PARTICULARITIES OF DISTRIBUTING THE OBLIGATION OF PROVING OF LABOR DISPUTES[1] IN CIVIL PROCEDURE

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The demand to act in a reasonable manner and exercise the rights established by regulatory legal acts, with grounds for keeping the labor legislation and with other ones causing labor rights and obligations set by the RA Labor Code[3] (Article 37), concerns both the employers and the employees.

During the organization and application of hired work, it is either sometimes impossible or not appropriate to entirely keep the obligations arisen between the parties of labor relations, which is conditioned by various objective and subjective reasons.

The labor misunderstandings arisen around different problems are often turned into a labor dispute when it is impossible to regulate by direct negotiations of the parties and one of the parties applies to the authorized body in order to solve the misunderstanding.

According to Article 264(1) of the Code, the labor disputes shall be examined in legal form, as prescribed by the Civil Procedure Code of the Republic of Armenia.

Article 6 of the Civil Procedure Code[4] of the Republic of Armenia establishes that civil proceedings are carried out on the

[1] By saying a "labor dispute" we mean the misunderstandings which occur between the employee and the employer and the judgments and conclusions made in the job concern only the judicial disputes where they participate. In this regard those judgments and conclusions are not relevant to the disputes which arise from the correlations between administrative bodies and employers of the same labor relations which are examined by the administrative procedure order in accordance with the RA Administrative Procedure Code.

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[3] Hereinafter: the Code

[4] Hereinafter: the Procedure Code

basis of competition and legal equality of the parties[5]. In line with it, Article 48 of the same code establishes that each participant of the case should prove the facts he or she has referred to. Consequently, the labor disputes also shall be examined by the rules of the competition between parties and equality of rights.

The fact that the competitive procedure is an important guarantee in supporting the judicial body to make a justified judgment, is indisputable, as the court is a "sedentary" body and normally studies and evaluates the evidence underlying the case solution usually in the place of his activity, except for the cases of impossibility or difficulty to bring the evidence to court, when the court, upon the motion of the parties or at its own initiative, carries out on-site examination and study of the evidence (Article 50 of the Civil Procedure Code).

At the same time we must not ignore that the competitive procedure is a means of performance of justice, but not an aim, and as it should be directed to the realization of the objectives of civil procedure. It should be derived that as the organizer of the competition between the parties the court should "care about" the competition contributing, but not hindering the comprehensive, complete and objective examination of case circumstances, consequently contributing also to the effective protection of the persons[6] who seek for the defense of the court through a legitimate and justified judgment.

First of all it is necessary to refer to the expression "equal competition" which, in our opinion, must not be understood in the

[5] In this regard it is noteworthy that the Judicial Code of the Republic of Armenia (hereinafter: Judicial Code) establishes that "the trial is competitive…". Thus, according to the Judicial Code, the competitive nature belongs not to the whole procedure, but only to one phase of the procedure.

[6] In this case by saying "persons who seek for the defense of the court" we mean not only the claimant who applied to the court for defending his or her violated or moot right (rights), but also the respondent who even did not apply but by becoming a participant of the procedure unwittingly becomes also a person who seeks for his or her rights' defense from the court just by the sense that he or she has the objective of preventing the issuance of a judicial act which violates his or her rights and legitimate interests.

sense of equally sharing the subject of proving between the parties in all the cases.

After determining the subject of proving or the same thing as the frames of the facts and (or) the consequences which are subject to be proved, the next important step is sharing the burden of proof between the parties on the right implementation of which depends the possibility of discovering the objective truth of the case and making a justified judgment.

For the right organization of the judicial proving, the comprehensiveness of the proving material, the provision of the direction and regular process of the proceedings, it is very important which of the procedure participants has the burden of proof[7].

First of all, we consider it important to underline that in the Procedure Code, in our opinion, the legal provision called "to push" the court to make a justified judgment is not well-formed.

In particular, the Article 53(1) of the mentioned code sets forth that the court evaluates each piece of evidence upon moral certainty based on a comprehensive, complete and objective examination of all evidence existing in the case. This does not fill the gap of the law concerning the court's obligation to examine all the essential circumstances of the case in a comprehensive, complete and objective manner.

