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Management and Efficient Resolution of Service/Labour Disputes in Civil Service

Situational Analysis and Needs Assessment

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I. Introduction

1. Goal of the Study

Statistical information obtained from the Courts¹, as well as information and reviews periodically broadcasted via TV and social media, illustrates how employees dismissed from public agencies often bring a dispute to Court if they believe their rights have been violated.

This reality demonstrates that communication challenges exist with the employees of public agencies. The existing situation results in various negative consequences for the financial health and the reputations of public agencies. In particular, every dispute ended with a ruling against a public agency, which implied the following:

- a) The employee had a legitimate complaint, which was not heard, shared and/or satisfied by the public agency;
- b) The human resources of the public agency were spent on a dispute proceeding;
- c) The legality and stability of the system to replace dismissed employees by a new candidate is not evident;
- d) The public trust in the agency and of the public system in general is decreased;
- e) Existing disputes might cause development of new ones;
- f) There was financial harm to the public agency: financial compensation for missed days is assigned (The agency normally pays salary to new employee as well, which means double expenses);
- g) The reputation of the public agency and civil service in general is damaged significantly as a result of public cases.

The lack of an institutional system that can identify, prevent, and/or resolve disputes causes significant financial, operative, and reputational damage to public agencies.

Utilizing tools that promote alternative dispute resolutions could result in cheaper and expedited dispute resolution. The use of such tools should lead to improved labour relations, since it would facilitate efficient and painless solutions; if this is impossible – these tools would still likely improve the culture of communication and cordiality of relationships between the disputing parties, which would help maintain the dignity and confidence of everyone involved.

The study reviews the key reasons for labour disputes in public service, the potential means for their resolution, how employees of different rank view existing procedures, and the introduction of additional/new tools for the efficient and cheap resolution of disputes at an early stage. To elaborate on the tools for effective management and resolution of these disputes, the findings are summarized at the end of the study and the authors' general recommendations are provided.

¹ See statistics of Tbilisi City Court <http://www.tcc.gov.ge/index.php?m=534&newsid=178>; also statistics, provided by Supreme Court of Georgia, p 49

We hope that this basic study will help the government of Georgia and donor organizations to analyse which elements and tools can be introduced in order to facilitate the efficient management of human resources, prevent and/or swiftly resolve disputes with fewer expenses, while developing a culture of effective communication between the employees of civil service.

2. Scope and Methodology of the study

Over the course of the study interviews were carried out with different stakeholders (public agencies, dismissed employees and field experts). Relevant documents (legislation, the Court decisions, existing reports/studies/statistical data) were examined.

Detailed information on scale of the study is provided below.

Interviews

In agreement with the Civil Service Bureau, the research team carried out interviews with the following stakeholders:

- Tbilisi City Hall,
- The Ministry of Justice,
- The Ministry of Finances,
- The Ministry of Economy,
- The Ministry of Regional Development,
- The Ministry of Defence,
- The Parliament of Georgia,
- LEPL National Agency for Public Registry; and
- Civil Service Bureau.

In total, the interviews were carried out with nine public agencies. In each agency, the interviews were carried out with employees of different level/rank of several offices, including: the heads of legal office, the human resources office, the audit/inspection office and the medium rank managers of different offices. In addition, the research team had discussions with two field experts: one from academia and another from the Court system. Besides those, the team met with two dismissed employees who had gone to Court and obtained a decision in their favour. In total 48 interviews were carried out.

Legislative Acts

The researchers examined the different legislative and bylaw acts regulating this field, including:

- Law of Georgia on Public Service
- Labour Code of Georgia
- General Administrative Code of Georgia
- Administrative Procedure Code of Georgia
- Law of Georgia on the Elimination of All Forms of Discrimination
- Regulation of the Civil Service Bureau
- Resolution of the Government of Georgia # 70 on approval of the Regulation the Ministry of Economy and Sustainable Development of Georgia
- Resolution of the Government of Georgia #297 on approval of the Regulation the Ministry of Defence of Georgia

- Resolution of the Government of Georgia # 594 on Approval of the Regulation of the Ministry of Regional Development and Infrastructure of Georgia
- Resolution of the Government of Georgia # 389 on Approval of the Regulation of the Ministry of Justice of Georgia
- Resolution of the Government of Georgia # 168 on Approval of the Regulation of the Ministry of Finance of Georgia
- Order # 134 of the Minister of Justice of Georgia on Approval of the Regulation of Legal Entity of Public Law - the National Agency of Public Registry
- Decree of Tbilisi Municipality Sakrebulo # 19-58 on Approval of the Regulations of Tbilisi Municipality City Hall
- Order # 9/3 of the Chairman of the Parliament of Georgia "Regulation of the Parliament of Georgia"
- Decree of the Government of Georgia №204 - Regulation of the competition in public service
- Decree №220 of the Government of Georgia - Approval of the rules and conditions of assessment of professional public servants
- Guidelines for Methodology and Organizational Arrangement of Functional Analysis of Public Institutions
- Regulation of the Department of Human Resources Management in Civil service of LEPL Civil Service Bureau
- Decree # 200 of the Government of Georgia on the definition of general rules of ethics and behaviour in public agency
- ILO Convention 158 and 166 Recommendations

Court Practice

Over the course of the study, the researchers studied 47 Court decisions. The decisions were drawn directly from each Court, but the practice related to the Law on Civil Service was drawn from the Tbilisi, Kutaisi, Batumi and Telavi City Courts, from both Civil and Administrative Chambers.

The research team examined the Court practice of two periods: 2013-2017 and court practice after July 1st, 2017 (after the new edition of the Law came into effect). However, all decisions received from the Court were on the disputes related to old edition of the Law. Thus, Court practice related to new edition of the Law was additionally drawn from Gori, Poti, Zugdidi, Samtredia and Rustavi City Courts. All Courts responded similarly, that no decision was made based on new edition of the Law.

The researchers team separately drew Labour Code related court practice in 2013 – 2017, where one of the parties is the LEPL. The decisions were drawn from the Tbilisi, Kutaisi and Batumi City Courts, as well as from the Tbilisi and Kutaisi Courts of Appeal, Civil and Administrative Chambers.

The Court decisions were obtained from the e-search system of the Tbilisi Court of Appeal and the Supreme Court of Georgia.

Public Defender

In order to collect this information, the researchers petitioned the Public Defender's office in regards to information about recommendations adopted from 2013 to 2017 on possible violations of labour rights by public agencies that occurred within the frame of the Law on Civil Service and Labour Code.

There were two types of data received from the office of the Public Defender: information on the number of applications (and respective recommendations prepared during this period), and also information about the topics (disputed issues) of the public defender's recommendations regarding possible violations of labour rights. Additionally, some specific recommendations were provided, which are analysed in different parts of the study, in compliance with the topics.

Statistics

The research team drew statistics on labour disputes from the Supreme Court of Georgia and the Tbilisi and Kutaisi Courts of Appeal. Statistics of the Tbilisi Court of Appeal were found on the website of the Tbilisi City Court.

Each agency that went through this process received a request for statistics on labour disputes. Statistical information was only provided by five agencies. Statistical information provided by GYLA and Transparency International Georgia, NGOs that represent dismissed people at the Court, was a valuable source.

Researches/Reports, Available regarding the Subject of the Study

It was revealed, over the course of the interviews, that mostly only NGOs represent dismissed employees at the Court. We got in touch two NGOs working in this field: GYLA (Georgian Young Lawyers Association) and Transparency International Georgia, which provided their reports relevant to our study (as well as statistical information, mentioned above). Information and findings of these NGOs are provided in different parts of this study.

3. Summary

The present study reviewed the respective legal basis, Court practices/statistics, and practices/statistics of other agencies, as well as perspectives of the stakeholders within its framework.

Key findings of the study are as follows:

- Currently, the majority of labour disputes are decided against a public agency, however restoration of the employees' rights is often impossible due to different reasons;
- The disputes mostly occur cases of dismissal within the frame of restructuring or disciplinary proceedings. Disputes related to lawfulness of the competition for a position are also frequent. Procedural violations made by public agencies, including the shortcomings of the examination of the circumstances of the case and the justification of the decision, are often identified in the disputes;
- There is no sufficient tool in public agencies, which would prevent the disputes (respective examination of problematic situation at early stage, communication) and/or promote their effective resolution in timely manner and at lower costs.

Key recommendations of the study:

- The implementation of a system for dispute perspectives and risk assessment;
- The third neutral body/respective tool of such a system shall be engaged at early stage of restructuring and disciplinary proceeding process;
- Groups of employees (managers/HR) shall be trained/retrained in effective communication, problem solving and other respective skills;
- Political will for implementation of mentioned tools needs to be demonstrated and reinforced with respective regulations (legal framework shall be adjusted).

II. Legislative Framework

The legislation concerning civil service and labour (pre-labour agreement) is quite broad. The methodology of the study (Part I) sets forth the laws and by-laws that the study team reviewed. For the purposes of the present part we highlight only those regulations that are directly referring to the topics of the Study.

Review of the legislative framework is divided into two parts: 1. one part sets out norms that regulate specific topics/basis of the Study; 2. the other part presents passages from regulations, which are important and create the primary grounds for dispute prevention and introduction of effective management mechanisms.

1. Norms regulating specific topics/basis of the Study

Restructment

Dismissing an employee under the article of restructuring is set forth both in the Law of Georgia on Civil Service (Articles 108 and 118) and Labour Code (paragraph “a” of Article 37.1 and paragraph “b” of Article 37.3). However, neither of the above-mentioned Laws clarifies the criteria and procedures for selecting the employees to be dismissed under the article of restructuring.

In this respect, Article 21 of Convention 158 of the International Labour Organization is also important. The Article states that during restructuring the Employer shall consider all other less severe means rather than termination of employment in order to protect the interest of the employee². Article 23 of the same Convention stipulates that it is better to prescribe in advance the selection criteria of the people to be dismissed³. Though these regulations are not actively enforced by the Georgian legislation, they are still actively employed and influence judiciary practice as recommendations.

Disciplinary action

Chapter X and Article 71 of the Law on Civil Service of Georgia, as well as sub-paragraph “h” of part 1 of Article 37 of the Labour Code of Georgia applies to disciplinary action. However, unlike the Labour Code, the Law of Georgia on Civil Service regulates the issues related to disciplinary action in particular: the action procedure (the grounds to start disciplinary action, the person who is carrying out the action, etc.), the terms and form of the action; it also stipulates the measures of disciplinary liability and the criteria to be considered while issuing disciplinary penalty. The law also stipulates that employment termination shall only take place in the case of severe misconduct and lists the forms of misconduct and assessment criteria (Article 85 and 98).

Contest

Matters related to contest are regulated by Articles 34 and 42 of the Law of Civil Service; the procedure of conducting a contest, the assessment criteria and the procedure of making a decision are stipulated by Decree N204 of April 21, 2017 of the Government of Georgia on Conducting a Contest at Civil Service.

Discrimination

² Cmpr. Article 21 of Recommendation N166 of June 2, 1982 of the International Labour Organization: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---norms/documents/normative_instrument/wcms_r166_de.htm

³ Part I of Article 23 of the Recommendation N166 of June, 1982 of the International Labour Organization: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---norms/documents/normativeinstrument/wcms_r166_de.htm. Cmpr. Extended, Chachava, Termination of Labour Contract voluntarily and involuntarily of the contracting parties – new classification as per the amendments of June 12. 2013, page 99 – 101, legal aspects of the latest amendments to the Labour Law, 2014

The law of Georgia on Civil Service reinforces the principle of equality before law (Article 9). Article 2 of the Labour Code of Georgia prohibits discrimination in labour and pre-labour relations. According to sub-paragraph “b” of Article 37.3 of the Code, termination of the contract on the basis of discrimination shall be inadmissible and Article 40² of the Code establishes the burden of proof on the employer in the case of suspicion of discrimination.

Leaving job on the basis of one’s own will

Articles 57 – 59 of the Civil Code of Georgia stipulate the basis for voidness of transaction, while Articles 72 – 89 stipulate the bases for a voidable transaction in the case of declaration of intent while making transactions by mistake, deceit and duress.

Other procedural conditions

Norms of the General Administrative Code of Georgia, applying to justification of an administrative decree (Article 53), the need of investigation when issuing an administrative decree (Article 96), and the matter and frames of exercising discretionary power (Article 6) shall by all means be taken into consideration. Articles 47 and 48 of the Labour Code are significant. They regulate methods for settling labour disputes, including negotiation procedures. Sub-paragraph “d” of part I of Article 187³ of the Civil Procedural Code, according to which any dispute can be a subject of judicial mediation if parties consent, also deserves attention.

2. Passages from regulations that provide grounds for prevention of dispute and introduction of effective management mechanisms

Within the frames of the study we became familiar with the regulations of all the public institutions where interviews were held. We are hereby bringing passages from the regulations of several Ministries. They are a significant foundation for the introduction of a system for the prevention or effective regulation of labour disputes at an early stage. We also review legislative regulations that create a basis for settling labour disputes with agreement.

2.1. Regulations that provide grounds for settling labour disputes with agreement

Labour Code

Paragraph one of Article 1 of the Labour Code of Georgia stipulates that the individual dispute shall be regulated by a procedure agreed between the parties. According to paragraph 5 of the same article: “If the parties fail to reach an agreement over the dispute within 14 calendar days after receiving a notification about conciliation procedures, or if either party avoids conciliation procedure, a party may refer the dispute to the Court of Arbitration.” This norm makes the goal of the legislator clear: he wants to promote dispute settlement through conciliation. Moreover, this norm can be considered obligatory, so that the parties are incentivized to use alternative dispute settlement means.

Convention N 158 of the International Labour Organization

According to Article 8 of the Convention and Recommendation N 166 of the International Labour Organization, in the case of the termination of a labour contract, it is recommended that a conciliatory procedure is held before or in parallel with appealing procedure, as the procedure enables each party to re-evaluate the justification and reasonability of the decision of termination of the employment contract, while a third party is in attendance and according to legal standards.

In the case of the dismissal of an employee at the initiative of the employer (organizational, structural, technologic, economic or on other grounds) Article 13 of the Convention stipulates opportunities to inform employees beforehand and that prior consultations must be held between the parties in order to reduce the risk of dismissal, and to allow the parties to review alternative opportunities.

2.2. Regulations promoting conciliatory procedures in the Law of Georgia on Civil Service and in the regulations of public institutions

The regulations of certain public institutions (LEPLs or Ministries) are an important basis for the introduction of an early stage prevention and effective settlement system for labour disputes.

