On some issues of the application of legislation by courts in the resolution of labor disputes

Unofficial translation

Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated November 28, 2024 № 1

Based on the results of the generalization of judicial practice, in order to ensure uniformity in the application of labor legislation by courts, as well as taking into account the issues that arise in courts when considering this category of cases, the plenary session of the Supreme Court of the Republic of Kazakhstan decides to provide the following clarifications.

1. The right of everyone to judicial protection of their rights and freedoms, stipulated in Article 13 of the Constitution of the Republic of Kazakhstan (hereinafter referred to as the Constitution), also applies to participants in labor relations.

2. Labor relations of certain categories of persons are regulated not only by the norms of the Labor Code of the Republic of Kazakhstan (hereinafter referred to as the Labor Code), but also by special legislative acts (on law enforcement service, on military service and the status of military personnel, on civil service, on internal affairs bodies, and others).

The legal relations of the parties to an employment contract, except for the conditions stipulated in it, are regulated by a collective agreement, other agreements of the parties and acts of the employer that do not contradict the norms of labor legislation. When considering labor disputes arising from legal relations that are not regulated by special regulatory legal acts, courts should be guided by the norms of the Labor Code.

If the working conditions of certain categories of employees regulated by other regulatory legal acts worsen the situation of these employees in comparison with the conditions provided for by the Labor Code, then the latter are subject to application in resolving a labor dispute, taking into account the provisions of paragraph 4 of Article 8 of the Labor Code and the hierarchy of regulatory legal acts established by Article 10 of the Law of the Republic of Kazakhstan dated April 6. 2016 "On Legal Acts".

3. Individual labor disputes are considered by conciliation commissions, with the exception of disputes arising between an employer and an employee of a microenterprise entity, a non-profit organization with no more than fifteen employees, a domestic worker, the sole executive body of a legal entity, the head of the executive body of a legal entity, as well as other members of the collegial executive body of a legal entity, and on unresolved issues or failure to comply with the decision of the conciliation commission - by the courts.

In addition, when applying in judicial practice the norms introduced on January 1, 2016 on the consideration of individual labor disputes by conciliation commissions in a pre-trial manner, the provisions of paragraph 3 of Article 8, articles 143, 144 and other provisions of

the Labor Code should be taken into account that the work of certain categories of employees, including those in military service, employees of special government agencies, law enforcement agencies, and civil servants are regulated by the Labor Code with special features, provided for by special laws and other regulatory legal acts of the Republic of Kazakhstan, which do not provide for the possibility of considering individual labor disputes by conciliation commissions. In this regard, the provisions of article 159 of the Labor Code do not apply to these individual categories of employees.

The conciliation commissions consider individual labor disputes on issues arising in the process of applying labor legislation in regulating labor relations, relations directly related to labor, on issues of social partnership, as well as occupational safety and health.

According to article 159 of the Labor Code, the appeal of employees or persons who previously had an employment relationship, or the employer to the conciliation commission is a mandatory stage of the pre-trial settlement of the individual labor dispute that has arisen between them. If a party to an individual labor dispute does not agree with the decision of the conciliation commission in whole or in part, the dispute is considered unresolved, and the party who does not agree with the decision of the conciliation commission, as in the case of non-fulfillment of the decision of the conciliation commission, has the right to apply to the court for a resolution of the labor dispute within the time limit set by it.

In accordance with paragraph 4 of Article 159 of the Labor Code, an application submitted to the conciliation commission is subject to mandatory registration by the said commission on the day of filing.

It is allowed to consider the dispute without the participation of the applicant with his written consent. Written consent to the consideration of the dispute without the participation of the applicant may be expressed both in an application when applying to the conciliation commission, and in a separate document submitted before the decision of the conciliation commission.

The procedure for the formation and activities of the conciliation commission are determined by an agreement on the work of the conciliation commission, which is concluded between the employer and employee representatives, or a collective agreement.

When resolving the issue of the legitimacy of the conciliation commission's activities, the courts should verify compliance with the requirements of paragraph 3 of Article 159 of the Labor Code on the content of the collective agreement or agreement on the work of the conciliation commission.

The provisions of paragraph 5 of Article 159 of the Labor Code provide that the conciliation commission is headed by a chairman elected by the members of the commission from among representatives of the employer and representatives of employees on a rotating basis with a frequency of at least once every two years. The meeting and the decision of the conciliation commission are valid if, when considering an individual labor dispute, an equal number of members of the conciliation commission from representatives of the employer and

representatives of employees were present at the meeting. Each member of the conciliation commission has one vote in the voting.

Courts should keep in mind that these rules are mandatory.

4. Article 160 of the Labor Code provides for the following deadlines for applying to the conciliation commission or the court for the consideration of individual labor disputes: for disputes about reinstatement at work, - one month from the date of delivery or sending by registered mail with a notification of delivery of a copy of the employer's act on termination of the employment contract to the conciliation commission, and for applying to the court – two months from the date of delivery or dispatch by registered mail with a notification of delivery of a copy of the decision of the conciliation commission when applying for unresolved disputes or in case of non–fulfillment of its decision by a party to an employment contract; for other labor disputes - one year from the day when the employee, including those who previously had an employment relationship, or the employer found out or should have found out about the violation of his right.

The term of the application for consideration of individual labor disputes is suspended during the period of validity of the mediation agreement on the labor dispute under consideration, as well as in the absence of a conciliation commission before its establishment.

Based on the provisions of paragraph 2 of Article 13 of the Constitution and article 159 of the Labor Code, the omission by a party to an individual labor dispute of the deadline for contacting the conciliation commission provided for in article 160 of the Labor Code is not a reason for the refusal of the conciliation commission to consider an individual labor dispute. The application is subject to consideration by the conciliation commission with a decision, which in the future will allow the party that does not agree with this decision to exercise its right to file a claim in court.

