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Gross Breach of Obligation as Grounds for Termination of Employment Contract

One of the most problematic issues in employment relationships is the termination of employment contract. The Labour Code of Georgia provides for exhaustive list of grounds for termination of an employment contract. This article focuses on one of the grounds of termination of an employment contract, which provides for termination of an employment contract due to gross breach of obligation by an employee imposed thereon by an individual employment contract or collective agreement or/and internal labour regulations. Despite the statutory possibility of termination of an employment contract under the grounds concerned, the practical application of this normative stipulation is associated with certain difficulties. The article offers the overview of circumstances, which should be taken into account and evaluated upon termination of an employment contract on the grounds of breach of obligation.

Key words: *gross breach, contract termination, Labour Code*

1. Introduction

The fundamental reform of the Labour Code of Georgia was implemented in 2006. As a result of legislative amendments a new principle was introduced, according to which principles nobody is required to maintain employment relationships when he is not willing to. Almost the similar principle is employed in the USA and common law countries, known as the so-called "employment at will" principle, meaning higher degree of freedom of an employer to chose with whom to enter into employment relationships and also, to decide when to terminate these relations at his sole discretion.[1] This is the fundamental difference between the US and European laws regulating employment relationships: the US law support minimal intervention into employment relationships, thus granting greater freedom to subjects, whereas the EU law makes its citizens feel, that the state will create legal safeguards to protect their right to maximum practicable extent.[2]

The latest reform of the Labour Code of Georgia was accomplished in 2013. The improvement of legal status of the employees became the milestone of this reform. Specifically, a set of amendments were introduced into the Code which more or less balanced the rights of an employer and an employee. The legislative amendments also concerned the grounds for termination of an employment contract.

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1 *Borroni A.(ed.),* Commentary on the Labour Code of Georgia, Tbilisi, 2014, XVII.

2 *Wallach Sh.,* The Medusa Stare: Surveillance and Monitoring of Employees and the Right to Privacy, The International Journal of Comparative Labour Law and Industrial Relations, *Neal A.(founding ed.),* 2011, 192, <http://heinonline.org>.

2. Termination of a Agreement under the Labour Code of Georgia (General Overview)

Termination of an employment contract is the manifestation of the principle of party equality and means the termination of an employment contract under various grounds, envisaged by law. For the parties to exercise this power in employment relationships, there should necessarily exist the legal grounds for the enjoyment of this right.[3]

Paragraph 1 of Article 37 of the Labour Code of Georgia (LCG) provides for grounds of termination of an agreement at or without discretion of the parties. These grounds automatically result in the termination of an employment contract, upon their occurrence. Specifically, the grounds for termination of a employment contract irrespective of the will of the parties are as follows: expiry of the contract term, fulfilment of the task envisaged by contract and the death of either an employer or an employee.[4]

As regards the termination of a contract at the initiative of an employer, these grounds are of wider scope and include the following under Paragraph 1 of Article 37 of the LCG[5]:

1. Economic circumstances, technological, or organisational changes requiring redundancy;
2. Incompatibility of an employee's qualifications or professional skills with the position held/work to be performed thereby;
3. Gross or repeated breach of his/her obligations by an employee, envisaged by an individual employment contract or a collective agreement and/or of internal labour regulations, if some disciplinary action has already been administered against the employee concerned during the past year;
4. "long-term disability" - if a disability period exceeds 40 consecutive calendar days or total disability period exceeds 60 calendar days for a period of six months;
5. Entry into force of a court judgement or decision excluding the possibility to perform the work;
6. Participation in a strike found illegal by the court of law;
7. Initiation of liquidation proceedings for the employer legal entity;
8. Other objective circumstances, justifying the termination of an employment contract.

Under the amendments of 2013 the LCG also provided for the obligation of an employer to abide by relevant rules and procedures set forth for the termination of an employment Contract thereby, specifically Article 38 of the LCG provided for the obligation to give advance notice and also to pay compensation, what was envisaged by the earlier version of the GLC even in a more restricted manner.

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3 *Kavtaradze L.(ed),* Practical Guidelines in the Field of Right to Work and Environmental Protection, Tbilisi, 2015, 45 (in Georgian).

4 *Chachava S.,* Termination of Employment Contract at or without Discretion of the Parties–New Qualification, Introduced by Amendments of 12 June 2013, Legal Aspects of Recent Changes to Labour Law, *Chachava S.(ed),* Tbilisi, 2014, 85 (in Georgian).

5 Labour Code of Georgia, Article 37, Paragraph 1, №4113-RS, Sakartvelos Sakanonmdeblo Matsne (Legislative Herald of Georgia), as of 09.01.2017 (in Georgian).

