Republic of Bulgaria
ECONOMIC
AND SOCIAL COUNCIL

O P I N I O N

on

ENHANCING THE EFFECTIVENESS OF THE JUDICIAL MECHANISM IN RESOLVING INDIVIDUAL LABOUR DISPUTES

(on its own initiative)

Sofia, 12 December 2006

The 2006 Annual Working Plan of the Economic and Social Council provides for the drafting of an opinion on “Enhancing the Effectiveness of the Judicial Mechanism in Resolving Individual Labour Disputes”.

The ESC President assigned the drafting of the opinion to the ESC Standing Commission on Labour, Incomes, Life Standard and Industrial Relations.

Mr. Chavdar Hristov – was appointed Rapporteur.

At its meeting on 14.11.2006 the Standing Commission on Labour, Incomes, Life Standard and Industrial Relations approved the draft-opinion.

At the plenary session on 12.12.2006 the Economic and Social Council approved the present opinion.

I. INTRODUCTION

With the adoption of the new Constitution (1991) the special jurisdictions, existing to that moment, the commissions on labour disputes inclusive, set up in the enterprises under Article 372 et seq. of the Labour Code (LC, repealed in 1992) had been abolished. Most of the labour disputes arisen were resolved by those commissions and in practice very few labour disputes, mostly related to compensations and dismissals, were referred to the judicial system.

After the adoption of the Constitution (1991) and the repeal of the relevant LC texts dealing with the setting up of the collective labour courts (CLC) and the labour disputes under their jurisdiction, the hearing and resolution of labour disputes were fully centralized in the judicial system. In the years of transition and at present, individual labour disputes are heard by the general civil courts under the general civil procedure, forasmuch as they are civil cases.

It is in the period after 1991 when the number of individual labour disputes has grown, not only because all of those are being referred to the judicial system, but also because in the past almost two decades complex and deep economic and social changes are ongoing in Bulgarian society and in the industrial relations in particular. Complex in their very nature, painful in respect of employment and the social consequences thereof, they have left their mark both on the number and characteristics of individual labour disputes. The number of disputes related to termination of employment, unpaid labour remuneration, compensation, etc. has grown.

In recent years **the number of labour cases** is comparatively high despite the somewhat downward trend.

By expert data:

1. For the regional courts it as follows: year 2000 – 25,237; year 2001 – 17,954; year 2002 – 15,769; year 2003 – 13,920; for the district courts (first instance for some labour disputes until 2004) it is: year 2000 – 935; year 2001 – - 683; year 2002 – 330; year 2003 – 110.

2. In the Supreme Court of Cassation (SCC) (private proceedings exclusive) their number has been as follows: year 2002 – 3,759; year 2003 – 3,244; year 2004 – 2,804; year 2005 – 2,665. We must note that only disputes related to wrongful dismissals and receivables under employment relationship exceeding BGN 5,000 reach the SCC. 70% of those are related to dismissals and 30% – to receivables under employment relationship where predominant are the disputes regarding financial liability of employer for factory of office worker’s death or injured health resulting from employment injury or occupational disease. This is a sustainable trend. Such is also the statistics in the first instance courts.

As we have already pointed out, the individual labour disputes and their number are due to a set of reasons – the economic situation in Bulgaria (change of ownership, transition period, unemployment); subjective reasons (breach of the labour legislation by some employers, mainly small and medium-sized enterprises); too little restrictions for filing writs of appeal; free proceedings for workers and employees, etc.

However, it is hard to predict whether and until when the outlined downward trend as regards the number of disputes will continue, or the higher number of labour disputes of the time before year 2000 will come back.

