

Abuse of Labour Rights: Theory and Practice

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Submitted: Oct 13, 2013; **Accepted:** Nov 10, 2013; **Published:** Nov 19, 2013

Abstract: It is known that conscientious use of rights and freedoms is a necessary condition for democracy and jural state. At transition to market relations limits of the subjective rights, including labor rights, are rather loose and restricted only by generally established principles. General legal principle of conscientiousness of legal subjects in the implementation of their subjective rights and duties acquires special significance in labor law. Judges daily face the problem of rights' abuse in the Republic of Kazakhstan. In the present article, the author proves the existence of "abuse of rights" in work relations with a specific example of judicial practice. "Abuse of rights" is observed in situations where a person realizes his/her subjective right, hurts another person and exceeds the limits of permissible rights. In our opinion, the main aspects of "right abuse" are moral and ethical. Despite the many publications of scientists devoted to the determination of the limits of subjective rights, we believe that the criteria proposed in the literature for determining limits are not sufficiently clear and practically used. Therefore, we still consider the cognitive activity of the judge, evaluating the evidentiary basis to make a decision in a particular case, to be the main factor.

Key words: Labour relations · Courts · Term of the employment contract · Enforced absence from work · Dismissals

INTRODUCTION

European Commission in Brussels published the Green Book, entitled "Modernizing labor law to meet challenges of the XXIst century" on November 22, 2006. There is a great importance of necessity in development of flexible labor relations and labor law reforming to bring economic advance of the country [1]. The aim of this Green Book is to start social discussion how to improve labor law to reach goals of Lisbon strategy: long-term development of large amounts of jobs [2]. Reaching abovementioned goals is considered in terms of a norm adjustment of positive labor law with market conditions. In most experts' opinion such adjustment can deteriorate conditions of an employee and is less protected from unfair dismissal.

As one of the mechanism that helps to reach such goal, it is suggested to apply guarded flexibility system that can increase adaptive capacities of employees and entities as well as to reach flexibility of labor market. The main idea of this document is to reach "gold triangle": mobile workforces combined with strong income security

system, whereby government carries out flexible policy of labor market combined with modern and viable social security system.

During reforming of Kazakhstan labor legislation, it is necessary to take into consideration world tendency of his modernization but based on various objective and subjective factors, that are:

- obligation that Kazakhstan is on the way of transition from command-administrative regulations of labor relations to market capitalism where quality of life of general population is not high enough;
- difficulty to make employment agreements by parties on absolute freedom principle, provide own benefits in it during unemployment conditions, when employee more or less is ready to sign the employment agreement under any conditions; moreover employer is empowered to define conditions of employment agreement in his sole discretion;
- Legislator provokes parties to abuse rights giving them right to solve any issue of employment agreement at their discretion;

According to paragraph 5 of Article 12 of the Constitution of the Republic of Kazakhstan implementation of rights and freedoms of individuals and citizens shall not violate the rights and freedoms of others; hence the legal subjects should not exceed the limits of their authority at implementation of their rights and duties, which in turn prevents abuse of rights.

The President of Kazakhstan pointed out in his message "Strategy" Kazakhstan-2050": New political course of developed state" that the most important issue of legal policy is to implement the right of citizens to judicial protection guaranteed by the Constitution and gave a number of instructions to improve the judicial system [3]. Development of Civil Law (from Roman law to modern) is caused, in particular, by the need to prevent the numerous abuses related to unfair use of outdated but still valid laws. Claims for "good conscience" (Roman law), "good manners" as an objection to ill implementation of the right (section 826 of German Civil Code), the "spirit of the law" in French doctrine and "equity law" in Britain indicate a constant struggle of civil law for strictly functional (i.e. system) use of its norms and legal structures "[4].

So, for example, article 2 of Swiss Civil Code 1907 provides: "In the exercise of rights and duties each must act in good conscience. Obvious abuse of rights is not protected"[5] trans., The Swiss Civil Code. Article 1 of the Civil Code of Japan provides: "All private rights must conform to the common good. Implementation of rights and duties shall be fair and consistent with the principles of trust. Abuse of rights is not allowed" "[6, p.48]. Article 281 of the Civil Code of Greece also assumes that the implementation of a right shall be prohibited if it clearly exceeds the limits set by good conscience and good morals or social and economic aims of law "[7, p.156]. In contrast to mentioned above countries French and pre-revolutionary Russian legislation did not know the rules explicitly prohibiting abuse of rights. Although attempts to create such norms were made for various reasons they did not lead to change of legislation [8].

