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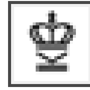

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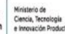

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NECESSITY FOR ACCESS TO JUSTICE FOR THOSE WHO HAVE NOT WON A COMPETITION UNDER THE BULGARIAN LABOR LAW

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Abstract

The competition is one of the grounds for the emergence of an employment relationship under the Bulgarian labor legislation. The widespread application of competitive tendering has led to an increase in labor disputes, which are related to the litigation of the legality of the competitive procedures conducted. Practice has shown that in such disputes the unsuccessful candidates do not have access to the court, which is a material violation of their basic right to a fair trial. The reason for the existing legal absurdity is the lack of explicit legal regulation governing judicial control over the legality of the competitions held. On the basis of the conducted research, the conclusion was drawn about the necessity of creating an explicit de lege ferenda provision, which regulates the legal possibility for unsuccessful candidates to challenge the lawfulness of a competition held.

Keywords

Competition – Legality – Contestation – Unsuccessful candidate – Access to justice – Fair trial

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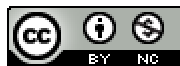

Introduction

The Labor Code[1] (LC) regulates the competition as one of the grounds for the emergence of an employment relationship, whose legal framework is contained in the provisions of Art. 89-97 of the Labor Code. The importance of the competition is compounded by the emergence of an employment relationship, but in order to reach this point, it is necessary to go through a series of successive legal actions, which the legislator has settled with mandatory provisions. By their legal nature, these actions outline the procedure for conducting a competition.

Competition start-up is widely used in national practice, as it enables the employer to check before appointing - who is the most prepared and suitable candidate among those who have, respectively, fulfilled the requirements for holding the respective competitive position. The widespread application of the competition has led to an increase in labor disputes, which are related to the judicial challenge of the legality of the competitive procedures conducted. Practice has shown that, in such disputes, unsuccessful applicants do not have access to court, and this necessitates the need for legislative changes to fill the existing gaps in the law with respect to the problem under study. To do otherwise would be a material violation of both the constitutional provision of Art. 56 of the Constitution of the Republic of Bulgaria (CRB), as well as the fundamental right to a fair trial, regulated in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Art. 47 of the EU Charter of Fundamental Rights.

Analysis of the problem studied

The problem with contesting the legality of the competition is the lack of a specific legal framework explicitly regulating subsequent judicial review.

Before proceeding with the actual analysis, it is necessary to answer several basic questions pertaining to the subject of the study.

The first question that arises is - is it possible to completely exclude the possibility of contesting the lawfulness of a competition held because of the lack of legal regulation?

The lack of an explicit rule of law governing the judicial review of legality, entitled persons, time limits and the competent court gives the initial impression that the competition was not admissible. I believe that such a claim would be wrong. The legal challenge to the lawfulness of the competition cannot be ruled out on a general basis, although it is not explicitly settled. As an argument, in support of the opinion expressed, I will use the legal definition for labor dispute contained in Art. 357, para. 1 of the Labor Code. According to the said provision, labor disputes are between an employee or a worker and an employer regarding the emergence, existence, performance and termination of the employment. I believe that in this case, there is precisely a dispute

[1] The Labor Code is the Bulgarian normative act that regulates the emergence, existence, amendment and termination of employment relations between an employee and an employer. The Labor Code has been in force since 01.01.1987 (promulgated SG 26/06, dated April 1, 1986. Supplemented SG No. 79 of October 8, 2019).

regarding the occurrence of an employment relationship that can be qualified as employment within the meaning of Art. 357, para. 1 of the LC[2]. The existence of a labor dispute necessitates its consideration by the competent court - the court whose jurisdiction, as a procedural precondition, is legally settled in the provision of Art. 360, para. 1 of the Labor Code.

The second question concerns the extent of the court's jurisdiction over the object of the dispute. In the case of a judicial challenge to the lawfulness of competition, the court's jurisdiction is limited to assessing the compliance with substantive prerequisites and the procedure for conducting the competition. The substantive prerequisites are regulated in the provisions of Art. 89-97 of the LC. The procedure for conducting the competition covers several main stages: announcement of the competition; defining the content of the announcement, for which the Labor Code provides for mandatory details; participation and admission of candidates to the competition; designation of competition commissions to ensure the competition and announcement of the results of the competition. It is essential to strictly adhere to the above stages in order not to interfere with the competitive procedure, which would be grounds for declaring the employment relationship invalid, due to the objective contradiction with the law. It is of particular importance to note that in the object of challenging, the decision of the selection board appointed to the employer under Art. 94 of the LC is not there. The decision of the Commission, as a collective body, is the result of an assessment of the professional training and other qualities of the candidates, which are necessary for the position held (according to the argument of Article 95, paragraph 1, sentence 2 of the Labor Code). And whether the person who won the contest is the most appropriate is a matter of judgment, which is not subject to judicial review on its merits. Even if there is a hypothesis in which the commission's judgment under Art. 94 of the Labor Code, the court is not entitled to grant the request as it does not have a jurisdiction to replace the decision of the commission through the operative part of the judgment.

