THE ASSESSMENT OF 2024 AMENDMENTS TO ARTICLE 265 OF THE LABOR CODE OF THE REPUBLIC OF ARMENIA: A SOLUTION TO THE PROBLEM OR A FAILED ATTEMPT TO FIND AN EQUILIBRIUM BETWEEN COMPETING INTERESTS?

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Abstract

The article addresses the issue of the employer's pecuniary liability for an employee's loss of income in cases of unjustified dismissal. The author discusses the goals of imposing such liability on the employer in a modern market economy and, in light of these goals and European human rights standards, proposes approaches that, in their view, ensure a balance between competing private interests and proportionality in the limitation of the employer's property rights. The article also constitutes a critique of the existing regulations of the Labor Code of the Republic of Armenia, with the author arguing that they offer disproportionate solutions that violate the fundamental right to property of the employer.

The article is construed in the light of general human rights standards, and given the similarities of the adopted solutions in various jurisdictions, the ideas presented herein may be useful for a wide range of researchers and practitioners interested in these problematics. In order to focus on the presentation of the subject matter, the author tried, as much as possible, to avoid burdening readers with references to theoretical sources, being confident that the readers are already familiar with their content.

***Keywords*:** loss of income, liability, unjust dismissal, proportionality, employer, employee.

Introduction

Prior the introduction of the latest legislative changes to the Article 265 of the Labor Code of the Republic of Armenia (2004)* (hereinafter also referred

* The English version of the Code does not contain the most recent amendments. Therefore, it is recommended to use the latest consolidated Armenian version and translate it into English by any available means.

to as the "Code") the same provision prescribed that in case of unlawful termination of the employment, besides ensuring a reinstatement the employer shall pay to the employee (1) a compensation in the amount of his or her average salary for the entire period of idleness (starting from the point of dismissal and ending with the reinstatement or in case of the impossibility of the reinstatement, the termination of judicial proceedings) and (2) in case the reinstatement is impossible, an additional compensation amounting to 1-12 times of average salary.

Due to systematic delays in adjudication of employment disputes, these regulations in fact disrupted the equilibrium between the interests of the employer and employee. In most of cases, the judicial proceedings took up to two years, and the eventual material burden of such delays was entirely shifted to the employer.

The author has dedicated a separate paper to these problematic,** which are not the primordial target of this article. The current article aims to discuss the amendments to the Article 265 of the Code, which were entered into force in November 2024 and were initially devised to find a reasonable balance between the competing interests of employees and employers.

Subsequently, the newly adopted regulations will be discussed from the perspective of the achievement of a just balance between the interests of parties to employment disputes, and the author will present his viewpoints on the legal regulations dealing with the issues of compensation in cases of unlawful dismissal.

The Analysis of the Amendments to the Article 265 of the Labor Code of the Republic of Armenia

The amended Article 265-1 of the Code, deals with the matters of remuneration of lost salary. The mentioned provision stipulates the following regulations:

1. As a general rule, the average salary is to be paid for the entire period of forced idleness, which ends upon the reinsertion of the employee or the entry in force of the final judgement.
2. In case the employee starts a new job for another employer during the period of forced idleness, he or she will be paid an amount of money equal to their salary for the nine months prior to the unlawful termination of the employment. The sum to be paid is fixed and does not depend on the length of the period of forced idleness or adjudication of the case.

** See more in detail in Grigoryan, 2024.

3. In case the employee, who started a new job for another employer during the period of forced idleness, worked less than 9 months for the previous employer, he or she will be paid an amount of money equal to the salary received for the entire past period of work.
4. In case the employee starts a new job during the period of forced idleness, in addition to the sums mentioned in points 2 and 3, the employer shall also cover the positive difference between previously and currently receiving salary.

From the same Article 265 of the Code, it follows that the period of forced idleness ends (1) when the employee is reinstated in the position he or she occupied before the unlawful termination of employment or (2) when, in case reinstatement to the same position is impossible, the final judgement enters into force.