As is noted by Carl Larents, in 1901 the imperial court found that the content of paragraph 826 in some cases may implicit entering into a contract (Kontrahierungszwang) [9, p.49]. "Rejection of the contract can be found anti moral especially when it is aimed at unfair competition or used to effectively remove potential competitors and gain monopoly position, or to achieve objectively indecent and unfair conditions" writes. Abuse of rights theory is also well known among countries of Muslim law family. Especially this problem

was a theme of work of Muslim scientist and legist Makhmud Fatih, who had published his work "Muslim abuse of rights studies" in 1913 [10, p.49]. Attempts to revise the Civil Code were made in the Russian Empire as well as in France in the early XX century. Several projects including rule prohibiting abuse of rights were prepared. However, these attempts did not come true. Stormy revolutionary events in Russia in the early XX century, culminating in the Great October Socialist Revolution, put an end to law-making [11, p.49].

Public law beginnings in labour relations dominated under conditions of socialism and domination of state ownership of production means, so the category of "rights abuse" in labour law has been studied rather poorly. In broad terms the employer was the state in the face of public enterprises, institutions and organizations. Only employees were called to material and disciplinary responsibility, but legal responsibilities of employers were not provided a priori [12, p.162].

Opponents of the rights abuse theory, in particular M. Agarkov and I.A. Pokrovsky, argued that this theory affects the strength of law in general and the strength of law, in their view, is more merit than the flexibility and the uncertainty of law [13, p.162]., [14, p.119].

Guiding the legal behaviour of subjects in labour relations is an important task of labour law. A necessary legal precondition to solve a number of socioeconomic problems is a certain level of stabilisation of labour relations. The increase in production rates and the role of the subjective production factor have made unjustified dismissals, violations of labour discipline and other labour violations particularly intolerable because of the harm of each offense. Furthermore, the irrational use of subjective rights in the workplace increases from year to year. Under these circumstances, it becomes increasingly more important to distinguish disciplinary offenses not only from related offenses but also from abuse of law, which will allow properly applying the rules of labour law. It is known that the difference between crimes and misconduct lies in a different degree of public danger. Public danger is not only a property of crime. Public danger is also inherent in offenses that are not dangerous to society but that have a socially harmful nature. Crimes and other offenses impinge on social relations and from this point of view represent a public danger. It is impossible to not consider offenses socially dangerous, recognising their hazards and condemnation at the same time. Recognising the non-criminal nature of offenses, including disciplinary offenses, properties of public danger received legislative embodiment, directly implying that not only criminal acts are recognised by the law as socially dangerous.

The concept of social danger is broader than the concept of crime; thus, all other offenses including disciplinary offenses have signs of danger to society.

Practice shows that courts sometimes decide differently regarding the division of crimes and offences, even if the consequences or deeds are the same. Courts are facing considerable difficulties in civil proceedings of labour disputes caused by the fact that Kazakhstan's labour laws, as well as Russian labour legislation, renewed in the spirit of the time, are far from perfect, contain contradictory norms and are characterised by "white spaces", inconsistencies and delays of sub-legislative labour regulations and directly connected to this regulations relations [15, p. 231].

The main criterion for distinguishing between a disciplinary and a criminal offense is the degree of the social danger of the offense, which is not a speculative concept. This concept has certain characteristics, a number of elements that may be revealed when comparing official malfeasances and disciplinary offenses. It can be said that the degree of social danger is a generic term determined by a combination of several elements (characteristics):

- the presence or absence of significant harm (e.g., injuries of varying degrees, death of the victim or a real threat of these consequences due to violations of safety regulations, industrial hygiene or other safety rules);
- the repetition of the offense (e.g., repeated and large-scale production of low-quality, non-standard or incomplete products);
- the nature of the action (e.g., unfair dismissal from work for personal motives);
- the form of guilt (e.g., wrong registration and other distortions in reporting on work assignments may be made only intentionally).

The order of relations, which is part of the economic sphere of the employer, is an element of the total order emerging in a society, which, in turn, delegates certain powers to the employer to regulate internal labour relations in its business sector. In this regard, the legal responsibility of the employee is a necessary condition of social control [16, p. 250-256].

In law enforcement practice, offenses and crimes are correctly differentiated in most of the cases; however, it is unknown and has not even been investigated how offenses and law abuses can be separated because the related offenses and law abuses infringe on the same object.

The main part of the research.