The third question concerns the active legitimation of persons entitled to seek judicial protection of their rights in connection with the competition held, respectively, the employment relationship that has arisen. As already noted, there is no obstacle to bringing a lawsuit on a general basis to challenge the employment relationship that has arisen due to the existence of material violations of substantive rules and/or competition procedure. Under a common ground, it should be borne in mind - in accordance with Art. 357, para. 1 of the LC, whose provision is also relevant to the question raised.

Based on the definition of a labor dispute under Art. 357, para. 1 of the Labor Code, the employer is the only legal entity that can challenge the legality of the competition held. The employer, as a party to the employment relationship, has the active legitimacy to bring a claim within the meaning of Art. 357, para. 1 of the LC.

The other absolute procedural precondition for initiating court proceedings in the labor dispute that has arisen is the existence of legal interest. The legal interest must be personal and direct, with the sole person meeting the requirements set out at the time of the dispute being the employer. In the present case, the legal interest stems from the fact that the employment relationship of the competition arises on the basis of the decision of the selection committee and is not the result of a unilateral declaration by the employer. Therefore, the employer is required to comply with the committee's assessment and to

[2] Atanas Vasilev, Trudovo pravo (Burgas: Burgaski svoboden iniversitet, 1997), 173.

appoint the person who won the competition. In the event that the employer has information that the substantive legal framework and/or the procedure for conducting the competition has been violated, then the employer has the legal opportunity to bring a lawsuit under Art. 357, para. 1 of the Labor Code to dispute the emergence of a competitive legal relationship and to request its declaration as unlawful, as contrary to the law. In the considered hypothesis, it can be concluded that, despite the lack of explicit legal provisions regarding the contestation of the legality of the competition, there is no procedural obstacle to the employer to file a claim on a general basis under Art. 357, para. 1 of the Labor Code[3].

This is not the legal situation for the unsuccessful candidates, which brings us to the essential question - can the unsuccessful candidates dispute the legality of the competition held in court?

First of all, it should be determined who can be qualified as "unsuccessful applicants". I think that these are the persons who were admitted to the competition, participated in the actual conduct of the competition according to the procedure of Art. 95, para. 1 of the Labor Code, but have not won it, as the commission under Art. 94 of the Labor Code considered that they have not had the necessary professional training and other skills to hold the position. In this regard, it cannot be assumed that a person has the status of an "unsuccessful candidate" if he or she is not allowed to participate in a competition pursuant to Art. 93. The persons who are not admitted to the competition do not have the status of candidates. I believe that for "unsuccessful applicants" should not be considered persons who have been admitted to the competition, but for some reason have not participated in the final stage under Art. 95 of the Labor Code, that is, there is a started but incomplete procedure for holding a competition for the position. In a similar hypothesis, persons have the quality of a candidate but cannot be qualified as "unsuccessful" since they have not participated in the actual conduct of the competition, which can be defined as a competition between admitted candidates or a competition with the requirements to hold a position with only one candidate. It is impossible to speak of an "unsuccessful candidate" if the latter one has not participated and lost the race, called a competition.

According to the current legislation, persons who have participated but have not won the competition do not have a direct path to litigate the lawfulness of the competition. In such cases, the contestation of the lawfulness of a competition is inadmissible because the unsuccessful candidate does not have active legitimation to bring an action under Art. 357, para. 1 of the Labor Code - on the occurrence of an employment relationship. Although there is a legal interest in the contestation, the unsuccessful candidate is a person outside the legal tender relation, that is, they are not a party to that legal relationship, therefore the dispute which has arisen cannot be qualified as a labor one under the meaning of Art. 357, para. 1 of the Labor Code.

There is also a different opinion in the labor law literature, according to which a claim for contesting the legality of a competition can be brought by any of the participants in the competition, who claims and presents data about the violation of the impulsive rules under Art. 90-95 of the Labor Code.[4] The main arguments are that the absence of an explicit legal provision recognizing the right to sue is not a valid argument for denying the

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[3] Vera Lazarova, "Vidove iskove po individualnite trudovi sporove", Targovsko pravo, num 1 (2006): 10-14.