The law does not exclude the right of the conciliation commission to restore the deadline for submitting an application to the conciliation commission for the settlement of a dispute in a pre-trial manner.

If, for valid reasons, the deadline for applying is missed, the conciliation commission for labor disputes may restore the deadline for applying to the conciliation commission and resolve the dispute on its merits.

The issues of compliance by the party with the deadline for applying to the conciliation commission, the respectfulness of the reason for missing the deadline and its restoration are within the competence of the conciliation commission, regardless of the existence of a statement by the party to the individual labor dispute on the restoration of the deadline.

The conciliation commission independently determines whether the reasons why an employee, including those who previously had an employment relationship, did not apply to the conciliation commission within the established time frame are valid.

At the same time, missing this deadline without valid reasons may serve as an independent basis for the conciliation commission to make a decision to refuse to satisfy the

application without a hearing on the circumstances of the dispute, which does not prevent the party to the individual labor dispute from seeking protection of labor rights in court.

For participants in labor relations who have the right, in accordance with the Labor Code, to apply to the court without contacting the conciliation commission for the consideration of individual labor disputes, the following deadlines are set:

for disputes about reinstatement at work – three months from the date of delivery or sending by registered mail with a notification of delivery of a copy of the employer's act on termination of the employment contract;

in other labor disputes, - it is one year from the day when the employee, including those who had previously been in an employment relationship, or the employer learned or should have learned about the violation of his right.

Having established that the deadlines provided for in Article 160 of the Labor Code were missed for a valid reason, the court must indicate this in the operative part of the decision and resolve the dispute on the merits. The time limit for appeal is applied by the court only upon the application of the party to the dispute made before the court's decision.

If the court finds that the plaintiff's labor rights have been violated, but he has missed the deadline for applying to the court for consideration of an individual labor dispute provided for by the Labor Code without valid reasons, the court in the reasoning part of the decision indicates a violation of these rights and refuses to satisfy the claim due to missing the deadline.

The court is not bound by the conclusions of the conciliation commission, and the individual labor dispute is resolved on its merits within the limits of the plaintiff's claims.

5. Claims in disputes arising from labor relations are subject to filing in court according to the general rules of civil procedure at the location of the defendant, - the body of a legal entity , or at the place of residence of the employer, - an individual acting as a defendant in the dispute.

When lawsuits are filed at the location of a branch or representative office in accordance with the procedure provided for in part three of Article 30 of the Civil Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC), only legal entities may be defendants.

6. In accordance with article 33 of the Labor Code, a person is allowed to work only after the conclusion of an employment contract.

The conclusion of an employment contract, amendments and additions to it may be made in the form of an electronic document certified by an electronic digital signature of the parties to the employment contract.

When appealing orders to terminate or terminate an employment contract, the courts should take into account that the employer is obliged, on the basis of subparagraph 27) of paragraph 2 of Article 23 of the Labor Code, to include information on the conclusion and termination of an employment contract with an employee in the unified system of accounting

for employment contracts in accordance with the procedure determined by the authorized state body for labor.

In case of absence and (or) failure to properly formalize an employment contract due to the fault of the employer, he is liable in accordance with the procedure established by the laws of the Republic of Kazakhstan. In this case, the employment relationship is considered to have arisen from the day when the employee actually started work.

In the event that an employee or employer (customer or contractor) is unable to document the existence of an employment relationship, a dispute over the existence of an employment relationship between the parties may be resolved in court without contacting the conciliation commission.

7. Courts must distinguish civil law relations from labor law relations.

The existence of an employment relationship may be evidenced by circumstances when an employee personally performs work (labor function) according to a certain qualification, specialty, profession or position, subject to labor regulations, and the employer pays him wages for work.

8. According to article 146 of the Labor Code, the work of employees who are members of the trade union bodies of a professional union is regulated by the Labor Code with the specifics provided for by the Law of the Republic of Kazakhstan dated June 27, 2014 "On Trade Unions" (hereinafter – the Law on Trade Unions).

In accordance with paragraphs 1, 2, and 3 of article 26 of the Law on Trade Unions, members of elected trade union bodies who are not released from their main work cannot be subjected to disciplinary action without a reasoned opinion from the trade union body of which they are members. The head (chairman) of a trade union body who has not been released from his main job cannot be brought to disciplinary responsibility without a reasoned opinion from a higher trade union body. Termination of an employment contract at the initiative of an employer with members of elected trade union bodies who have not been released from their main work is allowed subject to the general procedure for termination of an employment contract, taking into account the reasoned opinion of the trade union body of which these persons are members, except in cases of liquidation of a legal entity or termination of the activity of an employer – individual entity. An employment contract with the head (chairman) of a trade union body who has not been released from his main job may not be terminated on the initiative of the employer without the reasoned opinion of a higher trade union body, except in cases of liquidation of a legal entity or termination of the activity of an employer – individual entity.

The reasoned opinion of the trade union body is taken into account when issuing an act of the employer on the imposition of disciplinary action and termination of the employment contract at the initiative of the employer with members of elected trade union bodies who are not released from their main work, in accordance with the procedure provided for in the collective agreement.

When resolving a dispute over the legality of termination of an employment contract at the initiative of an employer or bringing to disciplinary responsibility, the courts should distinguish between the concepts of "trade union member" and "member of an elected trade union body." The legislation requires obtaining a reasoned opinion from the trade union body of a trade union only in relation to members of elected trade union bodies who are not released from their main jobs. The employer is obliged to obtain a reasoned opinion from the trade union body of the trade union when issuing an order to terminate the employment contract at the initiative of the employer and bring to disciplinary responsibility.

In accordance with subparagraph 9) of article 17 of the Law on Trade Unions, trade unions are required to inform the employer within three working days from the date of election or re-election of members of elected trade union bodies who have not been released from their main jobs.

