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# **LABOUR DISPUTES: ISSUES RELATING TO SUBSTANTIVE LAW AND PROCEDURE IN THE LEGAL PROCESS**

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## **LABOUR DISPUTES: ISSUES RELATING TO SUBSTANTIVE LAW AND PROCEDURE IN THE LEGAL PROCESS<sup>2</sup>**

This study addresses issues relating to procedural and labour law regulations governing legal proceedings in labour disputes, such as re-instatement cases, in the courts of general jurisdiction. Emphasis is placed on issues relating to the time limits set for filing employment lawsuits and the manner whereby these time limits shall be counted. The study provides grounds for a proposed change in the rules of territorial jurisdiction over labour disputes and identifies issues relating to evidence relevance and evidence admissibility in re-instatement law cases. The study highlights challenges associated with the presentation of evidence by employees. Special attention is given to imperfections in the statutory dismissal procedure. The study offers a dismissal procedure for each ground for employee dismissal set forth in Article 81 of the Russian Federation Labour Code and proposes ways to streamline the labour and civil procedural laws in the context of the issues addressed.

**Key words:** labour disputes, re-instatement, jurisdiction over labour disputes, evidence, presentation of evidence, time limits, due process of law, dismissal procedure.

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## **Introduction**

Russia's transition to market relations and its adoption of a new labor code have had a quality impact on the procedural position of parties to a labor dispute, as a result of which workers have been losing more and more in courts. Today over 80% of labor disputes are settled in favor of the employer.

The applicable procedural legislation on consideration of labor disputes originates from the principle of legal equality of parties. However, a worker is originally far from being on equal terms with the employer. As an economically unprotected party to labor relations, a worker may not fully exercise many of his or her procedural rights, including the right to a full and fair court proceeding, presentation of evidence, and qualified legal assistance.

All of the above shaped a number of issues considered in this study.

## **Issues relating to due process in labour dispute proceedings**

Basic issues pertaining to due process in individual labour dispute proceedings are dealt with in accordance with the rules set forth in the law on civil procedure. The Labour Code of the Russian Federation, which determines the order of individual labour dispute adjudication, describes only some specific procedures applied to labour dispute proceedings.

For example, Article 329 of the Labour Code determines the time limits within which legal action can be taken to resolve an individual labour dispute. The civil law describes these time limits as terms of limitation of actions.

Thus, an employee seeking the settlement of an individual labour dispute has the right to go to court within three months following the date that the employee became aware or should have become reasonably aware of the violation of his or her rights. Legal actions relating to dismissal shall be taken by the employee **within one month** starting on the day when the employee is served a copy of the dismissal order (*prikaz*) or given the employment book (*trudovaya knizhka*).

By allocating such a short period of time for an employee to take legal action, the legislator is protecting the employers from potential material losses that they may incur in case the court reviewing the labour dispute rules against the employer. Needless to say, virtually all labour disputes relate to an employee's financial claims (recovery of wages unpaid during enforced absence following unlawful dismissal, recovery of pay losses caused by downgrading an employee to a lower-pay position, recovery of pay retention, payment of compensation for unused vacation, overtime work, work on days-off and public holidays, moral damages, etc.).

As follows from the clarifications given to courts for reference in Ruling N2 passed by the Supreme Court at the plenary session on March 17, 2004, a case shall be dismissed if during the pre-trial stage of the proceedings the sued party claims the limitation of action has not been complied with in absence of valid reasons. If incompliance with the limitation of action is pleaded during the court hearings, the case shall be heard, but the applicant's claim shall be dismissed.

As demonstrated by our study of all labour cases tried over the past five years, more than one third of all labour claims have failed as a matter of law on grounds of the suing party's failure to comply with the limitation of actions.

Meanwhile, the same Article 392 of the Russian Federation Labour Code says that an employer seeking compensation for damage caused by an employee shall be entitled to take legal action within **one year** following the date that the damage caused was established.

This provision conflicts with the statutory principle that provides for procedural equality of the parties to civil proceedings. Therefore, this provision shall be treated as discriminatory against employees.