Functions of Audit

For example, according to the internal regulations of the Ministry of Economy and Sustainable Development, one of the functions of the internal audit is “To assess the quality of the risk management process of the the Ministry; assess the adequateness and effectiveness of the financial management and control system;” as well as “To provide recommendations to the Minister for establishing incentive structures to minimize violations of law by Ministry employee as well as the elimination of the gaps and their reasons.”

Functions of an internal audit⁴ stipulated by the international regulation of the Ministry of Regional Development and Infrastructure are the same as the functions listed above. In particular: “a) Identification of the Ministry’s level of exposure to risk and assessment of the management quality; b) Supporting improvements in the Ministry’s functioning as a system and ability to achieve its goals through an assessment of compliance of the activities of the Ministry in regard to the legislation of Georgia and developing recommendations for improving the frugality, effectiveness and productivity of the Ministry.”

The functions of the Internal Audit⁵ of the Ministry of Finance are also interesting: “b. a) Supervision over the implementation of laws within the Ministry, analyses potential violations or/and gaps and their prevention; b) Providing respective recommendations to the Minister for establishing and preventing the facts that caused violation of the law by the employees of the Ministry as well as for eradication of the gaps within the Ministry and their causing factors;”

To summarize, the Audit is responsible for examining and preventing incentives for misconduct or improper behaviour by employees (not only to identify the facts of misconduct but also to recommend measures) and also to develop preventive recommendations. In addition, the audit functions cover the management and risk prevention for the above-listed Ministries, which, in the case of job related disputes, necessitate analyses of prospective based on existing assessments or justifications.

The provisions given in the above-listed regulations broaden and extend the goals of disciplinary action stipulated by Article 86 of the Law on Civil Service.

Functions of Human Resources Management Office

⁴ Article 17 of the Decree N594 of the Government of Georgia on Approval of the Internal Regulation of the Government of Georgia.

⁵ Article 15 of the Decree N168 of the Government of Georgia on approval of the Regulation of the Ministry of Finance.

The regulation⁶ of the Ministry of Economy and Sustainable Development sets forth the functions of the Human Resources Management Office as follows: “Ensuring the productivity of human resources of the Ministry; ensuring compliance of human resources with the needs of the Ministry; the continuous development of human resources in compliance with the priorities of the Ministry; ensuring that the motivation and the development of employee performance are always improving; [...]The development, introduction and continual update of the assessment system; the examination and analysis of the motivation of employees; [...] carrying out the state policy of human resources management within the system of the Ministry,[...]; Coordination of the work of human resources offices within the Ministry and providing methodological guidance to them.”

The functions of the Human Resources Department of the Ministry of Justice are as follows⁷: “The development of recommendations for effective management of the human resources system of the Ministry; I) the development of proposals related to raising qualifications, professional training/re-training, and ensuring organizational cohesiveness; j) the development, introduction and upgrading of professional and career development, assessment, promotion, material and non-material incentivizing as well as of other procedures and human resource systems; k) development of recommendations as well as organizing events for increasing motivation, job satisfaction and loyalty towards organization.

Functions of the Human Resources Department of the National Agency of Public Registry are similar. The stipulations are the following⁸: development and introduction of assessment systems as well as submitting proposals to the management on the actions to be carried out; it is also important for the purposes of the study, that the functions of the Department also cover reviewing and responding to the issues of work conditions that are raised by the employees; organizing events for encouraging teambuilding and improving informal relations.

The human resources office is responsible for management policy that works to ensure the progression of office productivity. The policy they implement is responsible for the development of employee skills, the utilization of practices to maintain a high level of morale in office culture, , the promotion of sociability among employees in order to increase team work, and the review of issues raised by employees. Everything listed above is inherently related to the development of dispute prevention and effective communication mechanisms.

Civil Service Bureau

In an effective dispute management and settlement process, the Civil Service Bureau has a special role, whose functions, according to Article 21 of the Law on Civil Service, cover the following:

- a) Studying and analysing the current social context of civil service; ensuring that uniform state policy is followed and utilized in civil service, observing normative acts related to the policy and to develop respective recommendations;
- b) Studying and generalising existing practices of recruitment, assessment, career development, career management, professional development, observation of ethical norms by civil servants, and the practices of dismissal and feedback;
- c) Studying and analysing the experience of other countries in order to further refine civil service management and aid cooperation with international organizations;

⁶ Sub-paragraph Z1 of Article 7 of the Decree N 70 of the Government of Georgia on Approval of the Regulation of the Ministry of Economy and Sustainable Development.

⁷ Article 20 of the Decree N389 of the Government of Georgia on Approval of the Regulation of the Ministry of Justice.

⁸ Article 12, of the Decree N 134 of May 3 of the Minister of Justice of Georgia

- d) Analysing legal disputes related to employees and to develop recommendations to improve existing practices.

III Analyses of practice

The study examines and analyses Administrative and Civil Court Practice for 2013- 2018, in relation to the labour rights of civil servants and employees (in case of LEPLs). The reports of certain non-governmental organizations, which obtained information through monitoring civil service institutions and from Court employees, are also studied.

After analysing and observing what was being practiced, several topics were identified that are especially relevant, problematic, and deserve attention both in regards of protecting the rights of employees and protecting the legitimacy of decisions made by civil service institutions.

- ❖ First, let's examine cases of dismissal of an employee on the basis of restructuring.

As the Court practice stipulates, in order to ensure that the dismissal of a person is legitimate, restructuring has to occur, and the redundancy of the employee must be evident. In addition, the firing process shall be transparent and shall take place based on specific criteria. Dismissal must be justified.

- ❖ The dismissal of employees on the basis of disciplinary action is frequent.

It became apparent that often the administrative body does not evaluate whether the violation and the selected disciplinary action are proportional. Additionally, the disciplinary procedure is usually violated, and the case is not thoroughly nor comprehensively examined.

- ❖ The disputed grounds also typically represent unequal treatment and show signs of discrimination.

According to the Court practices examined, inadequate justifications are the norm to the degree that if a dismissal is not inadequately justified by a public agency it gives rise to the suspicion of discrimination.

- ❖ Hiring related disputes also deserve attention.

Court practice demonstrates that often employers cannot justify the criteria for recruiting one particular person over another. Specifically, detailed records, minutes on the criteria for selecting one particular person and rejecting the other, are not kept. Consequently, most dispute cases are rejected by the Courts, which doesn't produce an actual result for the plaintiff.

- ❖ Leaving job voluntarily

There are cases at the civil service when, during restructuring or if a superior is altered, employees leave job voluntarily. Such cases often possess characteristics of duress, misleading information, or other extralegal influences that cast doubt on whether the decision to leave was actually that of the employee.

- ❖ The exercise of discretionary power by an administrative body in regard to labour disputes

An administrative body often decides without justification, but within the frames of its discretionary power, and referencing only the latter as justification. This action is unambiguously considered by the Court as an inadequate interpretation of discretionary power by an administrative body.

- ❖ Remanding a Court case to the respective administrative body in order to re-examine the circumstances accompanying the case and make a new decision

When a decision on dismissing an employee is made without a sufficient examination and evaluation of the case, the Court currently lacks the opportunity to ascertain and assess factual circumstances of the case, and consequently, cannot judge whether the dismissal was lawful. In such cases the Court often remands the case while indicating to the administrative body that it should further examine the case and issue a new act.

1. Restructuring

One of the most common legal grounds for dismissal, both in terms of the Law of Georgia on Civil Service and the Labour Code, is restructuring. Based on the analysis of the Court practice, it can be established that in the case of dismissing an employee due to restructuring, the requirements and procedures established by the law for dismissing an employee are often violated and/or legal ground for dismissal was absent whatsoever.

The present chapter reviews the following:

- 1.1. The dismissal of an employee on the grounds of restructuring, according to the Law of Georgia on Civil Service;
- 1.2. Changes in organizational structure and what constitutes the appropriate need for reducing a work force according to the Labour Code;
As well as:
- 1.3. The overall practice analyzed by the Young Lawyers Association of Georgia and their findings on restructuring at civil service institutions.

1.1. Dismissing an employee on the grounds of restructuring according to the Law of Georgia on Civil Service

Verdict Nbr - 449 – 442 (j - 15) of July 8, 2015 of the Cassation Court defines restructuring as follows: “The structural or/and functional reformation of a civil service institution, that may result in the complete change of the institution or in the change of status of its structural sub-units, subordination or/and functional workload, shall be called restructuring.”

According to sub-paragraph “b” of Article 108 of the Law of Georgia on Civil Service: “An employee can be dismissed due to redundancy as a result of restructuring, liquidation or/and merging the institution with another one.”

The above-stated provision bears the same meaning as the one in the older edition of the Code. (According to paragraph 2 of Article 96 of the old Law of Georgia on Civil Service (Annulled from October 27, 2015) “Restructuring an institution does not represent the grounds for dismissing an employee. When restructuring is accompanied by redundancy, an employee may be dismissed on the basis of Article 97 of the Law.” Paragraph 1 of Article 97 stipulates that “An employee can be dismissed due to redundancy or so that an employee who was unlawfully dismissed can be restored.”

The research team could not find examples of Court practice related to these issues in accordance with the current Law on Civil Service. Thus, they analysed the Court practice as per the edition of the Law on Civil Service before July 1, 2017. However, the listed practice and definitions on dismissing an employee on the grounds of downsizing are still relevant within the framework of the new law.

The analysis of the practice showed that:

- Dismissing employees only on the grounds of restructuring, without redundancy, contradicts the law;
- Abolishment of the position is not considered the same as downsizing and does not provide grounds for dismissal of an employee;
- Dismissal of an employee based on downsizing is unlawful, unless the position is being replaced by another position with similar functions;
- In case downsizing is necessary, it is important that the procedure and criteria for employee dismissal is fair, developed in advance, and transparent;
- Dismissals during restructuring often involve a public institution exercising its discretionary power and not justifying its decision.

1.1.1. Redundancy as an essential component

On the case N2/456 – 15 of May 20, 2015 the Kutaisi Court explained that dismissing a person during restructuring can be lawful, if a downsizing is taking place. The Tbilisi City Court in the verdict on the case N3/ -----17 of September 28, 2017 agrees with the same opinion and indicates that restructuring can be deemed the ground for dismissing an employee only when the number of positions is reduced.

1.1.2. Repealing – changing titles of positions

According to the Verdict Nbr-449-442 (j-15) of December 8, 2015 of the Cassation Court “changing the title of a position shall not be considered the same as the position ceasing to exist. A position is deemed repealed where there is no position with its functions, a new position stipulates new rights and authorities, and/or a person shall meet other criteria to be considered fit for the position, etc.” Cassation Court highlights that the “structure of an administrative body may be changed, divided, and specific offices may be formed in different fashion, but the position occupied by a certain employee may remain unchanged, thus be on the same hierarchical level, even under supervision of another agency but considered fulfilling the same functions. Consequently, “to establish similarities among specific positions, it is necessary to assess: a) their place in the hierarchy of the institution; b) Chief functions; in addition, Cassation Court emphasises that removal from or adding to insignificant functions formally to the whole circle of functions does not change the picture; c) Capabilities that are necessary for occupying a specific position after restructuring; d) In some cases – salary.”

In such cases repealing a position is formal and shall not be qualified as downsizing, including the cases, when the number of positions had been cut but the position, that a person held, still exists with similar functions. As per the Court definition, dismissal of an employee requires essential grounds such as restructuring, accompanied by the downsizing and actual repealing of the position, the person to be dismissed, had been holding.

1.1.3. Selection criteria and justification

Court definitions are important as they maintain that the restructuring accompanied with downsizing and the selection of the employees to be dismissed shall be carried out on the basis of unbiased criteria developed in advance and mandating that the entire procedure shall be transparent.

In the Verdict Nbr-301-292 (2j13) of November 19, 2013 the Supreme Court defined that when downsizing occurs during restructuring “the administrative body shall be obliged to carry out comparative (analytical) research into the qualifications and professional skills of other employees and plaintiffs in order to establish precedence, before making a decision within its discretionary power.”

According to the Court definition, “the legal condition of one person cannot be different from the legal condition of the other if the difference between them in professional skill does not justify the established inequality in employment status. The same legal standard can be applied differently to different persons only if the existing difference is justifiable.”

1.2. Organizational changes and the need to downsize a labour force as per the Labour Code

The legislation and the Court have the same attitude towards dismissing an employee on the grounds of restructuring within the frames of Labour Code.

According to sub-paragraph “a” of Article 37 of the Labour Code, “Grounds for terminating a labour agreement can be: a) economic circumstances, or technological/organizational changes requiring downsizing.” As per paragraph 3 of Article 37 “Terminating labour relations shall be inadmissible:

- a) On the grounds other than those laid in paragraph 1 of this Article;
- b) On grounds of discrimination laid down under Article 2 of this Law;”

According to the Court practice, dismissal of an employee is admissible only if:

- The labour force is reduced;
- Selection criteria are established and justified (to eliminate possibility of discrimination)⁹.
- Dismissal of an employee is justified

1.2.1. The reasonability and expediency of restructuring while also considering the rights of employees

According to the Verdict N56-682-636-2017 of September 15, 2017 of the Supreme Court of Georgia “When the employer makes a decision on restructuring, he/she shall make sure that the step is in compliance with the interests of the organization and, at the same time, that it does not violate the rights of employees. The decision of the employer requires justification, certain calculations, comparisons of the structures before and after restructurings, and identification of the positive and negative sides of restructuring. If the legal ground for dismissal is not confirmed, the Court will assume that the employer misused his/her powers.”

The Court indicates that the defendant should have confirmed several circumstances; in particular: whether or not the restructuring and downsizing were actually carried out at the agency, what necessitated the downsizing, and what the specific circumstances were that caused termination of labour relations in each and every case. In accordance with the definition of the Court “the burden of proof is on the employer, he/she must prove before the Court, that, in consideration of the specific case, the agency does not need the position with the functions that the plaintiff had occupied.” In addition, the Court must find out whether the financial conditions of the agency actually caused the repealing of the position held by the plaintiff. In particular, it was exactly the defendant who must provide evidence that proves the lawfulness of repealing the position held by the plaintiff.