By comparison, let us mention that this problem was solved in the ASSR Civil Procedure Code of 1964, wherein Article 10 defined that the court, not being limited by the submitted materials and explanations, is obliged to take all the measures envisaged by law to find out the real circumstances, the rights and obligations of the parties in a comprehensive, complete and objective manner (paragraph 1). Thus, according to the current Procedure Code, the court does not have the duty to reveal all the factual circumstances of a case and adopt a judgment based on that, rather it bears the

[7] Meghryan S. G. Evidence in Civil Procedure of Armenia. Lectures. Yerevan, 2012, P. 67. [Մեղրյան Ս. Գ., Ապացուցումը Հայաստանի Հանրապետության քաղաքացիական դատավարությունում: Դասախոսություններ: Երևանի պետ.համալսարան: Եր., ԵՊՀ հրատ., 2012, էջ 67].

obligation to evaluate any obtained piece of evidence of the case on the basis of a comprehensive, complete and objective investigation of the other piece of evidence.

If the mentioned formulation of the law does not hinder the entire clarification of the real case circumstances in the proving process of other category cases, then the same cannot be said about the judicial proving in labor disputes.

According to the current legislation of Armenia, in organizations the management is led unilaterally by the organization, and the employees who are in labor relations with the latter are dealing with that management in so far as it concerns them. The law-making activity and directing the management which reflects it are the exceptional jurisdiction of the organization and receiving any information concerning it, except for the cases envisaged by the Code, is made by its factual possessor, that is to say upon the wish and consent of the organization. Various circumstances, which may be remarkable in case of a labor dispute and may be included in the frames of the proving subject, may be examined by the organization through being provided, confirmed and denied, an opportunity which does not possess the other competing party, i.e. the employee.

In our opinion, the equal distribution of the burden of proof while examining labor disputes is not a justified and appropriate approach in these conditions, if we admit that the main goal of the civil procedure is to discover the objective truth of the case.

First of all, we consider it necessary to clarify the essence of the notion "distribution of the burden of proof" in the frames of this work. While using the mentioned expression in the work, we meant not only the mechanical split of the factual staff of the subject of proof, i.e. which competing party must prove which fact (circumstance), but also the determination of each competing party's correlation with each fact (circumstance) included in the subject of proof, i.e. determining the obligation of proving the same fact (circumstance) for each of the participating parties individually. In the last case there comes a necessity to define a sequence of proving each certain fact (circumstance) as a result of which the party who

will have to bear the relevant fact (circumstance) is determined (can be determined). In this regard, the distribution of the burden of proof can be organized through two main principles:

1. to clearly determine the frames of the facts (circumstance) which are to be proved by each party and in case of not proving it (including not presenting admissible and relevant evidence), consider it as a justification of the other party's demand or objection, or

2. to determine the subject of proving in the case or, which is the same, the whole scope of all the evidence (circumstances) which is to be proved establishing the priority of each evidence based on the objective circumstance of obtaining and presenting each piece of evidence, and while deciding upon the question of priority of proving, we should consider exclusively or mainly the question as to for whose activities' evaluation it is necessary to prove or deny the given fact or circumstance.

The research of the discussion practice of the judicial cases on labor disputes shows that the wrong distribution of the burden of proof considerably complicates the comprehensive, complete and objective study of the real circumstances of the case, which, as a result, endangers the possibility of providing for the procedure participants' lawful expectation concerning the achievement of a legitimate and justified judicial act. Finally, if we accept the court as a body which resolves the plaintiff's claim based merely on the existing evidence but not on the real circumstances of the case, then, in our opinion, the reputation and weight of the court as the main institution of legal defense, is directly being derogated. As a result of an imprudent organization of the competition between the participating parties in a labor dispute, more precisely as a result of a wrong distribution of the burden of proof of the examined case the possibility of having a fair judgment essentially decreases, which must certainly be considered as an alienable part of the right to fair trial. However, in case of stating the vice-versa, when making a fair judgment is omitted from the right to fair trial, the fair trial becomes an end in itself and a non-led activity which is deprived of the ability to have real influence on the protection of the rights and legitimate interests of the law subjects.

While deciding the question of the distribution of the burden of

proof, the court must not give importance to the fact about which of the components of the subject of proving dominates - the factual (for example not being absent from the workplace, being present at work, the proper fulfilment of the task, etc.) or the documented (for example, the change made in the staff list, the results of a competition or a certification, making a wrong or a false document, the note in the workbook, etc.)? The court has to consider which of the competing parties has the functions of receiving each evidence underlying the case solution, whose obligation is to create and keep that evidence and who is responsible for it both in internal (we mean labor) and external (we mean civil, administrative) legal relations.

