

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHITJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS	SPECIJALNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU
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SCEL – 10 – 0014

Complainants

1. **B.B.**
2. **Z.P.**
3. **R.K.**
- 4/1. **H.H.**
- 4/2. **D.M.**
5. **B.S.**
6. **S.Š.**

Vs.

Respondent

Privatisation Agency of Kosovo

Ilir Konushevci Street, no. 8, Prishtinë/ Priština

The Panel no.1 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, composed of Paulo Ferreira Rijo, Presiding Judge, Shkelzen Sylaj and Ćerim Fazliji, Judges, after deliberation held on 12.06.2013, issues the following

JUDGMENET

1. **The complaints of Z.P. (C2), R.K. (C3) and S.Sh. (C6) are hereby approved as grounded. They will be included in the final list of eligible employees entitled to a share of proceeds from privatisation of the SOE.**
2. **The complaints of B.B. (C1), H.H. (C4/1) and D.M. (C4/2) are hereby rejected as ungrounded.**
3. **The complaint of the Complainant B.S. (C/5) is hereby dismissed as inadmissible.**

Factual and procedural Background:

The Complainants claim that they are the former employees of Socially-owned Enterprise SOE “K.B.” in D. which was privatised by the Respondent on 22 November 2006.

The final list of the eligible employees was published on 02, 03 and 04 September 2010 in public media in Albanian language “Kosova Sot” and “Koha Ditore”, in daily

newspaper in Serbian language “Blic” and in the newspaper in Monte Negro “Vjiesti” from Podgorica (Mali izi/Monte Negro) on 01, 02 and 04 September 2010 and deadline for filing of complaints with the SCSC, was 27.09.2010.

On 21.09.2010, B.B. (**Complainant C1**) filed a complaint with the SCSC of Kosovo against PAK which administer the SOE “K.B.” in D., due to his non-inclusion in the list entitled to a 20% share of proceeds from privatisation of this enterprise. He requested that the SC oblige PAK to include him in final list of entitled employees. The Complainant states that he was employed with this enterprise from 20.01.1981 until 31.01.1992. The complainant worked in capacity of director of the SOE and he was dismissed arbitrarily by his workplace by a decision issued by violent Serbian administrative authorities in Kosovo at that time. After the end of the war, specifically on 29.07.1999, he was re-appointed in capacity of Director of this SOE, but on 31.07.2004, he voluntarily resigned from this enterprise because he was employed with Agriculture Ministry. The Complainant attached: The decision of appointment in the employment relationship with the SOE no. 02-7, dated 16.02.2004, and the certificate of working experience with the SOE no. 02-25, dated 10.05.2004.

On 04.10.2010, PAK in its response to the Order of SC regarding the complaint, states that the Complainant does not meet the legal requirements of Article 10, paragraph 4 of UNMIK Regulation no. 2003/13 because the Complainant submitted uncertified copy of decision regarding his appointment in the enterprise, uncertified copy of his certificate issued by SOE, and the Complainant had no employment relationship with this enterprise at the time of privatisation of this SOE as he terminated his employment relationship on 31.07.2004 and was employed by Agriculture Ministry, therefore PAK proposed that his complaint shall be rejected as ungrounded.

On 22.09.2010, Z.P. (**the Complainant C2**) filed a complaint with the SCSC of Kosovo against PAK which administer the SOE “K.B.” in D., due to her non-inclusion in the list entitled to a 20% share of proceeds from privatisation of this enterprise. She requested that the SC oblige PAK to include her in final list of entitled employees. The Complainant emphasized that she was in an employment relation as of 1992 until she left Kosovo. She submitted the following documents: Employment booklet no. 15168, decision of administrative provisional body no. 02-421, dated 21.07.1992, and identity card. She states that PAK dismissed her complaint as belated. She states that the war was a special situation that is why she was not at work anymore.

On 04.10.210, PAK submitted its response to the Order of SC regarding the complaint, stating that the Complainant does not meet the legal criteria stipulated in Article 64.2 of the Law on Administrative Procedure 2006/17, as she failed to submit a complaint against provisional list until 12.10.2007. Her complaint is belated and proposed that SC dismissed as inadmissible.

On 23.09.2010, R.K. (**Complainant C3**) filed a complaint with the SCSC of Kosovo against PAK which administer the SOE “K.B.” in D., due to his non-inclusion in the list entitled to a 20% share of proceeds from privatisation of this enterprise, requesting that the SC oblige PAK to include him in final list of entitled employees. The Complainant states that he was employed with this enterprise since 1963 until 1992, when he was dismissed arbitrarily by his workplace by a decision issued by violent Serbian administrative authorities in Kosovo at that time. The Complainant supports

his allegations stating that all submitted documents by him with the SC are authentic, relevant and certifies his allegations in the complaint and based on documents he possesses he should have been included in the list of eligible employees from privatisation of this SOE, as he worked with this enterprise until 11.05.2007.