⁹ Chachava, “Termination of Labour Contract voluntarily and involuntarily from the parties” – New classification established by amendments of June 12, 2013, p.102, 119 and “Legal aspects of Labour Law”, 2014

1.2.2. Justifying the need to downsize

In the Verdict on the case N2b/4403-16 of March 9, 2017 the Tbilisi Court of Appeals discussed termination of labour relations on the basis of sub-paragraph “a” of paragraph 1 of Article 37 of the Labour Code and established that, “In the case of dismissing an employee on the above-mentioned grounds, it is necessary that economic circumstances, technological or organizational changes be responsible for driving the downsizing. In addition, one of the components of the listed circumstances (economic, technologic or organizational) may exist independently, though to consider termination of labour relations as lawful, any of the listed circumstances (economic, technologic or organizational) must be a cause of the downsizing.” The Court also defined that “The employer’s decision requires justification, certain calculation, and comparison of structures of the agency before and after restructuring,” in particular, the employer shall make sure that the decision is in compliance with the interests of the organization and does not disproportionately violate the interests of the employee.

1.2.3. Selection criteria and justification

In its Verdict N5b-682-636-2017 of September 15, 2017 the Supreme Court agreed with the Court of Appeals and emphasized that the defendant was obliged to dispel the factual circumstances that the plaintiff brought to dispute: whether the restructuring was actually held at the agency, what necessitated downsizing (economic, technologic or organizational changes that objectively caused downsizing;) and what caused the termination of labour relations in the cases of specific defendants.

In addition, the Court says that “if a person is dismissed on the grounds of restructuring and downsizing, the employer must indicate that the lack of qualification was not a justification as it constitutes grounds for termination independent of the labour contract while it should have been on the agenda within the frames of current grounds for terminating the labour contract.”

1.3. GYLA Report

The research team’s Assessment Monitoring Report on how public institutions reduce budgetary funds and carry out restructuring processes, prepared by the Young Lawyers Association¹⁰. Monitoring was carried out from December 9, 2016 through January 31, 2017. The Report is largely based on information obtained from public institutions as well as on particular cases on which the GYLA rendered legal assistance. Consequently, the findings of the Report thoroughly cover the issues of Court practice. That’s why the report covers that highlight the challenges in civil service; and also covers cases that reflect the GYLA’s findings in order to illustrate the gaps and questions surrounding the practice of public institutions, which, when existing Court practice is considered, may become the grounds for voiding the decisions of public institutions.

1.3.1. Key findings of the Report

- Most of the Ministers’ restructuring orders do not contain information such as: the length of the restructuring process, the procedure and requirements for dismissing an employee during restructuring, the need for staff auditing and how the audit recommendations are developed, what tasks are assigned to which Deputy Ministers or/and heads of Division/Department, etc. Consequently, the restructuring process was not transparent and predictable for civil servants as

¹⁰ Accessible at: <https://gyla.ge/files/%E1%83%9B%E1%83%9D%E1%83%9C%E1%83%98%E1%83%A2%E1%83%9D%E1%83%A0%E1%83%98%E1%83%9C%E1%83%92%E1%83%98%E1%83%A1-%E1%83%A8%E1%83%94%E1%83%93%E1%83%94%E1%83%92%E1%83%94%E1%83%91%E1%83%98.pdf> [Last seen 03.06.2018]

they were not updated with information on the restructuring process and decisionmaking criteria, while the Minister and/or other persons responsible for making decisions, exercised wide discretionary power in the decision-making process.

- During the restructuring process, the Government of Georgia, the Ministries and the local self-governments did not consult or take recommendations from the Civil Service Bureau – which is responsible for the effective functioning of the civil service altogether and also carries out functional analyses of public institutions for reform purposes.
- “Ministries have clear criteria for how they are to go about selecting civil servants to be dismissed during restructuring. The Monitoring showed that the majority of Ministries did not present evidence-based justifications that formed the basis on which an employee was selected for dismissal. Orders of dismissal indicate only restructuring as the grounds for dismissal and do not stipulate the circumstances for dismissal.” In addition, certain Ministries indicate inconsistent criteria, such as the quality of the work done by servant, outcomes of the latest attestation, professional skills, behaviour, etc.¹¹”
- According to the Report “Restructuring at the Ministries was not clear and transparent, was carried out through using wide discretionary power and could not meet the minimum standards required to prove justified dismissal of a civil servant.”

1.3.2. Specific cases from the Report

“In the cases against the Georgian Ministry of Defence, the following problematic issues were identified: at the Ministry of Defence certain employees were transferred to the Human Resources Management Division and, after the legal length of their term expired they were dismissed. The plaintiffs indicate that their transfer to the Human Resources Management Division, which resulted in their dismissal, was groundless and unjustified. In one of the cases the plaintiff also indicates that after his/her transfer to the Human Resources Management Division of the Ministry, a position with the same functions was added to the manning table. However, he/she was not appointed to that position because of a previous conviction, despite the fact that the conviction had already been expunged. According to the law, expunged conviction cannot be hindrance to be appointed for civil service.”

One of the cases in the Report states that “In the case versus the Ministry of Regional Development and Infrastructure of Georgia, an employee was dismissed on the grounds of restructuring and downsizing. Later on, the employee requested the staff list before and after restructuring, showing that downsizing did not actually take place at the Ministry and the number of employee (151 employees) in the old manning table is the same as in the new one. Moreover, according to the new staff list, total amount of wages is increased.”

The Report also sets forth a case where a plaintiff who worked at LEPL Tbilisi Central Library was dismissed on the grounds of downsizing. According to the staff list, the number of employees decreased from 119 to 90, though the criteria for selecting the employees to be dismissed still remained unclear.”

In a case against LEPL National Enforcement Bureau (under the Ministry of Justice), during restructuring an employee offered to be appointed to a new position as an acting employee, as the offered position was similar in terms of function to the one he/she occupied before restructuring. The employee demanded to be appointed to the offered position without contest, which was refused to him/her. Finally, the public institution dismissed him/her on the grounds of restructuring. According to the employee, the

¹¹ A 2017 Report on “Assessment of reducing budgetary funds and restructuring process at public institutions” by GYLA

restructuring was a formality as it was not followed by downsizing and the main motive of his/her dismissal was his/her political views.”

Within the monitoring period, the GYLA Zugdidi office also prepared and filed a suit against the Zugdidi Municipality Board. In the suit employees dismissed on the grounds of the scores of testing, demanded to be reinstated to their positions, as, according to them, the actual reason for dismissal, was their political affiliation and views.

The restructuring process at the Ministries was not clear or transparent, and it was carried out with wide discretionary power that did not meet the minimum standards of substantiation necessary to dismiss a civil servant.¹²”

2. Disciplinary liability, violation of obligation

One of the most common reasons for an employee dismissal (both within the frames of the Law of Georgia on Civil Service, as well as of the Labour Code,) is disciplinary misconduct, or violation of obligation. These types of disputes produce several problematic issues, given below, are identified in the Court practice:

- Often, when the administrative body imposes disciplinary liability on an employee the nature of the violation is not disclosed, and the use of the selected disciplinary measure is not justified;
- In particular cases, the selected disciplinary measure is disproportional compared to the violation;
- In addition, the administrative body usually does not consider whether there is a relatively light measure which would be reasonable in this particular case. The employer does not bother to investigate whether the employee had previous disciplinary liability, or what character references may be available, etc.;
- Employee is not given another chance;
- It’s disputable whether or not the factual circumstances of the dismissal are comprehensively and fairly analysed, and that the employee’s explanation of events is considered
- Even in the case of violation, the Court thinks that the employer should identify if it is possible to transfer an employee on another position, his/her re-training or another, lighter measure.

2.1. Significance of violation and proportionality of disciplinary measure

In the Verdict on the case N2b/6106-14 of January 27, 2015 Tbilisi Court of Appeals defined that “For misconduct, the termination of labour relations shall not be the disciplinary measure used right away. Severe misconduct shall be an exception.” According to the Court, dismissal of an employee without prior notice and without hearing an explanation from him/her shall not be admissible. Due to the fact that the Labour Code did not consider legal procedure for terminating labour contract by the employer, the Court applied the general condition of the Civil Code of Georgia – Articles 352 and 405 and noticed that in this case the misconduct was grave enough (not turning up at work because of inexcusable reasons) to validate a dismissal. Thus, in the case of not turning up at work because of inexcusable reasons, relatively light disciplinary measure should have been applied. The Court did not consider the misconduct severe enough to be grounds for dismissal.¹³

¹² A 2017 Report on “Assessment of reducing budgetary funds and restructuring process at public institutions” by GYLA

¹³ According to the evidences in the case it was established, that the plaintiff applied to the Administration on August 20, 2010 to let him/her use his/her leave; however, the Administration did not consider reasonable to let him/her go on leave until August 30 on the grounds that a team of internal audit of the Ministry of Education and Science worked at the agency.

In the verdict on the case Nbr-161-158 (j -15) of December 10, 2015 the Supreme Court reviewed disciplinary misconduct and proportionality of the assigned disciplinary measure and highlighted that “application of disciplinary measure shall intend prevention of violation. Response by the administration on any type of violation shall be carried out in consideration of proportionality principle. Disciplinary measure assigned on an employee shall be proportional to the gravity of the misconduct committed by him/her and shall consider the circumstances accompanying the misconduct.” The Court emphasized that “application of termination of labour relations as the ultimate measure shall be adequate and proportional to the violation.”

In the same verdict the Court emphasizes that “poor skills shall not be undisputable grounds for dismissal. In addition to dismissal, qualification raising, professional training and re-training, demotion, offering alternative position shall also be considered. Termination of labour relation shall be justified only in the case when the employer cannot offer alternative job or other, lighter measure and, at the same time, the employee refuses raising qualification, training.”

In the verdict on the case N2b/3929 – 15 of December 24, 2015, the Tbilisi Court of Appeals assessed Convention 158 of International Labour Organization “On termination of labour relations at the initiative of Employer”. The Court indicated that despite the fact that Georgia has not joined the Convention yet, it is obliged to introduce the principle of “reasonable grounds” with the same quality and content as the states that are part of the Convention; the obligation derives from International Customary Law and from Article 6 of International Pact on Economic, Social and Cultural rights. Considering the above stated, reasonable grounds for dismissing an employee shall be related to the lack of competence or/and decent behaviour of the employee.

In the verdict on the case N2b/5928 – 15 of April 18, 2016 Tbilisi Court of Appeals referred to the principle of Ultima Ratio, according to which “Termination of labour relations shall be applied only in the case, when using lighter sanctions against the employee, due to the nature of the misconduct committed, does not make sense.” The Court also defined Article 115 of the Civil Code of Georgia and added that fair balance between the labour right and the right of employer shall be based on a reasonable standard. According to the Court, when improper fulfilment of obligations by the employee comes under discussion, the employing organization shall be obliged to prove such circumstances with solid evidence.

Recommendation N14/2686 of February 27, 2017 of the Public Defender reviews proportionality between disciplinary misconduct and liability. The recommendation stipulates that “As per the proportionality principle, disciplinary measure assigned on the employee shall be compliant with the gravity of disciplinary misconduct committed and shall consider circumstances accompanying disciplinary misconduct.”

2.2. Assessment criteria while selecting a disciplinary measure, justification of decision

In the verdict on the case Nbr-1076-1070 (2j -17) of February 8, 2018 the Supreme Court indicated the necessity of justification of a disciplinary measure by the administrative body and explained that “in the case at hand, as the action committed by the plaintiff was deemed disciplinary misconduct and sentenced the strictest disciplinary measure – dismissal, the administrative body did not consider that the employee did not have previous disciplinary punishment, was characterized positively and successfully completed various types of professional trainings. In addition, the appealed Act does not contain reasoning on the proportionality of the disciplinary measure sentenced for the committed misconduct as to why the administrative body applied to the strictest disciplinary measure against the employee – termination of labour relation and why the administrative body could not use lighter forms of disciplinary punishment.

The law makes the administrative body liable to justify each and every decision made, whereas justification means confirming that the decision given in the Act was the most acceptable decision under given circumstances and it met the requirements of the law more than any other decision would have.”

In the verdict on the case N3b/2095-17 of February 15, 2018 of the Court of Appeals highlighted the need for the assessment of professional skills of employees during downsizing in the process of restructuring. The law indicates that “the administrative body should have studied and assessed professional skills, qualification, labour discipline and other important factors of all the six employees on the basis of respective legal, objective mechanisms, and should have taken into consideration attestation results (if such existed) and should have made the dismissal decision only after this.”

The Court highlighted that “acts similar to the ones committed by the administrative body, pose serious threats to the labour rights enshrined in the Constitution of Georgia as the administrative body may dismiss an employee only on the motive of formal restructuring, on the basis of an explanatory note, whereas it shall review matters like this in consideration of the requirements of the Court of Appeals listed above.”

2.3. Warning as a lighter disciplinary measure

In the verdict on the case N2b/6106-14 of January 27, 2015 the Tbilisi Court of Appeals referred to Convention 158 of the International Labour Organization and reasoned that despite the fact that Georgia is not the part of the above-mentioned Convention, “its requirements are interesting for explaining legal opinions.” The Court applied the recommendations further, in order to qualify the above Convention, and indicated that “dismissing an employee for one misconduct shall be inadmissible until the employer issues a written notice of warning to the employee.”

Taking into consideration the adopted recommendations the Chamber defined, “termination of labour relations with an employee on the grounds of non-fulfilment of duties shall be inadmissible unless the employee had been given reasonable term for improving the situation, except for the cases when the term expired without tangible outcomes and the employee had been notified in advance. Consequently, the Court considered that “Applying measures as strict as termination of labour relations, without observation certain procedural preconditions, for misconduct or for undue performance of professional functions shall be inadmissible.”

2.4. The need for examination within the frames of misconduct and disciplinary liability

In the verdict on the case N3/1271-15 of July 17, 2015 the Kutaisi City Court highlighted the need for comprehensive examination of disciplinary action and observation of the requirements established by Article 96 of General Administrative Code. The Court defined that “the person under disciplinary litigation shall be given the possibility, to participate in the litigation against him/her, through observation of legislative norms, and voice his/her opinions.”

In the verdict N2b/6106-14 of January 27, 2015 the Tbilisi Court of Appeals, referred to Convention 15 of the International Labour Organization and stated that “Dismissal of an employee without hearing his/her opinion, shall be inadmissible.”

In the verdict on the case N2b/5928-15 of April 18, 2016 the Tbilisi Court of Appeals considered that the dismissal of an employee without disciplinary action on the basis of sub-paragraph “n” of Article 37 of the Labour Code (implying other objective circumstances that justify termination of labour contract), was

a gross breach of procedure.” The Court indicated that applying grave sanction such as dismissal, without observing proper procedure of disciplinary action violates basic labour principles in Civil and Labour Law.¹⁴

Recommendation N14/2686 of February 27, 2017 of the Public Defender of Georgia applies to the aforementioned issue. One of the employees was dismissed on the grounds of disciplinary liability. In this case the plaintiff did not have the opportunity to voice his/her explanation. The recommendation states that: “On the basis of adversarial principle, a civil servant shall have opportunity to reply to the claim on disciplinary misconduct, represent his/her opinions, arguments and proofs during the process.”