Abusing the law is an unacceptable way to implement a subjective right and may at any time become an offense for which legal responsibility should be assumed. However, the "abuse of the law" should also be considered as a separate legal phenomenon, which is actually a legal fiction. "Abuse of the law" and "offense" are separate legal concepts with inherent binding characteristics. If an offense is committed by violating the prohibition or non-proper performance of duty, "abuse of law" is committed on the basis and use of subjective rights [17, p.3-8.] both legal categories are negative phenomena; thus, it is important to distinguish between these categories in law enforcement practice and to conduct a proper legal assessment [18, p.13-15]. Practice shows that courts often qualify the failure to meet subjective legal obligations in civil matters as abuse of subjective rights. Furthermore, in labour relations, because there is no legislation governing the limits of subjective labour rights, their abuse is not considered according to the principle that the "employee is always right". Prohibition of possible right abuse by the employer is expressed in legislation primarily through the prohibition of "discrimination in labour"[19, p.75-79].

Discussing the problems of law abuse, civil lawyers refer to old anecdotes from Tsarist times, in particular, the talk of a merchant and a lawyer: "Tell me, have I got the right?-Yes, you have.-Then can?-No, you cannot ". This anecdote illustrates best a situation where the person having the right cannot use it. When does such a situation occur? Such a situation occurs if the person having the right wants to use it to cause harm to another person.

Actually, the situation is about the limits of rights, in this case, in the sphere of labour. Because the Labour Code of the Republic of Kazakhstan from May 15, 2007¹ 251-III (hereinafter LC RK) does not contain provisions that establish the limits of the labour rights of Kazakh citizens, let us turn to the Civil Code of the Republic of Kazakhstan. Thus, article 8 of the RK Civil Code provides the following:

- "The exercise of civil rights should not infringe on the rights and the interests of other entities protected by the law and should not cause environmental damage.
- Citizens and juridical persons shall act conscientiously, reasonably and fairly in the implementation of their rights, respecting the requirements of the law and moral principles of society; entrepreneurs should also follow the rules of

business ethics. This duty cannot be excluded or limited by contract. Conscientiousness, reasonableness and fairness of civil legal actions of the participants are assumed.

- Actions of individuals and legal entities aimed at causing harm to another person and the abuse of the law in other ways, as well as implementation of the right in conflict with its purpose are prohibited. In the case of noncompliance of requirements listed under paragraphs 3-5 of this Article, the court may deny an individual to protect its rights.”

The existence of this legal standard does not mean that it is applied in the field of civil law. E.M. Offman believes that the abuse of rights in employment is qualified as an independent legal phenomenon, which according to its characteristics does not fall under offense or any lawful behaviour, as it is distinguished from offense by absence of characteristic unlawful and punishable behaviour and from lawful behaviour by absence of such a feature as public necessity ensured by the state”[20, p.4]. M.V. Lushnikova believes that in cases where the subject of labour law violates limits of rights formally defined by law, local acts, collective and individual agreements (time limits, the manner of law implementation, etc.), then it is a violation labour law and legal responsibility should be taken [21]. A.V. Yudin understands abuse of rights in labour relations as an unfair implementation of subjective rights granted by the Labour Code and other laws to the parties of the employment contract; and cases in which the authorized person creates the appearance of legitimacy of his/her own behaviour, aimed at obtaining unjustified organizational, property and other benefits associated with deception of the other party of labour contract [22, p. 36].

For more details we will focus on law abuse by employee, as arising in this case relations more clearly convey the characteristics of the phenomena [23, p. 447]

Let us consider an example from practice.

The term of the labour contract with employee A was about to expire on 05/12/2011. At the same time, given that she was more than 12 weeks pregnant and according to paragraph 2 of Art. 185 of the LC RK (“if on the day of expiry of the employment contract a woman presents a medical report on pregnancy of twelve or more weeks, except in cases of replacement of the absent employee, the employer is obliged to extend the period of employment contract upon her written request to the day of termination of maternal leave until her child comes to the age of three”), she applied for an extension of the

employment contract. On 05.12.2011, a few minutes before the end of the working day, the defendant invited her to sign a supplementary agreement to the employment contract; however, claiming that she could not instantly read and understand the contents of the additional agreement, she asked for the necessary review time. The employer refused her request and her employment contract was terminated. From the next day on, she was not allowed to work, which, in her opinion, was a violation of the law. She was not familiar with the order to terminate her employment contract. Later, following an investigation and trials, the defendant voluntarily reinstated her at work, provided the signing of the additional agreement to the employment contract for the extension of its term, which was signed by her on 09.01.2012, after which she was allowed to perform her duties at work. She believed that she was in an enforced absence from work from 06.12.2011 till 08.01.2012, in connection with which she asked the court to collect the average salary during her forced absence from 06.12.2011 until 08.01.2012.

