REPORTS OF THE NATIONAL ACADEMY OF SCIENCES OF THE REPUBLIC OF KAZAKHSTAN
ISSN 2224-5227 **https://doi.org/10.32014/2019.2518-1483.30**
Volume 1, Number 323 (2019), 179 – 184

UDC 349.2

A.Z. Issayeva[1], B.Zh. Aitimov[2]

[1]ZhansugurovZhetysu State University, Taldykorgan, Kazakhstan;
[2]ZhansugurovZhetysu State University, PhD,Taldykorgan, Kazakhstan
ayim_09@mail.ru, bola_30081978@mail.ru

SOME ISSUES OF THE PROCEDURAL PECULIARITIES OF REVIEWING CIVIL CASES ON LABOR DISPUTES IN COURTS OF APPEAL

Abstract. A review of labor disputesby the appeals instanceof court rulings may results in their cancellation if there are grounds. Investigating a number of civil cases, the authors believe that a formal violation of procedural rules should not cause a review of court rulings. Highlighting the classification of the grounds to cancel the court decisions on labor cases, critically evaluating the position of the Supreme Court of the Republic of Kazakhstan regarding the value of the correct distribution of the burden of proof, the authors substantiate the possibility of assessing such procedural violation as conditional. The authors believe that the court's disregard for the significance of evidentiary presumptions will lead to wrong decision.

Keywords: civil procedure, labor disputes, appeal, suability, jurisdiction, court costs, burden of proof.

The procedural peculiarities of legal proceedings in the cases arising from labor relations primarilyrelate to the time of proceedings, court costs, suability, jurisdiction and the burden of proof. They represent special procedural rules, and their violation may be the subject of consideration by court of appeal.

Taking into account changes in the appeal system, procedural violations in civil proceedings may be unconditional, conditional and formal. Unconditional violations result in cancellation of the decision in any case, formal ones cannot become a basis for cancellation, and conditional violations are the basis for review if they became or could become the reason for making the wrong decision (Article 427 of the Civil Procedure Code of the Republic of Kazakhstan) [1].

Thus, for practical purposes the procedural features can be divided depending on whether their violation leads to the review of the court decision or not.

1. The term of consideration of cases regarding the employment reinstatement is reduced to one month (Part 2 of Article 183 of the Civil Procedure Code of the Republic of Kazakhstan). The violation of terms does not affect the outcome of the case and therefore, does not cause the review of the court's decision, but may be a basis for awarding compensation, as well as making a private definitionby the court of appeal.

2. The court costs. The employees who apply to the courtwith a claim are exempt from court costs (Article 106 of the Civil Procedure Code of the Republic of Kazakhstan). It follows that even if the claim of the employee-plaintiffwas denied, it is impossible to recover the court costs from him, whereas for the employee- defendant there are no special rules for the distribution of court costs [2, p.20].

Having clarified that the court of appeal might change the allocation of court costs when reviewing the decision of the lower court, the Supreme Court of the Republic of Kazakhstan did not touch the issue of errors in the costs allocation. At the same time, it appears that an incorrect allocation of court costs may result in a review of the judicial act, since the higher court will be forced to change the operative part of the decision of the court of first instance.

For example, the courts sometimes charge the expenses of a representative's serviceswronglyfrom the employee-plaintiff, who was denied his claims. Considering a similar case in the order of supervision (according to the old rules), the Supreme Court of the Republic of Kazakhstan noted that such violation is

significant, and therefore it results in the cancellation of the decision regarding the recovery of court costs. There are also examples of the wrong refusal to recover court costs from the employee- defendant, and this leads to the cancellation of decisions in this part.

The Supreme Court of the Republic of Kazakhstan also clarified that the unreasonable exemption from state duty is a formal violation. At the same time, the exemption of the plaintiff from the payment of the state duty results in its recovery from the defendantif the plaintiff's claims are satisfied (part 1 of Article 116 of the Civil Procedure Code of the Republic of Kazakhstan). Therefore, the unreasonable exemptionof the plaintiff fromthe duty, whose claim is satisfied, will lead to theimproperallocation of court costs, and results in the cancellation of decision. If in the same situation the court refuses the claim, then the duty of the defendant is not charged. It seems that only in the latter case, when the interests of the defendant are not affected, the exemption from the state duty can be qualified as a formal violation.

3. The jurisdiction of labor disputes can be territorial or tribal. Let us consider each of them.

3.1. Territorial jurisdiction. According to the general rule, labor disputes are considered by the court at the location of the defendant. The jurisdiction of the plaintiff's choice is used only for victims of criminal or administrative prosecution (part 8 of Article 30 of the Civil Procedure Code of the Republic of Kazakhstan).