In essence, the principle of procedural equality in labour disputes means that the parties (employer and employee) shall enjoy equal opportunities to protect their respective rights and legitimate interests. As prescribed in item 3, Article 38 of the Civil Procedural Code, the parties shall enjoy equal procedural rights and shall discharge equal procedural duties. None of the parties shall enjoy any advantages over the other party<sup>3</sup>.

It is not to be overlooked that the employer relies on the expertise of the corporate administrative staff and is therefore better versed in statutory provisions. The employees on the other hand are generally forced to seek legal help and pay legal fees to lawyers who can help them understand the rules governing the application of legal norms to labour disputes and possible ways to reach a settlement with employers.

Meanwhile, the general period of limitations allowed for civil disputes is one to three years (see Article 181 of the Russian Federation Civil Code below).

1. The period of limitations allowed for legal actions to apply consequences of invalidity of a void transaction is three years. The period of limitations for such legal actions is counted from the day on which performance of the transaction commences.

2. The period of limitations allowed for legal actions to invalidate a voidable transaction and apply consequences of the invalidity thereof is one year. The period of

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<sup>3</sup> Comments to the Russian Civil Procedural Code (as last amended in 2012) under the editorship of P.V. Krasheninnikov, page 19.

limitations for such legal actions is counted from the day of termination of the coercion or duress applied to conclude the transaction (item 1 of [Article 179](#)) or from the day the plaintiff became aware or should have become aware of the circumstances serving a ground for declaring the transaction invalid.

Therefore, as seen above, the time limits allowed for a legal action to resolve an individual labour dispute as set forth in Article 392 of the Labour Code are much tighter than the period of limitations established in Article 181 of the Civil Code. This clearly demonstrates that the material interests of employees have a weaker protection than those of employers.

It should be noted that the above time limits were established in the Russian Soviet Federative Socialist Republic's Code of Laws on Labour (KZoT), which is now a thing of the past. To support the allocated time limits, the legislator would usually refer to the need to protect the material interests of the employer. While in the years before adoption of the new Labour Code the state was the only employer, today the share of state-run companies is fairly insignificant. Besides, the above provision is seen to be in direct conflict with the objectives specified in the current labour laws as set forth in Article 1 of the Russian Federation's Labour Code. Those objectives specifically include the creation of a legal framework beneficial for an optimal alignment of interests of the parties to industrial relations and the interest of the state.

Considering the above, we believe it to be expedient with regard to labour disputes that employers and employees be allocated a flat one-year period of limitations to file law suits.

*A time period of three months upon the day when a worker learned or should have learned about violation of his/her right* is established for the beginning of the timeframes for turning to a body considering labor disputes as set forth in Article 392 of the RF LC.

It should be noted that courts hearing labour disputes in fact disregard the "should-have-learned" provision. The courts proceed from the assumption that the employees are supposed to be fully aware of their labour rights. Therefore, if an employee fails (without a valid reason) to file a lawsuit before the three-month period of limitations established in Article 392 of the Labour Code has expired, the claim will be dismissed.

Similar issues arise in respect to claims relating to re-instatement cases. The point at issue is that the ***one-month period of limitations*** is counted from the date the employee is served the dismissal order or given back the employment book.

However, if an employee is not in receipt of either the dismissal order or the employment book, while the employer is claiming to have forwarded the dismissal order and a notice to collect personally (or via a legal representative) the employment record book with a regular mail

service, the court will endorse the employer's claim. If the employee presents no valid reasons for the failure to take action within the specified one-month period, the employee's claim will most likely be refused.

It should be noted that as follows from our study 70% of all employee dismissal cases heard over the past five years have been dismissed due to the claimant's failure to meet the time limits allowed for filing lawsuits.

2. The venue for labour disputes adjudication is also a vital issue. Application of regulations set forth in Article 28 of the Civil Procedural Code, which provide for the adjudication of labour disputes by courts of general jurisdiction at the defendant's location.

This irrational statutory regulation has time and again been addressed in the legal literature.<sup>4</sup> Attention is hereby drawn to a common situation where the employers who, due to their long-time presence in the territory of a district court, tend to develop and maintain certain personal relationships with the local judges, thereby affecting the outcome of the proceedings.