Under the Judicial System Act and the Civil Procedure Code all civil cases, including individual labour disputes, are heard by the civil courts. Fundamentally there is no specialization of the panels in our civil court system, i.e. there is no formal differentiation of the activity by matter. Differentiation is possible and even happens in the larger courts. However, in the smaller geographical jurisdictions (with two or three judges) this is virtually impossible. There is no formal differentiation in the district or courts of appeal either. In fact differentiation is made for practical reasons in the larger courts (the Sofia City Court for instance). Within the College for Civil Cases of the Supreme Court of Cassation (SCC) there is a special division – Third Division that hears mostly labour disputes. The Division comprises 12 judges (having 42 in total within the College for Civil Cases) divided in panels of three members. The consideration for the differentiation of this division is specialization of the judges with the purpose of resolving the disputes in a more qualified manner.

The above background outlines the main problems related to the present situation with individual labour disputes resolution.

Both the State and the social partners unanimously point out **the delay of decisions** as the main bottleneck of the existing system for hearing labour disputes. The delay is different for the different court instances and geographical jurisdictions, which have different workload depending on the size of the geographical jurisdiction, the employment rate, the number and nature of the enterprises-employers in the jurisdiction, etc. The number of labour disputes in the larger settlements is higher. In some cases, most often in the case of disputes regarding wrongful dismissal, the resolution of a dispute continues 2, 5 or more years. The resolution of civil cases is slow in principle, but this tardiness as regards labour disputes has specific importance. Such disputes relate to the work and income from employment relationship, whereon the worker or employee and his/her family depend. The continuing for several years uncertainty regarding the legal situation between the parties to the dispute creates also personal problems for the worker or employee, or organizational and financial problems for the employer. This delay in some cases leads practically to want of justice – for instance, the worker acquires entitlement to a contributory-service and retirement-age pension while the dispute for illegal termination of his/her employment is ongoing or dies while the dispute for compensation for damages resulting from employment injury is ongoing.

In some cases the individual labour disputes themselves and their slow resolution respectively lead to emotional overloading in the system worker – employer, which has also a negative impact on the rest of the workers and employees, creates negativism, hatred, etc. The above stated conditions high degree of personal and public interest in the faster and quality resolution of individual labour disputes.

The time it takes the courts to resolve labour disputes depends on a number of ***factors*** – *the great number* of labour disputes (particularly in some geographical jurisdictions); *the workload of the judges* (despite the sustainable downward trend regarding the number of labour disputes); the possibilities opened by the procedure legislation *to postpone the cases*; *the complicated nature* of some labour disputes, which require special knowledge; the inherent for Bulgarian physical persons and legal entities feature to avail of *all the possibilities* for remedy even when they are not sure about the positive outcome of the case. *The insufficient discipline* of some court panels is also a reason to be dissatisfied

with the speed of the proceedings. It is relevant not only to labour disputes. However, all the weaknesses of the administration of justice on civil cases are most felt in the case of labour disputes. Now, we must point out another circumstance, namely that *the procedure itself* is provided for civil cases and is not taking into account the specificity of substantive employment relationships – numerousness and diversity of labour law sources, the existence not only of individual, but also of collective entities of labour relationships, as well as the effect of collective over individual employment relationships. Beside these main reasons there are other reasons – *not well organized defence* of the parties to the disputes; *lack of material means* on the part of workers and employees to engage qualified lawyers; the *necessary equipment* of the courts; too *liberal possibilities* for having three instance proceedings; and last but not least – *abuse of rights* by some parties to labour disputes and use of all procedural options for "retarding" the proceedings.

The Economic and Social Council is of the opinion that the existing system for hearing and resolving labour disputes needs an immediate change. The immense delay in the hearing and resolution of cases and labour cases in particular makes pointless the judicial mechanism for protection and compensation of the breached rights of workers and employees because the effect sought with this protection is extremely belated. It turns so that when the court pronounces its final decision, it happens so late from the point in time when the labour dispute itself has arisen, that practically it is pointless, regardless of the fact that the decision might be in favour of the worker or employee. In this connection the ESC is of the opinion that it is crucial to establish safeguards and mechanisms for quick, competent, effective and fair resolution of labour disputes.