From the above-mentioned it follows that irrelevant of the fact the reinstatement is provided by law or not, the employee is entitled to demand a renumeration for the entire period of forced idleness. In turn, the period of the forced idleness is entirely dependent on the duration of the adjudication proceedings. Thus, even if the adjudication of the case was dilatory, and if the dispute was resolved quicker and in reasonable time the aggregate amount of the salary to be paid to the employee would be (significantly) smaller the negative consequences of the breach of the requirement of the reasonableness of the proceedings would bear the employer. From this point of view, the amendments to Article 265 of the Code have still not addressed the main issue, namely the imposition of excessive monetary obligations on the employer in cases of a breach of the requirement of adjudication within a reasonable time.

The new regulations mainly concern situations when the employee starts a new job during the period of idleness. The novelty is that in the mentioned case, the remuneration amount is fixed and determined from the very beginning, thus the amount of responsibility of the employer is not dependent on the length of adjudication. The question to be resolved is whether the imposition of an obligation to pay an average salary for nine months (if the employee worked less than for nine month – the entire period of employment) even if the period of idleness is shorter, can be considered as a proportionate solution.

The new regulations also prescribe that the employer shall additionally cover the positive difference between previous and current salary for the entire period of forced idleness, again not addressing the above-discussed negative consequences due to a prolonged idleness period, caused by the delays in adjudication.

The Essence of the Connection between Fundamental Rights and the Article 265 of the Labor Code of the Republic of Armenia

According to the Article 60-1 of the Constitution of Armenia everyone shall have the right to possess, use and dispose of legally acquired property at his or her discretion. Similar provision is prescribed in the Article 1 of Protocol No 1 to the European Convention on Human Rights, which states that every natural or legal person is entitled to the peaceful enjoyment of his possessions.

Article 265-1 of the Code prescribes that the courts are entitled to order the employer to pay compensation to the employee in the amounts presented above. In this case, the employer is legally obliged to transfer the funds from its own patrimony and in case it restrains from complying with court's order the corresponding sums will be seized and eventually transferred from the employer to the employee.

Thus, eventually the employer is derived from the legal opportunity to peacefully enjoy its possessions, i.e. funds which shall be transferred to the employee. Hereby, this constitutes a clear intervention to the fundamental right to property, and the intervention is undertaken via court order obliging the employer to pay compensation.

Besides the intervention to the fundamental right to property, the Article 265-1 also intervenes with the freedom to economic activity. In most cases the employer is a private subject undertaking entrepreneurial activity. Thus, the funds which shall be transferred to the employee would normally be spent to finance the entrepreneurial activity or be distributed as profit, or in other way be exploited for the needs of the enterprise. The possibility to freely possess the funds for the mentioned purposed constitute an integral part of the fundamental right to engage in economic activity.

Given the above-mentioned, our position is that the imposition of the obligation to transfer certain funds to the employee under the regulations of the Article 265-1 of the Code constitutes an intervention to the fundamental right to property (peaceful enjoyment of one's possessions) and the fundamental right to engage in economic activity.

In this case, the intervention with the right to engage in economic activity is always secondary to the restriction of the right to property as the former is a consequence to the latter: the unavailability of using the corresponding funds in course of economic activity is a derivate of the restriction of proprietary rights towards them. Hence, it is more appropriate to mention that Article 265-1 interferes with the right to property in conjunction with the right to engage in economic activity.

The Considerations on the Issue of the Legitimate Aim Pursued by Article 265-1 of the Labor Code of the Republic of Armenia

As it was discussed in the previous paragraph, the Article 265-1 of the Code interferes with the right to property in conjunction with the right to engage in economic activity. Article 60-3 of the Constitution of the Republic of Armenia states that the right to property may be restricted only by law, for the purpose of protecting public interests or the basic rights and freedoms of others.

Given that Article 265-1 of the Code deals with the consequences of the unlawful termination of employment, it is evident that the mentioned provision is devised to address the issues of restoration of the violated rights of the employees. Article 265-1 of the Code prescribes a legal remedy offered to the employee in case its employment was terminated unlawfully. Hence, the Article 265-1 of the Code can only pursue the aim of the protection of the basic rights and freedoms of employees.

The Constitutional Court of the Republic of Armenia, in its decision DCC-902 of July 7, 2010, has stated that "*[I]n this case the person, who has been unlawfully dismissed, has a legitimate expectation to continue to receive remuneration for their work. Thus, the unlawful dismissal of the employee by the employer constitutes a violation of their proprietary rights*" (Paravyan v National Assembly, 2010).