In its decision of June 27, 2016 Tbilisi Court of Appeals also highlights the need for examination. The Court agrees with the verdicts of the first Court and considers that “the disciplinary committee did not examine possible committed misconduct and its triggering factors and it considered the facts on the surface as sufficient.” In addition, the teacher was not summoned to the sitting by the Disciplinary Committee, nor his/her written explanation was reviewed. Consequently, the Order of Dismissal was considered void on the grounds of Article 54 of Civil Code.”¹⁵

3. Discrimination

The study of Court practice revealed that if the employer cannot justify the grounds for dismissing an employee, in certain cases the Court will automatically consider a dismissal, or otherwise a restriction of rights of a person, justified, whereas in certain cases it indicates that discrimination may instead be the case.¹⁶

In the verdict of on the case Nar-62-596-2016 of September 23, 2016 the Supreme Court considered, without examining the validity of dismissing an employee, that his/her dismissal on the grounds of a previous conviction was discrimination against him/her. The parties agreed that the job description did not restrict the employee because of his conviction. In addition, the special importance of the position did not require the contestant to state his previous conviction. The Chamber considered that “the lack of establishing a legitimate restriction of participation in the contest of previous convictions, constitutes enough reason to presume that if the candidate meets all the established requirements, the employer shall recruit the candidate despite the previous conviction.”

According to the GYLA Report “in one of the cases the plaintiff additionally indicates that after his/her transfer to the Human Resources Division of the Ministry of Defence, a position with the same functions was created, on which he/she was not appointed because of his/her previous conviction, in spite of the fact that the conviction had already been expunged by then. According to the law, expunged conviction should not have been a hindering factor to be employed at the civil service.”¹⁷

¹⁴ In the given case the employee presented a document certifying only the fact that the employee did not answer the phone calls of the employer which was considered by the law as insufficient evidence.

¹⁵ The Court considers that the actions of the Director were not examined, who was the appellant him/herself (the Director gave remark to the teacher with students. Teacher got emotional and left the class. Director’s remark could have caused teacher’s emotions and leaving the classroom.

¹⁶ As per Article 40² of Labour Code, burden of proof on discrimination shall be borne by employer. In particular, the employer shall prove the grounds for dismissal of or refusal to a person to be recruited. In the case of lack of evidence, discrimination will be considered proved.

¹⁷ A 2017 Report on “Assessment of reducing budgetary funds and restructuring process at public institutions” by GYLA

In its decision of September 15 2017 the Supreme Court indicates that “the employer holds the burden of proof and must prove that in that particular case, and in consideration of financial status of the agency, s/he did not need the position that the plaintiff occupied. In addition, the Court was obliged to find out, whether the repealing of the position only occupied by the plaintiff was caused by the financial status of the agency or there was discrimination. In this case it was the defendant who was obliged before the Court to prove the legitimacy of repealing the position of the plaintiff with respective evidence, which could not be proved within the given timeframes.” As per the decision, it can be assumed that if the employer cannot justify the need and reasonability of dismissal, it can be considered as discriminatory.

The recommendation N08/996 of February 9, 2015 of the Public Defender is significant, according to which the termination of labour agreement of the deputy director of school when she was on a maternity leave, is discriminatory and does not comply with Articles 36 and 37, despite that as per paragraph 4 of Article 41 of the Law on General Education “electing a new director causes termination of authorities of deputy director/s.

The Public Defender in his/her statement to the Minister of Health, Mr. David Sergeenko (referring to Order N2325 of the Minister of Labour, Healthcare, and Social Affairs– Article 5 and Article 6 of Order 231) on restricting the right of paternity leave to man. The Public Defender reminds of several conventions operating in this field (Convention on Elimination of all forms of discrimination against women, Article 5¹⁸, Convention N111 of 1958 of the International Labour Organization on Discrimination in Labour and Employment fields¹⁹) and highlights that according to the Convention, mother and father bear equal responsibility and shall be given equal opportunities to participate in raising and development of the child and separation of leave under sex shall be deemed discrimination. Public Defender also indicates to EU directives: as per Article 2 of Directive (76/207/EEC) of February 9, 1976 “On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions”, equal treatment shall mean prohibition of direct and indirect discrimination on the grounds of sex by reference to marital or family status because of pregnancy or motherhood. EU Directive (96/34/EEC) of March 8, 2010 stipulates the principles and conditions of using leave because of pregnancy, labour and childcare, according to which both men and women despite the type of their labour agreement shall be treated equally when using leave.

There is a related case at the Constitutional Court which refers to unconstitutionality of Orders N231 and 281 of the Minister of Labour, Health and Social Affairs. The case is still under the review.²⁰

The recommendation N14/2686 of February 27, 2017 of the Public Defender is significant. The case refers to the dismissal of an employee on the grounds of disciplinary liability. In this case the Defender officially requested information from the Audit Service, whether disciplinary action started against other employees, including in other Municipal Governments. The requested information showed that similar violations were observed at other Municipal Governments as well. However, it was established that other persons under liability for the same disciplinary action were given opportunity to make explanation, while the plaintiff was not. Additionally, in other cases recommendations were made on the use of warning, while in the plaintiff’s case recommendation was termination of labour relation. Public Defender considered this as discriminatory.

¹⁸ Ratified on September 22, 1994 by the Parliament of Georgia

¹⁹ Ratified on May 4, 1995 by the Parliament of Georgia

²⁰ <http://constCourt.ge/ge/ajax/downloadFile/2685>

4. Contest related disputes

The pre-agreement stage of contest related disputes. These matters are regulated by the Civil Service Bureau, as well as Labour legislation to some extent. The main challenges regarding this issue are as follows:

- In particular cases the transparency of the contest comes under concern. To this end the Court considers record keeping of interviews as mandatory;
- In order to reduce the number of biased decisions in interviews and increase the quality of trust, it is necessary that certain common approaches be developed in advance;
- A decision, even within the discretionary power, shall be justified if;
- =.²¹

4.1. Reasonability of recording

In the verdict, of August 2, 2016, on the case #BR-113-112 (2J-16), the Supreme Court of Georgia noted that "The principles of contest are: lawfulness, fairness, publicity, transparency, non-discrimination, objectivity, impartiality, collegiality, and creativeness." Taking into consideration the above principles, the Court explained that "although, the Law of Georgia or Resolution №412, as of June 18, 2014, of the Government of Georgia did not directly envisage the obligation of existence of any type of recording of the interview on "Public service", the attention should be paid to the fact that, according to the resolution, one of the principles of conducting a contest is transparency. The Court of Cassation considers that the administrative body - the Contest Commission - is obliged to draw up any document reflecting the interview stage, so that the Court can assess how the principles of the contest defined by the resolution N412 were observed. The Court pointed out that there is no possibility of inspection when the record does not exist, which violates the principle of transparency.

According to the Recommendation N 04-1/3840, as of April 21, 2016, of the Public Defender, information regarding the contest, and the production of the protocol reflecting the interview conducted during the competition, should be provided in order to confirm why the candidate is inappropriate for a particular position. In this case, the Public Defender requested documentation from the municipality, however, "the government could not present a protocol on the course of interviews, which would reflect the questions asked and answers, as well as the employees' assessment forms. Also, there were no criteria indicated, due to which the Commission has made a decision on the incompatibility with the occupied position."

4.2. Necessity of criteria at the interview stage, substantiation

In connection with the interview stage, the Supreme Court, in the Decision of August 2, 2016, regarding the case #BR-113-112 (2J-16) also pointed out, that "conclusions from the interview can be considered quite subjective, as it is only based on the appraiser's opinions and views. In order to reduce the subjectivity of interviewing results and increase credibility, it is necessary to develop common approaches in advance."

²¹ For ex.: see Study of GYLA of 2017 "On the lawsuits on dismissal of civil servants against Ministries and self-governing cities (2012 – 2017), page 3. Accessible at: <https://gyla.ge/files/news/2006/untitled%20folder/%E1%83%99%E1%83%95%E1%83%9A%E1%83%94%E1%83%95%E1%83%90.pdf>

In the Decision of October 6, 2015, when discussing the case #BR-718-704(J-7JR-14) regarding the contest, the Supreme Court highlighted the necessity to justify the decision taken by the administrative body within the discretionary authority and determined, that the administrative body "is obliged to indicate in the substantiation of the Act the circumstances, which led him to take this decision, in particular, according to part 4, Article 53 of the General Administrative Code, if the administrative body when issuing the administrative-legal act acted within the discretionary powers, all the factual circumstances which were essential when issuing the administrative-legal act shall be indicated in the written substantiation".

According to the recommendation, as of April 21, 2016, of the Public Defender, Article 53 of the general administrative code of Georgia grants the person / body issuing the administrative-legal act - Contest-Attestation Commission - discretionary authority of decision-making. It also prescribes the obligation that an individual administrative-legal act issued in written form shall contain a written substantiation. At the same time, in accordance with the imperative order of the General Administrative Code of Georgia, the administrative body is not authorized to base its decision on the circumstances, facts, evidences or arguments that have not been examined and studied during administrative proceedings.

5. Resignation at own will

The context around when the employee leaving the job by his/her own volition is interesting, since in some cases it causes significant questions. For example, in the verdict, of February 18, 2014, the Supreme Court of Georgia on the case #BR-463-451(J-13), discussed the role and principles of public service. "The Court of Cassation emphasizes the "bad" practice of civil servants resigning of their own volition. According to the Court's explanation, very often, when a person's application is approved and he/she is dismissed from the job, the person considers that his/her rights are violated and demands the examination of authenticity of expression of his/her will. Within the dispute, the Court has pointed out that "the head of the public institution has dismissed the 7 months' pregnant woman - a civil servant and was not even interested in what made her write the letter of resignation; why she did not use her right granted by the law on maternity leave; whether she wrote the letter of resignation of her own free will or not, etc."

The Court also pointed out that the head of the administration did not undertake an administrative proceeding established by the General Administrative Code of Georgia for issuing an individual act. The Court interpreted that "the will of a public servant to leave work on his/her own application must be free and unrestricted". The Court stated that someone, particularly the vertical members of direct subordination, should not make a dishonest and illegal influence on the formation of a public servant's will". The Court considered that ""the administrative body must conduct administrative proceedings to investigate all the factual circumstances, as well as what made the plaintiff to write the letter of recognition".

In the verdict of March 28, 2017, on the case #BR-802-794(J-16) the Supreme Court, noted: ""It is inevitable that the decision to resign from civil service on the basis of a person's personal statement is a special authority. In this case, before the release of the civil servant, the administrative body comprehensively and objectively examines the circumstances of the case, which, in turn, is a guarantee of the rights of workers and ensures economic, social and legal protection of employees, stability of staff members, etc." However, the Court did not disseminate the standard set by Article 17 of the Administrative Procedure Code, according to which, in the case of submitting a lawsuit on the non-

recognition, annulment or invalidation of an administrative-legal act, the burden of proof lies with an administrative body which issued this act". The Court noted that "the process of examining the lawfulness of these acts is not categorical and does not consider the unconditional observance of Article 17, paragraph 2 of the Administrative Procedure Code, according to which the burden of proof of legality of the administrative-legal act is imposed on the administrative body". Consequently, the employee is responsible for the burden of proof and that the letter of resignation was the result of coercion and did not correspond to his/her real will. "

Regarding this issue, the GYLA report is worth noting, specifically where it is said that according to the statement made by the Ministry of Defence, in the process of restructuring, 209 military personnel quit their job on the basis of their own application. However, according to GYLA, in the course of the restructuring, the massive leave of the Ministry of Defence by military servicemen on the basis of personal statements, causes questions about the authenticity such statements.²²

6. Discretionary powers in labour disputes

Regarding the discretionary power, the Court practice is uniform in case of restructuring, dismissal of the employee employed on the basis of disciplinary proceedings, and disputes related to the contest. The Court's explanations demonstrate that the administrative body mostly does not substantiate its decision on the dismissal of the employee and indicates its discretionary authority, which is a misunderstanding of discretionary powers.

In the verdict, of July 14, 2016, on the case #BR-166-165(J-16), the Supreme Court of Georgia interpreted that "the legal obligation of justification of an individual administrative-legal act is conditioned by the fact that the administrative body shall be bound to the law and to keep it in the frames of self-control, because decision-making should be based on specific circumstances and facts, the assessment of which leads the administrative body to the solution of the issue, i.e., concrete facts and circumstances of the case determine the legal effect of the decision." Given the context of the necessity of justification, the Court stated that, "the reasoning of the decision is essential for the recipient to evaluate its legitimacy, be sure in its compliance with the law, and use the right of appealing. He/she must know what argument to use to oppose the decision taken, which he/she lacks when making a decision without justification".

The definition on the case #BR-301-292(2J13) in the verdict, of November 19, 2013, of the Supreme Court of Georgia is similar. According to the Court "it is inadmissible that in Court the addressee of the disputed administrative acts – plaintiffs – bears the burden of proof and is required to deny, abolish, and confirm the opposite of the circumstances and unstudied facts, conclusions and arguments that do not exist naturally; the plaintiffs would only be obliged to prove the possibility for preferable retaining at work, if the disputed administrative acts would be reasonable, motivated, and the decisions presented in the acts would be based on studied facts and circumstances." According to the Court's view "the discretion of the administrative body does not mean ignoring the principles of legality and proportionality. The scope of administrative body is bound by law, and ends where the restrictions established by law begin. "

²² GYLA's report for 2017 "Evaluation of budget reduction and restructuring process in public institutions"

According to the verdict of June 27, 2016, the Tbilisi Court of Appeals ruled, "distribution of burden of proof in labour disputes is different than what can be explained by unequal opportunities of employer and employee." In accordance with Court practice, the burden of proof related to a decision of dismissal is imposed on the employer. Consequently, in case of incorrect interpretation of discretionary powers, the employer fails to prove the necessity of the decision, consequently the decisions are often deemed unlawful and unjustified in Court practice.

In the verdict, of September 15, 2017, the Supreme Court notes that "the employer has an advantage, to submit to the Court favourable evidence" that is related to the correctness of his/her decisions taken.

In the verdict of October 6, 2015, when discussing the case #BR-718-704(J-7JR-14) regarding the contest, the Supreme Court highlighted the necessity to justify the decision taken by the administrative body within the discretionary authority and stated, that "even if the administrative body acts within the discretionary powers, it is obliged to indicate in the substantiation of the Act the circumstances, which led him to take this decision, in particular, according to part 4, Article 53 of the General Administrative Code, if the administrative body when issuing the administrative-legal act acted within the discretionary powers, all the factual circumstances which were essential when issuing the administrative-legal act shall be indicated in the written substantiation".