According to the decisions of the district court and the appellate judicial board in civil and administrative cases of the municipal court, the lawsuit of A was rejected. The cassation instance made the opposite decision to recover from the defendant in favour of A the average salary for her forced absence during the period the plaintiff mentioned.

Why did judges decide the issue differently?

According to Articles 218 and 219 of the Civil Procedure Code of the Republic of Kazakhstan (hereinafter CPC RK), a court decision must be lawful and reasonable. In making its decision, the court establishes the circumstances relevant to the case, determines the laws to be applied to this case, evaluates the evidence and, according to all the facts, decides whether the stated claim should be satisfied. In making appeal decisions, all the requirements of both substantive and procedural law are fulfilled by the courts (district court and the appellate panel of judges in civil and administrative cases of the municipal court). It was noted that contrary to the requirements of Art. 65 CPC RK, the plaintiff had failed to prove the case of the claimant in the enforced absence from work caused by the employer.

The Court of First Instance found that on 22.11.2011 and 05. 12.2011, in connection with the upcoming expiration of the employment contract on 06.12.2010, the defendant sent the claimant a notice that the plaintiff refused to receive, the proof of which are the electronic text messages sent to an internal document management system on 22.11.2011 at 1737 and on 05.12.2011 at 1005 about sending scanned copies of the notifications to the email address of the claimant.

Furthermore, the court found that on 05.12.2011 at 1712, the claimant sent the defendant a request to extend the term of the employment contract in accordance with Article 185 LC RK and a copy of the certificate proving that the claimant was pregnant for more than 12 weeks. This fact is not denied by the defendant.

On 05.12.2011 at 1730, the defendant signed a supplementary agreement to the employment contract from 06.12.2010 according to which paragraph 46 of the employment contract reads as follows: "The date of termination of the employment contract due to its expiry is the last day of maternity leave for care for a child under the age of three years". The claimant also mentioned that the supplementary agreement was not signed, the proof of which is the act of refusal to sign it on 05.12.2011 signed by the vice president of the Legal Affairs Department, the vice president of the Human Resources Department and the manager of the HR administration.

Therefore, at the time of expiry of the employment contract, the employer had fully complied with the requirements of Article 185 LC RK. However, the claimant signed the mentioned supplementary agreement only on 09.01.2012, in connection with which the defendant cancelled an agreement issued earlier on 10.01.2012 to terminate the employment relationship with A [24].

Thus, absenteeism is admitted solely through the fault of the employee. Meanwhile, existing labour legislation provides for recovery of wages for enforced idleness of employee caused by the employer.

Therefore, there are no grounds to satisfy the claim for the recovery of the average salary for the days of absence caused by the employee.

In such circumstances, the Commission concludes to leave appealed decisions of the court unchanged, due to their legitimacy and validity. The claimant's appeal was dismissed because of its unsubstantiated arguments.

Based on the aforementioned and guided by paragraph 1 of Article 358 and Article 360 of the Code of Civil Procedure of the Republic of Kazakhstan, the Commission decided that the decision of the district court taken on August 1, 2012, in a civil case on the suit of A against the organisation to invalidate the order regarding the recovery of the average salary during her forced absence from 06.12.2011 to 01.08.2012 given on 05.09.2011 should be left unchanged. The appeal of the claimant's representative was left unsatisfied.

Having considered this labour dispute, the appeal board came to a completely different conclusion and fully satisfied the claim of A.

Thus, we have different judicial decisions regarding the same claim. Let us consider the accuracy of these solutions in terms of the theory of labour law.

In the LC RK, the concept of "enforced idleness" has not received a formal definition; thus, in law enforcement practice, this uncertainty often leads to an ambiguous interpretation of the concepts and, as a result, generates the corresponding challenges for law enforcement agencies.

Meanwhile, an analysis of the inter-related provisions of the LC RK allows one to consider enforced idleness an unlawful deprivation of an employee's right to work in accordance with the employment contract signed with the employer for a certain period of time.

Let us consider whether claimant A experienced the enforced absence from work on the payment of which she insists:

First, the claimant was asked twice to sign a notice of termination of her employment agreement dated 06, December 2010 at the expiration of its term, which she refused to sign. Notifications of the impending termination of the employment contract were also sent to the claimant on 22.11.2011 and 05.12.2011;

Second, after being presented the document certifying that the claimant was more than 12 weeks pregnant, the defendant, in turn, suggested to the claimant the signing of a supplementary agreement, which was also rejected by her;

Third, on 14.12.2011, in the presence of a representative of the relevant prosecution, the claimant again refused to sign an additional agreement.

