REPUBLIC OF ALBANIA

PEOPLE'S ADVOCATE

SPECIAL REPORT (II)

THE PUBLIC ADMINISTRATION AND LABOR RELATIONS REGULATION

YEAR 2014

People's Advocate Institution

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CONTENT

1. INTRODUCTION

Public administration of regulation of job relations were the focus of a Special Report by the People's Advocate submitted to the Assembly of the Republic of Albania in June 2014. The People's Advocate has been intensively committed to the review of complaints related to job removals. The review process has been crowned with a number of recommendations not just at individual level, but also at a much broader and far reaching scale, i.e., with recommendations designed to improve the regulatory framework on job relations in order to bring them up to international standards. At the same time, the People's Advocate has made efforts towards safeguards for human rights and their protections from the unlawful omissions and commissions of the public administration authorities; hence the present follow-up report on the situation in the Public Administration.

Based on continued monitoring, this report deals not only with recent issues, but also with issues carried over in the same unchanged way from previous years. In this connection, the report makes recommendations towards improvement of the effectiveness of applied measures. In particular, it contributes to the identification and design of mechanisms to ensure control over the implementation of employed rights at all levels and across public administration bodies in Albania.

As clearly stated in the European Commission's 2014 Progress Report on Albania, we also uphold that public administration reform is very important to not only create an efficient and effective public administration, but also provide stability and protection safeguards for civil servants.

2. METHODOLOGY

Methodology used to draft this report is based on:

First: On the statistical data and issues gathered through review of complaints submitted to the institution during the period January-September 2014. Deliberation involves issues under the competence and jurisdiction of the People's Advocate with regard to both civil servants and employees under the purview of the Labour Code.

Second: On the information collected from the central administration, the structures under its subordination, the districts and appeals administrative courts which served to create a clearer picture on the number of dismissals over January-September 2014, the grounds for these dismissals, the institutions with the larger number of dismissals or the number of dismissals which were taken to the courts for deliberation.

Data over the period January-September 2014, from the central administration and structures under its subordination were collected by means of formal requests[1], sent to these institutions to provide information on a number of issues on their current number of staff, recent dismissals, termination of labour relations, etc.

3. THE LEGAL FRAMEWORK REGULATING LABOR RELATIONS

Economic, social and cultural freedoms and rights are provided in the Constitution of the Republic of Albania, including the right to work.

Article 49 of the Constitution reads: "*1. Every individual has the right to earn his means of living through lawful work, which he has elected or accepted out of his own free will. Every individual is free to choose his/her profession and work place as well as his/her own system of professional qualifications. Employees are entitled to protection in relation to their labour relations."*

Economic and social security is a significant aspect of personal security. In this perspective the right to work and the labour rights have an important part to play in achieving personal security.

Alongside the social objective and the right to work, Article 107 of the Constitution provides for the right of citizens to compete for civil servant posts, except when otherwise provided by law.

[1] Letter No. 201302487 Doc; K3/I76-60 Prot, dated 06.06.2014

Labour safeguards and the legal rights of civil servants are set by law. One of these laws is the Law Nr. 152/2013 "On the Civil Servant" and the Code of Labour in the Republic of Albania. Law No. 152/2013, "On the Civil Servant," prescribes a number of rules aimed at underwriting stability, professionalism, meritocracy, but also career development. However, notwithstanding such provisions, and the lack thereof of bylaws deriving from this law, have contributed to a dysfunctional situation with regard to the implementation of the law itself.

♦ Article 2 of Law No. 152/2013 provides a definition of the civil servant.[2]

Under this Article, a public servant is someone who holds a public office in one of the central administration institutions, an independent body or a local government unit, with the exception of:

a) the elected;
b) the minister and deputy minister;
c) the officials appointed by the Assembly, the President of the Republic or the Council of Ministers:
ç) judges and prosecutors;
d) employees in the court administration
dh) members of the Armed Forces;
e) members of the State Intelligence Service;
ë) personnel in the direct service units;
f) members and chairs of the leading collegial bodies under the committees and institutions subordinate to the Prime Minister or one of the Ministers;
g) administrative staff;
gj) cabinet members.

Although the number of employees on the civil status has been increased to include staff at the local government level, still the implementation of this law is far from being normal. Mention should be made of the issues and problems observed when the law is being practically enforced, in particular with regard to by-laws governing the transitory period of the current employees whose labour relations were previously regulated by the Labour Code provisions.

♦ **Admission to the Civil Service Civil**[3]

Under Law No. 152/2013, admission at the executive level in the civil service[4] is subject to open competitions held periodically by the responsible structures. Normally, admission at this level is organized in two stages.
First: a preliminary screening of applicants is initiated to check their compliance with general and special requirements contained in the vacancy announcement;
Second, the evaluation of candidates is carried out.

[2] Currently, the public service is comprised of about 9000 employees entitled to the status of the civil servant, according to statistics of the Department of Public Administration.
[3] Articles 20, 21, 22, 23 of the Law No.152/2013 "On the Civil Servant"
[4] Articles 20, 21, 22, 23 of the Law No.152/2013 "On the Civil Servant"

The winning candidates with 70 per cent of the total evaluation scores are ranked by the Permanent Admission Committee, in a list of successful candidates.

With regard to the admission procedure, on 12.03.2014, the Council of Ministers made the Decision No. 143, "*On the procedures of recruitment, selection, probation, parallel transfers and promotion of the civil servant of junior, middle and senior civil servants".* Chapter III of this Decision contains detailed rules on the creation, composition and activity of the permanent admission committees complete with detailed rules on the procedure of recruiting and evaluating applicants.

♦ **Probation period**[4]

Employees admitted for the first time in the civil service, are expected to undergo a probation period which lasts one year from the date of the signature of the appointment act. During the probation period, the employee is obliged to go through a mandatory cycle of trainings with the ASPA. Also, in the execution of their tasks, junior employees are placed under the oversight of a senior employee of the same of higher category.

At the end of the probation period, the institution with which the employee has been assigned, decides:
a) to ultimately admit the employee;
b) to extend the probation period for one time only up to a maximum of 6 months, should a thorough evaluation of the employee be made impossible due to justifiable transparent reasons;
c) to reject the employee.

As regards the probation period, by Decision No. 143, Chapter V, the Council of Ministers has determined the obligations to be fulfilled by the civil servant during the probation period, as well the relevant decision making procedure.