7. The Court returning cases

According to paragraph 4, article 32 of Administrative Procedure Code, "If the Court considers that an individual administrative-legal act is issued without examining and assessing the circumstances of essential importance to the case, it is authorized to invalidate an individual administrative-legal act without solving the disputable issue, and to assign the administrative body, after examining and evaluating these circumstances, to release a new one". The Court takes this decision if there is an urgent legitimate interest of the party to invalidate an individual administrative-legal act. "

In the December 10, 2015 verdict, on the case #BR-161-158 (J-15) the Supreme Court noted that the Court uses the authority granted under the Administrative Offenses Code of Georgia when it is impossible to determine and evaluate the factual circumstances by rule of Court and therefore it is impossible to assess the material legitimacy of the disputed individual administrative-legal act. "

In the verdict of February 18, 2014, on the case #BR-463-451(J-13), the Supreme Court, considered it unlawful that the pregnant woman's dismissal was on the basis of her own application, invalidated the disputed act, and assigned the administrative body to make a new decision as a result of examination of the circumstances of the case.

The Court of Appeal, by verdict of February 15, 2018, on the case №3b/2095-17, without solving the disputable issue, cancelled the disputed dismissal of a person on the grounds of restructuring and noted, that "The Court cannot solve the issue substantially because the inspection of the professional skills, qualifications, labour discipline, and etc. of civil servants is the discretionary authority of the administrative body and as the final decision on an issue appertains to discretion, the intrusion into discretion, goes beyond the competence of the Court. "

GYLA's research into this issue is important²³, according to which the Court often returns the case back to the administrative body for further examination of the case and to issue a new act. However, in most cases public institutions left the decision unchanged²⁴, after which when it was addressed in Court by the party again, the Court (direct rule) ordered their reinstatement in a job.²⁵

IV. Financial impact of the Court decisions made against the public institutions

In order to assess the financial impact of ongoing and non-settled official disputes, the research team used the following methods: 1. For visualization two particular cases and incurred costs were discussed; 2. Information, provided by other sources: Transparency International Georgia and Georgian Young Lawyers' Association.

1. Costs related to particular cases

Decision of the Supreme Court, as of February 20, 2018, on the case #AR-1502-1422-2017 – in the mentioned case the Head of Monitoring Service of Tbilisi State University was dismissed from work. After five years, by the decision of the Court, this person was reinstated in a job, but was dismissed again in two weeks. The employee appealed the dismissal and on February 20, 2018 obtained a Court decision that entitled him to compensation for the time he was unable to work.

Costs: In case of the first dismissal, the imposed idle time from August 25, 2010 till January 27, 2015, constituted 1760 Gel monthly, in total 53 months, accordingly – 93 280 Gel.

After the second dismissal the imposed idle time from September 17, 2015 till the execution of the decision, constituted 1600 Gel monthly. The time the mentioned decision was affected is not known, but before obtaining the Court decision, after calculation of costs, the amount of compensation constitutes 29 months, accordingly – 46 400 Gel.

Totally, the minimum imposed compensation for the employee is 139 680 Gel.

Case Nar-682-636-2017 of the Supreme Court, dated September 15, 2017,
This is the case of the second respondent studied by the researchers (see part VI, 2.2)

The public institution had to reimburse the second respondent 1500 Gel for the forced idle time from March 11, 2014 till his reinstatement of employment. The decision entered into force, but has not been finished yet, accordingly, it is impossible to determine the final amount of compensation. As of today (June of 2018) this amount constitutes about 76 000 Gel.

2. Information obtained from other sources on financial expenditures

The research team also summarized the information provided by the Georgian Young Lawyers Association and Transparency International Georgia to generalize the financial expenditures generated as a result of unlawful dismissal of the employee by the public agencies.

1. Young Lawyers Association of Georgia - two reports:

²³ GYLA research “Court disputes on dismissal from work carried out by public servants against the ministries and self-governing cities”. (2012-2017) “

²⁴ Decision of the Supreme Court, as of March 28, 2017, on the case #BR-802-794(J-16)

²⁵ Pages 3, 6 and 8 of the research.

2. GYLA - Monitoring report (from December 2016 to January 2017).²⁶

The data provided in the report covers the information submitted by 6 ministries on the amount paid as compensation to public officials dismissed based on restructuring. According to the report, the total amount of compensation paid to public servants dismissed based on restructuring constitutes 5 398 734 GEL. After taking into account the number of dismissed civil servants, the Ministry of Defence issued the most compensation.²⁷

GYLA's other survey²⁸ had data provided by ministries and self-governing cities to GYLA in regards to the amount of money they gave out on the basis of the decisions made in 2012-2017.

According to the research, in the mentioned period, the ministries compensated the idle time of 27 public servants, in total 373 038 Gel.

The amount paid for idle time to the public servants by self-governing cities in the same period compiles 258 865 Gel.²⁹

Transparency International Georgia provided the information on the compensation granted in favour of employees in 2017 by the state, which is 568 650 Gel. According to their information, the amount of compensation is much higher compared to the previous years as a result of the decision of the Constitutional Court, according to which a restriction on issuing more than 3 months compensation has been deemed as unconstitutional.³⁰

²⁶GYLA's report for 2017 "Evaluation of budget resources reduction and restructuring process in Public Institutions"

²⁷ GYLA's report for 2017 "Evaluation of budget resources reduction and restructuring process in Public Institutions"

²⁸ GYLA's study of 2017 "Court disputes against the Ministries and Self-Governing Cities on dismissal from work by public servants (2012-2017)"

²⁹ GYLA's study of 2017 "Court disputes against the Ministries and Self-Governing Cities on dismissal from work by public servants (2012-2017)"

³⁰ Decision #2/3/630, as of July 31, 2015, of the Constitutional Court of Georgia

V. Statistics

The research team drew statistical information from several sources in order to present the picture perfectly: initially, the team requested information from the Courts. Statistical information obtained from the Tbilisi City Court deserves special attention, since it gives the clearest picture of official disputes and the results of their completion at this stage. 2. The team also asked the public agencies interviewed to provide statistical information on the disputes they have participated in. Only 5 institutions provided such information. 3. Finally, for the purpose of filling out the picture, the team used the information provided by NGOs: Georgian Young Lawyers' Association and Transparency International Georgia.

1. Statistical information withdrawn from Courts

Tbilisi City Court

Labour disputes carried out in Administrative Cases Panel of Tbilisi City Court in 2013-2017³¹

	2013	2014	2015	2016	2017
Filed lawsuits	537	431	282	291	474
Refused for acceptance	10	8	2	10	10
Considered with decision	341	318	173	163	302
Approved	289 (84,7%)	244 (76,7%)	141 (81,5%)	125 (76,6%)	202 (66,8%)
Discontinued	50	24	21	20	36
Unconsidered	17	25	22	27	32

Among them, labour disputes carried out in Administrative Cases Panel of Tbilisi City Court in 2013-2017 regarding the reinstatement in employment³²

	2013	2014	2015	2016	2017
Filed lawsuits	79	95	83	86	82
Refused for acceptance	5	1	0	1	2

³¹ Source: Statistical information placed on the website of Tbilisi City Court. See the website: <http://www.tcc.gov.ge/index.php?m=534&newsid=178>

³²Source: Statistical information placed on the website of Tbilisi City Court. See the website: <http://www.tcc.gov.ge/index.php?m=534&newsid=178>

With decision making considered	26	44	40	57	64
Approved	5 (19,2%)	18 (40,9%)	28 (70%)	41 (71,9%)	35 (54,6%)
Discontinued	28	4	8	9	9
Unconsidered	24	9	4	7	4

Tbilisi and Kutaisi Court of Appeal

The Tbilisi and Kutaisi Court of Appeals have provided us with information only about the number of redress / denial of appeals and the cases considered. As for the information on how many cases ended in favour of a private person or administrative body, they informed us that they do not process the statistics of this nature.

Administrative Cases Chamber of Tbilisi Court of Appeal

Year	Number of cases completed (On disputes arising from labour relations)	Redressed (On disputes arising from labour relations)	Rejected (On disputes arising from labour relations)
2013	117	25	92
2014	147	25	122
2015	93	35	58
2016	128	35	93
2017	145	37	108

Administrative Cases Chamber of Kutaisi Court of Appeal

	Appeal								Private complaint			
	Total considered	Including Decision							Total considered	Including		
		Left unconsidered	Left unchanged	Cancelled	Returned to the Court for a re-examination	Terminated	Ended with an agreement	A new decision has been made		Left unconsidered	Redressed	Rejected
2013	41		26	15		3	5	7	5		2	3
2014	24	1	15	8		1		7	1			1
2015	37	2	21	14		1	1	12	3	1	1	1
2016	27	1	9	17		1		16	1			1
2017	18	2	4	12		1		11	3		2	1

Civil Cases Chamber of Kutaisi Court of Appeal

	Appeal		Private complaint	
		Including decision		Including

		Left unconsidered	Left unchanged	Cancelled	Returned to the Court for a re-examination	Terminated	Ended with an agreement	A new decision has been made		Left unconsidered	Redressed	Rejected
2013												
Including labour relations:	29	10	10	9	1		1	7	4		1	3
On reinstatement in a job	8	1	3	4				4	2		1	1
2014												
Including labour relations:	60	13	24	23		1		22	3		2	1
On reinstatement in a job	25	9	6	10				10	1		1	
2015												
Including labour relations:	62	7	35	20	2		4	14	4			4
On reinstatement in a job	24	2	12	10	1		2	7	1			1
2016												
Including labour relations:	64	7	33	24	2	1	1	20	10	3	1	6
On reinstatement in a job	20		13	7				7	4	2		2
9 months of 2017												
Including labour relations:	37	3	32	12			4	8	3		1	2
On reinstatement in a job	11	1	5	5			3	2	2		1	1

Supreme Court of Georgia

Disputes due to labour relations considered on the basis of cassation complaint by the Administrative chamber of Supreme Court of Georgia in 2013-2017.³³

³³ Statistical information is based on the letter of the Supreme Court of Georgia #67-j, 20.04.2018

Consideration result	2013	2014	2015	2016	2017
Inadmissible	49	78	96	79	129
Left inconsiderable	3	3	1	3	2
Left unchanged	1	3	4	3	
Ended with an agreement	1				
Terminated	2	1			
Cancelled and returned for a re-examination	4	5	5	8	2
cancelled and a new decision has been made		7	7	9	8
Total considered	60	97	113	102	141
Among them the case was decided:					
in favour of the administrative body	18	51	44	30	36
in favour of private person	41 (68,3%)	46 (44,62%)	69 (61%)	72 (70,5%)	105 (74,4%)
Ended with an agreement	1				

2. Statistical information provided by public institutions

Before comparing and analyzing statistical information regarding the number of disputes, it is important to highlight the number of people employed in the interviewed institutions. According to the information provided by the LEPL Civil Service Bureau, as of 2017, the number of employees employed in the central office of these institutions is as following:

Ministry of Justice - 213

Ministry of Economy and Sustainable Development- 251

Ministry of Finance- 299

Ministry of Defence - 608

Ministry of Regional Development and Infrastructure - 151

The Parliament of Georgia - 710

Public Registry - 922

Tbilisi City Hall - 788

Information requested from the public institutions were about the number of disputes in the relevant department during the last 5 years (2013-2017), as well information on which party won these disputes. Below is the information provided by the public institutions:

Ministry of Finance: 1 labour dispute is registered in the in the central apparatus of the Ministry.³⁴

Ministry of Justice: In 2013-2018, the Ministry did not have any disputes with the staff due to the Law on Civil service and / or Labour Code,³⁵.

Ministry of Regional Development and Infrastructure: 8 labour disputes during the last five years, out which the Ministry was engaged as a third party in 2 cases. In particular: 1 dispute in 2013 that ended in favour of a private person; In 2016, 2 disputes, one of which ended in favour of the Ministry (third party) and one is ongoing (third party); In 2017 - 5 disputes, out of which 4 are ongoing and 1 ended in favour of the Ministry. Currently they have 5 labour disputes.³⁶

Parliament of Georgia: From 2013-2017 there were 9 labour disputes.

In 2013 - 2 disputes – one ended in favour of a private person and the other in favour of parliament; In 2014 - 1 dispute, which was partially redressed in favour of a private person; In 2015 - 2 disputes, one of which was partially redressed in favour of a private person; In 2016 - 2 disputes, which were partially redressed in favour of a private person; In 2017 - 2 disputes, which were partially redressed in favour of a private person. Currently, there are 2 disputes in Court, 1 that concerns the disciplinary penalty and the second that concerns the remuneration of wage arrears.³⁷

Tbilisi City hall: In 2013-2018 the Tbilisi City Hall had 53 labour disputes.

In 2013 - 1; in 2014 - 6; in 2015 - 22; in 2016 - 13; in 2017 - 5; in 2018 - 6. Currently there are 18 disputes; 14 ended in favour of administrative body and 21 in favour of a private person.

The research team noted that this information applies only to the disputes in the central apparatus of the institutions and does not include LEPL's subordinated to the relevant agencies.

3. Statistical information obtained from the non-governmental organizations

Public Defender

The present table of statistics from the Public Defender reflects the information provided by the office concerning the number of applications and recommendations issued regarding the alleged violation of labour rights in the Public Defender's Office during 2013-2017.

Year	Number of filed applications	Number of recommendations issued	Private institution	Public institution
2013	62	4	0	4
2014	41	21	1	20
2015	45	3	0	3
2016	51	6	1	5
2017	75	10	1	9

³⁴ Letter N08-04/65383 of the Ministry of Finance, as of May 22, 2018.

³⁵ Letter N3913 of the Ministry of Justice, as of May 30, 2018.

³⁶ Information provided by the Ministry of Regional Development and Infrastructure of Georgia through e-mail.

³⁷ Information provided by the Parliament of Georgia through e-mail.

The following table provides information on recommendations issued by the Public Defender's Office to public institutions:

The subject of the recommendation	Number of recommendations
Illegal dismissal from work	22
Lawfulness of disciplinary proceedings	5
Regarding the legality of the competition	3
Restriction of labour rights, including maternity leave restrictions	2
Sexual harassment	1
Violation of the rule of compensation when released	1
Remuneration	1
Problem related to enforcement	1
Other recommendations: (Parliament - Regarding the amendments to the law, Prosecutor's Office - regarding the possible criminal case against a citizen, Prime Minister - on the elimination of uneven treatment against former employees of the factory, Ministry of Internal Affairs – due to the actions taken against the former patrol inspector, parliament – about “Law on Labour Safety and projects of accompanying changes)	5

Young Lawyers' Association of Georgia³⁸

According to the GYLA's 2017 survey, conducted with public information provided by ministries and self-governing cities, in 2012-2017 civil servants had filed 382 lawsuits against ministries and self-governing cities (Ministries - 321, self-governing cities - 61), from which 368 lawsuits were submitted by public servants and 14 – by the persons employed by the labour agreement.