That being the case, the key means to overcome the present situation should be **to introduce fast and effective proceedings meaningfully balancing between the provisional and official principles and to preserve the procedural safeguards**.

The understanding of the special place and importance of employment relationships in the system of public relationships should also direct us to this conclusion. These relationships are essential, because they are underlying the gross domestic product, the government and such important public sectors as education, science, healthcare, etc. Their frequent disorganization by individual labour disputes, the slow resolution of such disputes ultimately lead to cataclysms therein and as a whole – to complex negative effects for society. That is why the faster and effective proceedings and the resolution of individual labour disputes would lead to higher stability of these relationships.

II. WHAT ARE THE POSSIBLE SOLUTIONS?

As of the moment the Bulgarian labour and civil procedure legislation provides for certain **rules to ensure the accessibility and to speed up** the hearing of labour disputes. Among those are the shorter compared to the generally set ***time limits for instituting claims*** regarding labour disputes; the ***jurisdiction***, as regards labour disputes, of regional courts, which are geographically the closest ones for the parties to the disputes; the proceedings are ***free*** for workers and employees; the ***time limits for hearing*** labour disputes – commendable

for hearing labour disputes regarding wrongful dismissals and the option for **summary proceedings** for hearing labour disputes regarding wrongful dismissals and regarding receivables under employment relationships; the restriction of the possibility for ***appeals to the court of cassation*** – allowed only for labour disputes for protection against wrongful dismissals and claims for labour remuneration and compensation exceeding BGN 5,000.

A draft of a *new Civil Procedure Code* is under consideration at the National Assembly. Among its more important solutions, relating to speeding up the resolution of civil cases in general and labour disputes in particular, we should mention: introduction of the ***concentration principle*** - an obligation to submit all evidence claims at first instance; setting of ***preclusive deadlines*** for exercising procedural rights; pronouncement ***in essence*** of the second instance without collecting new evidence; restriction of ***appeals to the court of cassation*** – allowed only in case of conflicting case law, in the event of no case law and to develop the law. Those and similar rules enjoy the support of both the judges and the social partners.

However, according to us this is insufficient.

Fundamental solution of the issue may be sought individually, independently or in several directions.

1. Specialized labour courts

The idea for such courts is applicable under Article 119, paragraph 2 of the Constitution, which permits the setting up of specialized courts. The idea is attractive for all those interested in employment relationships – the State, the social partners, workers and employees, and employers. All of them understand their advantages – first and foremost high qualification of the judges and the related thereto prerequisites for speeded up resolution of labour disputes, for standardizing case law, etc.

We understand Decision No. 711/02.09.2004 of the Council of Ministers as an expression of the positive attitude of the *State* to the idea. An interdepartmental expert group has been set thereby to make an analysis of the needs and possibilities for setting up specialized labour courts in the Republic of Bulgaria and to develop a concept for statutory arrangement of the labour courts. Representatives of the social partners are also involved in the group.

In 2005 the Council of Ministers considered at a meeting the report of the appointed by it working group. It assigned further study of the idea. No results have been announced as of the moment. We are not aware whether the set up or another expert group has ever continued with the study.

Certain champions of the idea for setting up specialized labour courts are the representative trade unions, although they are of the opinion that this idea requires the greatest financial and other resources. That is why they propose alternative options for enhancing the effectiveness of labour judicature, to be discussed below. *The employers' organizations* also accept this idea.

More and more *workers and employees, and employers* approve this idea in the media and even perceive it as a panacea, although a specialized labour court in itself is a possibility, but not an automatic one, for speeding up and improving the quality of dispute resolution.