When challenging an employer's act of disciplinary action or termination of an employment contract initiated by the employer with a member of elected trade union bodies who have not been released from their main job, the courts should verify that the employer and the trade union comply with the procedure and deadlines for providing a reasoned opinion provided for in the collective agreement. If an employer has applied to a trade union body for a reasoned opinion from a trade union body, within the time limits set by the collective agreement, but the trade union refuses or refuses to provide a reasoned opinion, then upon the expiration of the deadline for providing the opinion of the trade union body, an act of the employer on the imposition of disciplinary action or termination of the employment contract on the initiative of the employer with a member of an elected trade union body, who is not released from his main work, is issued.

The absence of a reasoned opinion of the body of the trade union at the time of termination of the employment contract on the initiative of the employer or bringing to disciplinary responsibility a member of an elected trade union body who has not been released from his main job is an unconditional basis for satisfying a claim for reinstatement, since a reasoned opinion must be obtained before issuing an order.

9. Transfer to another job in the cases provided for in Article 38 of the Labor Code is allowed both on the initiative of the employee and on the initiative of the employer by sending a notification with a transfer offer, but with the consent of the other party to the employment contract.

A notice of transfer to another job is submitted by one of the parties to the employment contract and reviewed by the other party within five working days from the date of its submission in accordance with article 33 of the Labor Code. The party that receives the notification with the offer of transfer to another job is obliged to inform the other party about the decision.

When transferring to another job, it is allowed to change the employee's job (labor function), which entails a change in position, specialty, profession, qualification, or if the

employee does not have a position, profession, or specialty, the employer assigns other work, during which working conditions change (salary, working hours and rest time, benefits, and other conditions) stipulated by the employment contract.

A transfer to another job will also be considered a transfer to a separate structural unit of the employer, regardless of whether such a transfer entails a change in position, specialty, profession, qualification or not. The norms of Article 43 of the Civil Code of the Republic of Kazakhstan (hereinafter referred to as the Civil Code) list the types of separate structural units of a legal entity (branch, representative office or other separate structural unit) and define their characteristics.

Amendments to the employment contract in accordance with paragraph 2 of Article 33 of the Labor Code upon transfer to another job are made by the parties in writing in the form of an additional agreement to the employment contract, with the exception of the cases provided for in articles 41 and 42 of the Labor Code, with the issuance of an act of the employer.

An employee's refusal to transfer to another job in the cases provided for in Article 38 of the Labor Code is not grounds for termination of the employment contract under paragraph 1 of Article 58 of the Labor Code, except for the employee's refusal to transfer to another locality together with the employer.

The Labor Code provides for a different notice period when an employee is transferred to another locality together with the employer. Based on paragraph 1 of Article 39 of the Labor Code, the employer is obliged to notify the employee of the upcoming relocation of the employer to another locality no later than one month in advance, unless labor or collective agreements provide for a longer notice period. In accordance with article 128 of the Labor Code, when an employee is transferred to work in another locality together with the employer , the latter is obliged to reimburse the employee for: 1) relocation of the employee and his family members; 2) transportation of the employee's property and members of his family. Failure by the employer to comply with the provisions of articles 39 and 128 of the Labor Code may result in the employee's refusal to transfer to another locality with the employer, which excludes the possibility of termination of the employment contract under subparagraph 1) of paragraph 1 of Article 58 of the Labor Code. At the same time, the courts should take into account that article 39 of the Labor Code provides for the possibility of transferring an employee to another locality together with the employer, and not to a separate structural subdivision of a legal entity.

10. Courts should distinguish the transfer of an employee to another job from a change in working conditions (salary, working hours and rest periods, benefits and other conditions) under paragraph 1 of Article 46 of the Labor Code, while the employee continues to perform work (work function) stipulated in the employment contract.

In case of a change in working conditions, the employer is obliged to notify the employee no later than fifteen calendar days in advance, unless labor or collective agreements provide for a longer notice period. Notification of changes in working conditions is given to

employees only in connection with changes in the organization of production related to reorganization or changes in economic, technological, working conditions and (or) a reduction in the amount of work at the employer, and a change in the working conditions of an employee is allowed if he continues to work in accordance with his specialty or profession, appropriate qualifications. At the same time, the notification should indicate which working conditions of the employee are subject to change. The employee's consent to the change in working conditions must be expressed in writing. In the event of an employee's written refusal to continue working due to a change in working conditions, or if there is an act certifying the employee's refusal to submit a written refusal to continue working due to a change in working conditions, the employment contract with the employee is terminated on the grounds provided for in subparagraph 2) of paragraph 1 of Article 58 of the Labor Code.

11. In accordance with the Labor Code, the employer's act must specify the basis for termination of the employment contract.

The court, when deciding on the reinstatement of an employee, due to violations of the law upon termination of an employment contract, recognizes as illegal and cancels the employer's act on termination of the employment contract, even if the plaintiff has not stated such a requirement. In this case, the court does not violate the rule on resolving the case within the limits of the plaintiff's claims (part two of Article 225 of the CPC), since reinstatement at work is impossible without recognizing the illegal act of the employer on termination of the employment contract.

12. When resolving a dispute about the legality of termination of an employment contract, the courts should verify the employer's compliance with the procedure for termination of an employment contract, which depends on whether an employment contract has been concluded for a certain or indefinite period. In case of termination of an employment contract concluded for a certain period of at least one year, the employer's notice of termination of the employment contract due to the expiration of its term is handed over by one of the parties to the employment contract on the last working day (shift).

A copy of the employer's act on termination of the employment contract in connection with the expiration of the term is handed over to the employee or sent to him by registered mail with a notification of its delivery or by sending via courier mail, fax, e-mail and other information and communication technologies, in the form of an electronic document certified by an electronic digital signature within three working days from the date of publication of the employer's act.