The public servants appealed against the ministries and self-governing cities in Court, here are grounds they appealed their dismissal from work on:

- a) Imposing disciplinary liability - 108;
- b) Restructuring- 97
- c) Attestation results - 15;
- d) Personal application - 14
- e) Expiration of term of temporarily in charge - 8
- f) The Court's judgment of conviction-2;
- g) Expiration of trial period - 1

During the research period, the proceedings of 153 cases were completed and the Court decisions legally entered into force, from which the Court fully or partially satisfied 83 lawsuits; rejected – 61 lawsuits; the case was settled in 4 cases; proceeding was terminated in 40 cases; due to withdrawal of the claim by the plaintiff, and 19 cases were not discussed.

During the research period, according to the Court decision, the relevant agency (both the Ministry and the self-governing city unit) was ordered to reinstate in job 50 civil servants, from which 35 were reinstated and four, due to lack of position, were not reinstated; one refused to be reinstated.

³⁸ GYLA's study of 2017 “Court disputes against ministries and self-governing cities by public servants on dismissal from work (2012-2017)

The Court ordered public agencies to investigate an additional 32 cases and to release a new act, but the public agencies did not restore the dismissed civil servants. These decisions on 13 cases were appealed again and the Court ordered (direct rule) the self-governing cities (Tbilisi and Poti) to reinstate these public servants.

According to the information provided, the Court decisions in all three instances were appealed by the public institution on 95 cases, by the civil servant – on 70 cases, and by both parties on -19 cases.

The duration of the hearing in the first instance takes only 7 to 9 months, and in all three instances the case proceedings take about 1 to 3 years.

Transparency International Georgia

In 2014-2017, Transparency International Georgia has conducted 315 "labour disputes" against public agencies. 167 cases were won. Some of the cases are still ongoing.

VI. Stakeholders perspectives

For the purposes of the study, the interviews with the stakeholders were carried out to review the perspectives in all demotions.

The interviews were conducted in public institutions, selected together with the Civil Service Bureau, while taking into account the principle to cover both legislative and executive authorities, as well as local governance and at least one legal entity of public law. As a result, interviews were conducted in the following institutions: Tbilisi City Hall, Ministry of Justice, Ministry of Finance, Ministry of Economy, Ministry of Regional Development, Ministry of Defence, Parliament of Georgia, LEPL "National Agency of Public Registry". In addition, the respondent was also the Civil Service Bureau itself.

On the other hand, interviews were conducted with two former employees who were dismissed from civil service, and successfully won their respective cases.

Finally, the research team talked to the experts: one academist and one representative of the judiciary system.

This part of the survey reflects the perspectives of the relevant stakeholders.

1. Public institutions

Within the study, the research team talked to the heads of legal, human resources and audit departments of the selected public institutions, as well as the employees of different sectors.

The questionnaires were focused on obtaining four main types of information. Consequently, the answers were grouped as follows:

- I. Issues / relationships, which aspects within the official relationship are mainly the subjects (or become the subjects) of disputes;
- ii. What is the impact of the dispute / conflict on the relevant institution?
- iii. Mechanism (s) for reviewing existing complaints / disputes;
- iv. Considerations related to the need, and form, of intervention from the third neutral person;

v. Possible challenges / barriers to the introduction of effective prevention / management / solution of disputes through the third neutral person.

1.1 Issues / relationships that basically become (or possibly become) the subject of disputes

Based on the relevant specifications, various types of issues / relationships that become (or possibly become) the subject of disputes were indicated in different institutions. For instance: disputes related to old wage arrears (individual, as well as collective), determination/ consideration of length of service, dissatisfaction among employees due to the rounding the salary (when as a result of rounding the salary, some employees got much higher salaries than those whose salaries were much closer to rounded figure, which was due to legislative amendments), sexual harassment, and so on.

Basically, the following issues were identified as the source of disputes:

1.1.1. Contest

The disputes related to the contest process often concerns the issue of how the interview was conducted and on which basis the candidate was rejected. Introduction of new practice was mentioned in some institutions. Namely, the video recording of the contest interviews is carried out, because in case of an appeal they have evidence of the selection process.

The Civil Service Bureau mentioned that the “monitoring” begins, in the frames of which the representatives of the bureau will attend the interviews in several pre-selected public institutions. As a result, they reveal existing practices and deficiencies in it. Recommendations will be developed and outlined in the report of the Bureau.

1.1.2 Restructuring

Employers' dismissal as a result of restructuring /optimization is one of the most common grounds, appealed the most frequently at the Court, by the employees. In most cases, it was noted that the heads of the institutions, as well as the heads / staff of the Human Resources Department, are involved in the restructuring/optimization process. In a separate case it was noted that the Human Resources Department is involved in determining which criteria should be assessed and by which assessment criteria the employee should remain and by which the employee should be dismissed from the job. Although, there is no formal restructuring procedure set out. It was mentioned that in case of restructuring, a new system would help the institution to determine which employee should be dismissed and which not. It was also noted that the existence of clear criteria and the mandatory engagement of the Human Resources Department would be good.

One agency noted that, before the dismissal of a person from job on the basis of restructuring, they address the Civil Service Bureau, which operates the entire base of human resources (and vacancies) in order to check if there is a vacant position in another agency, where the employee to be dismissed due to restructuring could be transferred.

1.1.3 Disciplinary violations

Regarding disciplinary violations, it was revealed that in the institutions that serve the citizens, the source of the complaint mainly is citizens / external persons; in such cases, complaints are mostly related to violations of service terms or unethical behaviour by employers. In case of addressing a head, manager or other employee, the subject of disciplinary proceedings is delay or other violations of labour discipline. It was noted that in such cases, relatively slight disciplinary measure are used, such as reprimand the employee. However, there were other cases when the employee was dismissed.

For instance: The employee did not control the deadline for the provision of certain assistance to a citizen. Nevertheless, the employee issued 300 GEL to the citizen (which, as an interviewer noted, should not

have been issued due to expiration). This employee was dismissed from the relevant institution and his supervisor was reprimanded. The dismissed person appealed to the Court. The Court cancelled the order on dismissal and found that a person, who made a decision on release, should not dismiss the employee directly on the basis of conclusion of the relevant audit service. He/she should have considered whether the release was a proportionate measure of the violation or used other disciplinary measures.

1.1.4 Annual assessment of employees

The new annual assessment system of employees has been identified as a source of discontent and disputes in a number of interviews. In several institutions it was mentioned that managers plan or have already conducted an interim assessment, and in some cases ask the employees to draw up self-assessment themselves. The purpose of self-assessment is to allow employees to give feedback as much as possible before the annual assessment, and that the expectations to be clear from both sides. It was noted that the Civil Service Bureau has developed a guideline that is available on the Bureau's website regarding the implementation of the new system of assessment. Nevertheless, the new assessment system was largely named as a potential source of disputes, and it was noted that the clarity of assessment criteria and correct communication by appraisers (managers) would be important in this process.

It was mentioned that the results of annual assessments will be sent to the Civil Service Bureau, which will analyse and issue the recommendations.

1.2 What is the impact of the dispute / conflict on the relevant institution?

Generally, the public institutions' view is that the tendency of the Court has changed significantly over the last few years and, unlike most of the earlier decisions, when an employee's appeal was satisfied as an exception, now around 80% of lawsuits are satisfied. In the public agency it was mentioned that the Court's approach towards these issues is often not foreseeable. Also, one agency mentioned, that the immediate execution of decisions is frequent, while decisions of Courts of other instances is no longer required.

The following factors were named for their impact on disputes / conflicts:

- ✓ The risk of loss of the dispute and the negative impact on the public agency's reputation due to the loss;
- ✓ Negative impact of dispute / conflicts on the employee's motivation to work and generally on the working environment in the institution;
- ✓ The existence of disputes leading to new disputes ("the more disputes you have the more employees complain");
- ✓ Spending of relevant human resources, employees of the public institutions;
- ✓ The costs to the institution (transportation) when its representatives have to travel long distances to get to the Court;
- ✓ In case of loss - material damage, which increases according to the duration of the dispute ("the more the dispute lasts, the more of idle time you have to pay", "You have to pay for the idle time, in parallel to which, you pay salary to a new employee employed on a dismissed person's position");
- ✓ The difficulty of executing the Court's decision in case of loss ("if the Court entrusts your reinstatement, which is impossible, due to the fact that the other person is already employed").

1.3 Reviewing mechanism (s) for existing complaints / disputes

1.3.1 Informal internal mechanism

The existence of an internal informal mechanism was identified in two institutions, out of interviewed, in which Human Resources Office has a leading role. In both cases, the active role of these offices was due to the initiative of specific people and, as noted, a high level of confidence in them.

In one case it was mentioned that the Human Resources Office tried to use several ways in order to reveal a problem: posting anonymous box, interviewing via basket, sending a common message and creation of a Facebook page where the staff shared their views on the problems. With the initiative of the same service, permanent feedback mechanisms, self-assessment / assessment models were introduced; trainings, workshops, presentations were held in communication directions; a psychologist was employed as well, who had worked in the state of the relevant institution for several years.

In the both institutions it was mentioned that the Human Recourses Office is the place, where the employees go in case of a problem and speak to the relevant manager about the problems they face. In some cases, an informal involvement of the audit service in dispute between the manager and the subordinate was noted as well.

This informal internal system is available only to employees of public institution (central apparatus); however, despite the need, LEPLs and LLCs, which are in the subordination of the agency, do not have such system.

One of these two institutions noted that, beyond/in spite of the personal initiative; an internal system that will provide and encourage prevention of disputes and its effective solution does not exist. In particular, when the details of the dispute prevention / effective solution are not defined, efficient and reliable mechanisms for dispute settlement don't exist as well; therefore, adherence to the relevant agreement is not guaranteed. For example: when a fired employee who did not agree with his dismissal was aided in finding another position in another institution thanks to a recommendation, and the involvement, by the HR manager of the institution he was dismissed from. Despite this, the employee appealed his dismissal from the previous institution. The recommendation, issued for employment of this person in other institution was not (and could not be, in accordance with the legislation in force) a formal subject for rejecting to the appeal of the order for dismissal. Consequently, due to the lack of regulation, great effort of the human resources of the institution turned out very damaging to the institution. The legislative regulation of such mechanisms would encourage the avoidance of disputes and / or their effective early settlement.

1.3.2 Disciplinary proceedings

In every institution there is a body carrying out disciplinary proceedings envisaged by the Law (in the form of internal audit or independent commission / council). The aforementioned body reveals and studies the infringements. Unlike the law applicable until 2017, the existing law envisages the necessity of oral hearings, if the expected disciplinary action is a dismissal of a person from work, which has been positively assessed. The two agencies noted that the study of the reasons for disciplinary violations were not the functions of this service; only the fact of violation is determined.

The conclusion of the Disciplinary Proceedings Body also includes recommendations on disciplinary actions. In all cases the decision on disciplinary measures is made by the head of the relevant agency.

Human resources services do not participate in any stage of disciplinary proceedings at any institution. The only case, when the Human Resource Manager was chosen as a member of the disciplinary

commission by the decision of the head of the agency, was deemed as a negative experience because this fact had a negative impact and led to loss of confidence of employees.

The role of HR is limited to providing necessary information to the disciplinary authority about the employee. It was mentioned, that the Human Resources Service participates in the process only after receiving the conclusion made by the disciplinary body, when the head of the office shall have to issue a decree on disciplinary measures based on the conclusion. In a separate case, the Human Resources Service would discuss a possible measure with the head of the department and prepare the relevant draft order. In some cases, after the conclusion, the HR Manager and / or direct supervisor, before delivering the written communication, holds an interview with the employee.

When preparing recommendations on the disciplinary measure, the following criteria were mentioned: the type and amount of damage, the severity of violation; and the previous violation may also be taken into consideration. In one agency it was noted that in the case of a minor infraction, the employee of the audit office warns the employee via mail and if there is no response to this informal warning, then disciplinary proceeding begins. An American example was mentioned as well, where the ethical warning practice is established in the military service. In case of violation, ethical warning is issued at first that is not included in the personal case. In two agencies it was mentioned that the dismissal from work should be an extreme measure.

The disciplinary conclusion process is confidential. In one case, it was noted that when making a decision, the manager takes into account a disciplinary measure, which is offered by an independent commission. The audit, together with the conclusion, prepares a recommendation. The new law has unanimously regulated this issue - writes the audit of the City Hall.

In addition, the law has unambiguously separated the functions. In particular, the person who writes the conclusion and issues a recommendation cannot impose the sanction. Accordingly, in the Ministry of Justice it was said that one agency cannot issue a recommendation and also impose sanction: "If I conduct an investigation, I should not impose sanction."

1.3.3 Other internal formal mechanisms for complaints review

In one agency there is a Council for improving conscientiousness, which, as it was noted, examines disputes between the colleagues and of the ethics violations in the cases and makes the decision on imposing a disciplinary penalty.

One agency has gender advisers, whom they address in case of gender discrimination. At present, the work on a mechanism of appealing gender discrimination cases is underway.

As a rule, appeal contest results take place on two levels. Results of the first stage of competition in public institutions are appealed to the Civil Service Bureau (examination of compliance of documents with the contest preconditions / requirements submitted by applicant). In this case, the Bureau specifies why the applicant's statement was rejected with the relevant department. If necessary, the bureau re-examines the application submitted by the applicant and returns it to the commission in order to consider the application. On the other hand, there is also an internal commission for appealing the results of the competition, which discusses the complaints related to the results of the second stage (interview).

1.3.4 Bargain

In all institutions it was mentioned, that bargains are made only in an exceptional case, i.e. when the "action is lost in 100%". However, it was noted that such cases are rare. A lawyer of one institution said, "the battle is always worth it." At the same time, the lawyer of the other institution noted that they are

assessing disputes and risks and, "if the case allows they try to come to an agreement." However, it was mentioned that sometimes lawyers do not "listen" and in this case they have to go to Court even if the case is loss-making.

In a number of institutions, it was also said, that do a case/risks assessment, although in most cases it is "oral", and no defined assessment criteria exists. In all institutions a decision on possible bargain is made by the head of the agency.