[4] Vasil Mrachkov, Trudovi otnosheniya (Sofia: Trud i pravo, 2010), 596.

judicial contest of the competition since such a decision would violate the fundamental constitutional right of defense of citizens under Art. 56 of the Constitution of the Republic of Bulgaria. In addition, the author argues that such a decision would limit the essential function of the judiciary - to protect the rights and interests of citizens, which in turn would lead to legal uncertainty. According to the quoted opinion, each of the candidates may file a claim under Art. 357, para. 1 of the Labor Code, as it concerns an employment dispute regarding the emergence of an employment relationship. I could not agree with the stated opinion. In the provision of Art. 357, para. 1 of the Labor Code it is explicitly defined which the parties to the labor dispute are, and as I have already noted, the unsuccessful applicants do not have the quality of employees under the relevant legal framework and are not legally entitled to bring such a claim. In the case between them and the employer, it is not possible to have a labor dispute within the meaning of Art. 357, para. 1 of the Labor Code. The applicant is not legitimate in establishing a claim for the emergence of a foreign employment relationship since he or she is not the bearer of substantive rights arising from the contested legal relationship. Being a third party outside the competitive relationship, the legal sphere is not affected, nor does it depend on the validity of the employment relationship that has arisen with the first in the ranking.

In case of procedural irregularities during the competition, the unsuccessful candidate has the only legal opportunity to appeal to the Labor Inspectorate, which should seise the court with a request to declare the legal relationship invalid. Contradiction of the competition with the law means a violation of the imperative rules for its conduct, which disrupts the employment relationship that has arisen. In accordance with the provision of Art. 76 of the Labor Code, the rules on the invalidity of a contract of employment also apply to the competition. According to the provision of Art. 74, para. 3 of the Labor Code, if a controlling or other competent authority considers that an employment relationship suffers from a defect, the court in whose jurisdiction it is to rule on the validity of that relationship should immediately be referred to. The Labor Inspectorate is the body that monitors the compliance with labor law, which means that it has the procedural legitimation to bring a court with a claim under Art. 74, para. 2 of the Labor Code for contesting the validity of the competition. In such a case, the Labor Inspectorate would be the plaintiff in the dispute, and the parties to the employment relationship arising from the competition would be the defendants. If the court finds that an infringement has been committed during the competition, it should respect the claim and declare the relationship invalid. The parties may invoke this nullity only after the judgment has been delivered. The relations between the parties shall be settled in accordance with the rules of Art. 75, para. 1 of the Labor Code if the employee acted in good faith. This refers to the so-called legal good faith, not ethical good faith. It means that the employee did not know about the defect of the employment relationship, they have not created it or participated in its creation. In the event that the employee acted in bad faith, for example, the general rules for invalidity of legal transactions under the Law of Obligations and Contracts will apply.

Regarding the inadmissibility of application by analogy of the provision of Art. 87, para. 1 of the Labor Code to the competition

In connection with the problem under study, the issue of the application by analogy of the special regulation on the control of the lawfulness of the choice should also be considered as a ground for the emergence of an employment relationship. The provision of Art. 87, para. 1 of the Labor Code states that disputes about the lawfulness of the election are considered by the district court at the request of each candidate or employer within 2 weeks of receipt of the notification of the result. In this case, there will be a labor dispute

regarding the occurrence of an employment relationship within the meaning of Art. 357, para. 1 of the Labor Code. The cited provision regulates the competent court, the time limits for challenging, and last but not least, the persons entitled to legal action. It is noteworthy that, in addition to the employer, the legislator also settled this procedural possibility for each candidate, thus recognizing to the person concerned their active legal legitimacy to bring a lawsuit before a court. The legislative solution in question is an exception to the general rule that only the parties to the employment dispute may be parties to the employment relationship.

Given that such a legal framework is in place, the logical question is, can we apply it by analogy (analogia legis) to overcome the existing void of contesting the lawfulness of the competition?

The provision of Art. 87, para. 1 of the Labor Code is imperative and procedural in nature since it regulates the procedure for exercising a claim for protection in violation of the substantive prerequisites and/or the procedure for making the selection. Although there is an incompleteness in the legal framework of a competition, the application by analogy of the norm of Art. 87, para. 1 of the Labor Code is inadmissible. The inadmissibility arises precisely from the procedural nature of the legal provision cited, which also gives active legitimation to subjects who are outside the employment relationship arising out of the choice. The legislator provided such a legal possibility for the unsuccessful candidates, as an exception to the general principle laid down in the provision of Art. 357, para. 1 of the Labor Code, which explicitly identifies the parties to a labor dispute – worker or employee and employer. I consider that, if the relevant procedural rule is an exception and relates to a specific case, such as a choice, it is inadmissible to apply the institute of analogia legis to an imperative rule of law[5].