♦ **Career in the civil service**[5]

The Law on the Civil Service provides for a fully-fledged career in the civil service. This law describes that should a certain vacant position in the low or middle category is not filled through the procedure of parallel transfers, the responsible unit announces the initiation of promotional procedures for employees in the civil service.

In connection with promotion procedures, the Council of Ministers issued Decision Number 143, dated 12.3.2014, "*On the procedures of recruitment, selection, probation, parallel transfer and promotion for civil servants in the executive category, in the low and/or middle management levels."*

Notwithstanding the law stipulation that prior to the launching of the procedure for new admissions in the civil service, the vacant position is firstly offered to the existing civil

[5] Article 26 of Law No.152/2013 "On the Civil Servant."

servants, through the procedures of parallel transfer and later through the promotion procedure, the independent institutions have exhibited problems with regard to the promotion and/or career advancement due to the limited job positions in these institutions which do not allow for promotions in certain jobs.

♦ **Transfers in cases of institution's closure or restructuring[6]**

The current legislation stipulates that, in cases when the previous position of a civil servant is no longer available due to closure or restructuring of the institution, the civil servant should be transferred to another position of the same category within the civil service.

When an institution of the public administration is cancelled, the civil servant whose position has been declared redundant is dismissed from the civil service. Also, when an institution undergoes restructuring, the civil servant whose position has been declared redundant, shall be offered a position of the same level in one of the ministries or another institution in the public administration. Should this not be possible, the civil servant shall be offered a position of a lower level.

Unlike the previous law, the current law does not provide for the employee keeping the civil servant status unless a position has been offered to him. In connection with this Article of the Law *"On the Civil Servant*", the Council of Ministers issued Decision No. 171 dated 26.03.2014, "*On the temporary and permanent transfer of the civil servant, suspension and dismissal from work*".

In the conditions when the law does not contain such a provision (referred to as the waiting list), the need becomes indispensable to clarify and shed further light on the status of the civil servant. It is therefore necessary to state whether the civil servant will be immediately released from the service and should this be the case what are the financial implications. Consequently, the government should undertake to review and further improve provisions under Article 50 of the Law No. 152/2013, "*On the Civil Servant"* in relation to instances of institutional restructuring both at central and local level, as well as the independent institutions in cases when no vacancies are available.

Labour relations in the Public Administration fall also under the purview of the Law No. 7961, dated 12.07.1995, "Labour Code of the Republic of Albania," with amendments.

This means that all those aspects of labour relations in the organs of the public administration which are not regulated by special law, will be subject to regulation by the provisions under the Labour Code.

The Labour Code does not contain specific employment requirements, as does the Law "On the Civil Servant." However, in order for labour relations to become real and effective, the condition of an individual or collective work contract should be fulfilled.

[6] Article 50 of Law No.152/2013 "On the Civil Servant"

Under the Labour Code, work relations may be for a definite or indefinite time.[7] For purposes of effecting durable labour relations, the Code stipulates that "*as a rule, a work contract should be concluded for an indefinite period of time."*

The Code prescribes the termination of work relations only on justifiable grounds. In this connection, it further stresses that in any instance of severing labour agreements, "reasonable" and "justifiable" grounds should exist."[8]

To this end, Article 146 of the Labour Code describes the situations considered to constitute reasonable grounds, but also situations considered to be unreasonable grounds for termination of labour relations.

Under Article 146 such situations shall be, for instance, when termination of contract is effected on grounds related to the personality of the employee, his/her race, colour of skin, gender, age, civil status, etc., as well as to membership of the employee in syndicates or other types of organization prescribed by law. Unreasonable grounds shall also constitute instances of dismissal because of claims made by the employee on rights granted to him under the contract, etc.

Article 153 considers as justifiable grounds those reasons which related to breach of good faith in the relations between the employer and the employee. Such instances are those in which the "employer breaches contractual obligations for minor reasons an in a repeated manner, despite the written warnings made by the employer". The meaning of "serious circumstances" or "repeated light fault" needs to be interpreted on a case by case basis by the sides and finally it is the court that as per Article 153 will deliberate whether justifiable reasons exit for termination of contract.

Alongside domestic legislation, work relations are also regulated by a number of international acts such as the ILO conventions ratified by Albania. In addition, there are a number of EU Directives that bear upon work relations and the relations between the employer and the employee, of which mention could be made:

♦ Council Directive **91/533/EEC**, dated 14.10.1991, "On the obligations of the employer to inform the employee on the contractual terms of labour relations," describes the obligation of the employer to advert the employee on such aspects as:

-Identity of the sides
-Work place
-Work title, category and grade of work complete with brief specifications
-Date of contract becoming effective
-In cases of temporary contracts, the duration of work relations
-Duration of paid work leave and relevant procedures to be followed to benefit from such leave
-Time lines for notice on contract termination and relevant procedure

[7] Article 140 of the Labour Code
[8] Article 153 of the Labour Code

-Salary and bonuses
-Working hours
-All the existing collective contracts.

4. DATA COLLECTED FROM CENTRAL INSTITUTIONS, CENTRALLY SUBORDINATED BODIES AND ADMINISTRATIVE COURTS

Based on Article 63 Paragraph 4 of the Constitution of the Republic of Albania, which reads: "*Public institutions and public officials are obliged to provide the People's Advocate with access to all documents and information requested by him" and pursuant to Article 19, paragraph* "b" of Law No. 8454 dated 04.02.1999, "*On the People's Advocate" with amendments stipulating that* "the People's Advocate has the right to: *b) request explanations from every body of the central and local administration and to acquire every material or file containing information relative to its investigations",* the institution of the People's Advocate asked the central bodies and structures under their subordination to submit information on:

1. The number of employees actually in office following adoption of organograms complete with details on those employed on the basis of the Civil Service Law and those under the purview of the Labour Code.

2. The number of employees dismissed from work over the period January - September 2014, in such institutions complete with information whether these employees were under the purview of the labour Code or the Civil Service Law.

3. The number of employees dismissed from work due to disciplinary measures and the number of those given an immediate termination of labour relations.

4. The number of employees dismissed from work due to institutional restructuring and the further legal treatment given to these former employees.

5. The number of employees recruited over the period January- May 2014, and the relevant procedures followed for recruitment.