In turn, the theory of tort law recognizes a separate group of torts - the economic torts: the torts that belong to this group are so-called because they all involve inflicting some kind of economic harm on someone else (McBride & Bagshaw, 2024, p. 143). The loss of salary constitutes the economic loss the employee sustains due to the inability to be remunerated in exchange for the labor they were supposed to provide.

Indeed, in case of unlawful dismissal, the employee loses the salary they could have received during the entire period of forced idleness. If there had been no unlawful dismissal, the employee would have continued to receive their salary. Thus, due to the unlawful termination of employment, the employee loses the income they had a legitimate expectation to receive, and suffers damage in the form of loss of income.

The above leads us to the conclusion that the regulations of Article 265-1 of the Code (the restrictions of the employer's property rights that provision imposes) pursue the aim of protection of the violated fundamental labor rights and property rights. The loss of salary is a consequence of the violation of the right to property (legitimate expectation to receive funds), as well as of the violation of labor rights.

As a conclusion, it is worthy to mention that the imposition of the obligation to pay the average salary for the period of forced idleness **serves**

the goal to cover the monetary losses of the employee, arising due to the fact they were unjustifiably dismissed. This is the legitimate aim the restrictions of the employer's right to property pursue and the very lawfulness of these restrictions shall be assessed from this perspective.

Do the Adopted Legal Solutions Aim to Protect Violated Rights of the Employees, and Do They Achieve a Balance between Competing Interests? An Inquiry into the Issue of the Maintenance of the Equilibrium in the Light of General Human Rights Standards

In this section, the lawfulness of the limitation of the fundamental right to property under Article 265-1 of the Code will be discussed in light of the aim pursued (1) and (2) proportionality of the intervention. We will examine separately the scenarios under Article 265-1 of the Code and assess the proportionality of the regulations that the legislator provides for each of them.

1. *The imposition of an obligation to provide the average salary for the period of idleness in cases the employee obtains a new job.*

Before starting the main analysis, it is worth reaffirming that the remedy under Article 265-1 of the Code is of a compensatory nature. Hence, by imposing an obligation on the employer to pay remuneration in the amount of the average salary for the period of forced idleness, the goal of covering the loss of income is pursued.

From this perspective, it becomes evident that in case the employee obtains a new job, there can be no loss of income since the employee continues to work and receive a salary. If there is no loss of income, the imposition of the obligation to pay the average salary for the period of forced idleness does not appear to pursue any compensatory aim. This leads us to the conclusion that in this case, the legitimate aim to oblige the employer to pay the average salary for the period despairs. To this end, it would be much more justified to prescribe that, if the employee obtains a new job, the employee may claim remuneration only for the period between unlawful dismissal and the start of the new job.

The only exception to the presented logic may concern the situations of concurrent employment, when the employee reasonably demonstrates that they were holding two or more jobs concurrently or in fact, have done so.

2. *The imposition of the obligation to provide the average salary for the period of idleness in case the employee does not obtain a new job and can be reinstated under the applicable law.*

In case the employee does not have new employment, they can be reinstated in their former position and challenges the dismissal in court: indeed, they shall be entitled to get a satisfaction in the amount of the average salary for the period they did not work. As it was discussed above, in this case,

the employee loses the income they could legitimately expect to receive. Thus, as a part of the restoration of the violated right the employee shall be granted a renumeration for his losses emerging due to the violation of their employment rights.

From the mentioned perspective, the regulation of Article 265-1 of the Code serves the legitimate aim, presented above. The following question to be answered is whether the subject matter limitation can be considered as proportionate intervention with the employer's property rights. The cornerstone factor to answer this question is the reasonableness of the duration of the judicial proceedings.

The object of the provision of the requirement of reasonableness of the length of the adjudication is to protect the individual concerned from living too long under the stress of uncertainty and, more generally, **to ensure that justice is administered without delays which might jeopardize its effectiveness and credibility** (Rainey et al., 2021, p. 306). An adjudication resulting in a prolonged idleness, which has economic consequences, crates ineffectiveness.

