" and only in terms of the possibility of non-reinstatement. It is certainly obvious that if there are no reasons not to reinstate the employee to his/her previous job, then s/he should be reinstated to his/her previous job. Nevertheless, in practice, there are many situations when the employee's previous job is not available at the time of proclamation of the court decision, but there is another job equivalent to the previous job.

Moreover, the study of foreign experience shows that the institution of restoring the employee to an equivalent job is widely used along with the previous job.

For example, in Australia, this relationship is regulated by Fair Work Act 2009, the 391 point (reinstatement) of which defines` An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person to the position in which the person was employed immediately before the dismissal; or

²¹ Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 39–40 (Mason J).

²² Francis Bennion, Understanding Common Law Legislation: Drafting and Interpretation (Oxford University Press, 2001) 137–8.

²³ Elizabeth Shi and Freeman Zhong Rethinking the reinstatement remedy in unfair dismissal law. AdelLawRw 14; (2018) 39(2),p. 368:

appoint the person to another position on terms and conditions no less favorable than those on which the person was employed immediately before the dismissal²⁴.

In the UK, If the tribunal decides not to make an order for reinstatement, it shall then consider whether to make an order for re-engagement and, if so, on what terms²⁵.

In the Republic of South Africa the S 193(2) point of the Labour Relations Act, 1995 defines that if the Labor Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee. (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless- (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure. (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court, in addition may make any other order that it considers appropriate in the circumstances²⁶.

It is important for an employee to constantly do his/her job and earn money. In our opinion, this goal is served by the institution of not only reinstatement to the previous job but also reinstatement to an equivalent job in all those cases when the former position of the employee has not been preserved, but instead, there is another equivalent job.

CONCLUSION

Summing up the results of the study, we come to the conclusion that the legislator failed to regulate the institute of non-reinstatement of illegally dismissed employees to their previous jobs, giving the courts such wide discretion that in the same factual circumstances, irreconcilable judgments may be issued due to the judge's subjective approach.

Legal regulation must be as well-known and predictable as possible, and judicial practice should be as uniform as possible. Only in such conditions do the subjects of law have a reasonable opportunity to bring their behavior in line with the requirements of legal norms.

In order to resolve the existing uncertainty, in our opinion, it is necessary to clarify the scope of discretion of the courts not to restore illegally dismissed employees to their former jobs, conditioned solely by objective factors. The courts should have the right not to reinstate an illegally dismissed employee to his/her former job, not only in cases where the impossibility of reinstatement is justified by economic, technological and organizational reasons but also in cases where such an impossibility is due to the lack of trust between the employee and the employer, however, in this case, the lack of trust

²⁴ <https://www.legislation.gov.au/Details/C2021C00421> (26.10.2022)

²⁵ <https://www.legislation.gov.uk/ukpga/1996/18/part/X/chapter/II/crossheading/orders-for-reinstatement-or-reengagement> (26.10.2022)

²⁶ <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/43174/64455/F-1675744155/ZAF43174.pdf> (08.11.2022).

should be based on an objective, measurable and verified by certain evidences.

In addition, we believe that it is necessary to show a differentiated approach in the case of organizations with up to 10 employees, and, in this regard, to determine the need to have the employer's consent to the restoration of an illegally released employee, since in the case of micro-companies, personal relationships are very important and in this case the importance of balancing the interests of the employer and the employee is more clearly emphasized.

Finally, in our opinion, it is very important to introduce the institute of reinstatement of the employee not only to the previous but also to an equivalent job and clearly define its regulation. This institution, first of all, will exclude the possibility that the employers abuse the rights of the employees, for example, by renaming the position during the judicial proceedings, and presenting it as the absence of the previous job.