The mentioned actions of claimant A indicate an abuse of her position, which is reflected in her apparent misconduct.

The refusal of A to sign the additional agreement to the labour contract at the time when the organisation's leadership had repeatedly taken action to sign the additional agreement with her due to her pregnancy cannot be considered conscientious. Particularly, because the claimant knew that the term of her fixed-term contract had expired, her repeated refusal to sign the additional agreement actually forced the employer to extend the fixed-term contract turning it into an open-ended contract.

The employer could not meet the requirements of paragraph 2 of Article 185 of the LC RK unilaterally.

In this case, the claimant had the right and timely opportunity to sign an additional agreement on the extension of the employment contract by the end of her maternity leave but did not take the necessary actions, i.e., did not sign the additional agreement that would allow the defendant to perform the duties and then acted against the defendant with the accusation of violating the law.

Fourth, there actually could not be an enforced idleness for the following reasons: a) at the day of the refusal to sign the additional agreement, the term of the employment contract ended and on 6 December 2011, the claimant was not to perform her work duties; b) the supplementary agreement, even if it was signed, did not entitle the claimant to perform work duties because she was working on a fixed-term employment contract, which had expired on 05.12.2011. This additional agreement does provide for the extension of the employment contract and its main purpose is the preservation of seniority for the time of the birth and care of a child under the age of 3 years; c) if claimant A had an open-ended employment contract, then her claim for payment of enforced idleness could possibly be satisfied.

The actions of A expressed in the unjustified refusal to sign the additional agreement led to controversial actions on the part of the defendant: the termination of the temporary employment contract, followed by its cancellation, although the defendant, after the claimant's refusal to sign the additional agreement, could easily have terminated the employment relationship at the expiration of the term of the employment contract.

The abuse of the right on the part of employee A is characterised by the following features:

- A, realising her subjective right to extend the term of the employment contract according to paragraph 2 of Article 185 LC RK simultaneously violated the legitimate interests of the employer to terminate the employment relationship in a timely manner and under certain circumstances (pregnancy of the claimant) tried to extend the term of the employment contract;
- her repeated refusals to sign the additional agreement to the employment contract violated the right of the employer to the recruitment and its optimisation, as well as led to negative actions such as a request to compensate for the enforced idleness, which by law is not supposed to take place because as of 06.12.2011 she had no right to perform work duties.

Thus, the actions of A are seen as an abuse of the right because to achieve her goal of transforming the fixed-term contract into a permanent contract for a period of time she systematically crosses the limits of her subjective rights, makes signing of the additional agreement a problem to harm the employer and , subsequently, sues for the payment of the enforced idleness trying to inflict material damage on the employer.

The idea of abuse of the law has not received scientific justification in modern legal literature. Exploring the limits of civil rights, civil lawyers by abuse of the right refer to cases when an authorised subject acting within the subjective rights belonging to him/her and within the possibilities that make up the content of the law uses the law in a way that goes beyond its prescribed limits.

In this case, employee A, knowing that the law protects pregnant women, hoped her inadequate actions would force the employer to extend the employment contract and turn it from a temporary into a permanent contract. However, she did not consider the interests of the employer associated with the selection and placement of personnel, payroll and other factors. Such behaviour that to some extent exceeds the limits set by law may be considered illegal. The claimant did not take the necessary actions, i.e., did not timely sign an additional agreement prepared and provided by her employer and did not allow the employer to fulfil its duty and protect the labour rights of the pregnant woman. Consequently, there is abuse of rights by claimant A through inaction (not signing the additional agreement). Perhaps the actions of A were not aimed at causing harm to the employer in form of the recovered wages for, in her opinion, forced absenteeism. However, keeping an additional agreement to the employment contract for a long time and not signing it objectively caused harm to the employer, preventing the employer from timely fulfilling its duties. The conclusion of the Court of Appeal regarding this part does not mean shifting the burden of proof from the claimant to the defendant; however, the conclusion implies failure to protect the rights belonging to the claimant.

The trial court and the City Board of the Court of Appeal in civil and administrative cases, in our view, correctly made the decision finding that A had abused her right and refused to protect her rights.