As the period of forced idleness is dependent on the length of the proceedings it is a just approach to infer that the consequences of the idleness shall be attributable to the employer insofar as the duration of the proceedings is reasonable.* Hence, from the moment the adjudication of the case becomes dilatory, the imposition of the resulting consequences on the employer seems to excessively interfere with the employer's proprietary rights. The employer cannot be held responsible for the delays in administration of justice, even if the latter is in fact the initiator of the dismissal. The negative consequences one private actor (the employee waiting for reinstatement) bears due to the improper implementation of public functions (deliverance of justice in time) cannot be coped at the expense of the other private actor.

Referring to the practice of the European Court of Human Rights, it should be noted that there is no absolute or objective limit to the length of time that can be taken to decide a case. Whether there has been an unreasonable delay is a matter that must be assessed in the light of the particular facts of the case and having regard to the criteria laid down in the Strasbourg Court's case law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and the importance of what was at a stake for the applicant in the litigation (Wilcox, 2016, pp. 73-74).

Indeed, the importance of what is at a stake is a particularly relevant factor in labor disputes. The employment is vital for the employee as the salary is their primarily source of income, maintaining their subsistence and quality of

* For further justification, see Grigoryan, 2024.

life. Thus, the employment disputes touch the ultimately essential interests of the employee. On the other hand, the adjudication of the employment disputes touches the crucial interests of the employer, as the length of proceedings predetermines the amount of their monetary liability, which continues to accrue up to the resolution of the dispute. The employer continues to pay a salary to an employee, which in fact does not provide the corresponding labor. Though the imposition of such financial liability on the employer is in general, justified, the excessive burden will lead to the violation of their fundamental right to property.

In the light of the above consequences for the employer, we estimate that the average time for adjudication exceeding one year cannot be considered reasonable from the perspective of the employer, the liability thereof continues to abruptly accrue without receiving any labor from the employee in return. Hence, we are of the position that the continuation of accumulation of the compensation amount beyond one year period results in the prolongation of the liability period of the employer beyond the reasonable length of adjudication which cannot but disproportionately interfere with the latter's fundamental right to property.

The legislator themselves accepts that the adjudication of the labor disputes shall be prioritized and not dilatory. For this reason, the procedural laws prescribe strict timelines for the resolution of the employment disputes. Given the regulations of the Article 210-3 and 377-1 of the Civil Procedure Code of the Republic of Armenia (2018) the adjudication of the labor disputes shall be handled (in first instance and appellate courts) within **a maximum** of 9 months (3+6 correspondingly). Although there is no strict temporal limit for the proceeding before the Court of Cassation, most cases do not pass the admissibility threshold, and the Article 397-2 of the same Civil Procedure Code prescribes a maximum of 3 months period for the admissibility stage. Hence in most cases the very maximal possible timespan given to the judicial system for the adjudication of the labor disputes is 12 months in aggregate. Moreover, the judiciary is obliged to exploit all possible instruments to adjudicate the cases with the deadlines as swiftly as possible. Returning to the stage of cassation, it is also worth to add that even if the complaint was declared admissible, (1) the Court of Cassation must prioritize the resolution of such kind of complaints, (2) irrelevant of any other factor the continuation of accumulation of the amount of employer's liability beyond 12 months is excessive and disbalanced.

3. *The imposition of the obligation to provide the average salary for the period of idleness in case the employee cannot be reinstated under the applicable law.*

According to the Article 265-2 of the Code, in case the law does not provide for a possibility to reinstate the employee to their former position, the period of forced idleness shall end on the date the final judgement enters into force. In this case, the employer shall pay the employee their average salary for this particular period and, in addition, compensation in the amount ranging from one to twelve times their average salary for not being reinstated.

The concept of determining the period of idleness by the moment when the final judgement enters into force seems to be unreasonable. If the period of idleness is understood as the time during which the employee is unable to fulfill their duties for reasons beyond their control, if should end when these reasons no longer exist. As with all temporal periods, this one too should have clearly defined starting and ending points. In this case, the starting point is the termination of the employment, however there is no actual ending point, since the causes preventing the performance of labor duties never cease to exist, as the law does not provide for the possibility of reinstatement. To overcome this predicament, the legislator has introduced a fictional moment in time – the entry into force of the final judgement, which is, in fact, arbitrary and does not accurately reflect the nature of labor idleness.