The provisions of Article 29 of the Civil Procedural Code, which set forth concurrent jurisdiction (or cognizance at the plaintiff's choice), in its current wording prohibit labour dispute adjudication at a venue chosen by the plaintiff – save for cases relating to the violation of labour rights of wrongfully convicted persons and personal injury claims filed in connection with industrial accidents or work-related diseases.

Thus, the employee is compelled to be reconciled with the absence of a right for concurrent jurisdiction and already at this stage practically dooms himself to defeat in the dispute.

## **Issues of Proof and Proving in Individual Labour Disputes**

The underlying principle of civil proceedings in individual labour disputes is the principle of equality of the parties involved in the proceedings. Article 56 of the Civil Procedural Code specifies the duties of each party to prove the facts to which it refers as to the grounds for its claims and objections.

However, the principle of equality among the parties is not a universal principle of legal proceedings. A valid application of this principle is possible only when the parties to the legal proceedings indeed enjoy a formally equal standing, such as opposing parties to a contractual dispute between corporate entities or parties to a divorce property settlement dispute.

In practical terms, equality of the parties to labour disputes is non-existent, with the employees being the weaker party in labour relations. Therefore, procedural equality is not

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<sup>4</sup> M.O. Buyanova, Procedural Order for Labour Disputes// Labour Disputes, 2009, Nr.3, page 15.

possible unless formal equality of the parties is in place. After all, the criminal process does furnish a legal instrument described as presumption of innocence.<sup>5</sup> The law on labour disputes offers no presumptions whatsoever, although the inequality of parties is evident.

Considering the general rule governing the allocation of the burden of proof (each party to the proceedings shall prove the facts to which it refers as to the grounds for its claims and objections), it is the duty of the defendant in labour dispute proceedings to prove that the employee's dismissal was a legitimate action, whereas it is the duty of the employee to prove that the dismissal had no legal grounds.

The burden of proof shifts to the defendant if the employer initiated an employee's dismissal. As stated in item 23 of Ruling 2 passed at the plenary session of the Supreme Court of the Russian Federation, in labour dispute proceedings relating to the re-employment of dismissed persons whose employment contract was terminated at the initiative of the employer, the duty to prove the existence of valid grounds for dismissal and compliance with the established dismissal procedure shall be laid on the employer.

The burden of proof shifts onto the applicant if the termination of an open-ended or fixed-term labour contract was initiated by the employee. If the applicant claims that the resignation was forced by the employer, the claim shall be verified, and it shall be the duty of the applicant to present evidence to support the claim brought against the defendant (see item 22 of the Ruling mentioned above).

The court hearing a re-instatement case can admit all instruments of proof specified in the Civil Procedural Code, which include written evidence, explanations presented by the parties to the proceedings and by third parties, witness testimony, as well as audio and video recordings in rare cases and subject to their merits, and expert opinions.

It is to be noted that the employees, who are the weaker party to the proceedings, may not be able to present any of the above evidence.

#### *Documentary (written) evidence*

Documentary written evidence means evidence which contains information about the circumstances having importance for a court case review and settlement, such as certificates, contracts, memoranda, business correspondence, other documents and materials in digital and graphical form, as well as documents and materials received via facsimile transmission or using electronics and other means of communication offering a reliable identification of document authenticity. Documentary written evidence also means court verdicts and rulings, court

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<sup>5</sup> D. Kazantsev, Back-Breaking Burden of Proof// EZH-Yurist, 2011, Nr.17

proceeding minutes and records, procedural action protocols and attachments thereto (schemes, maps, layouts, drawings).

As prescribed in Article 71 of the Civil Procedural Code, only original documents or duly certified copies thereof shall be admitted as evidence for court review.

Regrettably, no types of original written evidence indicated in the Civil Procedural Code (save for the employment contract) are available to the employees who at best may only hold copies thereof.

The employees are not able to certify a copy as true on their own authority as they do not hold seals. The employees cannot approach a public notary with a request to certify the required copies because a public notary is not empowered to certify a copy's authenticity in the absence of the original documents to be reviewed against their copies. Unlike the employees, the employer can present for court review any document (including freshly fabricated ones and copies thereof) bearing an imprint of the corporate seal, a signature and a "True Copy" inscription, making the document admissible as evidence.