Upon termination of an employment contract concluded for the duration of a certain job, for the duration of the replacement of a temporarily absent employee, or for the duration of seasonal work, a notice of termination of the employment contract is not required.

The courts should keep in mind that it is not allowed to terminate an employment contract on the initiative of the employer during the period of temporary disability and the employee's

stay on vacation, except in the cases provided for in subparagraphs 1), 18), 20) and 23) of paragraph 1, paragraph 1-1 of Article 52 of the Labor Code.

An employment contract concluded for a certain period of at least one year, based on a written application for an extension, is extended by the employer until the end of parental leave for pregnant women with a pregnancy period of twelve weeks or more, as well as employees with a child under the age of three who have adopted a child, and those who wish to use their right to leave without pay for child care. If an employee belonging to this category provides supporting documents granting the right to extend the term of the employment contract, the employer is obliged to extend the employment contract on the day of the end of parental leave, the duration of which is determined by a written statement from the employee. The day of termination of the employment contract is the day of the end of parental leave.

At the same time, it should be borne in mind that the specified duties of the employer do not apply to an employee with whom an employment contract has been concluded for the duration of the replacement of a temporarily absent employee, for the duration of certain work, or for the duration of seasonal work.

In cases where, after the expiration of the contract, which was first concluded for a certain period, it was not terminated, the employee continued to perform his previous work with the knowledge of the employer and neither party during the last working day (shift) has not notified about the termination of the employment relationship, such a contract is considered extended for the same period for which it was previously concluded, with the exception of the cases provided for in paragraph 2 of Article 51 of the Labor Code.

If the expiration date of the contract falls on a paid annual work leave, the last day of the paid annual work leave is considered to be the day of termination of the employment contract due to the expiration of its term.

The Labor Code restricts an employer's right to renew an employment contract more than twice. In case of further continuation of the employment relationship, the employment contract is considered concluded for an indefinite period. This rule does not apply to cases of continuation of employment relations with persons who have reached retirement age provided for in paragraph 5 of Article 30 of the Labor Code.

13. When examining the issue of compliance with the procedure for termination of an employment contract, courts should distinguish between the concepts of "termination of an employment contract on the initiative of the employer on the grounds provided for in subparagraphs 2) and 3) of paragraph 1 of Article 52 of the Labor Code" and "termination of an employment contract on the grounds of subparagraph 2) of paragraph 1 of Article 58 of the Labor Code."

In case of termination of an employment contract at the initiative of the employer on the grounds provided for in subparagraphs 1) and 2) of paragraph 1 of Article 52 of the Labor Code, the employer is obliged to notify the employee of the termination of the employment contract at least one month in advance, unless the labor or collective agreements provide for a

longer notice period. Upon termination of an employment contract under subparagraph 3) of paragraph 1 of Article 52 of the Labor Code, the employer is obliged to notify the employee of the termination of the employment contract fifteen working days in advance, unless a longer notice period is provided for in the employment or collective agreements.

It should be noted that the notice period for termination of an employment contract can be replaced by payment of wages proportional to the unpaid period only upon termination of the employment contract in accordance with subparagraph 3) of paragraph 1 of Article 52 of the Labor Code.

In case of termination of an employment contract at the initiative of the employer on the grounds provided for in subparagraphs 1) and 2) of paragraph 1 of Article 52 of the Labor Code, termination of the contract may be made before the expiration of the notice period with the written consent of the employee.

Upon termination of the employment contract on the initiative of the employer on the grounds provided for in subparagraph 3) of paragraph 1 of Article 52 of the Labor Code, the employer must indicate in the notification the reasons that served as the basis for the termination of the employment contract.

Labor legislation prohibits the termination of an employment contract on the grounds provided for in subparagraphs 2) and 3) of paragraph 1 of Article 52 of the Labor Code with pregnant women, regardless of the duration of pregnancy, but does not prohibit the delivery of a notice of impending termination of an employment contract, which provides pregnant women with the opportunity to provide the employer with a document confirming pregnancy.

14. In the event of a negative result of an employee's work during the test period, the employer has the right to terminate the employment contract with him in accordance with subparagraph 7) of paragraph 1 of Article 52 of the Labor Code, notifying the employee, indicating the reasons that served as the basis for the termination of the employment contract. Simultaneously with the delivery of the notice of non-completion of the test, the employer's act of termination of the employment contract is issued.

If the test period has expired and the employer has not notified of the termination of the employment contract, the employee is considered to have completed the test period.

The test period can only be stipulated at the conclusion of an employment contract, in order to verify the compliance of the employee's qualifications with the assigned work. The test period begins on the date of commencement of work specified in the employment contract.

An unsatisfactory test period must be confirmed by objective data related only to the qualifications of the employee assigned to the job. Consequently, no other circumstances can serve as a basis for termination of the employment contract on this basis.

15. Upon termination of an employment contract on the initiative of an employee in accordance with the procedure provided for in Article 56 of the Labor Code, the employee must notify the employer at least one month in advance, except in cases provided for in

paragraph 3 of Article 56 of the Labor Code. An employment contract may set a longer period for the employee to notify the employer of the termination of the employment contract. If there is a longer notice period in the employment contract, the employee must notify the employer within the time period agreed upon by the parties to the employment contract, unless the parties have agreed to shorten the notice period.

The notification period before the date of termination of the employment contract includes both the period of actual performance of work duties and the period of his absence, during which the employee retains his place of work (for example, being on vacation, temporary disability, inter-shift rest, etc.).

The notification of the impending termination of the employment contract at the initiative of the employee may be withdrawn unilaterally by the employee during the notification period.

Termination of an employment contract before the expiration of the notice period is allowed only with the written consent of the employer.