7. The number of dismissals taken to the Administrative Court on which the central institutions and their subordinated structures have received notification.

As described in the First Special Report on the "Public Administration and the Regulation of Labour Relations", notwithstanding positive cooperation with the Department of Public Administration, the Ministry of Education and Sports and the Ministry of Health refused to provide information and respond to the People's Advocate request for information.

After collection of information on the period January – September 2014 from 14 ministries, it follows that a total of 2337 employees were dismissed from the Public Administration.

Of those dismissed, a number of 227 were on the civil servant status, whereas the rest of the employees fall under the purview of the labour Code. Of the total number of the dismissed workers, it follows that 935 employees were put out of their jobs in an immediate manner due to the restructuring of the institutions; 628 employees were dismissed pursuant to normal procedures prescribed in the Labour Code. In the latter case, the employees were given due notice of the decision made to put them out of the job; in cases of fixed term contracts, the entire duration was observed. Of the above total number, 79 employees had handed in their resignation since they were overwhelmingly employed as political staff. An additional 468 employees were dismissed from work due to serious disciplinary breaches.

The data reported by the central and centrally subordinated institutions with regard to dismissals[9], reveal that a total of 816 dismissed employees (under both the civil service law and the labour code) have filed court proceedings with the administrative courts at regional level.

As shown by the statistics covering the period of time under review, the largest number of dismissals has been affected on the grounds of institutional restructuring which has consequently led to cancellation of the job position.

Based on the data reported, it is evident that the Ministry of Environment has the largest number of dismissals due to the restructuring of the Forest Service Departments with a total of 571 employees in the entire range of its subordinated institutions having lost their job due to cancellation or redundancy.

As regards dismissals taken to the Administrative Courts, besides the information received from the relevant ministries, the People's Advocate collected information from the administrative courts both in Tirana and in the other districts. The request made to first instance administrative courts at the various districts focused on:

1. The number of files deposited with the Administrative Court over January-September 2014, on dismissals from the Public Administration.

2. The number of cases in the pipeline of deliberation and the number of cases for which a decision has been made.

3. The number of complaints admitted by the relevant court.

4. The institutions against which complaints have been filed with the Administrative Courts at the District level.

The reports gathered showed that the Administrative Courts in the Judicial District of Tirana and Gjirokastra refused to cooperate by supplying the information requested.

[9] Data reported by the relevant ministries and presented in a detailed manner in Annex No. 2

● **The First Instance Administrative Court in Durrës,** over January - May 2014, registered 361 petitions on dismissals from the Public Administration. Of this number, 153 have been knocked down, 32 have been cancelled, 8 have been declared out of competence, and 131 are in the pipeline of deliberations.

● **The First Instance Administrative Court in Shkodër** registered 391 files asking for resolution of disagreements over labour relations. Of these, 67 have been deliberated upon, 20 have been completely accepted and 23 partly accepted.

● **The First Instance Administrative Court in Vlorë**, registered 66 files over the period of November 2013 – January 2014, 353 files over January - March 2014 and 216 files were registered in the month of June 2014, namely a total of 637 petitions. Of them 475 have been deliberated, the rest are being reviewed and deliberated. With regard to the reviewed files, 336 have been accepted whereas the rest have either been knocked down or the sides have withdrawn their petitions.

● **The First Instance Administrative Court in Korçë** registered 273 files on labour relations disagreements. Review has been initiated in all cases and a decision has been made over 151 cases. Of the latter, 93 have only been accepted partially.

5. ISSUES OBSERVED BY THE PEOPLE'S ADVOCATE WITH DISMISSALS FROM THE PUBLIC ADMINISTRATION

Over the period January – September 2014, the People's Advocate received 168 complaints on unfair dismissals. Based on these complaints, 33 recommendations have been made to the Public Administration authorities. A good portion of recommendations call for absolute cancellation and nullity of the dismissal acts and job restitution to the complainant. Regrettably, these recommendations have been largely ignored forcing the complainants to turn to the courts.

In the greatest part of the complaints, the justification used by the employer for severing work relations, with regard to employees on both the civil service law and the labour code, was the one of the institution's reform which led to the reduction of jobs.

A significantly large number of complaints were received by former employees of the General Customs Directorate, the General Tax Directorate, the National Employment Service, the Educational Directorates both in Tirana and the districts, the Albanian Post, Ltd, the Forest Service Directorate, the hospital units, mainly for such posts as nurses, janitors, etc. The affected individuals did not agree with their dismissal from the job. In addition, they complained that neither were their financial rights observed.

The review of complaints on a case by case basis, has revealed legal flaws, without exception, for cases when the civil servants were put on the waiting list (as per the repealed civil service law), as well as cases when the workers were hired on contracts. Legal flaws were also identified with regard to financial entitlements due to unfair dismissals, but also in cases of job restitution based on a final court decision. The People's Advocate addressed each of these cases with recommendations to the responsible public administration bodies.

Following up on the issues highlighted in the Special report (I) "On the Public Administration and the Regulation of Labour Relations" the breaches persisting in the period January – September 2014 are noted below.

♦ **Individual labour relations under the purview of Law No. 7961/1995 *"The Code of Labour" with amendments***

1. The institution of the People's Advocate received 80 complaints for work dismissals due to institutional restructuring and changes to the organizational organograms in the context of institutional reform. Of these complaints, 15 became the subject of recommendations, not just on an individual level, but also a collective level in the case of employees dismissed jointly with the same motivation.

Reports collected from the responsible institutions reveal that restructuring led to changes in the organograms and composition of the governmental bodies. As a result, a number of employees were put out of their jobs immediately, i.e., their labour relations were terminated on justifiable grounds, as per the Decree of the Prime Minister "*On adoption of structures and organics*".

Given that dismissals were considered a by-product of restructuring, the immediate severing of labour relations thereof has been considered justifiable, too, and has been effected under Articles 153/1 of the Labour Code. .

Based on the legislation that regulates labour relations, specifically Law No. 7961 dated 12.07.1995 "*Labour Code*", with amendments, Articles 153 and 154 therein, determine the justifiable grounds for immediate severing of labour relations. Under these articles, justifiable grounds are considered all those serious reasons, which as per the good faith principle render the continuation of labour relations impossible.

