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MEDIATION AS A WAY TO PROTECT AND RESTORE VIOLATED CITIZENS LABOUR RIGHTS

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Abstract

The article is devoted to the analysis of the basics of legal regulation of mediation procedure, which is one of the types of pre-trial settlement of disputes between an employee and an employer. The author stresses that today many aspects of mediation in labour law need more detailed study. At the same time, the article also touches upon the existing shortcomings concerning the legal regulation of mediation, as well as the absence in Russian labour legislation of a clear indication of such alternative method of dispute resolution as a mediation procedure. The authors note the theoretical potential of mediation and at the same time the weak practical demand for the analysed method of protection of individual labour rights in modern times. The aim of the study has been achieved: the authors develop proposals to amend the current legislation of the Russian Federation on the compulsory nature of the mediation procedure.

Keywords: Clear indication, pre-trial settlement, legislation, labour rights, mediation procedure

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1. Introduction

Recently, there has been an increase in the number of cases when employees do not seek protection of their violated labour rights in court, as the cost of legal services rendered for drafting a statement of claim and representation in general jurisdiction litigation on labour disputes may exceed the amount of the claimed claims in the statement of claim. Many workers cannot initially pay for the services of representatives because they do not have enough money, although the court costs after the satisfaction of claims are reimbursable. Workers do not have sufficient guarantees that their statement of claim and requirements in the court decision will be satisfied (Zagainova, 2018). We believe that in this case, the mediation procedure can help to protect the violated rights of workers in pre-trial order.

The emergence of a labour dispute in most cases leads to the need to provide a legal mechanism for the employee, as an economically weaker party that is more vulnerable to the conflict to protect his/her labour rights. The mediation procedure is one of the alternative ways of resolving such dispute by voluntary agreement of the parties with the involvement of a mediator who has certain experience and accumulated knowledge in this field. This allows him to achieve a mutually beneficial solution between the employee and the employer, not least due to the skilful emotional and psychological impact on the two parties. The possibility of implementing the mediation procedure was introduced into domestic legislation through the adoption of the Federal Law of 27.07.2010 No. 193 – FZ "On alternative dispute resolution procedure with the participation of a mediator (mediation procedure)".

Despite the relative novelty of the institution of mediation for the Russian legal field, it has found an active and lively response among many citizens involved in labour legal relations. At the same time, this legislative act considers the mediation procedure in a general and global sense as a means of dispute resolution in various branches of law "for the purpose of harmonisation of social relations". However, p. 5, Article 1 of this federal law establishes the impossibility of using mediation procedures in the framework of resolving collective labour disputes, since such dispute may affect the interests of third parties. And reaching an agreement between the employer and several employees is very problematic due to the large number of participants, each of whom may have an individual opinion on the subject matter of the dispute and the method of eliminating disagreements. Therefore, Russian law regulates the process of mediation only in relation to an individual labour dispute on the basis of equality of rights of the two parties, voluntariness and desire to resolve the conflict peacefully and by compromise with the participation of a mediator.

2. Problem Statement

The right to choose the method of settlement of a labour dispute, of course, belongs to its parties. According to paragraph 1 of article 46 of the Constitution of the Russian Federation, "everyone is guaranteed judicial protection of his rights and freedoms". In other words, an employee can always appeal to a judicial body to protect his labour rights, if it excludes the possibility of pre-trial settlement of the conflict. However, often the employee's position in court does not look ideal and flawless due to the not too high level of legal culture in the population, as well as due to more powerful administrative and financial resources available to the other party to the dispute, the employer (Karakaev et al., 2019).

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Moreover, court proceedings may be delayed indefinitely, the court may require from the parties additional evidence and facts in the case, which in some cases will further weaken the arguments of the employee. Many academics rightly note that even the decision of the judicial body in favour of the employee does not mean its instant execution. But at the same time, the very fact of initiating the judicial process by the employee can often spoil his relations with the employer and the work team.

3. Research Questions

Analysis of the basics of legal regulation of mediation procedure, which is one of the types of pre-trial settlement of disputes between an employee and an employer. Detailing the legal aspects of mediation in labor law. Disadvantages related to the legal regulation of mediation. The theoretical potential of mediation. The weak practical relevance of the analyzed method of protecting individual labor rights in our time.

4. Purpose of the Study

The purpose of the study is to develop proposals for amendments to the current legislation of the Russian Federation on the mandatory nature of the mediation procedure.