Termination of an employment contract on the initiative of an employee is permissible if the notification of termination of the contract came from the employee himself and was his voluntary expression of will.

Upon expiration of the notification period, the Labor Code imposes on the employer the obligation to execute the termination of the employment contract, i.e. timely issue the act by the employer and deliver or send a copy of it by registered mail with notification of its delivery or by courier mail, fax, e-mail or other information and communication technologies within three working days from the date of publication of the order.

16. When considering cases concerning the reinstatement of persons whose employment contract has been terminated due to the liquidation of an employer (legal entity), termination of the activity of an employer (individual), reduction in the number or staff of employees (subparagraphs 1) and 2) of paragraph 1 of Article 52 of the Labor Code), the courts are required to verify whether the organization (legal entity) has been liquidated, whether the activity of the employer (individual) has been terminated, whether there has actually been a reduction in the number or staff of employees, whether the procedure provided for by legislative acts for the release of employees has been observed, and whether other persons have been hired in their place.

When distinguishing between the concepts of "liquidation" and "reorganization", courts should be guided by the norms of the Civil Code, given that, according to Article 47 of the Labor Code, a change of ownership or reorganization (merger, affiliation, division, separation , transformation) of an employer organization does not terminate an employment relationship. In this case, termination of the employment contract at the initiative of the employer is possible only with a real reduction in the number or staff of employees.

When considering cases on the reinstatement of persons whose employment contract was terminated due to a decrease in production, work performed and services rendered, which led

to a deterioration in the employer's economic condition (subparagraph 3) of paragraph 1 of Article 52 of the Labor Code), the courts are required to verify whether the employer has complied with the procedure established by law for termination of an employment contract on this basis. The employer is obliged to notify employees about the upcoming termination of the employment contract on this basis fifteen working days in advance, unless a longer notice period is provided for in the employment or collective agreements. By agreement of the parties, the notice period may be replaced by the payment of wages proportional to the unpaid period. In the notification, the employer must indicate the reasons that served as the basis for the termination of the employment contract.

Termination of an employment contract on this basis is possible if the following conditions are met at the same time:

closure of a structural unit (workshop, site);

inability to transfer an employee to another job;

at least one month's notice to employee representatives indicating the reasons that served as the basis for termination of the employment contract (there is a direct link between the economic changes at the employer and the need to terminate the employment contract).

Consequently, an employment contract can be terminated only if there are a set of conditions defined by law.

The employer must prove his financial insolvency and provide evidence of a deterioration in the economic situation by providing financial documents confirming a decrease in production. Such evidence may include audit reports, early completion of work under civil law contracts, which confirms a decrease in production, work performed and services rendered, which has led to a deterioration in the economic condition of the employer.

Given that the initiative to terminate the employment contract comes from the employer, the obligation to provide such evidence rests with him.

17. Termination of the employment contract in accordance with subparagraph 4) of paragraph 1 of Article 52 of the Labor Code, in view of the employee's inconsistency with his position or work performed due to insufficient qualifications, confirmed by the results of attestation, must be based on the decision of the attestation commission, which must include a representative of the employees, unless otherwise established by the laws of the Republic of Kazakhstan.

The procedure, conditions and frequency of certification of employees are determined by a collective agreement or an act of the employer. Termination of an employment contract on the grounds provided for in subparagraph 5) of paragraph 1 of Article 52 of the Labor Code, in case of repeated failure to pass a knowledge test on occupational safety and health or industrial safety by an employee, supervisor and person responsible for ensuring occupational safety and health, must be based on the decision of the examination commission established

in accordance with the procedure established by the legislation of the Republic of Kazakhstan . The results of the examination of employees' knowledge are drawn up in a protocol, which is signed by the chairman and members of the examination committee.

Employees are trained and tested on occupational safety and health issues at least once a year. The training of employees ends with a knowledge test (exam) on occupational safety and health.

Managers and persons responsible for ensuring occupational safety and health are trained and tested on occupational safety and health issues in organizations engaged in professional development, periodically, at least once every three years, in accordance with the procedure determined by the authorized state body for labor, according to the list approved by the act of the employer.

Termination of an employment contract on the grounds provided for in subparagraph 6) of paragraph 1 of Article 52 of the Labor Code, on the grounds that an employee does not comply with his position or work performed due to a health condition that prevents the continuation of this work and excludes the possibility of its continuation, must be confirmed by a medical opinion in accordance with the procedure established by the legislation of the Republic of Kazakhstan.

18. When resolving a claim for reinstatement of a person dismissed on the grounds provided for in subparagraph 16) of paragraph 1 of Article 52 of the Labor Code, the court is obliged to examine evidence as to whether the employee had previously committed misconduct for which he was brought to disciplinary responsibility, whether the procedure and deadlines for imposing this disciplinary penalty established by legislative acts were observed, whether there is a sign of repeated failure or repeated improper performance of work duties by an employee without valid reasons.

If, during the consideration of the case, the court finds that the person was disciplined for a previously committed offense in violation of the law, then the sign of repetition is excluded, and the plaintiff is subject to reinstatement at his previous job.

When determining the recurrence, it is necessary to be guided by the presence of an employee of one of the types of disciplinary punishment (remark, reprimand, severe reprimand) during the period of its validity, regardless of which disciplinary offense was committed by the employee repeatedly similar to the first offense or any other disciplinary offense. The termination of an employment contract provides for the imposition of disciplinary penalties on an employee for repeated non-performance or repeated improper performance of labor duties without valid reasons.

At the same time, the court should keep in mind that termination of an employment contract on this basis is possible only if there is a previously committed disciplinary offense for which the employee has already been brought to disciplinary responsibility, in accordance with the procedure provided for in Article 65 of the Labor Code.