The courts are often mistaken in determining the territorial jurisdiction and accept applications regarding the recovery of salary at the place of residence of the plaintiff, and the Supreme Court of the Republic of Kazakhstan indicates that this fact cannot be allowed [3, p.88]. The rule of part 8, Article 30 of the Civil Procedure Code of the Republic of Kazakhstan was also recognized the rule that does not violate the constitutional rights of citizens and does not impede the appeal to the court.

The issue of the consequences of breaking the rules of jurisdiction is the subject of doctrinal disputes, which are also caused by the fact that the explanations of the Supreme Court of the Republic of Kazakhstan differ from the positions of the Constitutional Council of the Republic of Kazakhstan.

Therefore, based on the acts of the Constitutional Council of the Republic of Kazakhstan, there is the position according to which any violation of the jurisdiction rules is the unconditional basis for the cancellation of court decision [4, p.104-107].

For example, according to the definition of the Constitutional Council of the Republic of Kazakhstan, it is necessary to cancel the decision of the lower court, which was made with the violation of the jurisdiction rules, and to transfer the case to the authorized court. This definition is based on other positions of the Constitutional Council of the Republic of Kazakhstan which state that violation of the jurisdiction rules is a "significant (fundamental) violation" and that the absence of such basisamong the standards of procedural law for cancellation of court decision as an error in jurisdiction, does not exclude the possibility of cancellationon this basis due to direct application.

Meanwhile, the last legal position allows ignoring the content of Article 427 Civil Procedure Code of the Republic of Kazakhstan and bringing down thefurther research to political and legal analysis.

As L.A.Terekhova notes, "fetishization" of the jurisdiction rules is unacceptable, since while defending the right to the legal court in accordance with Article 13 of the Constitution of the Republic of Kazakhstan, the right to judicial protection is diminished (part 2 of Article 13 of the Constitution of the Republic of Kazakhstan), and due to the fact that "judicial protection itself is a priority, not the court that implemented it", the violation of the jurisdictionrules may not be the unconditional basis for review [5, p.10-13].

We agree with the thesis concerning the priority significance of judicial protection and note that if the court decision is cancelledbecause of the violations of the jurisdiction rules, the denial of justice does not occur. Such person will receive judicial protection, but after his case is considered againin the legal court.

In this regard, the opinion of L.A. Gros is of great interest [6, p.5-8]. She notes that if the decision is substantively correct, after the case is transferred to the proper court, itwill make an identical decision.Therefore, from the point of view of the person whose rights were protected in court, it looks like a little delayed judicial protection of his rights. The author also states that since the court controls the observance of jurisdiction, the state should be responsible for the harm caused by illegal actions (inaction) of the court. Taking into account the above mentioned, the author concludes that the unconditional cancellation of correct decision that is taken in violation of jurisdiction, can be justified only when judicial acts that have not entered into legal force are appealed (i.e. only on appeal).

At the same time, it should be noted that the problem of the delay in judicial protection also occurs during the appeal, since the entryof court decision into force is postponed until the end of appeal consideration by the court (Article 240 of the Civil Procedure Code of the Republic of Kazakhstan). According to the author,it turns out that the delay is justifiedat the time of the appeal, and the further delay is not justified, and may even results in the responsibility of the state for the damage caused.

Moreover, if the possible losses are obvious, the plaintiff can ask the court to execute the decision immediately (Article 244 of the Civil Procedure Code of the Republic of Kazakhstan), while the court's decision on employment reinstatement is initially executed immediately (Article 236 Civil Procedure Code of the Republic of Kazakhstan). So, the problem of delay in obtaining legal protection can be solved.

However, the importance of the entry of court decision into force should not be underestimated due to the principle of legal certainty or resjudicata [7]. Therefore, the grounds for the cancellation of valid decision must be sufficient so that the axiological value of resjudicata become more significant, whichparticularly is taken into account in the law wordingsregarding the importance of violations for cassation appeal (Article 434 of the Civil Procedure Code of the Republic of Kazakhstan). If the appeal does not touch this principle, the grounds for review in this order may be less significant. However, this does not allow giving a definite reply regarding the significance of the jurisdiction for the appeal.

The purpose of determining the importance of jurisdiction seems to be the starting point for reasoning. E.V. Vaskovsky wrote that "the assignment of the activity of homogeneous courts to certain parts of the territory is mainly the convenience of the litigants and is done in their private interest" [8, p.487].