In the event that an employee claims that the documents presented by the defendant are fabricated and petitions the appointment of an expert examination of the same, the court, as a general rule, will postpone the review of the claimant's statement on the ground that the weight of evidence available needs to be fully evaluated in the first place.

Then the court – referring perfunctorily to any other document (oftentimes a document forged by the employer himself to bolster the defendant's argument – will ultimately dismiss the employee's application without bothering to appoint the requested expert examination.

An employer may go further and submit for the court's review local normative acts (oftentimes fabricated) including written regulations, orders or other documents issued by an organisation that affect policy or action within the organisation, such as a corporate code of labour conduct, bonus payment rules, or collective labour agreements. Oftentimes, fabricated personnel orientation and introduction certificates bearing a corporate seal imprint will be furnished to support claims the employees did receive guidance on the contents of the above documents. If an employee requests to submit any of the above documents in the original form for review, the defendant will present, for instance, a certificate alleging the requested original document has been destroyed while it received water damage and could no longer be presented in court for evaluation in its original physical form.

It is noteworthy that the courts frequently dismiss employee petitions to appoint an expert examination by arguing that an expert examination may delay court proceedings. In doing so, the

courts refer to Article 154 of the Civil Procedural Code, which determines time limits for the adjudication of claims.

The need for a strict compliance with time limits determined in Article 154 of the Civil Procedural Code for the adjudication of labour disputes is highlighted in item 7 of Ruling 2 “On the Enforcement of the Labour Code of the Russian Federation by the Russian Courts”, passed at the plenary session of the Supreme Court on March 17, 2004. As prescribed by law, reinstatement cases shall be tried and resolved by the courts within one month, whereas other labour disputes shall be tried and resolved within two months after a lawsuit has been accepted for adjudication. The above time limits include the time required for the pre-trial preparation of the proceedings (Chapter 14 of the Civil Procedural Code).

Incompliance with the prescribed time limits is deemed to be an irregularity. Therefore, judges seek to maintain the prescribed time limits. As is known, a gross or systematic violation of procedural law, which leads to unreasonable non-observance of the time limits allocated for court settlements and materially impairs the rights and legitimate interests of the parties to legal proceedings, may cause imposition of disciplinary actions on judges and even lead to a termination of their mandate (see item 1, Article 12.1 of the law “On the Status of Judges in the Russian Federation”).

Therefore, whenever a party to labour dispute proceedings requests the appointment of an expert examination of the admitted documents, the court as a rule will dismiss the request, arguing that it may delay the proceedings beyond the established time limits.

Considering the above, it would make sense to review again the time limits allowed for settling labour disputes.

Having established a tight time limit allowed for adjudication of disputes relating to reinstatement in a job, the lawmaker aims to reduce the time period of enforced truancy eligible for compensation (if and when the dismissed employee has been re-instated in a job).

Therefore, the lawmakers play into the hands of the employer. Meanwhile, if the court sustains the employee’s motion to appoint an expert examination, the time limits allowed by Article 154 of the Civil Procedural Code will not be maintained (on average, an expert examination takes 2-3 months, and in some cases even up to 6 months).

It is worth observing that the above time limit was in fact allowed under the Civil Procedural Code of the RSFSR, which was effective at a time when all business entities were owned by the state and when submission of faked documents was an unheard-of practice (organisations were fearful of legal consequences that such misconduct could cause for them).

Nowadays, it is common practice among employers to produce evidence whose authenticity is questioned by plaintiffs. While there are no other remedies that employees may use to support the validity of their claims, a dismissal of the request to appoint an expert examination on the ground of potential non-observance of the time limits allowed by the Civil Procedural Code will in essence mean a dismissal of the claim.

Therefore, in our opinion it is indispensable that a single 2-month period following the filing of a lawsuit be allowed for all labour disputes.

Secondly, Article 154 of the Civil Procedural Code shall be modified so as to include a provision whereby the time period required for performance of an expert examination shall be excluded from the time period indicated above.