Abuse of rights is a means of defence primarily of a defendant. In the present case, the only argument of the defendant was abuse of rights on the part of claimant A. While the defendant referred to that argument, the court of cassation did not consider it. This event happened partly because, first, the Labour Code of the RK has no rule dedicated to abuse of the right; second, the courts almost always decide in favour of women, particularly pregnant women; and third, there is no practice of settling labour disputes on the basis of law abuse. Even in civil law, abuse of rights as a way of legal protection is not an effective strategy because of the difficulties of proof. In any case, the judge, who in his/her discretion assesses the evidence of the parties and qualifies actions of a person as an abuse of the right, has the last word.

As a result of research, scientists have formulated the concept of "abuse of rights", which is a subject's valid exercise of law within the boundaries of subjective rights belonging to him/her violating, or not, the limits of the subjective rights but which is socially harmful and reprehensible and causing harm to the rights, freedoms and interests of other participants of public relations [25].

This definition includes the following interrelated features of "rights abuse":

- valid exercise by a subject of his/her subjective rights;
- violation of limits of the implementation of the right by a subject;
- implementation of the right granted by law limits by a subject;
- causing harm to the rights, interests and freedoms of other participants of public [26].

Thus, the "abuse of rights" does not refer to the offense because it does not violate the prohibition included in legal norms but exceeds the limits of the law or, if it does not exceed the granted limits, is socially harmful and reprehensible because it causes harm to other participants of public relations. Therefore, courts, in our opinion, should primarily evaluate social harm and social reprehensibility of actions of law abusers and make fair decisions.

As known, certain difficulties are caused by the practical application of the grounds for the termination of employment contracts, in particular, by the provisions of Articles 51, 52 and 57 of the Labour Code of the Republic of Kazakhstan, which can also cause abuse of rights on the part of the employee and the employer.

Agreement of the parties as a basis for the termination of an employment contract according to subparagraph 1 of Article 51 of the LC RK is used in cases where the will of only one part of the contract (either employer or employee) is not enough for the termination of the employment contract. Mutual will of the parties to terminate the employment relationship is needed. Subparagraph 1 of Article 51 of the LC RK does not provide any reasons for limiting the possibility of termination of the employment contract by mutual agreement.

With an agreement between the employer and the employee, a labour contract can be terminated at any time within the period stipulated by the parties.

The parties may agree on the possible termination of the employment contract by mutual agreement at any time

when concluding an employment contract. For example, a supplementary agreement dated 12 October 2007 to the employment contract concluded on January 4, 2012, between the head of the organisation and the employee states the following: 1.2. Subparagraph 6.4 of paragraph 6 shall read as follows: "6.4 This Agreement may be terminated by mutual agreement. The party to the contract which has expressed desire to terminate the Agreement by mutual agreement shall notify the other party to the contract. The notified party shall within three working days inform in writing the other party about its decision. Date of termination of the Agreement by mutual agreement of the Parties shall be agreed between employer and employee.

In accordance with paragraph 4 of Article 52 of the LC RK, the employer may terminate an employment contract without complying with the above mentioned requirements with compensation in the amount of not less than the average salary for a year"[27, p.656].

The employee was timely informed about this additional agreement and signed it. There is also the signature of the head in accordance with the Labour Code of Kazakhstan.

After completing all the processes of termination and receiving compensation, the employee goes to court with the request to reinstate him at work because he believes that the employer did not warn him in advance and did not agree with him on the date of termination of the employment contract.

Agreement of the parties to terminate the employment contract by mutual consent according to subparagraph 1 of Article 51 of the LC RK is an independent basis for termination of an employment contract and should not be confused with paragraph 4 of Article 51 of the LC RK, which is also an independent basis for termination of an employment contract by the employee where the initiative comes from the employee manifested in the form of submitting an application for resignation.

As a general rule, the order of termination of the employment contract by agreement of the parties referred to in paragraph 2 of Article 52 of the LC RK allows the parties to express their will at the forthcoming dismissal of an employee within three days. If the party that received a notice does not express its written consent to the dismissal in writing, the employment contract cannot be terminated by mutual agreement because this basis requires the mutual will of both parties. If consent to terminate the employment contract by mutual agreement is achieved, parties then jointly determine the date of dismissal.

Requirements established by paragraph 2 of this Article shall not be required if the employment contract stipulates the right of the employer to terminate the contract with payment of compensation in the amount of not less than the average salary for the year. In this case, the additional consent of the employee for dismissal is also not required because the employee and the employer agreed on the possible termination of the employment contract by mutual agreement at any time when concluding the employment contract.

Therefore, an employee at the time of signing a supplementary agreement to his employment agreement agreed in advance to a possible dismissal by agreement of parties at any time. For such a prior consent, the employee receives compensation in the amount of the average wage for the year as evidenced by the content of the order of termination of the employment contract according to subparagraph 1 of Article 51 and paragraph 4 of Article 52 of the LC RK.