In addition, if there is an essentially equivalent job, it does not matter whether the employee will perform a similar job with the same or almost the same salary or exactly do the same job before dismissal. Finally, the institution of reinstating equivalent work can be applied only when the previous position does not exist so the introduction of this institution is directly in the interests of the employee. Referring to the balancing of the employer's interests, we believe that it is not essential for the latter whether the employee will be restored to the same job or an equivalent job, if there are no objective grounds to reinstate his/her.

ՄԱՆԵ ԿԱՐԱՊԵՏՅԱՆ – Նախկին աշխատանքում վերականգնվելու՝ աշխատողի իրավունքի իրացումը անօրինական ազատման դեպքում – Սույն հոդվածում ներկայացվում են անօրինական ազատված աշխատողի՝ նախկին աշխատանքում վերականգնվելու իրավունքի իրացման ինստիտուտը և դրա կիրառման խնդրահարույց հարցերը աշխատողի և գործատուի ողջամիտ շահերի հավասարակշռման համատեքստում: Անդրադարձ է կատարվել այն դեպքերին, երբ անօրինական ազատված աշխատողին հնարավոր չէ վերականգնել նախկին աշխատանքում՝ պայմանավորված օբյեկտիվ հանգամանքներով, քննարկվել են աշխատողի և գործատուի միջև վստահության հարաբերությունների առկայությունը, ինչպես նաև նախկին և համարժեք աշխատանքում աշխատողի վերականգնման հնարավորությունը:

Արվել է եզրակացություն, որ օրենսդիրը չի կանոնակարգել սպորինի աշխատանքից ազատված աշխատողներին իրենց նախկին աշխատանքին չվերադարձնելու ինստիտուտը՝ դատարաններին տալով այնպիսի լայն հայեցողություն, որ նույն փաստացի հանգամանքներում կարող են կայացվել իրարամերժ դատական ակտեր՝ պայմանավորված դատավորի սուբյեկտիվ մոտեցմամբ: Առկա իրավական անորոշությունը շտկելու համար առաջարկվում է հստակեցնել անօրինական ազատված աշխատողներին նախկին աշխատանքում չվերականգնելու՝ դատարանների հայեցողության շրջանակները՝ հիմնվելով բացառապես օբյեկտիվ գործոնների վրա:

Հոդվածում ներկայացված են արտասահմանյան երկրների փորձը, դոկտրինալ մոտեցումները, միջազգային իրավական չափորոշիչները և դատական պրակտիկան:

Բանալի բառեր – անօրինական ազատում, վերականգնում, նախկին աշխատանք, աշխատանքի վերականգնման իրավունք, համարժեք աշխատանք, աշխատանքից ազատում, վերականգնվելու ակնկալիքներ, աշխատանքային իրավունք

МАНЕ КАРАПЕТЯН – Осуществление права работника на восстановление на прежней работе в случае незаконного увольнения. – В данной статье представлен институт реализации права на восстановление на работе незаконно уволенного работника и проблемные вопросы его применения в контексте баланса разумных интересов работника и работодателя.

Были упомянуты случаи, когда незаконно уволенный работник не может быть восстановлен на прежней работе в силу объективных обстоятельств, обсуждено наличие доверительных отношений между работником и работодателем, а также возможность восстановления работника на предыдущей или эквивалентной работе. Подводя итоги исследования, мы приходим к выводу, что законодатель не урегулировал институт невосстановления незаконно уволенных работников на прежнюю работу, предоставив судам настолько широкое усмотрение, что при одних и тех же фактических обстоятельствах могут быть вынесены непримиримые судебные решения из-за субъективного подхода судьи. Для разрешения существующей неопределенности предлагаем уточнить пределы полномочий судов по не восстановлению на прежних должностях незаконно уволенных работников, обусловленных исключительно объективными факторами.

В данной статье представлен опыт зарубежных стран, доктринальные подходы, международно-правовые стандарты и судебная практика.

Ключевые слова: *незаконное увольнение, восстановление на работе, прежнее место работы, право на восстановление на работе, равноценная работа, увольнение, ожидание восстановления на работе, трудовое право*