Thus, under the Labour Code provisions, a "justifiable" reason is only one of the instances described above under Article 153 therein.

The recommendations made by the People's Advocate put emphasis on the fact that restructuring and elimination of job positions cannot be considered justifiable grounds under

the above mentioned provision, when specifically initiated to allow for the immediate severing of labour relations.

Therefore, the employee is not at fault, nor has he/she committed any contractual breach when the employer for his/her own motives or force by the circumstances makes the decision to cancel his/her job position.

As a result, in every case of severing labour relations, the provisions of the Labour Code (Articles 143, 145, 155) on the related financial compensations should have prevailed.

A part of the recommendations have been favorably considered by the 3 public administration bodies which have in some cases allocated up to 5 monthly salaries as a compensation for loss of job. However, in the majority of cases, the recommendations could not take effect due to the fact that the damaged side had taken the case to the administrative court in Tirana, but also in other regions.

2. Review of complaints revealed that in 20 cases labour relations were severed in inappropriate points in time. Article 147 of the Law No. 7961, dated 12.07.1995, *"Labour Code"*, with amendments, provides the definition for termination of contractual relation at an inappropriate time. The article specifically reads: "*The employer may not sever the contract when, under the current legislation,* ***the employee is summoned to complete his military obligation, is placed on temporary disability schemed covered by the employer or the social insurance schemes for a period up to one year, as well as when the employee is away on paid leave in agreement with the employer."***

In addition, should the severing of the contract take place prior to the employee leaving on military assignment, going on a period of temporary working disability, or going on paid vacations granted by the employer, and the notification term is still in progress, the notice will be suspended until such time as the employee completes his military assignment, his disability term and his vacation leave and resumed following completion of this period."

Therefore, in the cases of labour relations severance in inappropriate periods, i.e., the employee being on paid annual leave, medical rehabilitation leave or any of the cases described above, the recommendations of the People's Advocate have pointed out the absolute invalidity of the administrative dismissal act and its inability to produce legal implications. Further, the recommendations ask for the continuation of the labour contract between the sides and also the continuation of contractual obligations with regard to both employees returning to their job positions, and the relevant financial terms resumed in particular the payment of monthly salaries.

In accordance with the above, the People's Advocate institution has drafted 6 recommendations to the public administration bodies asking for steps to be taken to repeal such acts as absolutely null, return employees to their previous job positions and clearance

of financial obligations even for the period in which the employees were severed based on these acts.

3. The following issues identified while dealing with 30 complaints have to do with the faulty application of Articles 143, 144, 145, 155 of the Labour Code in terms of severing labour relations following expiration of individual labour contracts. There have been cases of labour relations continuation beyond the period of contract validity even though contracts as such were not renewed.

As a result, certain complainants (in their capacity as employees) used to keep up their work at some of the institutions[10] for many years, beyond the contract term and currently were communicated the termination of labour contracts without written notice.

Based on these complaints, the People's Advocate asked the relevant institutions for explanations in relation to the severing of labour relations.

In response, the institutions pointed out those labour relations were severed due to the expiration of the individual contract term which had in fact expired a long time ago.

In fact, the People's Advocate noted that the individual labour contracts between the employers and the employees dated many years back and were only valid for one-year duration.

However and despite the fact that the contract had expired months ago and no steps were taken to renew it, based on the continuation of labour relations, it will be assumed that the sides are bound by a labour contract of undefined duration, which may only be severed as stipulated by Articles 143, 144 etc. of the Labour Code.

In this connection, should the employer accept the services of the employee and pay the employee a salary following expiration of the labour contract, it shall be assumed that the sides have altered the term of the contract into a contract of undefined term (legal assumption). In this case, the same contract shall bind the sides until such time that either side decides to terminate it in accordance with the regulations governing severance of open end contracts.

These circumstances constitute situations described by provisions of Article 143 paragraphs 1 and 4 of the Labour Code, with amendments, specifically:

"*1) Following the probation period, to sever open ended contracts, the sides must observe a one month period for a one year employment period, two months for two-five year employment periods and three months for more than five years of employment.*

[10] This situation affects primarily the medical personnel at the Hospital University Center in Tirana.

4) Should one of the sides terminate the contract in disregard of the notification term, it shall be continued as an instance of immediate contract severing."

Consequently, the non-observance of the notification term has no impact on the validity of the contract. The contract will, hence, be considered terminated notwithstanding disregard for the notification term. On the other side, non-observance of the notification term automatically means the application of articles 153/154/155/156 of the Labour Code on the immediate severance of labour relations.

Specifically, employees are entitled to the benefits under Article 155, paragraph 1 of the Labour Code with amendments, which reads: *"The Employee is entitled to the salary he/she would have received should labour relations have been terminated at the time of expiration of the notification term defined in the contract or under the law, or upon the termination of the contract's fixed term."*

With regard to the above, Article 155 applies to open-ended contracts, too. In this meaning, depending on the length of employment, employees should have been notified 1-3 months prior to their actual dismissal from work. Although the labour Code acknowledges the right of the employer to early termination of the contract, it obligates the employer to pay adequately indemnify the employee with three monthly salaries as per the notification term to have been given to the employee.

The above mentioned indemnification shall also be topped with the right to indemnification for labour seniority under Law No. 7961 dated 12.07.1995, "*Labour Code of the Republic of Albania" with amendments.* Article 145 paragraphs 1 and 2 of this Law stipulate: *"The employee shall be entitled to seniority benefits in cases of contract severance by the employer in cases of labour relations having lasted for no less than 3 years. …*

Payment for seniority shall amount to at least half the monthly payment for every full year spent on the job at the termination of job relations.

To address this situation, the People's Advocate presented the responsible institutions with recommendations to observe the provisions under articles 143, 144, 145 and 155 in the Labour Code with respect to severing labour relations.

4. Alongside the individual complaints, the People's Advocate also reviewed the added implications of job dismissals by looking at discipline at the work place.

Discipline rights represent the entirety of legal norms creating the internal order in a work place, such as an institution, enterprise or otherwise. Such discipline rules are mandatory for employees in a labour relationship, who should under any circumstance observe the measures designed to establish discipline in an organization.