19. Considering labor disputes on claims of persons on the grounds provided for in sub-paragraphs 8), 9), 10), 11), 12), 14), 15), 16), 17), 18) of paragraph 1 of Article 52 of the Labor Code, courts should keep in mind that:

termination of an employment contract on these grounds is one of the types of disciplinary liability that can be carried out in compliance with the procedure for applying disciplinary penalties provided for in articles 65, 66 of the Labor Code;

the day on which the misconduct is discovered, from which the month period begins, is the day on which the person to whom the employee is subordinate becomes aware of the commission of the misconduct, regardless of whether he is entitled to impose disciplinary penalties or not;

an employee's refusal to provide a written explanation or an explanation in electronic form with authorization, identification of the employee about the circumstances of the misconduct committed by him is not a reason for reinstating him to his previous job or canceling an order to impose a disciplinary penalty if the guilt of committing a disciplinary offense is confirmed by a set of evidence. The norms of labor legislation do not impose on the employer the obligation to familiarize with the act on the fact that an employee has committed a disciplinary offense and with the act on the employee's refusal to give a written explanation.

In this case, an act on the employee's refusal to give a written explanation or an explanation in electronic form with authorization, identification of the employee is drawn up by the employer's representative after two working days from the date of receipt of the request or drawing up an act on evasion or refusal to receive the request. The request for an explanation of the offense committed is made in writing (on paper or in the form of an electronic document certified by an electronic digital signature) and is delivered to the employee personally or by courier mail, postal service, fax, e-mail and other information and communication technologies with confirmation of receipt of the employer's request.

Termination of an employment contract at the initiative of an employer with an employee for committing embezzlement (including petty theft) at his place of work can only take place if his guilt in committing embezzlement is proven by a court decision or court verdict that has entered into force, regardless of the type of punishment imposed. Such dismissal is allowed no later than one month from the date of entry into force of judicial acts.

At the same time, courts should distinguish this type of disciplinary punishment from termination of an employment contract under subparagraph 2) of paragraph 1 of Article 57 of the Labor Code, the grounds for termination of which do not depend on the will of the parties, in connection with the entry into force of a court verdict by which an employee or an individual employer is sentenced to punishment, excluding the possibility of continuing the employment relationship.

For violation of labor discipline, the employer has the right to apply disciplinary action to the employee even when, prior to committing this offense, he submitted an application for termination of the employment contract on his own initiative, or a notice of termination of the

employment contract by agreement of the parties, since in these cases the employment relationship is terminated only after the expiration of the notice of termination of the employment contract on the initiative of the employee or by agreement of the parties (paragraph 2 of Articles 50 and 56 of the Labor Code).

For committing a disciplinary offense, an employee may be brought not only to disciplinary responsibility, but also to other types of legal action that are not disciplinary action (financial liability, etc.).

20. When resolving a case on the correctness of termination of an employment contract for the absence of an employee at work for three or more hours without a valid reason. in a row for one working day (shift), it must be borne in mind that termination on this basis, in particular, can be made for:

leaving an employee's place of work without a valid reason, as well as during the period of work before the expiration of the one-month notice period on termination of the employment contract;

leaving an employee's place of work without a valid reason before the expiration of the employment contract;

the absence of an employee from work for three or more consecutive hours during one working day (work shift) without valid reasons, namely, being outside the workplace, where, in accordance with labor duties, he must perform the work assigned to him;

unauthorized taking of leave, including unpaid leave (with the exception of unpaid leave to care for a child until he reaches the age of three, which the employer must provide to the employee upon his application in accordance with Article 100 of the Labor Code) or unauthorized use of rest days for work on holidays and weekends or hours of rest for overtime work.

21. When considering a case on reinstatement of a person dismissed for absenteeism due to refusal to transfer to another job, the court is obliged to verify the legality of the transfer itself (articles 38, 39, 43 of the Labor Code). If the transfer to another job is considered illegal , dismissal for absenteeism cannot be considered justified, and the employee is subject to reinstatement at his previous job.

22. If the court, when resolving the case, finds that the misconduct underlying the order to terminate the employment contract for violation of labor discipline was expressed in the employee's refusal to continue work due to a change in working conditions and he does not agree to continue work in the new conditions, the court has the right, with the consent of the plaintiff, to change the wording of termination of an employment contract.

23. At the initiative of the employer (subparagraph 9) and 10) of paragraph 1 of Article 52 of the Labor Code), an employment contract may be terminated if the employee is at work in a state of alcoholic, narcotic, psychotropic, or substance abuse intoxication (their analogues), including in cases of use during the working day of substances causing alcoholic, narcotic, substance abuse intoxication (their analogues). For termination of an employment contract on

these grounds, it does not matter whether the employee was suspended from work due to such a condition.

Termination of an employment contract on these grounds may also occur when an employee was in such a state during working hours or used these substances not at his workplace, but on the territory of an organization or facility where, on behalf of the employer, he was supposed to perform a labor function.

The presence of an employee in a state of alcoholic, narcotic, psychotropic, or substance abuse intoxication (their analogues) must be confirmed by a medical report.

The procedure for conducting a medical examination is regulated by the order of the Minister of Health of the Republic of Kazakhstan dated November 25, 2020 "On certain issues of medical and social assistance in the field of mental health", which approved the " Rules for conducting a medical examination to establish the fact of substance use and intoxication" (hereinafter referred to as the Rules). By virtue of paragraph 4 of the Rules, a medical examination is carried out in state medical organizations.

The decision to send an employee for a medical examination is made by the employer's representative. If an employee refuses to undergo a medical examination, an appropriate act is drawn up, which is the basis for termination of the employment contract in accordance with subparagraph 10) of paragraph 1 of Article 52 of the Labor Code.