In this case, the employee's refusal to sign the order of the employer in the presence of persons proving its refusal has no legal significance because consent to the possible termination of the employment contract by agreement of parties according to paragraph 4 of Article 52 of the LC RK was given when signing an additional agreement.

It should also be noted that when reading the supplementary agreement on the possible termination of the employment contract by agreement of parties, the employee could refuse to sign it, that is, not give consent to the possible termination of the employment contract with him in accordance with paragraph 4 of Article 52 of the LC RK; however, such refusal did not occur in our case. Consequently, an additional agreement was completely agreed with and its signing was not forced.

This example is also clear evidence of abuse of the right by the employee. At the same time, it should be emphasised that the actions of the employee may not be illegal because they are aimed at protecting his interests within the law. The employee does not violate the provisions of Article 52 of the LC RK but asks the court to reinstate him at work because he believes that the date for the termination of the employment contract by mutual agreement was not specifically set.

Demanding reinstatement, the employee may not assume that this demand infringes on the employer's interests, which are expressed as follows: a) with the written consent of the employee to the possible termination of the employment contract by agreement of

parties, the employer is counting on the fact that the employment contract can be terminated at any time without compliance with paragraphs 2 and 3 of article 52 of the LC RK, that is, the order of termination of the employment contract by agreement of the parties; b) having paid salaries one year in advance, that is, having paid a large sum of money for unperformed work, the employer has suffered material expenses that he planned to incur in exchange for a new, more qualified person or to reduce the position (work performed), e.g., to optimise personnel. Therefore, requiring the employer upon termination of the employment contract to set a specific date of termination of the employment contract in accordance with article 52, paragraph 4 of the LC RK and observing the provisions of paragraph 3 of the article, the employee actually negates the purpose and meaning of compensatory payments and thereby allows an abuse of employer rights. He did not even consider the reasoning for this rule in the LC RK and why the employee is given a "gift" in form of an unearned average annual salary.

CONCLUSION

Thus, the gaps and controversies in the rules of the labour law, the lack of qualified lawyers who know and correctly explain the legal norms of the labour law and the lack of specialised labour courts contribute to the abuse of the rights.

The following statement brings it to the point: "The most dangerous and serious type of abuse is the abuse of the right to freedom of judicial discretion, which in practice often leads to causing harm to the rights of trial process participants" [28, p.3-8]. The above essay. P.18 Thus, in both of the above-mentioned examples, the courts of different instances made completely opposite decisions. The fact that some of the judges abused their freedom of judicial discretion is obvious because judgments on the abuse of the right are the exclusive prerogative of the court.

Courts in Kazakhstan for the resolution of labour disputes do not consider the fact that the abuse of rights can be observed in the field of labour as well as in the field of civil law if subjects to labour law abuse their subjective right to the freedom of labour (<http://inform.kz/rus/article/2524912/> (reference date 20 February 2013)25.

Therefore, first, we would like to propose the following addition to the Labour Code of the Republic of Kazakhstan:

“The implementation of labour rights must not violate the rights and interests of other entities protected by the legislation and should not cause environmental damage.

Employees and employers must act in the implementation of their rights conscientiously, reasonably and fairly respecting the requirements of the law and moral principles of society. This duty cannot be excluded or limited by an employment contract. Conscientiousness, reasonableness and fairness of actions of the participants of labour relations are assumed.

Actions of employees and employers aimed at causing harm to another person, at abuse of the law in other ways, as well as at the implementation of right in contradiction with its purpose should be avoided. In the case of non-compliance of these requirements, the court may reject a claim of an individual to protect his/her rights."

This rule is intended to provide a means of protection in the form of an objection to a claim ("exceptio"). The essence of this rule consists in the fact that the defendant may argue that the plaintiff having the right abuses it. Thus, in the example with the pregnant woman, she knew that the labour contract could be extended only if she signed the additional agreement: however, she did not sign the agreement even after repeated requests on the part of the defendant. Her inaction was aimed at transforming her fixed-term contract into a permanent contract. Article 185 of the LC RK providing the right for a pregnant woman to extend a fixed-term employment contract due to her pregnancy is objective; however, the abuse of the right is a product of the subjective will. In this case, the plaintiff acts in her own interests with the indirect intention to obtain what she wants against the interests of the defendant.

Dismissal of the claim on the basis of our proposed new article is permissible in the case of abuse of power, that is, in the case of acting against another's interest. The main way to refer to this article must be an objection to the claim on the basis of a declared valid right, in this case, the right declared in paragraph 2 of Article 185 of the LC RK.