Magistrates have certain reserves towards the setting up of a specialized labour court. The

reasons behind are lack of traditions, but also the traditionally underestimated specialization in judicature in general and in labour law in particular. Regretfully, we have to openly admit that labour law is still considered as not prestigious in the legal profession.
As regards the setting up of a specialized labour court there are several options. All of them basically depend on the required for their realization financial, organizational and technical, human, etc. resources:
In the first place, there is an option for setting up a separate three instance court – first, second and third instances, performing its activities independently in organizational terms. This option requires the greatest resources, both financial and others. To this end and bearing in mind that the development and establishment of labour courts should be followed up in time, this option may be appropriate as a perspective.
When considering the issue of a specialized labour court, an option may also be considered to set up specialized first and second instance courts and specialized panels within SCC for individual labour disputes subject to three instance proceedings. Pros and cons this option may be sought only after the idea for setting up independent in organizational and financial terms labour courts is adopted.
Regarding the geographical situation of first instance labour courts it is possible to consider another geographical division consistent with the number of labour disputes within the relevant territory. In the event of any such decision, a number of other factors should be taken into account in order not to create difficulties in terms of transportation, finances, etc. for the parties to the dispute, workers/employees in particular and thus to impede access to justice.
In order to consider the possible adoption of this option we should make a thorough study of the necessary resources, before that outlining within a separate project the system – geographical and instance location, insurance of the necessary number of judge positions, assistance staff, etc., organizational and technical provision, including premises, etc.
Only after outlining the project, the relevant estimations can be made in order to consider whether this option is implementable and appropriate.

2. Independently differentiated panels within the existing judicial system

Another possible step towards solution of the problem is the option to set up **specialized panels** for labour disputes within the general civil courts. We are speaking of independently differentiated panels within the regional courts and courts of second instance, as well as within SCC, which will hear and resolve only labour disputes. This differentiation may have both organizational and administrative aspect.
However, from organizational and human resource aspect it also poses problems, particularly in smaller geographical jurisdictions, where the number of judges sometimes is two or three anyhow. Any organization of joint panels for several close regional courts will breach the general rules of the Civil Procedure Code about the jurisdiction of civil cases; it requires huge organizational efforts, creates difficulties (particularly for workers and employees) because of the distances and thus hinders access to justice, etc.

Within the relevant panels, we may consider to involve representatives of the representative workers' and employers' organizations. In such cases the issue with the panel of the court may be solved in a different way (see below).
We will note that the option to differentiate specialized panels within the general civil courts is accepted by the social partners.

3. Changed procedure and introduction of the institute of conciliation. Amendments also to substantive laws

The following solutions are possible in this respect:
3.1. Introduction of ***special claim proceedings*** regarding labour disputes, performed by the existing civil courts.
This will not entail spending of additional financial resources or serious organizational changes within the judicial system, but it will allow the application of specific rules that will facilitate the speed and enhance the effectiveness of labour disputes hearing. Also thereby we may test the effectiveness of eventual setting up in the future of specialized panels for labour disputes and even of specialized labour courts. The establishment of such rules, on the analogy of the special marital proceedings, the defalcation and embezzlement proceedings, etc. which traditionally exist in Bulgarian procedure legislation, will take into account the specificities of labour disputes and will find procedural means for their fast and effective resolution.
These rules, for instance, may include:
a) rules guaranteeing the timely resolution of labour disputes
The most radical way would be to establish ***obligatory summary proceedings***, not like under the present regulation to leave it at the discretion of the parties to a dispute. We may recommend also the reinstating (in full or at least some elements of) the ***official principle*** in labour dispute resolution. Without renouncing at all the equal treatment of the parties both in the substantive labour relationship and in the proceedings, we should not forget that the practical (mainly material) difficulties of workers or employees to find effective legal counsel are usually greater than those of employers. The more active role of the court in such cases will not only enhance the effectiveness of judicial protection, but it will also preclude the postponement of cases, the burdening of the higher instance with the collection of new evidence, etc. The social partners are of the opinion that the introduction of obligatory ***conciliation proceedings*** for labour disputes, on the analogy of the special marital proceedings, would also contribute to the timely resolution of disputes. There is even now such an option under Article 109, paragraph 1, sentence 1 of the Civil Procedure Code which provides that during the first court session "the court invites the parties to reach mutual agreement", but it is used very seldom. An option for settlement of a dispute between the parties exists in particular also in cases of wrongful dismissal, when the dispute may first be referred to the employer and the employer himself may revoke the order of dismissal (article 344, paragraphs 1-2 pf LC). Regretfully, these provisions are not used in practice.
b) rules for more effective resolution of labour disputes