#### *Witness Testimony*

If coercion was applied to force an employee into signing a letter of employment termination upon the employee's request (or into signing an employment termination agreement as set forth in item 1, Part 1, Article 77 of the Labour Code) in the presence of witnesses, the duty to prove coercion lies on the employee.

But how is the employee going to prove that coercion did take place? Once the coercion has been applied in the presence of witnesses, the employee will petition a witness's testimony. However, if the witnesses are still employed by the defendant, they will (most likely) fail to appear in court by referring to failing health conditions (or to other valid reasons for failing to take the stand) while they fully realise that telling the truth in court would lead to their summary dismissal.

*Presentation of audio/video recordings* may offer another opportunity to prove that coercion indeed took place. However this type of evidence (as a rule) will be challenged by the employer on the grounds of possible forgery, therefore the courts tend to prevent admission of this type of evidence in the case. Oftentimes, the court will ask the claimant whether the recordings were made with the permission of the defendant. If the answer is negative, the recordings will not be admitted as evidence in the case.

Frequently, employees attempt to prove certain circumstances by submitting *email exchanges with the employer*. However, these documents are neither admissible in court nor are they filed for court records because they are not duly certified and do not meet evidence admissibility requirements. Meanwhile, for some reasons, email correspondence as evidence is admissible in court proceedings in commercial litigations (see Article 75 of the Arbitration

Procedural Code). To establish the authenticity of such documents, the court may appoint three types of expert examination, including a computer examination, fingerprint analysis, and, if a document bears a signature, an examination of the applied handling procedures for records.

All that is mentioned above confirms our assertion that the employee completely has no ability to provide necessary evidence to support his claims or defence.

**Compliance with the procedure governing employee dismissal is the main condition for the recognition of dismissal legality**

Court proceedings in dismissal dispute cases shall follow a certain procedure (order). Failure to do so will invalidate an employee's dismissal, and the courts will order the employee's re-instatement, award recovery of pay for the period of forced absence, and payment of compensation for emotional distress.

At the same time, the dismissal procedure is not explicitly determined by law (with some exceptions). Therefore, the employers (and courts hearing labour dispute cases) tend to define the dismissal procedure in their own way and act accordingly as they see fit at their own discretion.

The Supreme Court of the Russian Federation made an attempt to bring clarity to this issue in Ruling 2 passed at its plenary session on March 17, 2004. The Ruling failed however to provide an all-embracing statutory framework while addressing only individual grounds for employee dismissal.

The Supreme Court maintains, for instance, that adjudication of reinstatement claims filed by employees whose employment agreements were terminated as per item 7, Part 1 of Article 77 of the Labour Code (discontinuation of job functions following alteration of the employment contract agreed upon by the parties thereto), or adjudication of claims to invalidate alteration of the terms and conditions agreed to by the parties in the employment agreement (whereby the employee continues performance of work with the job functions remaining the same) shall follow the provisions set forth in Article 56 of the Civil Procedural Code. Thereby, the employer shall among other things present evidence to prove that the undertaken alteration of the terms and conditions agreed by the parties in the employment contract is a consequence of the changes introduced in the organisational and technological conditions of labour (introduction of new machines and technology, optimization of work place arrangement based on a work place audit, structural reorganization of the production process, etc.) and that the modified terms of the employment contract are not inferior to those that were originally agreed upon in the collective agreement. If no evidence to this effect is presented, the termination of the employment contract as per item 7, Part 1 of Article 77 of the Labour Code or the changes introduced in the terms and

conditions originally agreed by the parties in the employment contract cannot be deemed legal (item 21).

Therefore, the provisions set forth in this item of the Ruling passed at the plenary session of the Supreme Court may lead one to an erroneous conclusion that the employer is required to take only one action to comply with the employee dismissal procedure, whereas failure to do so will represent grounds to declare the dismissal illegal.

However, to establish the validity of the dismissal on the above grounds, the court must also verify whether the employer has taken additional actions described below:

- Has the employee been informed about the planned changes by the employer in writing no less than two months prior to the introduction of the changes?
- Has the employer received the employee's refusal to continue job performance in a new job environment?
- Has the employee been offered in writing to review all vacant positions in the organisation, which the employee is able to take considering the employee's state of health, as set forth in the provisions of Article 74 of the Labour Code?
- Has the employer received the employee's refusal to accept a different position?