The inability to access the justice of unsuccessful candidates within the context of fundamental human rights

From the abovementioned, it can definitely be inferred that unsuccessful applicants participating in Labor Code competitions do not have access to justice. Such a decision is unacceptable and contrary to the Constitution of the Republic of Bulgaria (CRB), which regulates the right of defense of every citizen when their rights or legitimate interests are violated or endangered (on the argument of Article 56 of the CRB). The existing void in the law is also a violation of the fundamental right to a fair trial, which is proclaimed in the provision of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] and Art. 47 of the EU Charter of Fundamental Rights.

Access to justice should be understood as a real possibility for a person whose rights and freedoms have been violated to bring to justice a judicial authority that is competent to resolve the dispute in question[7]. The provision of Art. 47 of the Charter

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[5] Georgi Mihaylov, Regulatorna otsenka. Kachestvo na zakonodatelstvoto (Sofia: Propeler, 2018), 161-167.

[6] Ratified by a law adopted by the National Assembly on July 31, 1992 - SG, issue 66 of 1992. Effective for the Republic of Bulgaria of 7 September 1992). Supplemented by Protocol No. 2 of 6 May 1963, amended by Protocol No. 3 of May 6, 1963, Protocol No. 5 of 20 January 1966, Protocol No. 8 of 19 March 1985. Prom. SG, Issue 80 of October 2, 1992, amend. SG. 137 of November 20, 1998, amend. SG, Issue 97 of November 9, 1999, amend. SG. Issue 38 of 21 May 2010.

[7] The term “judicial authority” is used both in the Council of Europe and EU law and should be understood as equivalent to the term “court”.

regulates the rights of the defense and the right to a fair trial. According to that provision, anyone whose rights and freedoms guaranteed by Union law have been infringed has the right to an effective remedy before the court concerned. The possibility of seising the court in violation of the rights guaranteed by the European Union (EU) Law is a major manifestation of the legislative intent under Art. 47 of the Charter.

The provision of Art. 6, § 1 of the ECHR states that *" In the determination of his civil rights and obligations or of any criminal charge against him ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

The right to a fair trial should be seen as a guarantee of one of the founding principles of any democratic society within the meaning of the Convention (Pretto and Others v. Italy, ECHR). Therefore, an effective remedy must be provided for in the national law of the state concerned to enable entitled persons to defend their violated civil rights[8]. It should be noted that the European Court of Human Rights (ECHR) accepts that the right to a fair trial incorporates in its content the right of access to a court, that is to say, the right to initiate civil proceedings before a court that deals with civil matters (Golder v. the United Kingdom, ECHR). The question examined shows that the lack of explicit regulation on the right of contestation of unsuccessful applicants creates procedural barriers that prevent the possibility of a claim for the infringement of substantive provisions relating to the competition procedure.[9]

Conclusions

Based on the research, it can be clearly concluded that the lack of explicit legal regulation governing the right to direct judicial review by candidates who have not won competitions under the Labor Code hinders their access to justice. Such a decision contradicts the provision of Art. 56 of the Constitution of the Republic of Bulgaria and the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6) and the EU Charter of Fundamental Rights (Art. 47).

The impossibility of applying the provision of Art. 87, para. 1 of the Labor Code, by analogy, requires only one solution to the problem. It is necessary to create an explicit de lege ferenda provision, which regulates the legal possibility for unsuccessful candidates, as persons outside the competitive relationship, to challenge the lawfulness of the competition by claim. The proposed provision can be worded as follows: *"Disputes about the legality of the competition shall be heard by the district court at the request of each candidate who has not won the competition or the employer within 2 weeks of receiving the message with the result."*

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[8] It is clear that the provision in question also applies to civil disputes, which also cover labor disputes. The application of the provision of Article 6 § 1 to civil matters depends on the existence of a genuine dispute over rights and obligations which are "civil" within the meaning of the Convention (James and others v. United Kingdom, ECHR).

[9] In its judgment in Roche v. the United Kingdom, the ECHR concludes that the provision of Article 6 § 1 cannot be applied in cases of material restriction of a right under national law, that is, the Convention bodies cannot create by interpreting Article 6 § 1 materially civil law which has no legal basis in the party concerned. It should be noted that the case that is the subject of the cited decision concerns substantive law, and this article focuses on the introduction of a procedural rule similar to the one existing under Art. 87, para. 1 of the Labor Code.

Such a decision will help to overcome the legal absurdity that has arisen by providing access to judicial protection of persons whose rights have been violated by illegally conducted competitions and, last but not least, will facilitate the court in the exercise of its judicial function.

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