Thus, the territorial jurisdiction at the location of the defendant (or the so-called natural jurisdiction) is established to protect against potential abuse by potential plaintiffs [9, p.46-65]. Such rule is a subjective right, and therefore, its implementation depends on the manifestation of the initiative. Moreover, the plaintiff can change the jurisdiction of his choice, if there are grounds for that (Article 30 of the Civil Procedure Code of the Republic of Kazakhstan).

Taking into account theabove mentioned, the explanation of the Supreme Court of the RK that the violation of territorial jurisdiction rules is the ground to cancel court decision seems to be reasonable if the petition for lack of jurisdiction is stated in the court of first instance, or there is no objective opportunity to make such petition. If such petition is not submitted, the party is considered to agree to a change of jurisdiction.

On the one hand, this approach takes into account the importance of the right to the legal court (part 2 of Article 13 of the Constitution of the Republic of Kazakhstan), and on the other hand, it reflects the specific goals of establishing territorial jurisdiction [10].

3.2. The situation with tribal jurisdiction is somewhat different. The regional courts consider all labor disputes, with the exception of applications for the issue of court orderswithin the jurisdiction of the world judges, as well as the cases within the jurisdiction of regional courts related to state secrets, and the cases on recognition of the strike as illegal.

Taking into account the fact that a court order cannot be appealed, the violations of jurisdiction established for world judges will not be investigated.

It is interesting to note that the Civil ProcedureCodeof Lithuaniafrom February 28, 2008recognizes the violations of the tribunal jurisdiction rules "absolute basis for invalidity" of the decision [11]. As it will be shown below, this issue is not solved definitely in Kazakhstan.

It seems that the solution to the problem of tribal jurisdiction also lies in the goals of its establishment, which are significantly different from the goals of territorial jurisdiction. As E.V. Vaskovskywrote: "the distinction between the categories of cases givenfor conducting various courts ... iscaused by the public and legal considerations regarding the best organization of judicial authority".

In particular, the purpose of establishing cases within the jurisdiction of regional courts involving the state secrets is the need to study classified documents, it is impossible to make reasonable decisionwithout them.

For example, the regional courtssometimes take up proceedings for dismissalsimproperly due the termination of admission to state secrets (clause 19, part 1, Article 52 of the LC RK) [12]. Considering

one of these cases in cassation, the Supreme Court of the Republic of Kazakhstan noted that since the consideration of the case was related to the investigation of classified documentation (job descriptions, acts regulating secrecy, etc.), the regional court violated the rules of tribal jurisdiction, therefore, the decision is subject to cancellation, and the case is transferred to jurisdiction to the regional court.

Such procedural violation results inmaking the wrong decision, which in accordance with part 3 of Article 427 of Civil Procedure Code of the Republic of Kazakhstan is the ground to cancel the court decision.

Also, the jurisdiction of the courts includes theproceedings for recognizing a strike illegal (Article 26 of the Civil Procedure Code of the Republic of Kazakhstan). The violation of this rule does not directly limit the collection and evaluation of evidence. Therefore, if this violation was not stated in the court of first instance, then, in accordance with the position of the Supreme Court of the Republic of Kazakhstan, similar decision should remain valid.

However, if we consider the violation of the jurisdictionrules as a separately taken conditional procedural violation, then its existence does not result in making wrong decision. If the judge of the regional court cannot understand the case due to lack of qualification, then other violations committed by him led to judicial error. If the same judge does not make any other significant violations, then the decision made is correct in essence, and therefore it cannot be cancelled for formal reasons. It does not matter in which court the case was considered. Thus, separately taken violation of the rules of jurisdiction of cases regarding the recognition of the strike as illegal bythe regional court should not causethe review of the court decision.

There is also an opinion that violation of the rules of tribal jurisdiction is an unconditional basis for cancellation, since the decision was made by the illegal court [13, p.209-215]. However, chapter 3 of the Civil Procedure Code of the Republic of Kazakhstan says that the members of the court are a judge or a board of judges, but not a court. The Supreme Court of the Republic of Kazakhstan holds the similar positions, emphasizing that the illegalmembers of the court relates to the judge's characteristics (whether he has the authority, whether there is no reason to disqualify him, or whether he participates in the case for the first time). Consequently, the case may be considered legally, but with violation of the jurisdiction rules.

4. The jurisdiction of labor disputes to courts of general jurisdiction is provided by Article 23 of CPC RK.

G.A. Zhilinstates that the consequences of violation of court jurisdiction and suability are the same, since jurisdiction in the constitutional legal meaning is the same suability [14, p.35]. This statement also means that the higher court must not only cancel the decision, but also pass it on jurisdiction.