3. Termination of Employment Contract according to the EU legislation (General Overview)

The stability of an employment contract is the basic principle of employment relationships, recognized by the European Union. According to Article 30 of the Charter of Fundamental Rights of the European Union[6] every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.[7]

Article 24 of the European Social Charter (ESC)[8] sets basic rules of protection against dismissal, specifically, the right of all workers not to have their employment terminated without valid reasons; the right of any worker to be informed about the reasons of his dismissal, to be able to evaluate the lawfulness of dismissal and appeal the decision with an impartial body; entitlement of workers, whose employment is terminated without a valid reason, to adequate compensation or other appropriate reliefs, etc.[9]

The basic principles of protection against dismissal are also reinforced by the International Labour Organization (ILO) [10] in its C158 - Termination of Employment Convention.[11][12] Although this Convention is not ratified by many European countries and Georgia amongst them, its basic principles are still implemented in labour laws of many states. The milestone of the ILO Convention N158 is the justification principle: according to the Convention dismissal should be based on one of the following reasons: skills of a worker; behaviour of a worker and business interests.[13] The Convention also provides for the obligation of existence of the so-called 'reasonable grounds' upon termination of an employment contract. The principle of existence of reasonable grounds upon termination of employment relationships at the initiative of the employer, as embodied in the Convention N158, is binding and of minimal standard category. This document binds the states rather strictly and does not allow them to drop the principle of 'reasonable grounds' out of the scope of regulation of domestic legislation or ignore it in any other manner. Furthermore, Convention N158 obliges the states to implement this principle at the level of domestic legislation in the meaning and according to interpretations, provided by Convention.[14]

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6 Charter of Fundamental Rights of The European Union (2000/C364/01), Article 30, <http://www.europarl.europa.eu/charter/%20pdf/text_en.pdf>, [20.12.2016].

7 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* translated by: *Berikelashvili T*., *Zaalishvili V.(ed.),* Tbilisi, Tbilisi, 2016, 344 (in Georgian).

8 Georgia signed the European Social Charter (ESC), as a Council of Europe Member State, in 2005.

9 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* translated by: *Berikelashvili T*., *Zaalishvili V.(ed.),* Tbilisi, 2016, 346 (in Georgian).

10 Georgia is a member of the International Labour Organization since 1993.

11 Termination of Employment Convention, 158 (adopted on 22 June, 1982, entered into force on 23 November, 1985) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100 INSTRUMENT_ID:312303:NO>, [20.12.2016].

12 For the list of Convention Georgia is a party to see *Tarasashvili M.,* Labour Law in South Caucasus, Collection of Articles on Labour Law III, *Zaalishvili V.(ed.),* Tbilisi, 2015, 145 (in Georgian).

13 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Tbilisi, 2014, 400.

14 *Kasradze L.,* Minimal Obligation of the State and Principle of 'Reasonable Grounds' with regard to Termination of Employment Relations: Standard of International Labour Organization, International

Overall, the constitutive essence and function of employment relationships and rights to work is the necessity of existence of reasonable grounds upon dismissal of an employee. Otherwise, the right to work would have been inflexible and would have existed without real essence.[15] Inadmissibility of termination of employment relationships by the employer without a valid reason and the principle of 'reasonable ground' of Convention 158 are also incorporated in the right to work guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights.[16]

ILO Recommendation 166 is also an important document with regard to ILO Convention N158.[17][18] It is not binding for the signatory countries and the states may provide for its implementation at domestic level at their own discretion. The text of this recommendation often repeats the stipulations of the Convention N158, however is also provides for additional protection criteria, which are not guaranteed for by the Convention. For instance, unlike the Convention the Recommendation prohibits the reduction of work force under the following grounds: age and absence from work due to compulsory military service or other civic obligations.[19]

The Convention sets procedural requirements which should be abided by the employers before and in the course of termination of employment relationships (a worker should be given an opportunity to be informed about the reasons of his dismissal and also to express his opinion); it also provides for appeal procedure and the involvement of a worker in the termination of contract. The Recommendation adds that an employer should provide a worker, on request thereof, a written statement of the reason or reasons for the termination. (Paragraph 9).[20]

As a result of amendments of 2013, the Labour Code of Georgia, and, specifically, the articles regulating the termination of employment contract, incorporated the principles introduced by the above mentioned international acts, and ILO Convention N158 amongst them.

As regards the examples of experience of some European countries with regard to termination of employment contract:

Standards of Human Rights Protection and Georgia, Collection of articles, *Korkelia K.(ed.),* Tbilisi, 2011, 87 (in Georgian).