5. Research Methods

Taking into account the fact that the subject of most labour disputes is reinstatement in the workplace, establishment of the fact of labour relations, as well as recovery of debts under the employment contract, the psychological component that predetermines the comfort of the employee's presence in a particular team in subordination to a certain employer is not an empty sound. But, on the contrary, it influences very much the choice of the employee's method of settlement of the labour dispute (Pavlova & Salikov, 2022). In this regard, the mediation procedure is the very institution that can both protect the rights of the opposing party and preserve the relationship between the employee and the employer at the same level. It allows them to find common ground on important points and to settle the dispute without the participation of the court. At the same time, mediation in labour legal relations is possible if the employer and the employee have concluded a labour contract, but there are cases when its conclusion is the subject of the dispute (Radaeva & Agafonova, 2022). For example, an employee is employed at a workplace as a trainee without official registration, but after the probationary period the employer is not in a hurry to conclude an employment contract with him, despite the relevant requirements. Of course, in this dispute, the parties have every right to use the services of a mediator and resolve it through pre-trial settlement on mutually beneficial terms. The presence of an employment contract between an entrepreneur and a person, who performs a certain type and scope of work, also does not prevent the mediation procedure, but this process will relate to the civil or legal plane. Another positive moment of the mediation procedure is hidden in the openness of the parties for mutual co-operation, in the voluntariness of their decisions, unlike the judicial process, in which, as noted by A.I. Rashidova and Z.M. Darchinyan, "disputes are considered regardless of the willingness of the parties to make mutual concessions" (Rashidova & Darchinyan, 2016, p. 34). Among other things, mediation is the

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most effective means of unloading the judiciary, so in practice the court can offer the parties to settle the dispute through such procedure (Kondratye et al., 2018). In the framework of such settlement, the identity of the mediator is also extremely important for the parties. The mediator should be a person who observes the principle of neutrality, equality and legality, because the degree of fairness of decisions depends on it (Lantseva, 2021). If the mediator will be a figure dependent on any party, or a person who can sacrifice the interests of one party for the sake of the interests of the other party, any fair and just settlement of a labour dispute is out of the question. Therefore, the most important principle of mediator's activity is the principle of neutrality and impartiality, i.e. the absence of bias (Abramyan & Golubkina, 2021). As a result of the mediation procedure, a mediation agreement is concluded between the parties in writing with the direct participation of the mediator.

6. Findings

Despite the importance of the institution of mediation for the protection of labour rights, as well as the increasing number of cases of mediation between an employee and an employer, its legal regulation in domestic law needs some improvement and enhancement. It allows one to eliminate ambiguity in the interpretation of legislative norms related to mediation, as well as to eliminate those shortcomings that prevent an adequate understanding of the legal essence of the mediation procedure. Hence, according to E.A. Murzina, the branches of Russian law need a specific approach to the institution of mediation, which can be embodied through the adoption of federal laws on alternative pre-trial settlement of disputes in relation to each legal branch in which the mediation process can be involved (Murzina, 2019). By the way, the same author puts forward the idea of the need to include mediation in the list of ways to protect labour rights and freedoms established by Art. 352 of the Labour Code of the Russian Federation. To date, this list looks as follows: 1. Self-protection by employees of their rights; 2. Protection of their rights by trade unions; 3. Federal supervision of compliance with labour legislation; 4. Protection of labour rights in court.

7. Conclusion

The inclusion of mediation in the above list of labour rights protection methods will make mediation even more important under Russian law and will contribute to the prevalence and effectiveness of this procedure. With a certain degree of loyalty of the employer, a clause on the possibility of mediation can be included in the employment contract at the stage of its conclusion, which will allow the employee to feel more confident and protected, because he will be notified from the very beginning of his career at a certain workplace about the employer's desire to resolve possible disagreements through conciliation procedures (Zaslonov & Golovina, 2021). Some domestic scientists, based on foreign experience of mediation, consider it appropriate to give to the parties of a labour dispute not the right to apply to a mediator, but the obligation to do so within the framework of pre-trial settlement. Indeed, for example, in Great Britain the judicial authorities begin to deal with labour disputes only if the mediator concludes that a peaceful settlement of the dispute between the parties is impossible. And in Germany the case is considered on the merits only after the fact of conciliation is recorded. Nevertheless, the

introduction of mediation as a mandatory procedure in the Russian Federation may reveal a lot of problems, one of which already exists today. The fact is that the employee initially takes a subordinate and weaker position in relation to the employer, being materially dependent on him. Because of this, the employer often sees the mediation procedure as the root of the solution to all problems, as it can maximise its benefits for itself, while the interests of the employee are relegated to the background and are not fully taken into account. Of course, the mediator's personality, experience and ability to follow the main goal of mediation, i.e. to respect the interests of both parties to the labour dispute, in an unbiased manner can play a crucial role in solving this problem.

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