5. The burden of proof in most labor cases is distributed according to special rules [15, p.51]. They are not confirmed legally,however, the courts have developed similar rulesbased on the special features of labor relations [16, p.70].

In particular, in cases of employment reinstatement upon dismissal on the initiative of the employer, the defendant is obliged to prove the legality of dismissal, but not the plaintiff (clauses 13, 24, 26, 28, 30, 31 of Resolutions of the Plenary session of the Supreme Court of the Republic of Kazakhstan dated October 6, 2017 No.9 "On some issues of the application of lawby courts in labor disputes resolution"). It should be noted that the Supreme Court of the Republic of Kazakhstan does not consider the improper distribution of the burden of proof as a procedural violation that could lead to making wrong decision. The Supreme Court only clarified the possibility of presenting new evidence, if not all the circumstances relevant to the case were proved in the court of first instance, because of the improper distribution of the burden of proof as well. Therefore, the burden of proof is assessed only in accordance with the clause 2, part 1 of Article 427 of CPC RK.

If the improper distribution of the burden of proof leads to the fact that these circumstances are notdetermined, this is the ground to cancel the court decision. However, this approach does not seem to be completely correct. Actually, if there is enough evidence to substantiate the conclusions of the court, the fact who presents the evidence does not play a significant role. But if the proof is difficult, the court should be guided by evidentiary presumptions and their wrong definition can result in the wrong court decision.

For example, the employee appeals to the court challenging the dismissal on the initiative of the employer. The court mistakenly imposes the obligation to prove the illegality of the dismissal on the plaintiff. As it happens, of all the documents the employee has onlya labor contract [17, p.101]. In accordance with part 1 of Article 73 of the Civil Procedure Code of the Republic of Kazakhstan, the court offers the parties to submit additional evidence, but the employee has nothing more to provide, and the employer ignores the requirement of the courtintentionally. Since the employee did not submit evidence concerning the illegality of the dismissal, the court denies the claim. In this case (in accordance with the established court practice)the correct distribution of the burden of proof would lead to the satisfaction of the claim, since the employer's inaction would be qualified as the absence of evidence of the dismissallegality, i.e. as determination of the fact of its illegality. Therefore, the violation of the rules of evidence results in making wrong decision.

Thus, the position of the Supreme Court of the Republic of Kazakhstan is subject to criticism as ignoring the significance of evidentiary presumptions.

УДК 349.2

А.Ж.Исаева[1], Б.Ж.Айтимов[2]

[1] І.Жансүгіров атындағы Жетісу мемлекеттік университеті, Талдықорған, Қазақстан
[2] І.Жансүгіров атындағы Жетісу мемлекеттік университеті, Талдықорған, Қазақстан

АПЕЛЛЯЦИЯЛЫҚ САТЫ СОТТАРЫНДА ЕҢБЕК ДАУЛАРЫ БОЙЫНША АЗАМАТТЫҚ ІСТЕРДІ ҚАЙТА ҚАРАУДАҒЫ ПРОЦЕССУАЛДЫҚ ЕРЕКШЕЛІКТЕРІНІҢ КЕЙБІР МӘСЕЛЕЛЕРІ

Аннотация. Апелляциялық сатыдағы соттардың еңбек даулары бойынша сот қаулыларын қайта қарауы негіздер болған жағдайларда олардың күшін жоюға әкеп соғуы мүмкін. Авторлар бір қатар азаматтық істерді зерттей отырып, процессуалдық нормаларды формальды түрде бұзу сот қаулыларын қайта қарауға әкеп соқпауы тиіс деп санайды. Еңбек істері бойынша сот қаулыларын жою үшін негіздерді жіктеуді бөліп көрсете отырып, дәлелдеу уақытын дұрыс бөлу мәніне қатысты ҚР Жоғарғы Сотының ұстанымын сыни бағалай отырып, авторлар мұндай іс жүргізушілік бұзушылықтарды шартты ретінде бағалау мүмкіндігін негіздейді. Авторлар дәлелдемелік презумпциялардың мәнін соттың елемеуі дұрыс емес шешім қабылдауға әкеледі деп санайды.

Түйін сөздер: азаматтық процесс, еңбек даулары, апелляция, соттылығы, ведомстволық, сот шығындары, дәлелдеу уақыты.