The above procedure to be complied with by the employer is set forth in Article 74 of the Labour Code.

At the same time, as it follows from the implications of Article 394 of the Labour Code, if the employer violates the above procedure as a whole (or fails to perform any of the above actions) the dismissal shall be ruled illegal.

However, it should be noted that court proceedings today tend to infringe on the employee dismissal procedure established by law.

The court may rule, for instance, that the employer's failure to serve a two-month notice on the employee's upcoming redundancy dismissal (or failure to serve this notice in a timely manner) does not constitute a violation of the established dismissal procedure. The court will only order recovery of a two-month average pay (or part of the two-month average pay, if the minimum dismissal notice period of two-months was not observed) and will dismiss the re-employment claim filed by the dismissed employee. The above approach is shared by some labour law scholars and experts.<sup>6</sup>

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<sup>6</sup> V.I. Mironov, "Russia's Labour Law", Textbook, Moscow, 2005, p. 413; B.A. Gorokhov, "What They Do Not Teach Students", Moscow, 2009, p. 22

The employer's failure to comply with other statutory regulations governing the application of dismissal procedures may not be deemed a violation either. For instance, dismissal as per item 5, Part 1 of Article 81 of the Labour Code requires an opinion expressed by the elected trade union body with respect to the proposed dismissal, as set forth in Article 373 of the Labour Code. The court may determine that in case the opinion was not requested the trade union can present its well-grounded opinion during the court proceedings and the opinion will be admitted into evidence in the case. In a situation like this, admittance of evidence as described above will not be recognized as a ground to invalidate the dismissal order issued by the employer.<sup>7</sup>

It appears that negligence displayed by both the employers and the courts towards the statutory procedure governing employee dismissal contradicts with the principle of stability of labour relations, damages the integrity of judicial practice, and cannot be deemed lawful.

The hierarchy of law is another important point to consider when one reviews employee dismissal procedures that are enacted at different levels of legislative authority. In a number of instances, the dismissal procedures are set forth not only in the Labour Code, but also in other federal laws, laws of the Russian Federation's constituent entities, social partnership agreements, collective labour agreements and local regulations and labour contracts.

As follows from the implications of the current law (Article 9 of the Labour Code), these regulations (and collective labour contracts) shall not include provisions that restrict an employee's rights and reduce the scope of guarantees below those offered to the employees in the labour code, and such regulations shall be recognized by all law enforcement authorities.

This notwithstanding, the courts oftentimes fail to heed these provisions (save for the Labour Code) and ignore them in their awards, claiming these provisions are absent in the Labour Code and referring to the provisions of Article 423 of the latter.

For example, as prescribed by Article 25 of the Russian Federation's law "On the Employment of the Population", the employer is obliged to notify an employment relations authority at least two months prior to the upcoming dismissal as per item 1 and item 2 of Article 81 of the Labour Code (personnel reduction or staff optimization). In the event of a massive discharge of employees, such notice shall be given at least three months in advance.

In real life however, the courts hearing dismissal cases on the grounds mentioned above may not even require the employers to produce evidence in support of the dismissal and will rule the dismissal was legal and well-founded.

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<sup>7</sup> V.I. Mironov, "Russia's Labour Law", Textbook, Moscow, 2005, *ibid*

Noteworthy are comments provided by B. A. Gorokhov, Chairman of the Supreme Court panel for labour and social disputes. Addressing participants of a roundtable discussion at the National Research University Higher School of Economics in Moscow in September 2013, he said that the Supreme Court suggested that the award in dismissal legitimacy proceedings be dependent on the established “significance” or “insignificance” of the dismissal procedure infringement. However, an explicit definition of and a clear distinction between the two notions are provided neither by law nor by the Supreme Court’s plenary session.<sup>8</sup>

Hence, a court of law hearing a re-employment dispute proceeds from the assumption that if the consent of the elected trade union body to the employee’s dismissal has not been obtained (while only an opinion of the elected trade union body has been requested, although the labour contract clearly provides for the elected trade union body to consent an employee’s dismissal), this shall not constitute a significant violation of the established procedure and therefore shall not entail the employee’s re-employment.