The Complainant attached: the decision of his working experience in the SOE no. 6, dated 31.01.2008, issued by Agriculture Cooperative in D., employment booklet no 2347.

On 01.10.2010, PAK responded to the Order of SC stating that the Complainant does not meet the legal requirements foreseen by Article 10, paragraph 4 of UNMIK Regulation no. 2003/13, because at the time of privatisation of this SOE, the Complainant had reached retirement age, therefore, the PAK proposed that his complaint shall be rejected as ungrounded.

On 28.09.2010, H.H. **(the Complainant C4/1)** and D.M. **(the Complainant C4/2)** filed a complaint with the SCSC of Kosovo against PAK which administer the SOE "K.B." in D., due to their non-inclusion in the list of eligible employees entitled to a 20% share of proceeds from privatisation of this enterprise, requesting that the SC oblige PAK to include them in final list of eligible employees. The Complainants in their allegations stated that they were employees of this enterprise and attached an Extract of the Assembly of Agriculture Cooperative dated 20.11.2003.

On 07.10.2010, PAK in its response to the Order of SC regarding the complaints of the Complainants, states that the Complainants do not meet the legal criteria of Article 10, paragraph 4 of UNMIK Regulation no. 2003/13, because the Complainants failed to submit relevant evidence to prove their continuity of employment relationship, and they were not registered as employees of the SOE at the time of privatisation. PAK proposed that their complaints shall be rejected as ungrounded.

On 04.10.2010, B.S. **(the Complainant C5)** filed a complaint with the SCSC of Kosovo, against PAK which administer the SOE "K.B." in D., due to his non-inclusion in the list entitled to a 20% share of proceeds from privatisation of this enterprise, requesting that the SC oblige PAK to include him in final list of eligible employees. The Complainant in support of his allegations submitted the following documents: Employment booklet no. 1309/83, copy of decision on his employment no. 02-446, dated 29.08.1992, copy of identity card.

On 15.10.2010, PAK in its response to the Order of SC regarding the complaints of the Complainants, states that the Complainants do not meet the legal criteria of Article 10, paragraph 4 of UNMIK Regulation no. 2003/13, because at the time of privatisation of this SOE, the Complainant was not appeared in the list of this SOE, therefore, PAK proposed that SC shall reject his complaint as ungrounded.

On 27.09.2010, S.Š. **(the Complainant C6)** filed a complaint with the SCSC of Kosovo against PAK which administer the SOE "K.B." in D., due to her non-inclusion in the list entitled to a 20% share of proceeds from privatisation of this enterprise. She requested that the SC oblige PAK to include her in final list of entitled employees. The Complainant emphasized that she was in an employment relation as of 1989 until she left Kosovo. In support of her allegations, she submitted the

following documents: Employment booklet no. 6334/87, and copy of decision on her employment no. 02-69/85, dated 25.01.1990.

On 15.10.2010, PAK in its response to the Order of SC regarding the complaint of the Complainant, states that the Complainant does not meet the legal criteria of Article 10, paragraph 4 of UNMIK Regulation no. 2003/13, because the Complainant failed to submit sufficient evidence to prove that she had undertaken any legal action for her continuity of employment relationship in this SOE after June 1999, while the other submitted documents do not present relevant evidence in support of her claimed allegations. PAK proposed that her complaint shall be rejected as ungrounded.

On 25.03.2011, the Complainant (C6) regarding the response of PAK to the Order issued by SC filed a counter response to the response of PAK stating that she does not agree with the statements of APK, because her employment booklet was never closed and as a consequence of the war in the middle of June 1999 she was forced to leave Kosovo. After the war, she had undertaken a legal action in order to return at her workplace. She also states that there was no legal decision on termination of employment was issued, and pursuant to Article 10 paragraph 10.4 of UNMIK Regulation no.2003/13 she meets the criteria to be included in the list of eligible employees.

On 16 December 2010, PAK responded to the Order dated 26 November 2010 of the Court and submitted a report of Review Committee of the complaints dated July 2010, an employee list dated 11 May 2007, a statement of director of company.