In the event of a dispute over the presence of an employee in a state of alcoholic, narcotic, psychotropic, or substance abuse intoxication (their analogues) during the period of being on duty during the inter-shift rest, the courts are required to take into account the specifics of the use of the shift method. According to paragraph 4 of Article 135 of the Labor Code, a shift is a period that includes the time of work at the facility and the time between shifts of rest. Inter-shift rest does not relate to working hours, it is one of the types of rest.

The identification of the fact that an employee is in a state of alcoholic, narcotic, psychotropic, or substance-abuse intoxication (their analogues), including in cases of use of substances that cause alcoholis, narcotic, psychotropic, or substance-abuse intoxication (their analogues), during the period of inter-shift rest is not grounds for termination of the employment contract at the initiative of the employer under subparagraphs 9) and 10) of paragraph 1 of Article 52 of the Labor Code.

24. When considering a dispute in connection with the commission of a disciplinary offense by an employee, the courts should take into account that the choice of the type of disciplinary punishment (remark, reprimand, severe reprimand, termination of an employment contract) is the right of the employer, depending on the disciplinary offense committed by the employee and falls within the competence of the employer with whom the employee is in an employment relationship.

When determining the type of disciplinary action, the employer in the cases provided for in the sub-paragraphs 8), 9), 10), 11), 12), 14), 15), 16), 17), 18) of paragraph 1 of Article 52 of the Labor Code has the right to apply termination of the employment contract. If, when

considering the case of reinstatement of a person with whom the employment contract was terminated for violation of labor discipline, the court concludes that the misconduct actually took place, but the termination was carried out in violation of the procedure established by the Labor Code or the deadline for disciplinary action, then the employee may be reinstated.

25. Termination of an employment contract on the grounds provided for in subparagraph 13) of paragraph 1 of Article 52 of the Labor Code is allowed in respect of employees who directly serve monetary or commodity values, as well as in respect of employees who use their official position in their own interests or in the interests of third parties, contrary to the interests of the employer, in return for obtaining material or other benefits for himself or other persons, if these actions or inaction give grounds for the loss of confidence in him on the part of the employer.

The courts should take into account that according to subparagraph 13) of paragraph 1 of Article 52 of the Labor Code, not only employees who directly service monetary or commodity values (reception, storage, transportation, distribution, etc.), but also other employees who, by virtue of their work responsibilities, have direct access to monetary transactions, who have committed culpable acts or omissions that give rise to a loss of confidence in them, may be dismissed.

Such actions, in particular, may include: receiving payment for services without appropriate documents, measuring, weighing, cheating, violation of the rules for the sale of alcoholic beverages or the issuance of narcotic drugs, overestimation of prices, embezzlement of property or culpable admission of its shortage and surplus; banking transactions conducted in violation of the established procedure.

Termination of an employment contract under subparagraph 13) of paragraph 1 of Article 52 of the Labor Code is not a type of disciplinary action. The employer's act should regulate the procedure for conducting an internal investigation to terminate an employment contract on this basis, the observance of which should be checked by the court when considering a labor dispute.

The basis for issuing an order to terminate an employment contract under subparagraph 13) of paragraph 1 of Article 52 of the Labor Code is an act of internal investigation indicating in it the justifications confirming the commission of guilty actions or omissions by the employee.

26. Termination of an employment contract on the grounds provided for in subparagraph 14) of paragraph 1 of Article 52 of the Labor Code is allowed only in respect of persons directly performing educational functions (school teachers, teachers of educational institutions, preschool educators, industrial training masters, and others) if the immoral misconduct they have committed is incompatible with the continuation of this work. Other employees of educational institutions who do not directly perform educational functions may not be dismissed on this basis.

Immoral should be understood as an offense that contradicts generally accepted norms of behavior, committed not only in the exercise of educational functions, but also in everyday life (obscenities, violence against students, appearing intoxicated, insulting human dignity, etc .).

27. Termination of an employment contract on the grounds provided for in subparagraph 24) of paragraph 1 of Article 52 of the Labor Code is allowed only in respect of employees who have reached the retirement age established by the Social Code of the Republic of Kazakhstan.

Termination of an employment contract on the grounds provided for in subparagraph 24) of paragraph 1 of Article 52 of the Labor Code is allowed, including with the heads of trade union organizations elected on the basis of a decision of the supreme or collegial body of a trade union, regardless of the term of election. Termination of an employment contract with elected heads of trade union organizations may be carried out before the end of the term of office in accordance with the procedure provided for in paragraph 9 of Article 53 of the Labor Code.

Courts should take into account that termination of an employment contract with employees who have reached retirement age is the right, not the obligation, of the employer.

The possibility of continuing employment relations for employees who have reached retirement age should be fixed by the provisions of the collective agreement only for pensioners whose work involves difficult, harmful and (or) dangerous working conditions (subparagraph 9) of paragraph 1 of Article 157 of the Labor Code).

Termination of an employment contract at the initiative of the employer is allowed at any time, regardless of the term of the contract, but after the employee reaches retirement age, with mandatory notification to the employee after reaching retirement age, at least one month before the date of termination of the employment contract and payment of compensation in the amount determined by labor, collective agreements and (or) by an act of the employer.

28. When resolving a dispute about the correctness of termination of an employment contract on the grounds provided for in subparagraph 25) of paragraph 1 of Article 52 of the Labor Code, the court is obliged to examine evidence indicating the employee's actual absence from work for more than one month for reasons unknown to the employer.

The employer has the right to terminate the employment contract on the grounds provided for in subparagraph 25) of paragraph 1 of Article 52 of the Labor Code, subject to the following conditions:

1) absence of an employee from work for more than one month for reasons unknown to the employer;

2) drawing up an act on the absence of an employee from the workplace for more than one month on the basis of a time sheet;

3) sending an act on the absence of an employee at the workplace by registered mail with a notification of its delivery in order for the employee to provide information about the reasons for his absence;

4) failure by the employee to provide information on the reasons for absence from work within ten calendar days from the date of sending the employee's absence report by the employer.