At the same time, as follows from the implications and contents of Article 394 of the Labour Code, “any” violation (not only “significant” violation) of the employee dismissal procedure constitutes a ground to invalidate the employee’s dismissal and to award recovery of pay for the time of an employee’s forced absence and compensation for emotional distress.

It is to be noted that the employee dismissal procedure is normally set forth not only in the provision which determines the grounds for dismissal, but also in various Articles scattered throughout the Labour Code and in other federal laws, which makes it difficult to locate them and which cause wrongful decisions to be made by the employer.

For example, the dismissal procedure as per item 2, Part 1 of Article 81 of the Labour Code is established in five Articles of the Labour Code (Articles 81, 82 ,179, 180 and 373) and also in Article 25 of the Russian Federation Law “On the Employment of the Population”.

The dismissal procedure applied to the termination of employment as per item 3, Part 1 of Article 81 of the Labour Code (where an employee’s qualifications are found to be inconsistent with the job requirements in the aftermath of a competence assessment) is described in the relevant Articles of the Labour Code (articles 81, 82 and 373), as well as in the regulation which specifies the procedure for competence assessment set out in the labour law and other laws and regulations that contain labour provisions, and in local regulations that are passed with due regard to the opinion of the employee’s representative body.

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<sup>8</sup> URL: <http://pravo.hse.ru/labourlaw/events>

It is to be further noted that the law does not specify a time period during which an employee failing a competence screening can be dismissed.

In absence of the above provision, an employee may be dismissed in six months or even more after the competence test took place.

It appears feasible that this issue be dealt with based on the time periods as described below:

1. As a general rule, the competence assessment outcome and a notice on possible dismissal as per item 3, Part 1, Article 81 of the Labour Code shall be communicated to the employee in writing immediately (i.e. on the same day). However, if the employee in question was not present at the competence assessment procedure, the decision of the assessment board and a notice on dismissal shall be communicated to the employee in question on the following work day after the assessment was completed at the latest.

2. Receipt of a well-grounded opinion expressed by the elected trade union body may take another 10 working days (7 working days are allocated for the case review and 3 working days are allocated for additional consultations with the employer in case the elected trade union body disagrees with the decision proposed by the employer).

3. The employee may need another working day to consider vacant positions, which must be offered for the employee's review by way of transfer to another job as per Article 82 of the Labour Code.

Therefore, the Labour Code needs to be amended so as to include a time period during which an employee can be dismissed as per item 3, Part 1 of Article 81, meaning within 12 working days from the date of the written notice of dismissal.

A similar problem exists for dismissal as per item 4 Part 1 of Article 81 TC RF, because the Act does not specify for how long after the change of ownership of company property the chief executive officer, his deputies, and the chief accountant may be dismissed on this ground. This gap allows the employer to delay this issue for a long period of time, which is not always convenient for the employee, because he is in an awkward position.

One can refer to numerous similar examples supporting our conclusion that the current legislation does not contain an explicit definition of the procedure for employee dismissal. This creates confusion in the law enforcement practices and leaves the employees unprotected against unlawful dismissal.

## **Conclusion**

Our study makes it possible to arrive at the following key conclusions:

1. The applicable civil procedure and labor legislation about the consideration and settlement of labor disputes fails to include the principle of procedural equality of the parties.
2. The rule for the territorial jurisdiction of labor disputes set forth by Article 28 of the RF CPC (in the area of the respondent's location) and the lack of a possibility of alternative consideration reduces the principle of impartial judicial litigation to zero.
3. Limited timeframes established for consideration of labor relations by courts prevent full judicial litigation.
4. Special timeframes for a worker to appeal to the court prescribed by Article 392 of the RF LC put him or her on unequal terms with the employer.
5. The rule forbidding a worker to add non-notarized copies of written evidence to the case materials predetermines the outcome of a court dispute.
6. A worker has no real possibility to prove that his or her rights have been violated by using the evidence of witnesses that are still employed by the employer.
7. A court's right to refuse to satisfy a worker's motion to conduct an expert evaluation of documents made available by the employer prevents the truth from being established in the case.
8. Lack of a procedure strictly established by law for dismissing workers for each of the grounds violates the principle of judicial practice uniformity – NEW TEXT.