As a rule, legal services compile a generalization of existing Court practice and provide the head of the relevant agency with the information on the development of Court practice.

Heads of legal services, as well as the audit service and human resources, noted that it is desirable to have a unique written form of risk evaluation and analysis, which, in the event of each dispute, will make clear the prospect of the dispute and possible risks. This will help the agency to make a reasonable decision on the expediency of the dispute, correctness of the bargain, and formation of its specific conditions.

1.4 Considerations related to the need and form of the third neutral party's intervention

1.4.1 Issues / disputes categories

On the question of what issues / disputes need the intervention of the third neutral person to resolve the dispute, the following answers were identified:

Appropriate for the following issues: violation of ethics rules, issues under subordination to the head (assignment and execution, load, etc.), "life issues" (unlawful issues), disciplinary violations, dismissal from work (whether restructuring or disciplinary grounds), sexual harassment (from one interviewer only). One agency noted that it is especially important to have a possibility to settle a dispute without going to Court, i.e. when the employee stays in public institution: "If you leave the agency, the Court is acceptable; if you stay - there should be an alternative mechanism."

Inappropriate for the following issues: sexual harassment, dismissal from work.

1.4.2 Identity / form of the third neutral person

There are several different opinions on this issue.

On the one hand, it is desirable that the third neutral person to be an outsider, because if he/she is employee/ part of the internal system, his/her neutrality and impartiality will always be doubtful. It was noted that from the impartiality point of view it is especially important what the source of financial income of this person is and to whom they are subordinated. Also, in the case of an outside mechanism, additional requirements for confidentiality must exist.

On the other hand, it was noted that due to various reasons (confidentiality, informality, etc.) it is advisable to have internal mechanisms for disputes settlement. Taking into consideration such functions, and considering appropriate retraining, this role can be combined by HR service. It was also said; that exhaustion of internal resources is important, because taking out "behind the scene dealings" is not easy. In addition, in the case of the existing mechanism within the institution, it would be important to ensure confidentiality of information on using such medium (e.g. Viber); i.e. visiting the mediator / neutral person within the agency should not be inconvenient.

Expediency of internal and external mechanism was outlined in some agencies. It was mentioned, that the existence of internal mechanisms will be more appropriate at the initial and early stage of disagreement and if it does not work, then the external mechanism will be used. The expediency of the internal or

external mechanism may depend on the essence of disputable issue. It was also suggested that an employee may be given an opportunity to address an internal or external neutral person.

It was noted, that the third neutral person may be an employee of another public agency (for example an HR officer of another) who is not subordinate to the head of the agency where the dispute arose. There was a contradictory opinion, in particular, as it was also viewed that interference of employees of one agency in the disputes / cases of the other agency is not advisable.

The Civil Service Bureau has also been named as an institution that can provide involvement of a third neutral person. On the other hand, it was noted that the Civil Service Bureau may not have the appropriate resource and it may not be the appropriate institution for this role, since the bureau may be deemed as a "Party" interested in the outcome of the dispute that can affect the perception of neutrality and confidence in this process.

The Public defender, as well as council consisting representatives of academic circles and non-governmental organizations was named as well (where representatives of public agencies may be included) ... One agency noted that such council shall be authorized to make decisions or give recommendations and, for its legitimacy, may be established under the Civil Service Bureau. It was mentioned, that the quota of lawyers could be established in the Council (that unlawful deals have no place), and rule of staffing may be established by law.

In two agencies, middle-level managers gave the idea of the creation of professional unions and handing this function to them.

The following opinions / necessities were mentioned and identified: employees avoid formalizing the process, as it creates an inconvenience. They prefer talking and personal communication. In general, it is better to be focused on prevention rather than on revealing of and punishment for misconduct. In this regard, the role of the manager is particularly important. The manager is well positioned to resolve small disagreements between the employees or with the employee. It is desirable that he/she have the appropriate skills. "The role of the manager is to establish a dialogue, and maintain clear communication while assigning a task and feedback towards the staff." The communication of a manager with their subordinates in the process of introduction of evaluation system will be very important. Also, improvement of managers' skills will be essential to prevent disputes and disagreements. It was also noted that the role of the manager is to be activated in the context of coming late and disciplinary violations, because all these issues should not be discussed by audit (executive body of disciplinary proceeding). "This mechanism of management should be built into daily administrative activities."

In any case, in all departments the following requirements regarding the third neutral person / intervention mechanism was named: trust (impartiality and independence), qualification, speed (efficiency) and confidentiality (only one agency noted that the public agency does not have interest in confidentiality because publicity of information is more important to him).

1.4.3 The time / phase of the third neutral party interference

It was mentioned that the interference of the third neutral person will have more value at the earliest stage, before the conclusion of the disciplinary proceeding body and/or the decision on the dismissal of the employee is presented. In this case, the human factors and the various circumstances will be revealed at an early stage, which may be important in the context of dispute. In some cases respondents made a positive example of the Revenue Service practice, which, before issuing a fine act, carries out mediation.³⁹

In almost all institutions it was mentioned that after imposing a disciplinary measure it would be difficult to make a deal, due to the fact that the decision is already made by the head of the institution, which means that the head of the institution is certain about his decision. As it was mentioned in one institution “if there is a disciplinary violation, the agreement cannot be made – the law obliges us to take measures”.

Where the issuance of the recommendation by Civil Service Bureau was discussed as planning the restructuring process, as well as analyses/assessment of risks of disputes, it was indicated that this function shall be implemented at early stage: in case of the restructuring – at the planning stage, while preferably in case of dispute, the Civil Service Bureau issues the recommendation prior to the issuance of respective administrative act.

1.4.4 Mechanism of involvement/ addressing

In one institution it was mentioned that addressing the third neutral person (before the Court) must be mandatory, however, in the majority of cases, it was noted that it should be voluntary. It was voiced that it is desirable to indicate such a mechanism of dispute settlement in the agreement and/or this procedure to be determined by law and regulations.

1.4.5 The advantage of the third neutral person’s interference

The following circumstances were named as advantages of the introduction of such a system: settlement of the dispute in the short term, availability of alternatives for dispute settlement, avoidance of financial risks, saving human resources, healthy working environment, confidentiality, less complaints, and a more positive reputation of a public agency. Also, after passing the procedure, in case of disagreement, the dispute will undergo one additional pass and the legitimacy and perceptions of the dispute will be better analysed.

In one agency it was mentioned, that official disputes in this department are so rare that they do not see the need for such a mechanism

1.5 Possible challenges / barriers when introducing the system of effective prevention / management / solving of disputes via a third neutral person

Several obstacles were mentioned in public agencies that could hinder the possibility of solving disputes in a consensual way and at the earliest stage. Hence, the following was mentioned:

- Bargaining is a big responsibility. If this issue is not resolved and if there is no recommendation of the Civil Service Bureau, it will be difficult to make decisions about the bargain. Criteria for case assessment should be determined, i.e. how profitable / justified is to go to the Court (in this regard reputation and costs are significant criteria). It was mentioned, that Risk assessment can be done by the legal department and submit to the board of directors of the relevant agency (Where the heads and deputies of departments are involved). Decision on the expediency of the bargaining should be made collegially or by the head of the agency. This can be the subject of

³⁹ More information regarding the practice in the Revenue Service see <http://www.rs.ge/4821> and Order #31275 of February 8, 2013 of the head of revenue service.

audit examination (how correctly the lawyer has assessed the risks). However, the risk assessment may not be sufficient argument / justification for the external audit service. "Why did not you go to Court if asked - what shall happen then?" It is desirable to change the methodology of external audit at the legislative level. It was mentioned, that The Civil Service Bureau may have a valuable role in this regard. The Bureau may help the agency in terms of risk assessment, give it a recommendation and share generalized practice.

- The framework of the agreement is very limited. In the process of bargaining negotiations cannot be flexible, because agreement on reinstatement cannot take place. Often the agency has already employed another person. The person cannot be hired to another position, because this should be done according to the contest rule. "It is desirable if the system itself, subordinate LEPLs, LTDs and NAPRs have possible alternatives". Also, "It would be easier, if it is permissible to accept without competition in such exceptional cases "; "Besides the fact that the administrative body controls the legitimacy of the bargain, the Court controls that as well and does not approve everything."
- The terms of disciplinary proceedings are determined. If the possibility of negotiation / involvement of third neutral party is used in disciplinary proceedings, then the terms should be extended or termination of the term flow should be established;
- The awareness of the society / employee about the possibility and advantages of settling the dispute via bargaining. Accordingly, they should be informed;
- The involvement of a third neutral party may be a waste of time. Mediation should not cause paralysation of processes. There should be a short procedure in time;
- If the third party is an outsider this may be related to additional expenses; If the mechanism is internal - problem of neutrality may arise.

2. Former employees who have been dismissed from the civil service and who have succeeded in disputes in Court

2.1 Respondent 1

The first respondent is the person who was employed under labour contract in the public service. His official inspection was started about one year after his employment, and about five months after launching the inspection, his labour contract was terminated.

For the purposes of the research, in this section, attention will be paid to the process of the dispute and not its essence. As for essence, it should be mentioned, that there is a decision from Court of Appeals on the above-mentioned case. The respondent's request was satisfied and the order on his dismissal from work was annulled. The public agency, where the respondent was employed, was imposed to compensate 55 000 Gel for idle time. Cassation proceedings are underway regarding this case.

In terms of time, the main dates are:

Conclusion of the disciplinary proceeding body	25 April, 2014
Dismissal of the respondent	02 June, 2014
The first instance decision	28 October, 2016
Appeals Court decision	25 January, 2018

In terms of the process, attention was paid to the respondent's point of view on disciplinary proceedings, attempts to bargain during the process, and the mood of the respondent, as well as, in case of availability, whether he had a chance of solving the dispute in consensual way from the current point of view.

As for the disciplinary proceeding, the respondent mainly had two comments: the first is that he gave evidence in such condition and manner that does not ensure adequacy of the investigation and a fair opportunity for the employee (against which the investigation is being carried out) to protect his/her interests. In particular, the respondent pointed out that the office that was carrying out the inquiry, called him unexpectedly and he even did not know the reason. He was given 30 minutes to appear to the relevant body for testimony and was not allowed to see the documents. In the respondent's opinion, when employee is asked about the acts/events carried out that took place months ago, he/she is not given an opportunity to recover fully the facts, prepare them and give full testimony. The second concern refers to the term of imposing a disciplinary penalty: he was imposed liability after the expiry of the one-month period established by law (internal regulation)

As for the bargain the following was mentioned: in the first instance the Court has offered for the parties to come to an agreement. At this stage the condition for the respondent was that the order on dismissal as a result of disciplinary liability to be voided. In this case he would not require the compensation and reinstatement. The employer rejected the mentioned agreement. At the appellate stage the respondent offered, in writing, the following condition of agreement: annul the order on dismissal on the grounds of disciplinary liability, half of the requested compensation and refusal on reinstatement of employment. The mentioned proposal was rejected and the opposite proposal at this stage was voidance of the order on dismissal from work. The respondent did not agree with this proposal (without the half of the compensation). According to the respondent, the dispute process had a significant (negative) impact on his emotional state during this time, and a lot of energy and resources were spent, and therefore, despite that he won this stage of Appeal Court, he would still have a desire to come to an agreement at the earliest stage and without Court.

2.2 Respondent 2

The second respondent is the person who has been dismissed from the civil service on the basis of restructuring. Along with the respondent, a colleague of his was also released. Both persons (respondent and his colleague) applied to the Court and requested to annul the order of their dismissal, be reinstated in employment and compensated for idle time. At present, there is a Court decision on the respondent's case that came into force and the public institution was mandated to reinstate and pay 1500 Gel for idle time starting from dismissal until reinstatement.

In terms of time, the main dates are:

Dismissal of the respondent	10 January, 2014
The first instance decision	5 April, 2016
Appeal Court's decision	9 March, 2017
Supreme Court's decision	15 September, 2017

The Court in several stages has offered terms of agreement to the parties. In the first instance, the employees' (respondent and his colleague) condition of the agreement was apology / recognition by the institution and compensation for accumulated wages/idle time. In such a case, the demand for their reinstatement in employment would be withdrawn. The institution did not agree with this condition.

After the decision of the Supreme Court (by which the appeal Court's decision remained in force), in the course of the execution of the Court decision, the parties tried to come to an agreement. At this stage the following conditions of the agreement were mentioned by the public agency: compensation of coercive idle time; Refusal to reinstatement and apology/recognition; According to respondent, he and his colleague offered several alternatives (apology/recognition and compensation of idle time, with different combinations, decline the request for reinstatement), but the institution refused the proposed conditions.

At present, the respondent who has won all stages of Court proceedings, noted, that resolution of disputes at an early stage would be the best solution. This would save not only the reputation and financial expenses of the public agency, but also the respondent would not spend time and resources in this process. In spite of the Court's decision that entered into force, the respondent's request is not yet satisfied (the execution of the decision has not been completed due to the impossibility of enforcement).

3. Experts: academist and representative of judiciary system

3.1 Expert 1 Academist

The expert welcomes the introduction of "mediating" elements in public service, which will facilitate the prevention of disputes and help to effectively solve them at an early stage. He notes that it is not necessary to arrange a new institution, to go to great administrative expenses and create new agencies. It is necessary to include functions and instruments in the existing system, which will ensure better communication, prevent disputes and solve them before going to Court.

The expert pointed out that the issue of personal responsibility is not specified in the law. Today the officials do not have a law affording the possibility of making a bargain. Regulation is necessary. We should look into the chapter of administrative proceedings and, "create administrative mediation proceedings"

There should be a control mechanism. Legal services should be responsible for incorrect assessments of disputes and risks, for example, when disputes continue up to the appeal / cassation stage, when the end results are clear.

In his opinion there may be a circle in the executive authority, which, on the one hand, will generalize the Court practice on these issues, and on the other hand, will discuss the legal, reputable and financial side of a specific dispute and give recommendation to the relevant agency that the state's interests include a settlement of the dispute...If the Civil Service Bureau has this function, then the lawyers of the relevant institution will be bolder. This would be an instrument that would give more opportunity to the relevant agency effectively manage and resolve disputes.

In his opinion, there are cases when a third neutral person's involvement will not work. These are cases when the employee is released on the basis of a conscious (political) decision, not on the basis of wrong assessment of the situation by the institution.

The expert sees the possibility and superiority of the involvement of mediation or of a third person not only in labour disputes, but also in the context of other, wider disputes. According to him, the research will be interesting and implementation and evaluation of this system will be important too.