29. When considering applications to challenge an employer's orders to bring an employee to disciplinary responsibility, it should be borne in mind that a violation of labor discipline is the culpable failure or improper performance by an employee of the work duties assigned to him (violation of labor regulations, job descriptions and regulations, orders of the employer, technical rules, etc.).

Such violations include, in particular:

refusal of an employee to perform work duties without valid reasons based on changes in working conditions, if such changes were made to the employment contract with the consent of the employee;

refusal or evasion, without valid reasons, from a medical examination mandatory for employees of certain professions or an expert occupational pathology commission, as well as the employee's refusal to undergo special training necessary to perform the work; the employee's refusal to undergo training in occupational safety and health, exams on safety and operating rules, industrial safety, if this is a prerequisite for admission to work.

30. If, when resolving a dispute about reinstatement at work, the court finds that the employer had grounds for termination or termination of the employment contract, but the order mistakenly specified a provision of the Labor Code or another law, the court refuses to satisfy the claim. In the reasoning part of the decision, the court indicates the basis for termination or termination of the contract provided for by the Labor Code or other law, according to which the employment contract was subject to termination or termination.

31. In case of illegal termination of the employment contract, an employee is subject to reinstatement at his previous job, regardless of the fact that the former position at the time of the dispute is actually absent (reduced). Subsequent termination or termination of an employment contract with an employee may be carried out only in compliance with the procedure and grounds established by law. However, at the request of an unlawfully dismissed employee, the court may limit itself to making a decision in his favor to recover wages for the time of forced absenteeism (but not more than six months) and to change the wording of the grounds for termination of the employment contract on the initiative of the employee.

Illegally dismissed military personnel are reinstated in their former military service (and with his consent – equal or not lower) positions and are provided with all types of allowances not received in connection with illegal dismissal.

If it is impossible to restore the employee to his previous job due to the liquidation of the organization or the termination of the activity of the employer (individual) the court recognizes the termination of the employment contract as illegal, obliges the liquidation commission or the body that made the decision to liquidate the organization (if the liquidation was not carried out by a court decision), and in appropriate cases, the legal successor, to pay the employee wages for the time of forced absenteeism, but not more than six months in advance. At the same time, the court recognizes the employee as dismissed under subparagraph 1) of paragraph 1 of Article 52 of the Labor Code in connection with the liquidation of a legal entity or the termination of the activity of the employer (individual) from the moment of the decision on liquidation / termination of activity. Reinstatement at the previous job of an employee with whom an employment contract concluded for a certain period of time has been unlawfully terminated or terminated, is allowed within the term of the employment contract. If, at the time of the dispute, the term of the employment contract has expired, the employee, by decision of the conciliation commission or the court, is paid wages and other payments due to him for the entire period from the date of unlawful termination of the employment contract to the date of expiration of the employment contract, but not more than six months in advance.

32. Given that the Labor Code does not provide for the right of an employer to early recall from work leave without the employee's consent, the employee's refusal to comply with an order to recall from work leave cannot be considered a violation of labor discipline.

33. The Labor Code excludes the limits of an employee's financial liability for damage caused.

According to paragraph 7 of Article 123 of the Labor Code, the list of positions and jobs held or performed by employees, employees of the sending party, with whom an agreement may be concluded on full individual or collective (solidarity) financial responsibility for failure to ensure the safety of property and other valuables transferred to employees, employees of the sending party, as well as a standard agreement on full financial responsibility, is approved by an act of the employer or an act of the receiving party.

The list of grounds for incurring financial liability in the full amount of damage caused to the employer or the receiving party, the employee of the sending party in the performance of his work duties, is specified in paragraph 8 of Article 123 of the Labor Code.

It is unacceptable to impose on an employee, an employee of the sending party, material responsibility for damage that can be classified as a normal industrial and economic risk. The employer or the receiving party is obliged to provide employees and employees of the sending party with the conditions necessary for normal work and to ensure the complete safety of the property entrusted to them.

Courts should take into account that in order to bring employees, employees of the sending party, to full financial responsibility, the Labor Code does not in all cases require a contract on full financial responsibility. So, for example, for failure to ensure the safety of

property and other valuables, an employee may be held fully financially responsible if he receives material assets under a one-time document.

When considering disputes on compensation for property damage, the courts should distinguish the harm caused by an employee in the performance of his work duties from the harm arising from civil law relations.

The employer with whom the employee has an employment relationship is responsible for the damage caused by the employee in the performance of his work duties to third parties. At the same time, the employer who has compensated the damage has the right to reverse the claim (recourse).

34. Plaintiffs are exempt from paying state duties in courts for claims for recovery of wages and other claims related to work (subparagraph 1) of Article 616 of the Code of the Republic of Kazakhstan "On Taxes and Other Mandatory Payments to the Budget (Tax Code) ". In case of satisfaction of the claim, the court, in accordance with Article 117 of the CPC, is obliged to collect a state fee to the state revenue from the defendant, who is not exempt from its payment.

35. Invalidate:

1) Regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated October 6, 2017 No. 9 "On some issues of application of legislation by courts in resolving labor disputes";

2) Paragraph 18 of the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated April 20, 2018 No. 7 "On Amendments and Additions to certain regulatory resolutions of the Supreme Court of the Republic of Kazakhstan on civil and civil procedural legislation".

36. According to article 4 of the Constitution, this regulatory resolution is included in the current law, is generally binding and enters into force from the date of the first official publication.

Chairman of the Supreme Court of the Republic of Kazakhstan — *A. Mergaliev*

Judge of the Supreme Court of the Republic of Kazakhstan, secretary of the plenary session — *G. Almagambetova*