Given the above, we posit that if the employee cannot be reinstated to their former position, there would be no effective period of idleness. It is worth reiterating that the obligation to pay the average salary for the period of idleness pursues a compensatory purpose. Therefore, the payment of the average salary should cover the loss of income the employee sustained due to the termination of employment.

If, in fact, there is no definite end point (except the one fictionally introduced by the legislator), one cannot argue that there is a determined period of time during which the employee could expect to receive an average salary, and that, due to the violation of their labor rights, they were deprived of such an opportunity. This leads us to the conclusion the imposition of the obligation to pay the average salary for the period up to the entry into force of the final judgement does not pursue a purely compensatory aim but also implies punitive elements.

Our position is that there is no evidence that the employee could have received the average salary for the period up to the entry into force of the final judgement. This means that there is no reason to obligate the employer to provide an average salary for the mentioned period. Instead, it would be much more logical and just to obligate the employer to provide a salary for a reasonable period during which the employee (who cannot be reinstated) would need to find new work. We believe that beyond such a reasonable period of time, it is not correct to assert that the employee has been deprived of their source of income due to the unlawful acts of the former employer.

Moreover, the Article 265-2 of the Code prescribes the provision of a separate compensation for the non-reinstatement.

Given the above presented, our position is that **if the employee is not going to be reinstated in their former position, there cannot be any effective period of idleness**. It is worth to reinstate that the imposition of the obligation to provide average salary for the period of forced idleness pursues compensatory aims. Hence, the payment of the average salary shall cover the loss of income the employee sustained due to the termination of the employment. If in fact, there is no definite ending point (except the fictional one the legislator introduced) one cannot argue that there is a determined period during which the employee could expect to receive average salary if their labor rights were not violated.

We estimate that the average period for a specialist to find a new job does not exceed three to 6 months after the termination of employment. To ensure that the interests of the employee are taken into consideration to the maximal possible extent, we suggest providing the average salary for a period of 6 months following the date of termination.

This would be a fair approach, balancing the competing interests of both parties. On the one hand, it would allow to intervene in the employer's property rights to the maximum **necessary extent** in order to protect the employee's rights, and from the other, the employer has to bear (to the maximum necessary extent) the consequences of their unlawful conduct.

Alternatively, the legislator can bestow the authority to determine the mentioned period to a competent executive organ, which would periodically monitor the labor market in order to ensure the correspondence of the mentioned period to the existing economic conditions. Still the period for compensation cannot exceed six months.

In addition, it shall be stated that in any case, the obligation to pay an average salary cannot exceed the moment the employee starts a new job.

4. *The imposition of the obligation to provide the positive difference of the former and current salaries to the unlawfully dismissed employee.*

The conclusions set forth in this subparagraph are derived from those presented in the preceding ones. Therefore, we will present these conclusions without reinstating the justifications already delivered above.

1. In case the employee has found a new job but under the applicable law they may be reinstated in their former position, the employer shall be obliged to pay the positive difference between the current and former salaries only for the reasonable period of adjudication.
2. In case the employee has found a new job and under the applicable law they may not be reinstated in their former position, the employer

should not have an additional obligation to pay the positive difference between the salaries for any period.

Conclusion

To sum up the positions presented in this article, the following conclusions can be made:

1. Article 265-1 of the Code is clearly interfering with the fundamental right to property of the employer, meanwhile providing a remedy for the employee unjustly dismissed.
2. As the mentioned provision is interfering with the fundamental right to property, the intervention shall pursue a legitimate aim and be proportionate.
3. The aim to impose an obligation to pay the average salary for the period of idleness is to cover the loss of income the employee sustained due to the unjust dismissal.
4. The interference can serve the aforementioned purpose and be proportionate only if the payable amount covers the period during which (1) the employee has no new job (source of income), and (2) the adjudication does not become dilatory.
5. In case the employee has a new job with a smaller salary, the employer's obligation to pay the positive difference can only cover the period during which the length of adjudication is considered reasonable.
6. In cases where the employee cannot be reinstated to their former position, the payment of average salary can be imposed only for a maximum period of 6 months, but in no case exceeding the moment the employee starts a new job.

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