For example if the lawfulness of the termination of the labor contract due to lay-offs in jobs is litigated in the court, then the burden of proof must bear the employer. In particular, the employer must prove that:

a) actually there was a lay-off of the employee's position which must be confirmed by a similar legal act by which the position was created;

b) the decision (another legal act) about the lay-off was adopted by law, by another regulatory legal act or by a person authorized by the statute of the employer;

c) an individual legal act was released about the termination of the labor contract;

d) the individual legal act entered into force as prescribed by law;

e) a written notification to the employee about terminating the labor contract preceded the adoption of the individual legal act;

f) the contents of the notification corresponds to the law requirements;

g) another job corresponding to the professional readiness, qualification and health state of the employee was offered but the employee refused it;

h) in case of not offering another job, the absence of the relevant job (vacancy).

This kind of distribution of the burden of proof is explained by the thing that the Code, when terminating the labor contract of the employee for the reason (on the basis) of lay-off, establishes some

obligations the fulfilment of which is obligatory in any case, regardless of the form of employer's property, the organizational–legal type, the particularities of the activity and other circumstances. In such cases, the "removal" of the subject of proving to the court is often impossible, and sometimes depends on big difficulties and inconvenience by which overloading the competing parties is not reasonable and realistic.

For example in what extent is it reasonable to put an obligation on the employee concerning the denial of the fact of the signatures' belonging to the Council members, which is put under the decision on confirming the staff list, in case when putting the obligation of proving the mentioned signatures' belonging on the employer is incomparably easy and manageable. In the same manner, in our opinion, it is not reasonable, for example, to put the obligation of proving the fact of having worn an established type of clothing (obligatory outfit) on the employee, if the fact of not wearing such outfit can be proved by the employer with the help of the recording devices and other technical means placed around him. In this regard we think that while solving the problem of the distribution of the burden of proof, the court must act also by the principle of economizing the time and the means, however, provided that this economy is not on the expense of the complete, comprehensive and objective study of the real circumstances of the case.

Practically it is possible to have a situation when the parties have different evidence at their disposal which, in the opinion of the party possessing it, can confirm this or that circumstance and deny the other one. In this case, in our opinion, the Court must put the obligation of proving the same fact on both the competing parties and afterwards evaluate the credibility of the evidence presented by each party.

The examination of the norms of the Procedure Code and the analysis of the judicial practice application concerning the distribution of the burden of proof allow us to state that the rules of the distribution of the burden of proof are not regulated in details in them.

The provision that each party is obliged to prove the facts he or she has referred to (Article 48(1)) is a general rule which should

underlie the process of proving as a baseline principle of the competitive procedure. At the same time it should be noticed that making that rule absolute may often threaten the interests of discovering the real circumstances of the case, creating a situation when the court decides the litigation arisen between the parties not on the basis of factual circumstances, but on the basis of the evidence about some circumstances presented to the Court.

As in conditions of labor legal relations, all or at least the main regulating documents of those relations are under the possession of the employer, thus obvious difficulties may appear while putting the obligation of proving the case circumstances by the mentioned documents (evidence) on the employer.

Nevertheless, putting the obligation of proving the indicated facts on each party is not the only rule of organizing the competition of the parties. From this general rule the Procedure Code sets an exception empowering the court with the jurisdiction of determining the subject of proving and distributing the burden of proof between the parties. It is another problem that the criteria and the definitive rules of distributing the burden of proof are not established in the Procedure Code in sufficient details, which may lead to rendering a judgment or another judicial act which does not reflect the real circumstances of the case.

According to Article 149.8(2)(5) of the Procedure Code, the Court discusses with the parties the scope of the facts to be proved in the preliminary court session and distributes the burden of proof in compliance with the rules in burden of proof distribution.

From the contents of the mentioned legal provision, we can think that it is a legal guarantee for making the process of proving even more effective, for omitting from the process the facts which have no significance for the right solution of the case and for duly organizing the competition of the parties, and that the significance of this guarantee does not decrease in case of existence of a legal provision establishing the burden of proof of the indicated facts for each party.

Moreover, we think that the legal provision about determining the subject of proving and distributing the burden of proof among the parties should be considered dominating as the Court who knows the

law, at the same time finds it necessary to deviate from the general provision by setting for each party the facts which are to be proved. In this regard we think that while distributing the burden of proof, the Court must not be bound with the circumstance as to which party referred to the facts that are to be proved.

Otherwise, the law would establish only one exceptional rule - Article 48(1) of the Procedure Code, and the competitive procedure would be organized by that logic, contributing to the enrichment of the subject of proving and letting the Court have the duty of a too passive "jury".