3.2 Expert 2 The judge

According to Maia Vachnadze, the judge of the chamber of administrative cases of the Supreme Court, the issue regarding the compensation of coercive idle time is problematic due to the new edition of law on “Public Service”, when the dismissal act is void; however, the respective state is no longer available. On a judge’s directive, due to the previous edition of the law, with a broad explanation of the Court’s norms, the administrative body was imposed a coercive idle time, which the judge excludes in the case of new edition.

The expert considers that regulation of the law envisaged by the new edition is problematic, according to which, in case of successful completion of disputes, reinstatement in employment of illegally dismissed person is impossible if other person is hired on his or equivalent position. According to the expert, such regulation may encourage public institutions in unlawful decision making on dismissal of persons within the frames of restructuring and disciplinary proceedings.

According to the judge, the negative consequence of the delay in Court disputes is the increase in the amount of coercive idle time due to which the State has to pay wage for a person working in a disputed position, and at the same time compensate the idle time for the person unlawfully dismissed from the work. According to the judge, public interest in this case is affected and this is a large imposture on the state budget.

The expert pointed out that, according to present law, even if the Court establishes that the contest was held illegally, the unlawful winner remains in reserve and has the right to compensation / damages. The judge thinks that the criteria for determining the above mentioned amount of the damage is problematic and obscure, and considers the existence of the reserve merely formal. In his opinion, the person appointed by an illegal act should not remain on the position.

The involvement of mediation is considered to be favourable when the Court returns back the case to the administrative body for further examination of the dispute; as well as in cases of imposing a disciplinary penalty; issues related to gender balance; in cases of discrimination; in the case of employees in reserve to simplify communications. In addition, the judge noted that the use of mediation should not be framed and should be used everywhere where conflicts occur, because in the end all such disagreements will go to the Court. In the opinion of the judge, in the majority of cases, the lack of proper communication between the supervisor and the subordinate causes the conflict.

In the judge’s opinion, in the context of the involvement of the third person, the existence of internal and external mechanisms will be acceptable: use of external mechanism in case of expiration of internal mechanism; involvement of legal and HR services is considered essential in this process. However, existence of political will and appropriate legislative amendments is important.

According to the judge, the number of cases has increased approximately two times over the past five years, due to the fact that the administrative body refrains from exercising the managerial function and is limited to the administrative function. They want the Court to make decision on all issues and do not want to take responsibility for themselves. When the practice on certain issues is established, and the administrative body still appeals the Court's decision, the reason should be clear and investigated. In this regard, mediation will increase the implementation of managerial function and facilitate the taking more responsibility.

VII. Findings and Recommendations

General Analyses of Situation

Currently, the majority of labour disputes are ended with the decision against the public agency, however restoration of the employees' rights is often impossible due to different reasons

In some cases, the person cannot return to his/her position, since someone else is already recruited. In particular cases the rights of individuals cannot be restored due to difficulties associated with their restoration. According to the practice, the Court often finds the decision made by a public agency unlawful and returns the case for re-examination. Normally the public agency does not change the decision in such circumstances.

Such approaches make the process longer and they add additional obstacles. Besides, if a dispute against the public agency is solved, the volume of compensation also increases, which develops additional problem for the agency.

The public agency might get undesirable results due to procedural violations (for example: if circumstances are not studied respectively while making the decision), since as a rule the agencies do not study and/or justify all the circumstances in their decision making process.

Such conditions are not favourable for employees or employers. The employees' rights are restored too late (or not at all), and the agency must undergo extensive processes, by the end of which, very high compensation could have been assigned or/and problems of execution could appear. Both parties have high expenses. Reputational damage is inevitable for public agency, which often is substantial.

Challenges

1. It was identified that the cases of dismissal due to restructuring and/or resigning with their own statement are quite frequent. Dismissing an employee based on the afore-mentioned grounds seems less disputable for employees, however the practice proves that even in such cases the disputes might end detrimentally for the employer. In this respect, it is interesting that often the need for restructuring or staff cuts cannot be justified, people to be dismissed are not selected based on preliminarily defined criteria, and the decision is not justified. Consequently, the majority of disputes are made against the agency.

2. The new edition of the Law on Civil Service regulates the rule and conditions of disciplinary proceedings. According to the regulation, actual conditions shall be studied in detail during the proceedings process and in case the dismissal of a person is viewed as a disciplinary measure, an oral hearing shall be appointed. Besides, the selection conditions to be taken into account when determining disciplinary measures were also defined carefully. Despite this, the interviews demonstrate that in particular cases the disciplinary proceedings have a formal nature and the agencies' approach to this procedure is rather rigid.

Such an approach still does not ensure comprehensive study, since the subject to disciplinary proceedings is not always heard. Consequently, communication with such person is often incomplete and/or too formal.

Besides, the role of disciplinary proceedings causes concerns – according to which, the boss has sole decision-making ability based on the conclusions and recommendations provided as a result of the disciplinary proceedings. Such format gives opportunity for the improper use of discretion, disproportionate sanction and even discrimination (for similar violations some people might be dismissed, while for some slight disciplinary measure, or even no punishment might be used.)

3. Some agencies we talked with already make records/minutes of interviews. Consequently, the tool for proving the grounds for selecting the candidate to be dismissed has been implemented already. However, this part of collecting evidence might remain a challenge for other agencies, where the recording is not done and the process goes on without abiding by principles of transparency. If a violation is detected on the competition level, the Court returns the case, which in fact does not ensure protection of the employee's rights. Besides, in many cases the candidate is assessed only based on the assessors' opinion and no assessment criteria have been developed in advance, which could facilitate impartiality of the assessment.

4. Today, there is no tool in public agencies, which would promote disputes prevention (early detection and study of problematic situation, communication) and also effective resolution of disputes at early stage and in less formal manner. Out of the interviewed public agencies, only two have the opportunity for analysing disputes via the participation of the human resources department, but must rely on the initiative of particular individuals. Even in such cases, there are some structural and legislative barriers, hindering the achievement of more effective agreements. Dispute settlement is an exception normally. In public agencies, no financial, legal and reputation analyses of disputes are conducted based on criteria defined in advance. Where it was said that it is done orally, analyses as a rule are done by a lawyer of the legal office and they are not always taken into consideration by the decision making body. Often, the administrative body makes a decision on the proceeding or continuing case at the Court (appealing the decision), considering that the Court decision is a guarantee and commitments assigned by this decision less likely could become reason for an external audit. In contrast to that, an official's decision on the settlement means acceptance of responsibility.

Recommendations:

a) It is reasonable to implement a system, which could be used to assess dispute risks and define the criteria for a risks assessment, and for ensuring the agency's realistic assessment of expected risks in case of the Court dispute. The criteria could be grouped in three directions: legal, financial, and reputational. Such assessment will enable a public agency to make decision on reasonability of settlement and acceptable conditions for it.

b) It is necessary to use a special tool (internal or external) in disciplinary proceedings before making the decision, as it would help the investigating authority to assess the completeness of investigation and compliance/adequacy of recommendation. Availability of such a procedure will provide additional opportunity for identification of the causes of violation and ways for its prevention; as well as options for remedy and the appropriateness of particular measure.

c) It is reasonable to study carefully, whether restructuring is necessary and justified. Besides, it shall be also identified whether staff reduction as a result of restructuring is essential. What are the alternatives to the dismissal of people? Communication with employees is essential before starting the process. Active engagement of the Civil Service Bureau in this process would aid its efficiency.

In the event of dismissal of persons based on restructuring, it is essential to identify the criteria according to which people will be selected for discharge. These criteria shall be thorough and unified. It would be better if in the process of selecting people for dismissal, a neutral third party participates (possibly Civil Service Bureau), which would ensure the consideration of the selection criteria. Besides the neutral third party can also assess the adequacy of the decision.

d) Current practice regarding competitions is good, as public agencies arrange the consultations with the Civil Service Bureau prior to competition. Such an innovation, meaning the presence of the representatives of Civil Service Bureau, who will observe the interviews in the competition process, is

appreciated. As a result of the afore-mentioned, they should develop recommendations, assessing the transparency of the process and the possible risks and their prevention tools, in case of the disputability of a particular decision.

e) The assessment system envisaged within the frame of the Law on Civil Service is innovative, and its effective implementation shall promote the development of a healthy environment and effective feedback at the workplace. In this regard, proper implementation of the processes in the agencies will be especially important, in order to prevent this innovation from becoming an additional source of conflicts and disagreements. The employees' perception of unequal treatment, partiality, or unfairness might often be caused by ineffective communication. Consequently, in this process the form of the managers' feedback and use of effective communication skills will be crucial. Additional training on effective communication and feedback skills might be reasonable.

f) With the purpose of prevention or management of disputes, it is reasonable to promote development of internal resources available in public agencies. Initially these resources (managers/HR) shall be used and trained/retrained respectively in effective communication, problem solving and other skills. Besides, it is reasonable to define the phases and format of using the afore-mentioned tools. It is recommended to make the format less formal, volunteer based and confidential. Legal grounds mostly are provided by the regulations of the agencies, with the functions considered for human resources departments.

g) The accessibility of the possibility for engagement of a third neutral party (not affiliated with the agency) together with internal tool for dispute prevention and management would be desirable. More discussions on an external tool are possible with the Court mediators and educational institutions, which have a strong profile in regard to alternative resolution of disputes. In case of the engagement of any tool (internal or external), confidence and neutrality/impartiality will be crucial.

h) Declared political will is essential for the introduction/implementation of mentioned tools; besides it being underpinned by respective regulations. There are also some legislative level restrictions, and consequently in order to navigate them it is essential to outline the following:

1. The procedure for prolonging or termination of procedures;
2. In disciplinary proceedings, it is better to be focused on its function and goals, in order to promote the implementation of negotiations and other tools in this format. In this regard, it is desirable to elaborate on respective regulations and outline in procedure availability of such tool;
3. It is reasonable to regulate the issues, which will provide the grounds for settlement and broaden the alternatives.
4. It is essential to regulate the procedure and criteria (financial/legal/reputation risks assessment) for assessment of risks related to the Court disputes by the agency. It is desirable to assess them with internal and external tools (participation of Civil Service Bureau might be efficient). Besides, it is important to outline the procedure for decision-making on proceedings (continuing) or the settlement of cases at the Court (it could be done by collegial body, for example Advisory Board composed of the heads of departments) and justifying the decision on whether the dispute is continuing or being terminated.
5. The procedure for assessment and management of the restructuring shall be outlined with the respective tool.

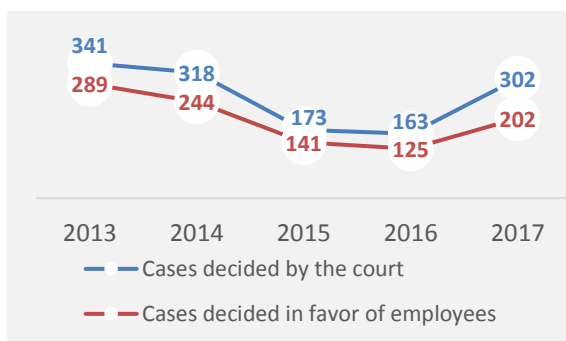


Empowered lives.
Resilient nations.

Study: Management and Effective Resolution of Labor/Employment disputes in the Public Service

The amount of cases decided by court within the last five years demonstrates that employees dismissed from public agencies often apply to the court for protection of their rights and in majority of cases, succeed.

For example, an average of 77% of the cases decided by the Administrative Collegium of the Tbilisi City Court in 2013-2017 ended in favor of the employees.



Multitude of such disputes has following types of negative consequences:

Reputational damage

- Impact on the reputation of state institutions
- Impact on the level of trust of the society

Financial damage

- Substantial burden on State budget – *for example, only in 2012-2017, the amount paid out by the ministries and self-governing cities to public servants for enforced idleness amounted to GEL 631 903.*
- Human/financial resources spend on dispute management – *for example, the average time spent in litigation in all three instances is 1 – 3 years.*

Organizational damage

- Negative impact on the employee motivation and overall working atmosphere in the public institution.
- Overload of the courts – *for example only in 2017, the Administrative Collegium of Tbilisi City Court received 474 new claims related to “employment” relationships.*

Goals of the Study

1. To identify key grounds/reasons for labour/employment disputes in public agencies, and means for their resolution
2. To solicit views of servants employed in public sector on existing needs and on of introduction of new mechanisms for efficient resolution of disputes
3. To develop recommendations for effective prevention and resolution of disputes and efficient protection of employees’ rights.

Main Findings

- Majority of disputes end with the decision against a public agency, nevertheless, restoration of the employees’ rights is often impossible
- The disputes mostly occur in case of dismissal of a person within the frame of restructuring and disciplinary proceedings. The disputes related to lawfulness of the competition are also frequent
- Procedural violations made by public agencies, including the shortcomings of examination of the circumstances of the case and lack of justification of the decision, is often the case
- There is lack of sufficient tools and legal basis in the public service, which would ensure (i) prevention of disputes

(respective examination of problematic situation at early stage, communication) and (ii) promotion of resolution of disputes at early stage with less time and resource

- Settlement is an exception; No financial, legal or reputational analyses of disputes, which would be based on pre-defined criteria, is done that would help the respective public agency make a decision with respect to settlement
- The employees support improvement of the existing procedures and introduction of alternative mechanisms of dispute resolution.

Recommendations

- Dispute perspective and risk assessment system (financial, reputational, organisational) needs to be implemented
- The necessity and justification for restructuring, as well as the necessity of reduction of staff is analysed in detail. Advance communication with employees is essential. The employee dismissal criteria should be identified in advance. Active engagement of Civil Service Bureau in this process should be ensured
- Before the disciplinary body makes a decision, specific mechanisms (internal or external) are used in the course of disciplinary proceedings which would help the investigating authority assess the completeness of investigation and

adequacy of its recommendation. Availability of such procedure will provide opportunity for identification of the causes of violation by the public servant and will increase the chances of improvement of the situation and of appropriateness of the particular disciplinary measure to be used

- Particular groups of employees (managers/HR/legal and audit departments/units) should be trained/retrained in the skills of effective communication, problem solving and other respective competencies
- Together with internal tool for dispute prevention and management it is desirable that the possibility for engagement of a third, neutral party (not affiliated with the agency) is also accessible. Further discussions with respect to such external tools should be conducted with court mediators and educational institutions
- Political will for implementation of the mentioned tools should be expressed and reinforced by means of the respective regulations (legal framework needs be adjusted)
- The role of the Civil Service Bureau in the implementation of these recommendations and setting up of the system shall be reinforced. Respective support should be provided to the Civil Service Bureau in carrying out this task.