Here we should include reinstating the practice of having a ***jury*** in the labour dispute hearing panels. In order to avoid the bottlenecks that have conditioned the revocation of this participation (poor training, non-attendance of court sessions, etc.) the jury members should be proposed by the social partners and approved by a public authority, for instance the Minister of Justice or the Supreme Judicial Council. They may be trained by the social partners and why not with the assistance of the National Institute of Justice or the law schools of the universities. Their practical experience and knowledge not so much of labour law, but of the environment for its application, will be an important factor for improving the quality of decisions on labour disputes. The proposed reinstating of elements of the ***official principle*** would also contribute to the effective resolution of disputes.

Without going into details along this line (speed, effectiveness), we may consider certain amendments to the Labour Code (to other substantive laws inclusive).

Speed in the procedure will be indirectly achieved thereby, ceasing the practice of meaningless appeal of court decisions when the facts are clear and there are concrete and numerous reasons of the judgement.

Conclusions and recommendations

The Economic and Social Council understands the criticisms of the European Commission towards the condition and work of the judicial system and the requirements for its reformation as requirements to the system in the area of the judicature on labour disputes too. **That is why it has made the decision to elaborate an opinion on "Enhancing the Effectiveness of the Judicial Mechanism in Resolving Individual Labour Disputes"**.

The opinion of the Council aims at attracting the attention of society, of the public authorities, of the parliamentary represented political parties, of the academics to the issue and to outline not only the position of the Council, but also the options for its solution.

In this connection, based on the above stated, having regard that the Pact on Economic and Social Development of the Republic of Bulgaria until 2009, signed by the social partners in October 2006, provides for in item 11.6 **Improving Labour Legislation**, that:

"Speeding up the process and quality of jurisdiction in matters concerning labour related disputes by establishing a specialised labour court with the participation of representatives of both employees and employers and establishing a new procedure including a compulsory preliminary peaceful settlement stage of proceedings",

Having regard also of the fact that the resolution of labour disputes in EU Member States is of particular priority and that it is done mainly through specialized labour courts or panels, the **Economic and Social Council makes the following proposal to**:

1. The Government of the Republic of Bulgaria

a) to set up a special expert group to develop a detailed project as regards the possible solutions according to the agreement reached with the social partners in item 11.6 of the Pact on Economic and Social Development of the Republic of Bulgaria until 2009.

b) to draft and table a proposal for amendments to the Judicial System Act, whereby to ensure that appointed by the representative trade unions and employers' organizations jury members participate in the resolution of individual labour disputes.

2. Those, having the right to legislative initiative urgently to further develop and table at the National Assembly texts, whereby the Civil Procedure Code to provide for the establishment of special claim proceedings regarding labour disputes, reflecting:
a) rules guaranteeing the timely resolution of labour disputes
b) obligatory summary proceedings
c) obligatory conciliation stage.

3. Within the tripartite cooperation to discuss and forward a Bill to Amend the Labour Code whereby to further guarantee the speed and quality in labour disputes resolution.

4. The Council finds it necessary in order to achieve consistency, speed and quality in labour disputes resolution to explore the possibility to amend:
a) the Protection against Discrimination Act and the hearing and resolution of certain disputes under it, bound with the hearing and resolution of individual labour disputes;
b) the Mediation Act as regards conciliation, which is possible under this Act in the case of individual labour disputes.