On 03 March 2011, PAK responded to the Order of Court dated 10 February 2011, by attaching copies of publications in dailies in Albanian language “Koha Sot” and “Koha Ditore” on 2, 3 and 4 September 2010 (Saturday) and dailies in Serbian language “Vijesti” on 1, 2 and 4 September 2010 and “Blic” on 1 and 4 September 2010. PAK stated further that PAK is a public institution and all its documents are certified by Agency stamp, same as certified by Ministry of Public Services.

Legal Reasoning

The judgement was rendered without holding the oral hearings, as the legal facts and arguments were presented quite clearly. The Panel does not expect any other relevant information or arguments in any other hearing. The Article 68.11 of the Annex to the Law 04/L-033 on the Special Chamber;

The complaints of the Complainants (C2), (C6) are grounded.

The failure of the Complainant (C2) to challenge the provisional list pursuant to Article 67.2 of UNMIK Administrative Direction 2008/6 does not make the complaint against the final list inadmissible.

- a. Article 127 of the Law on Administrative Procedure No 02/L-28 is not applicable. Article 127 reads as following:

“Administrative appeal

127.1. The administrative appeal may be submitted in the form of request for review or an appeal.

127.2. Any interested party has a right to appeal against an administrative act or against unlawful refusal to issue an administrative act.

127.3. The administrative body the appeal is addressed to shall review the legality and consistency of the challenged act.

127.4. The interested parties may address the court only after they have exhausted all the administrative remedies of appeal.”

The UNMIK Administrative Direction 2008/6, in Section 70.3 (a) and (b) under the heading “Applicable Law” does not refer to the Law on Administrative Procedure No. 02/L-28 but instead refers to the Code of Contested Procedure which does not contain any provision prescribing the exhaustion of all administrative remedies before going to the court.

However, even if Article 127 Law on Administrative Procedure No. 02/L-28 would apply, the Complainants would not have needed to challenge the Provisional List before complaining against the final list. Their Complaint does not regard the Provisional List (which could have been challenged) but the Final List (against which no administrative remedy is allowed).

- b. Moreover, the wording of Section 67.2, first sentence, UNMIK Administrative Direction 2008/6 cannot be interpreted in a way that the employee must challenge the Provisional List in order to be entitled to complain later on against the Final List. Section 67.2, first sentence, UNMIK Administrative Direction 2008/6 reads:

“Upon receiving the list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, the Kosovo Trust Agency shall publish a provisional List of eligible employees together with a notice to the public of the right of any person to file a complaint within 20 days with the Agency requesting the inclusion in or challenging the list of eligible employees.”

The law underlines only a right to challenge and not the obligation.

- c. The panel is aware, that an obligation to challenge any deficiencies in the provisional list combined with the sanction, that if this is not done, the complaint against the final list becomes inadmissible, would help the Agency to compile in shorter time a correct final list.

The obligation to exhaust the administrative remedies before addressing the court would prevent the party from using the legal remedies without necessity.

The procedure of having established a Provisional List initially and give the chance to everyone to challenge this list and submit facts and evidence within 20 days shall help the PAK to establish without unnecessary delay a correct Final List. This means, to focus and speed up the procedure. The collection of all necessary facts and evidence as early as possible is an essential tool in a procedural context in which the monetary amount to a 20% share to every employee depends on granting and rejecting decision.

UNMIK Administrative Direction No 2008/6 does not sanctioning lack of cooperation of the employee in the stage of compilation of the final list by making the complaint against the final list inadmissible (similar to: the Judgement of the Special Chamber of the Supreme Court SCEL-09-0001)

Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, defines the requirements that an employee shall fulfil in order to be considered entitled, while the Section 10 defines the procedure for filing a complaint with the Special Chamber as follows:

“10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatization and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6..”

The Complainants (C2), (C6) left the SOE during the war, as that was a specific situation. They did not submit documents to prove the fact of being attacked or discriminated. They did not state in detail any act of aggression or discrimination. However, neither the Respondent contested the fact that they left their country because of fear, nor objected that such a fear after the end of the war was justified for Serbian nationality. Therefore, in Civil Procedure this could be taken as a fact, which the Judgment can be based on and there is no need for any other documents or evidence.

The Respondent PAK did not contest the employment relationship of the Complainant (C2) with the SOE or any other fact, but it was focused only on the fact that the Complainant did not exhaust other available administrative remedies against the provisional list, while PAK did contest the continuity of employment relationship of the Complainant (C6) after 1999.

Even, if the Respondent would contest the discrimination, the burden of proof is not to carry by the Complainants, but the burden of proof is to carry by the Respondent to prove that there was no discrimination.