The legal regimen of labour discipline is specified in Article 37 of the Law No. 7961 dated 12.07.1995, "*Labour Code of the Republic of Albania"* with amendments, which reads: "*Disciplinary measures are mainly established in the collective labour contract. In any case, the individual contract should contain references to the relevant provisions on disciplinary measures".*

As seen, this article contains neither the notion nor the instances of disciplinary breaches, but refers instead to the respective acts (the individual labour contract), which generally lack such specifications along with the relevant procedures handling disciplinary measures from the light to the most serious one. Such a situation creates room for abusiveness on the part of the employer including the unjustified severance of the labour contract.

In our judgment, a special provision in the individual labour contract on the disciplinary measures, such as written notice, written notice with a preliminary warning for dismissal, etc., is very necessary. Such measures do not have any direct bearing on the legal labour relationship. Neither do they cause its temporary alteration, or lead in any way to the nullification of such relationship. Such steps would allow for alert the employee to the consequences and even dismissal should the employee continue to breach the work discipline.

The right to work is closely connected with the human rights and the breaching of such right by the employer such as through the immediate and unjustified severing of the labour relations, means a breach of human rights. The People's Advocate has submitted a recommendation to the Ministry of Youth and Welfare asking for a review of the respective provisions in the Labour Code and a subsequent amendment of Article 37 "*On disciplinary measures"* in the individual labour contracts.

5. Further issues were identified in a set of complaints submitted by the Syndicate of Artists in which they complain against the Ministry of Culture in relation to the obligations imposed on each of the employees in the institutions under its subordination as regards the new labour contracts.

Specifically, following the adoption of the structural organics for every institution under the subordination of the Ministry of Culture (The National Theatre of the Opera, Ballet and the Folk Ensemble; the National Drama Theatre, the National Children's Centre and the Puppet Theatre; the National Arts Gallery; National Circus, the Institute of Culture Monuments; the National Library; National History Museum; the Central Film Archive; the Albanian Cinematographic Centre; and "Alba Film" Studio), both the artists and the administration personnel were asked to conclude new labour contract with a duration of 3, 6 or 12 months, although the Independent Syndicate of the Artists of Albania claims that the employees in these institutions are in possession of collective and individual labour contracts.

Based on Law No. 8454 dated 04.02.1999, "*On the People's Advocate," with amendments,* explanations have been requested from the Ministry of Culture in relation to the grounds for

new labour contracts and the different timelines of contract validity within the same institution. The Ministry was also asked to explain whether the criteria of job seniority was taken into consideration for every employee, and whether there was an intention to consider the 3 and 6 month contracts was “probation” period for these employees.

In response, the Ministry of Culture explained as follows: “In the context of structural reform to fulfill the obligations and use the powers of the domain of governmental responsibility as determined in the Decision of the Council of Ministers No. 844 dated 27.09.2013, “*On the determination of the domain of governmental responsibility for the Ministry of Culture,”* the Culture Ministry and institutions under its subordination revisited their structural organics.

1. *In the conditions of restructuring, the regulation of labour relations has observed the current legislation. It also complied with the new organizational architecture of the institutions, which dictated changes both in the manner or organization and the number of employees.*

2. Labor contracts are now bound to fixed time frames as a result of the structural overhaul, in which the modification of the overarching structures has been coupled with job cancellations due to redundancies, as well as adjustments in employee standards. As a subsequent result, we’ve witnessed an internal flux of labor, due to the uncertainty associated with the mandatory probation period, during which time employees must adapt to the new criteria.

3. Regarding the TOB, the National Theatre, and the Children’s National Culture Centre, these modifications are part of the structural reforms proposed by the Ministry of Culture, designed to increase visibility for the patrons of the arts and the art community at large. These reforms are in accordance with the Government’s objective to actualize a new approach to the management of cultural institutions, to expand the scope of the latter’s self-sufficiency, and to enable these institutions’ fund raising capacity from third parties. The implementation of these reforms will require the introduction of necessary measures that will allow these labor contracts to be successfully established, in accordance with a well-coordinated scheme, which will ensure the pursuit and adherence to legal obligations.

Due to the complex nature of this problem, and the mandatory compliance with the structural reforms of all institutions affiliated with the Ministry of Culture, in cases where employees of the National Theater of Opera, Ballet, and the People’s Ensemble have refused to enter into these new contractual agreements, the ramifications have included sanctions, such as the withholding of the monthly salary for the month of June 2014.

Following the ratification of the new Labour Code, the Organic Structure of the National Theatre of Opera, Ballet, and the People's Ensemble under the Prime Minister's Order No. 140, dated 28.03.2014, the number of employees at the aforementioned institution has totaled to 248. Of these, only 127 employees have signed the contracts and entered into new contractual agreements in accordance with the labour code stipulating that a contract should be made for 2, 3 or 4 years, as per the employees' seniority at their place of work. Meanwhile, employees who have been in the same workplace for 30 years or more, the contract should be open ended.

Employees who have refused new contracts of employment under the new labor code have been granted a period of notice and must meet the obligatory final deadline of 7.10.2014 for the signing of said contracts. In the event that these employees will not sign the contractual agreements, their positions or posts will automatically be assumed vacant and will be announced as such, in accordance with the current legislation. (The employee will be assumed to have terminated the contract one-sidedly).

In addition, those employees who had not agreed to enter into the aforementioned contractual agreements but, were otherwise, regularly and routinely present and entirely functional (including the completion of all accorded tasks) at their place of work, were not however paid for the month of June 2014.

The People's Advocate, having condensed and synthesized the context and associated problems of the aforementioned conflict, and in reference to the current legislation that regulates labor relations, submitted the recommendation below.

An assessment of the available documents has brought to light the information that the former Ministry of Tourism, Culture, Youth and Sports has negotiated a five year term collective contract with all employees of the aforementioned Ministry as well as its affiliates.

Moreover, in accordance with the Labour Code as well as Article 18 of the Collective Contracts Act, all institutions under the Ministry of Arts and Culture are obligated to negotiate second tier Collective Contracts, between institutional departments and unions. Additionally, freelance artists and those employees who are not covered by the collective contracts under the Article 21 of the Labor Code are equipped with individual labor contracts.

In analyzing the Labor Code as mentioned above, Article 174 indicates that:

"1. The collective contract ceases its effects on the contracting parties when the contract term has expired.

2. Every individual labor contract concluded in the framework of the collective contracts continues to be regulated by the provisions of that contract, with the exception of those cases in which the contract has been modified via an agreement between the employee and the employer. The same rule applies to relations between the employee and the employer or any other legal party, which has been predetermined by the contracting parties.