УДК 349.2

А.Ж.Исаева[1], Б.Ж.Айтимов[2]

[1] Жетысуский государственный университет имени Ильяса Жансугурова, Талдыкорган, Казахстан;
[2] Жетысуский государственный университет имени Ильяса Жансугурова, Талдыкорган, Казахстан

НЕКОТОРЫЕ ВОПРОСЫ ПРОЦЕССУАЛЬНЫХ ОСОБЕННОСТЕЙ ПЕРЕСМОТРА ГРАЖДАНСКИХ ДЕЛ ПО ТРУДОВЫМ СПОРАМВ СУДАХ АПЕЛЛЯЦИОННОЙ ИНСТАНЦИИ

Аннотация. Пересмотр судами апелляционной инстанции судебных постановлений по трудовым спорам может привести к их отмене в случаях наличия оснований. Авторы, исследуя ряд гражданских дел, считают, что формальное нарушение процессуальных норм не должно повлечь пересмотра судебных постановлений. Выделивклассификацию оснований для отмены судебных постановлений по трудовым делам, критически оценивая позицию Верховного Суда РК в отношении значения правильного распределения бремени доказывания, авторы обосновывают возможность оценки такого процессуального нарушения как условное. Авторы считают, что игнорирование судом значения доказательственных презумпций, приводет к принятию неправильного решения.

Ключевые слова: гражданский процесс, трудовые споры, апелляция, подсудность, подведомственность, судебные расходы, бремя доказывания.

REFERENCES

[1] Civil Procedure Code of the Republic of Kazakhstan dated October 31, **2005**. No.377-V3RK // http://adilet.zan.kz/rus/docs/K1500000377.

[2]Regulatory resolution of the Supreme Court dated December 22, **2017**. No.14 "On amendments and additions to the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated December 25, 2006 No.9"On application of the law on court costs in civil casesby the courts of the Republic of Kazakhstan" //Bulletin of the Supreme Court of the Republic of Kazakhstan, 2018. No.2 Article 20.

[3]RegulatoryresolutionoftheSupremeCourtdated October 6, 2017 No.9"On some issues of application of law in resolving labor disputes by the courts" //Bulletin of the Supreme Court of the Republic of Kazakhstan. **2017**. No.10 P.88.

[4]GaliyevM.S.On the issue of legal consequences of violation of the right to a legal court //Contemporary law. 2014, No.4, P. 104-107.

[5]TerekhovaL. Fetishization of rules of jurisdiction in civil proceedings //Arbitration and civil proceedings. **2009**. No 6, P. 10–13.

[6]GrosL.A.On the significance of proper definition of the jurisdiction of civil case//Arbitration and civil proceedings. **2010**. No.3, P. 5–8.

[7]The principle resjudicata means the prohibition to revise a judicial act that has entered into legal force without extraordinary reasons.See: KisselyovA. Constitutional grounds for cancellation of court decisions in the cassation instance. 2014 // Reference system "ConsultantPlus".

[8]Vaskovsky E.V. The course of the civil proceeding. M.: Publishing HouseBrothers Bashmakovs, 1913. P. 487.

[9]ThisphraseissuggestedbyA.R. Sultanovafterthepre-revolutionary lawyer K.I. Malyshev.See: A.R. Sultanov.Is jurisdiction a subjective right to review a case in court in accordance with established jurisdiction or a court guarantee arbitrarily established by the legislator?//Bulletin of the civil proceeding. 2013. No.6. P. 46–65.

[10]Constitution of the Republic of Kazakhstan of August 30, 1995 http://adilet.zan.kz/rus/docs/K950001000.

[11]Verification of court rulings in civil proceedings in the EU and CIS countries /edited by E.A.Borissova. The 2nd edition, revised and enlarged. M.: Norma: Infra-M, 2012.

[12]Labor Code of the Republic of Kazakhstan of November 23, **2015**. No. 414-V3RK. // http://adilet.zan.kz/rus/docs/K1500000414.

[13]GaliakbarovaG.G. Peculiarities of the legislative formation of the institution for individual labor disputes in the Republic of Kazakhstan //Bulletinof Kazakh National University.Legal series.**2015**. No.1 (73). P.209-215.

[14]ZhilinG.A. Jurisdiction and suability of labor disputes //Deskbookforjudgesonlabourdisputes: tutorialbook /editedbyS.P.Mavrin.M.: Prospect, **2011**. P. 35-38.

[15]BuyanovaM.O.Individual labor disputes: procedural issues of legal regulation // Law. JournalofHigherSchoolofEconomics. **2014**. No.2. P. 51.

[16]TreushnikovM.K.Judicial evidence.M.: Gorodets, **1997**. P. 70.

[17]Nurgaliyeva E.N., YermagambetovaZh.B.Individual labor disputes. Almaty, **2004**. P.101.