All of the above makes it possible to introduce the following amendments to the applicable laws:

1. Amend the civil procedure legislation (RF CPC) as follows:
  - 1.1. regulation on presumption of a worker's good faith with the burden of proof with respect to the reasons for dismissing a worker being imposed on the employer;
  - 1.2. regulation on a court's obligation to order (as requested by a worker) an expert evaluation of documents provided by the employer;
  - 1.3. establish a rule on the territorial jurisdiction of labor disputes at the claimant's option, such as either in the area of the respondent's location or the claimant's registration (including temporary registration): paragraph 1.3 new;
  - 1.4. audio and video records made available by a worker must be accepted by court (upon a worker's submission) and be taken into consideration along with other evidence;
  - 1.5. electronic correspondence made available by a worker must be accepted by the courts without any notarization and be taken into consideration along with other evidence;
  - 1.6. additional guarantees must be provided to witnesses pertaining to labor disputes in the form of prevention of a worker's dismissal initiated by the employer (except in cases set forth by

Article 81 Part 1 Paragraph 6 of the Labour Code) for two years upon being involved in a court proceeding.

## **2. amendments to the Labour Code**

### **2.1. Amend Article 81 of the Labour Code to include Part 7, which reads as follows:**

“Where an employee is dismissed on the initiative of the employer, the procedure established herein shall be strictly observed along with the Articles of this Code listed below:

- Article 180 (**dismissal as per item 1, Part 1 of this Article**)
- Articles 82, 179, 180 and 373 of the Labour Code (**dismissal as per item 2, Part 1 of this Article**)
  - Articles 82 and 373 of the Labour Code and relevant regulations governing the competence assessment of employees (**dismissal as per item 3, Part 1 of this Article**)
  - Articles 181 and 75 of the Labour Code (**dismissal as per item 4, Part 1 of this Article**)
  - Articles 192 and 193 of the Labour Code (**dismissal as per items 5-10, Part 1 of this Article**). The above mentioned dismissal procedure in accordance with items 7, 7.1 and 8 of this Article shall be applied where the employee misconduct takes place at the employee’s place of employment.”

### **2.2. Amend Article 81 of the RF Labour Code to include Part 8, which read as follows:**

“When taking a decision to dissolve a business entity or discontinue individual entrepreneur activities, reduce corporate staff or staff employed by an individual entrepreneur, or terminate employment contracts, a corporate employer and an individual entrepreneur shall furnish a notice to the employment relations authorities informing them about the contemplated actions no later than two and three months, respectively, before they proceed with the implementation of the contemplated actions, indicating each employee’s position, profession, qualification, and skill standards, as well as remuneration arrangements. If a decision to reduce corporate staff may lead to massive redundancies, a notice thereof shall be furnished to the employment relations authorities no later than three months before the action is taken.”

### **2.3. Amend Part 3 of Article 81 of the Labour Code to include a sentence as follows:**

“The above obligation shall be placed onto the employer as well if the employees are dismissed as per item 1, Part1 of this Article.”

### **2.4. Proposed amendments and additions to Article 180 of the Labour Code:**

#### **1. Amend the title of the Article to read as follows:**

Article180. Guaranties and compensations offered to employees dismissed on individual grounds set forth in Article 81of the Labour Code

**2. Amend paragraph 1 to include a sentence reading as follows:**

If an employee is dismissed in accordance with items 2, 3, and 11, Part 1 of Article 81 of this Code, the employer shall offer the employee another job opportunity (vacancy) in compliance with Part 3 of Article 81 of this Code.

**3. Add a paragraph reading as follows:**

Pending dismissal as per item 3, Part 1 of Article 81 of this Code, the employee shall receive a notice thereof not later than 12 working days after failing to pass the competence assessment.

**2.5. Amend Article 394 of the Labour Code to read as follows:**

An employee shall be reinstated if the authority hearing the labour dispute case finds that the dismissal procedure applied to the dismissal grounds in question has not been observed.

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