The expiry date for this contract is stated to be 2017, after the legal obligation has been fulfilled, and furthermore, there has been no detection of a case in which one party unilaterally breaches the collective contract.

Moreover, it has been stated as a reason for the negotiation of fixed term individual labor contracts due to the fact that the change of the structural framework has set in motion the process of job cancellations as well as modifications in job criteria.

However, in referring to the argument invoked by the TOB based on the provisions of the Labor Code, legally speaking, job resignations must appeal to a legal procedure, which suggests that in the case of job cancellations, this process must adhere to a legal procedure in order to resolve the unilateral breach of contract. Meanwhile, the institution with which we are concretely dealing has no record of the job redundancies that lead to layoffs, in fact, some positions are being modeled after the functionality of the existing job positions.

Article 11 of the Labour Code establishes the hierarchy of the legal acts:

1. The rights and obligations under the labour relations are regulated in order of precedence from the following source:

d) Collective Labor Contracts
e) Individual Labor Contracts

3. Any provision that violates the provisions of a higher category is invalid. However, those provisions that strengthen the position of the employee will be considered valid.

As is evident, collective contracts for all employees should take precedence over individual labor contracts, and even more so at a time when no action has been taken by the respective institution to nullify the effects of this contract.

Moreover, since no employee received a notice of termination of the previously binding contract, or a notice of dismissal, the employer is obligated to adhere to the clauses of the employment contract, under which the payment of a regular salary is covered. When an

employee has contributed to the completion of a certain work, or has carried out a certain service, the employer is legally obligated to compensate them monetarily.

As has been previously stated, the institution of the People's Advocate recommends the following measures:

a) Reimbursement of all TOB employees for the withholding of monthly salaries for the month of June 2014
b) Taking into account previous labor contracts, collective as well as individual, for those who have previously entered into an employment contract. These individuals will be assisted on a case-by-case basis, taking into consideration the functionality of their positions.

- **Individual Labour Relations under Law Nr. 12/2013. "On the Status of the Civil Servant" with amendments**

1. The People's Advocate received a complaint by a group of former employees of the Regional Council of Durres in which they raised the issue of wrongful termination of labour relations. More specifically, the complaint alleged that these employees have worked for years in various positions, and according to the documentation submitted by them, the recruitment process was in accordance with the provisions of Law Nr. 8549 dated 11.11.1999, previously known as "On the Status of the Civil Servant." In addition, in April 2014, they have received an offer to meet and discuss the launching of relevant procedures for resolving labor relations, as is outlined in Article 144 of the Labor Code. The People's Advocate, after a comprehensive assessment of the nature of the complaint, requested detailed information from the Durres Regional Council regarding the cause of the termination of labor relations under the legal provisions of the Labour Code, in particular since the complainants were entitled to protection under the "Status of the Civil Servant."

Following request for detailed information from the Regional Council of Durres, the following was brought to the attention of the People's Advocate:

"The Regional Council of Durres, under Decree Nr. 06, dated 03.17.2014, "On amendments to the organic structure of the administration of the Regional Council of Durres" and Decree Nr. 07 dated 03.17.2014, "On approval of internal regulations regarding the organization

and functioning of the administration of the Regional Council of Durres," modified job requirements in the process of the implementation of these Decrees. Adhering to article 50 of Law 152/2013, "On the Status of the Civil Servant" the Restructuring Commission established in the context of the restructuring of the institution, then considered possible arrangements to make amends for the employees in question. As a result of their inability to transfer to one of the vacant posts where they met the specific requirements, the Commission proposed to release these employees from duty.

Given the nature of the problem ascertained and the inconsistencies in resolving labor relations, Article 50 of Law Nr. 152/2013 states that in the event of closure or restructuring of the institutional framework, it is predicated that all affected parties have the option of transferring to other posts. The Article explicitly states that:

"In the event of closure or institutional overhaul in which the previous post of a civil servant is terminated, ***he or she must be transferred to another civil service position in the same category*****."**

Transferability of employees, according to the first passage of this Article, must be organized based on precedence, in the following order:

a) in the same institution where the civil servant was previously appointed
b) in the institution that is the result of a merger with the previous institution, in one of the institutions that are a result of the dissolution of the previous institution, or in the institution that has absorbed the functions that the civil servant in question previously performed
c) in any institution affiliated with the previous institution that has been subject to restructuring
d) in any other institution that performs civil service functions

In the event of institutional closure or reform, a Restructuring Committee must be enacted. The Committee is expected to examine the employment options for civil servants and to arrange their transferability to vacant posts with which their job skills are compatible and they fulfill the criteria. The final decision regarding the transferring process must be ratified by the responsible entity based on the report or proposal of the Committee.

The employee in question retains the right to reject the transfer based on the reasoning outlined in paragraph 3 under Article 38 of this law. Refusal to transfer for reasons not covered under this law allows the discharge of the employee from the civil service.

For further clarification of this legal provision, the Council of Ministers issued Decree Nr. 171 dated 26.03.2014, *"On the transferability, suspension, or dismissal of permanent or temporary civil servants",* in which chapter 3 discusses employee transferability due to closure or restructuring of the institution and states that: *"In the event of closure or restructuring, modifications to the job criteria will be considered in cases where, due to such processes affecting the institution, posts are terminated, reconfigured, or their requirements changed, the affected parties (employees) can be deployed to the new posts, whether restructured or retained as a result of the restructuring.*

Thus, the above anticipates the laws and regulations in the event of closure or restructuring of institutions, where previously held positions of civil servants are disbanded and the affected parties are transferred to a relevant post or category within the civil service, however, no mention is made of further legal provisions that will anticipate the regulation of labor relations for civil servants in the absence of job vacancies, particularly for autonomous institutions which constrict the playing field, as transfer options are available only within the designated institution.

A similar case was arbitrated under former Law Nr. 8549 dated 11.11.1999, amended as "On the Civil Servant", where under Article 23 of the Civil Servant Act, the civil servant maintained all privileges related to his previously occupied post until he was offered another post, a stipulation valid for no longer than a year. Under the conditions of the new law, when this provision (the waiting list) is not provided, it becomes more than necessary to further clarify the status of the civil servants in the case where the immediate discharge of the civil servant is being considered, and as such, the civil servant is subject to a financial severance package.