The process of correctly organizing the competitive procedure must not be limited just by the right distribution of the burden of proof. It is also important to make the legal regulation of the problem of evaluating the facts which are presented by distribution. The Procedure Code must regulate also the problem of legal consequences of failure to fulfil or improper fulfillment of the obligation of proving. It should be read by taking into account that the Court must not be allowed (have the possibility) to do "a turnaround of the burden of proof", that is to say when one party is overloaded with proving the contrary of the facts which are not proved by the other party and the failure to fulfil it may influence the outcome of the case. We mean that if the Court puts the obligation of proving this or that fact on one of the parties during the preliminary court session, then it means that the Court indirectly releases the other party of the obligation of proving the contrary and not proving the contrary must not be considered as a ground for solving the competition to the detriment of that party.

Let us bring an example[8] from practice. On April 5, 2011, the company provided the employee with a written notification about terminating the employment contract after three months, as of July 1, 2011, under which the employee made a note with the following contents "I have read the order and received a copy of it" and mentioned his disagreement with the subject of the notification. The employee continued his work till the day of employment contract's

8 The example is brought from a specific civil case (see the civil case materials of YeKD/1643/02/11)

termination and only on the day of the termination, on July 1, 2011, settlement payments were done, he received his employment record book, but the copy of the order was not handed to him with the argumentation that it was handed to him on the day of the notification, on April 5, 2011, and in connection with it the employee had already made the relevant note.

On July 22, 2011, *i.e.* after the settlement payments and twenty-two days after having received the employment record book (before the expiration of a one-month period), the employee applied to the court with the claim of objecting the dismissal. In the preliminary court session, upon the motion of the claimant, the respondent was obliged to prove that on April 5, 2011 the claimant received the disputable order. The respondent did not prove it, but the court, based on the application of the statute of limitation, explained the rejection of the claim with the argument that the claimant did not prove that he was provided with another order, but not with the disputed order. That is to say, the court made a turnaround of the burden of proof, *i.e.* first he put the obligation of proving on the respondent but afterwards, as the fact was not proved by the respondent, he came to the conviction that the claimant did not perform the obligation of proving the contrary either.

Thus, the Court neglected several circumstances, including the ones that:

1. the respondent was under the obligation to prove the fact of having handed the disputable order to the claimant,
2. the claimant was not under the obligation to prove the fact of having handed another order,
3. the confirmation of the fact that the claimant received another order was not significant for resolving the case, but rather the confirmation of the fact that the respondent handed the claimant the very disputable order.

While distributing the burden of proof, it is necessary to follow a certain rule. Establishing for each party the obligation of proving the circumstances they have referred to (the general rule of distributing the burden of proof), being the cornerstone of the

competitive procedure in civil cases in general, however, in certain category of cases, in particular, for example in labor disputes, it can be applied by some exceptions, conditioned by the circumstance of the unequal distribution of the evidentiary material, the negligence of which endangers the stemming of the judicial act from the real circumstances of the court, which, in its turn, endangers also the interest of the real protection of the violated or disputable rights of the persons seeking the right to protection from the court.

While distributing the burden of proof in labor disputes, *the circumstance of the centralization of the evidentiary material, the objective possibilities of their presentation and the principles of economizing the time and the means* should be considered as basic conditions and requirements.

Taking into account that the main staff of the documents concerning the labor activity of the employee is under possession of the employer, we think that while distributing the burden of proof in labor disputes the Court must deviate from the general rule of distributing the burden of proof and demand the evidence in correspondence with[9] the centralization of the evidentiary material, the objective possibilities of their submission and the principles of economizing the time and the means.

9 By the way, the direction of deviating from the general rule of distributing the burden of proof has been known to the legislation of Armenia while examining other types of disputes as well. In particular, there is such private approach in the RA Civil Code, and there is an exception made from the general rule about the cases regarding person's honor, dignity and business reputation. According to article 1087.1(4) of the Civil Code of the Republic of Armenia, "[u]*nder the cases on slander, the burden of proof in respect of the availability or absence of necessary factual circumstances shall lie with the defendant. It shall be transferred to the plaintiff, where the burden of proof requires from the defendant unreasonable actions or efforts, whereas the plaintiff possesses all the necessary evidence".* In our opinion, in this case, too, the legislator took as a basis *the circumstance of the centralization of the evidentiary material, the objective possibilities of their presentation and the principles of economizing the time and the means* invoked by us.