It is not up to the employees to prove discrimination, but it is up to the Respondent to prove that there was no discrimination. The burden of proof, which according to UNMIK Regulation 2003/13 was to carry by the Complainant, has been shifted to the Respondent by the Anti-Discrimination Law No. 2004/3.

The Article 8 of the Anti-Discrimination Law, with regard to the burden of proof, reads as follows:

“8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a Complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence.”

Article 11 of the same Law states:

“11.1 When this law comes into effect it supersedes all previous applicable laws of this scope.

11.2. The provisions of the legislation introduced or into force for the protection of the principle of equal treatment are still valid and should be applied if they are more favourable than provisions in this Law”.

The conflict in Kosovo during the period of time 1998-1999 is notorious fact by which the Court may assume discrimination. Therefore, it would have become the burden of the Respondent to prove that there was no discrimination, and not the burden of the Complainant that there was discrimination (Art 8.1 Anti-Discrimination Law, similar to the Judgement of the Special Chamber of the Supreme Court, dated 10 June 2011 in the case SCEL-09-0001). Therefore, the complaints of the Complainants are grounded (Section 10.4 of UNMIK Regulation 2003/13).

The complaint (C3) is grounded.

The Court considers that the evidence submitted by the Complainant (C3) were sufficient to prove his legitimacy for being included in the list of 20%

Based on the list of records of the employees ‘matrix book of Agriculture Cooperative “D.” no. 02-1, dated 11 May 2007, the employment booklet no.2347, certification no.6 issued by Agriculture Cooperative and the statements of director of this enterprise, the Court found that the Complainant was registered and worked with the SOE until the date of privatization, and his employment booklet was not closed, even he reached retirement age.

Article 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45 which defines the requirements that an employee shall fulfil in order to be considered eligible does not foresee the age as an obstacle for being entitle to 20% of privatisation of the SOE.

The complaint of the Complainants (C1), (C4/1), (C4/2), are not grounded.

The Complainant (C1) stated that on 31.07.2004 he had voluntarily terminated his employment relationship with the Agriculture Cooperative in D. and employed with Agriculture Ministry. The Complainant was not appearing in the list of employees of this SOE at the time of privatization; therefore, he does not fulfill the requirements foreseen by Article 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, in order that an employee shall be considered eligible.

The complaints of Complainants (C4/1) and (C4/2) were ungrounded and their allegations were not supported with relevant evidence, such as, employment booklets, decision on employment relationship or any other salary statements on personal incomes at the time of privatization of SOE. They submitted only an extract from the process of Assembly of Agriculture Cooperative dated 20.11.2003, but according to Court such document cannot be relevant for proving continuity of employment relationship until the privatization of the SOE.

The complaint of Complainant (C5) is inadmissible.

According to Article 67.6 of UNMIK Administrative Direction No 2008/6 in connection with section 10.6(a) UNMIK Regulation No 2003/13, a complaint against the Final List must be submitted within 20 days after publication of the final list.

The publication of final list took place on 02, 03 and 04 September 2010 in public media in Albanian language “Kosova Sot” and “Koha Ditore”, in daily newspaper in Serbian language “Blic” and in the newspaper in Monte Negro “Vjiesti” from Podgorica (Mali i zi/Monte Negro) on 01, 02 and 04 September 2010 and deadline for filing of complaints with the SCSC, was 27.09.2010.

The Complainant filed a complaint after deadline, on 01.10.2010, therefore such complaint is inadmissible.

Court fees

The Court does not impose costs to the Claimant as the Kosovo Judicial Council has not approved until now any written schedule issued by the Presidium of the Special Chamber (Article 57 Paragraph 2 Special Chamber Law). This means that till now there is no sufficient legal basis to impose costs.

Legal Advice

An appeal may be filed against this Judgment within 21 days with the Appellate Panel of the Special Chamber. The Appeal shall be served also on the other parties and to the Trial Panel by the Appellant within 21 days. The Appellant shall submit to the Appellate Panel proof that the Appeal was served on the other parties.

The prescribed time limit begins at the midnight of the same day the Appellant has been served with the written Judgment.

The Appellate Panel shall reject the appeal as inadmissible if the Appellant fails to submit it within the prescribed time limit.

The Respondent may file a response to the Appellate Panel within 21 days from the date of service of the appeal, submitting its response to the Appellant and on the other parties.

The Appellant then has 21 days after being served with the response to his appeal, to submit his response to the Appellate Panel and on the other party. The other party then has 21 days after being served with the response of the Appellant, to serve his counter-response to the Appellant and the Appellate Panel.

Paulo Ferreira Rijo, Presiding Judge

Shkelzen Sylaj, Judge

Ćerim Fazliji, Judge