As has been discussed above, resulting from the issues associated with the employee complaints, we have sought to revise and supply an addendum to the provisions of Article 50 under Law Nr. 12/2013, "On the Civil Servant", which refers to the restructuring of central and autonomous institutions in the event of an absence of vacant posts.

2. A similar problem has been detected during the arbitration process of a group of other plaintiffs, who have catalogued under the waiting list, in accordance with former Law Nr. 8549/1999, "On the Civil Servant", prior to the implementation of the new law.

During the process of mediation of these complaints, large portions of them have come under judicial review at the Administrative Court. The decisions reached by this court have retroactively enacted the Constitutional Court's Accord Nr. Five dated 0.02.2014, which has been repealed as incompatible with normative Act Nr. 5 of the Constitution of the Council of Ministers dated 09.30.2013, "On Amendments to Law Nr. 152/2013", "On the Civil Servant", and the Assembly Law Nr. 161/2013 "On the Approval of Normative Act Nr. 5 dated 30.09.2013".

Related to the matters discussed above, the waiting lists under the “On the Civil Servant” law have been classified as absolutely invalid, which has resulted in the affected employees to request to be reinstituted in their former posts.

3. The examination of submitted complaints revealed violations in the legislation of civil servant dismissals. Specifically, during the mediation process of the issues raised by plaintiffs, concern has been expressed regarding the violation of the law and the legal framework concerning the termination procedures followed vis-a-vis the civil servant plaintiffs from the General Directorate of Taxation. The Institution of the People’s Advocate, after reviewing the relevant documents cited in the proposal has identified the following:

Under Article 41 of Law Nr. 152/2013 " On the Civil Servant”, every employee has the right to be kept informed as to the progress of the start of the disciplinary proceedings and any decision related to it. Also based on Article 13 / d of Decision Nr. 115 dated 03.05.2014, " On the Disciplinary Procedure and the Guidelines for the Establishment, Content and Decision-Making in the Civil Service Disciplinary Committee”, the employee must be informed within a minimum of 4 days’ time.

According to the available documents obtained from the General Directorate of Taxation, there has been a violation of the terms of the notice of initiation of disciplinary proceedings, where in the plaintiff was informed only two days prior to the Disciplinary Hearing Committee. At a time when the documentation submitted by the applicant and based on his claims, it turns out that only two days prior, the applicant was verbally informed that he or she must appear before a Disciplinary Committee resulting from their decision to initiate the disciplinary proceedings. This information has been divulged from an e- mail that is dated June 3rd 2014, sent by the Head of the Labor Evaluation and Training Sector, to several persons at the Regional Tax Directorate of Tirana.

In this regard, it ought to be noted that no such act exists that substantiates the claim that the applicants were officially informed as to the beginnings of the legal proceedings, in accordance with the legal parameters stipulated in the aforementioned decree. For this reason, we recognize that violations have taken place in the notification procedure and the plaintiffs are to be protected under the law associated with these violations.

Furthermore, we acknowledge that the applicants were not notified of their alleged breach by the General Directorate of Taxation and from the documents and specific evidence, in order to prepare their defense, thus violating Article 13 of Decision No. 115 dated 03/05.2014. On the other hand, it must be noted that the preliminary legal procedures provided under Law 152/2013 "On the Civil Servant" were not adhered to, and the progressive administrative disciplinary measures to be taken pending the final decision to release the civil servant from duty under Articles 57 and 58 of the Law 153/2013 were equally violated.

After several meetings held by the Disciplinary Action Committee, a decision to dismiss the plaintiffs from their civil service duties was reached by a terribly narrow majority, due to the ambiguity surrounding the attributed violations and their unsubstantiated nature due to lack of specific provisions and procedures. The above is confirmed by the fact that the Commission was not clear nor convinced in their initiated procedure, aiming only to come to the final decision to discharge the applicants from duty after summoning several different experts to support the collective decision.

Apart from the inability of the summoned experts to provide a professional opinion based on the applicable legal framework, one of the experts stated that he had very little experience in the post he occupied and had no prior knowledge of any meetings on the part of the committee to undertake disciplinary measures, to the detriment of the applicants. We believe that all these findings have impaired the legal process associated with the disciplinary hearings and its decision making body.

Simultaneously, the documents attached to the GDT indicate that the applicants have not signed the required notary acts that delineated the court hearings, which is an essential part of the proceedings, and ensures the appropriate hearing procedure has been carried out that also allow the plaintiffs to articulate and verify their complaints.

As previously mentioned, the Institution of the People's Advocate proposes measures for the proper implementation and observance of legal provisions regarding the termination of employees of the General Directorate of Taxation and the Regional Tax Departments.

One of our concerns associated with the new law, in addition to its reform to cover more employees under the umbrella of "Civil Servant Status", has to do with the municipal and communal employees in regards to their Human Resources departments and their incapacity to properly implement this aforementioned new law.

Despite the existence of an Act of the Council of Ministers regarding the treatment of the current employees of local government units, it has not yet helped regulate the transition, either for current employees or civil servants.

In many cases, the municipalities and communes have lamented the insufficient capacity of current Human Resources departments to deploy such procedures, even as this very procedure as it pertains to current employees should have been implemented to cover these employees under the civil servant status. However, it has not yet found a path towards incorporating the appropriate regulatory measures, even for various central governance institutions that exercise their will in precisely this domain, referring also to the employee terminations under the provisions contained in the Code of Practice. Also, the fiscal policy and treatment towards entry level employees remains an issue, if not assumed to be resolved by the modified branches of local government following an approval of the territorial reform.

1. THE IMPLEMENTATION OF FINAL COURT DECISIONS ON TERMINATIONS

Just as is stated in the progress report for Albania (2014), the implementation of legislative orders and court decisions must absolutely be complied with. The lack of enforcement policies over executive titles remains a problem, among the most difficult The Institution of the People's Advocate has faced and is faced with. Between January 2014 and September 2014, the institution receive about 20 complaints from employees, in which the object of their appeal was the violation of court order decisions in terms of layoff procedurals, including the withholding of financial severance compensation in the case of wrongful termination, and the disregard for court appeals warranting job restitution.