Abuse of right is an independent form of deviant behaviour, an unlawful phenomenon expressed in an action (inaction) that by external signs does not exceed the limits of a subjective right but prejudices the legitimate interests of others, in this case, the interests of the employer. "Abuse of the right" has certain legal limits, the output of which is fraught with consequences unfavourable to others. Consequences of abuse of rights are connected with dishonest and unreasonable execution

of rights and obligation performance that is a result of right protection failure. On the other hand reasonableness and honesty are not legal categories, but they make up their legal meaning, which characterise abuse of rights. Therefore, some authors suggest to mark out such independent form of right abuse as an execution of right which is at variance with honesty principles [29, p.60]. The use of subjective rights to the prejudice of others is necessarily accompanied by the fact that a plaintiff acts (fails to act) with malice to harm the defendant. In modern European Law the problem of abuse is solved with the help of support of moral and law norms of fairness, honesty and reasonableness. So Civil Code of Germany establishes the following legal measures for will restriction of right holder:

- prohibition of cavil, that is prohibition of equitable right usage only in somebody's despite; execution of right is inadmissible if it is in somebody's despite only;
- prohibition of right execution against "good temper" or duty of obligation performance on the base of reliability and trust including "good temper: "Debtor is obligated to execute his/her duties as reliability and trust demand, including legal custom";
- terms of right execution whose expire may involve right deprivation for its execution and expiry of periods of limitation [30, p.309].

Employee is required to execute his/her employment duties honestly only that is assigned with employment agreement by Labour Law, however Labour Law does not content similar demands related to execution and protection of law of employment [31, p. 48].

If there is no such demand, it is suggested as a loophole in labour law, that is confirmed with the situation when court meets with difficult, considering actions of employee as dishonest ones or not. "Labour law does not define concrete bounds of employee's behavior to execute equitable rights. These bounds do not almost have limitation unless employee abuses his rights..." [32, p.131].

In our opinion, the main aspects of "right abuse" are moral and ethical. Despite the many publications of scientists devoted to the determination of the limits of subjective rights, we believe that the criteria proposed in the literature for determining limits are not sufficiently clear and practically used. Therefore, we still consider the cognitive activity of the judge, evaluating the evidentiary basis to make a decision in a particular case, to be the main factor (See Fig. 1 given below).

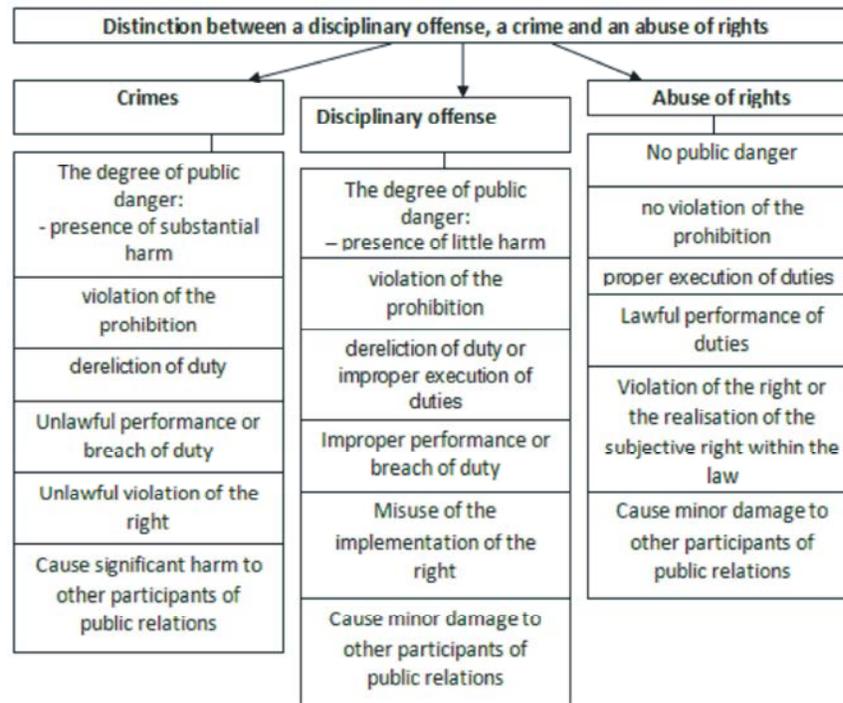


Fig. 1: Shows distinction between a disciplinary offense, a crime and an abuse of rights.

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