A major portion of the content of the complaints filed with the People's Advocate reveal the government's disregard for proper procedural steps on a case by case basis, and to fulfill their obligation to provide the involved parties with an enforcement mechanism for implementing executive titles.

This violation of the principle of legality by the very entities that are endowed with its enforcement and implementation creates financial troubles day by day, due the failure to enforce the final judicial decision at the time of its issuance. Here we are referring to those final court orders under which the payment of financial compensations is mandatory, and non-adherence to it requires measures to be taken by the budgetary debit institutions.

Contrary to the regulations imposed by the court or the Civil Service Commission, in some cases, the breach of financial obligations towards employees on the part of executive title holders of budgetary debit institutions have been grotesque and in violation of legal orders to pay appropriate severance wages instead of the meager amounts they currently pay, which stand at a monthly rate of 5,000 to 10,000 leks. These "reparations" not only account for about 1/10 or 1/15 of the obligatory monthly payment, but also significantly damages the standing of those employees whose cases the courts favored.

There is no pretext that can rationalize or justify the failure on the part of the public administration to enforce court orders that have been legally won. The actualization of judicial decrees must be considered an integral part of the legal process in the context of Article 6 of the ECHR[11].

This brings us thus to the decree dated 25.03.2014 of the European Court of Human Rights dated 25.03.2014, who, after analyzing the appeal case EM VS. THE REPUBLIC OF ALBANIA for non-compliance with a final court decision obtained from the Municipality of Tirana, noted that: "There is no functional internal apparatus to regulate the delays in

[11] See Hornsby v. Greece, Judgment dated 19 Mars 1997, Reports 1997-II, p. 510, § 40

implementation or non-implementation of final court decisions. Similarly, the absence of funds on the part of the institutions absolutely does not justify the non-enforcement of a final court decision.[12]"

Although the Constitution and the European Convention of Human Rights ensures that all persons, without bias or discrimination, receive a fair hearing, as is their right, the Public Administration entity regularly disrupts access to that right. Within its jurisprudence, the European Court of Human Rights has encountered violations of legal principles and procedures, via interference or violation of provisions and legally enforced acts. A similar interpretation was cited in the BURDOV vs. RUSSIA case[13].

One of the issues associated with the violation of legal procedures, as well as the determining of the financial value of the compensation to be distributed to the injured parties, has to do with other social security benefits accorded to current employees yet not accorded to former employees who receive no reparations for their wrongful termination.

Based on the jurisprudence of the ECHR, the Court considered that the respondent state should ensure the payment of accrued interest on social contributions, as provided in the clause of the respective court ordered decisions[14].

The liquidated amounts allocated by the state towards the implementation and enforcement process of executive titles are utterly insufficient, whereby the number of unresolved cases of which the budgetary debit institutions are in charge rapidly increase, stimulating the simultaneous increase of the financial severance payments owed to the subjects whom the courts favored.

7. CONCLUSIONS AND RECOMMENDATIONS

1. In light of the evidence accrued against the offices of the Public Administration via the complaints issued and the monitoring undertaken, despite the fact that the Law "On the Civil Servant" came into force in February 2014, as can be attested by the

[12] See for more information: Immobiliare Saffi v. Italy [GC], no. 22774/93, § 74, ECHR 1999-V.
[13] See *Burdov vs. Russia*, No.59498/00, ECHR 2002-III.

[14] For more information, see: CASE OF ČOLIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA, Applications nr. 1218/07, 1240/07, 1242/07, 1335/07, 1368/07, 1369/07, 3424/07, 3428/07, 3430/07, 3935/07, 3940/07, 7194/07, 7204/07, 7206/07 and 7211/07), Judgmen 10 November 2009.

progress report, many of those who were dismissed or newly employed as civil servants between the time frame of October 2013 and the actual enactment of the aforementioned act have been severely affected. This is clearly illustrated by the lack of a unified legal practice for court judgments, especially during this transition period for civil service laws.

1. It has become increasingly apparent that the legal procedures regarding terminations in the context of institutional structural overhaul have not been rigorously and strictly adhered to, both for those employees covered under the Labor Code as well as for those who retain Civil Service status.
2. The increase in judicial decisions rendered in favor of former employees is causing the amplification of financial compensations to be administered by the state budget for the enactment of these decisions, which adheres to the principle of due legal procedures under the Constitution of the Republic of Albania and the European Convention of Human Rights.
3. The pending state of those individuals whose names have been included in the waiting list prior to the enactment of the new law, most of whom have won court decisions to return to their formerly held positions, is extremely problematic.
4. Equally troubling is the scope of enforcement and repercussions of the new law pertaining to civil servants and employees local government units.

In conclusion to the issues dissected and elucidated in the content of this document, the People's Advocate is morally obligated to delineate several recommendations that may begin to rectify these challenges and contribute to the amelioration of the framework of our current public administration institutions, which has yet to operate according to European standards.

Towards the above, the following recommendations are made:

1. Examination of recruitment practices and employee terminations undertaken during transitory legal periods.
2. Implementation and upholding of rigorous standards enforced by the existing legal framework that can guarantee the arbitration of labor relations (especially as they pertain to financial severances) and the mediation of cases in which individual labor contracts are unilaterally nullified, leading to immediate or wrongful termination of employees, with the objective of avoiding further increases in financial state debt owed to employees who have been illegally dismissed.
3. The acknowledgement and compliance with the rights of those individuals who are currently on waiting lists, to enable a more consolidated approach to these legal processes, especially for those who are no longer legally protected under the provisions of the new law.

4. All procedures and practices associated with the enactment or enforcement of final court decisions must come into review, especially in those cases where the courts reached a decision in favor of the plaintiff's reinstatement to his or her former post. For this reason, we posit that the DAP closely examine the provided guidelines for the implementation, enforcement, and enactment of those court decisions that dictate the retroactive redeployment of terminated individuals into their previous places of work. This concern has also been expressed in the progress report.
5. Appropriate measures must be taken to determine the costs of layoffs in the context of institutional reforms and overhaul of existing structures.
6. Appropriate measures must be taken to hold accountable those individuals and heads of departments or institutions who are responsible for wrongful terminations of civil service employees.
7. Appropriate measures must be taken to advance the establishment and consolidation of a civil service employee database, to enhance the monitoring and tracking system of the civil service domain, thus ensuring rigorous compliance with labor laws.