15 Ibid, 82.

16 International Covenant on Economic, Social and Cultural Rights (adopted on 16 December, 1966, entered into force on 3 January, 1976), <http://www.ohchr.org/EN/Professional Interest/Pages/CESCR.aspx>, [20.12.2016].

17 Termination of Employment Recommendation, 166 (adopted on 22 June 1982), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312457:NO>, [20.12.2016].

18 The Recommendation N166 of the International Labour Organization substituted Termination of Employment Recommendation, 119 (adopted on 26 June 1963), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312457:NO>, [20.12.2016].

19 *Kasradze L.,* Minimal Obligation of the State and Principle of 'Reasonable Grounds' with Regard to Termination of Employment Relations: Standard of International Labour Organization, International Standards of Human Rights Protection and Georgia, Collection of articles, *Korkelia K.(ed.),* Tbilisi, 2011, 87 (in Georgian).

20 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T., Zaalishvili V.(ed.),* Tbilisi, 2016, 348 (in Georgian).

The employment relationships and dismissal problem in particular are regulated in Germany by individual contracts or collective bargaining agreements, agreements between the works council and the employer, labour laws and the Constitution, as well as European law.[21] According to general rule, it is prohibited to directly dismiss an employee in Germany. The employee should first be warned and requested to refrain from violating his obligations and only after missing this warning the right of dismissal originates. A dismissal without warning can be considered unjustified by the court.[22]

In Italy the employment relationships, including the termination of employment contract, are regulated by the Constitution, the Civil Code and specific laws, regulating employment relationships.[23]

Both in Germany and Italy, like in the majority of countries, the cases, when employment relationship may be terminated, are predetermined.[24]

In Germany the Termination Protection Act identifies three grounds. Termination is socially unjustified when its justification is based on the employee's person, employee's behaviour and reduction of work force. In Italy they do not differentiate between the dismissal for the employee's conduct and business circumstances. For the requirements of law to be met the grounds should be related to the behaviour of the employee (material breach of contractual obligations) or the production and/or organization of a business entity. There does not exist a concept like 'reasons related to employee's person'.[25]

Article 2118 of the Civil Code of Italy provided for the right of an employer to make a decision on the termination of employment contract at any time (*ad nutum*), meaning that the latter was free from any restriction and was bound only by the obligation to abide by the notice timelines; now this rule applies only to a small category of employees, like home workers, domestic workers, persons employed for a probation period, managers and retired persons; the employees of other category enjoy the higher standard of protection. The size of a company is very important for the identification of the scope of application of the Termination Protection Law.[26]

There is a rule in Italy, under which rule dismissal can be applied as *ultima ratio*. However, this principle plays an important role as is intensively applied by courts, at least, in the case of termination under economic grounds. Dominating is the opinion, that an employer is obliged to assist an employee, whose position is worsened, to offer him some reasonable alternative job or other employment. In the case of individual termination on economic grounds, neither the law nor collective bargaining agreements provide for the obligation to arrange trainings.[27]

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21 Baker & McKenzie, The Global Employer: Focus on Termination, Employment Discrimination and Workplace Harassment Law, 2012, 193, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1068&context =lawfirms>, [20.12.2016].

22 Termination of Employment Relationships, Legal situation in the Member States of the European Union, European Commission, 2006, 61.

23 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* Tbilisi, 2016, 289 (in Georgian).

24 *Ibid*, 358.

25 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* Tbilisi, 2016, 2016, 358 (in Georgian).

26 Ibid, 356.

27 Ibid, 362.

As regards criteria, the employers in Germany are required to select employees with due consideration of social aspects. And in Italy, the selection criteria is employed only in the case of mass redundancies.[28]

Like any other Member State, the first limitation on dismissal both in Germany and Italy, is the observance of notice timelines, the application of which, as mentioned above, aims at granting an employee an opportunity to find an alternative job and respectively, an alternative source of income. An employer is exempted from the obligation to abide by notice timelines only in the case of gross breach or other urgent necessity, which make the continuation of employment relationship until the expiry of notice period unreasonable.[29]

4. Termination of Employment Contract on the Basis of Gross Breach of Obligation by an Employee

Under Paragraph 1(g) of Article 37 of the LCG,[30] the grounds for termination of an employment contract is gross breach of obligation by an employee imposed thereon by an individual employment contract or collective bargaining agreement or/and internal labour regulations.

The analysis of this provision demonstrates that breach of an obligation, prescribed by an individual or collective agreement or/and internal regulations may become grounds for termination of an employment contract. Firstly, the essence and purpose of each of them should be defined.

A collective agreement is a multilateral arrangement. It is an outcome of efficient social dialogue, when negotiated agreement encourages the normalization of the solution of the problem existing within the organization and on the other hand, enables the employees to enter into relationship with socially more sustainable legal levers.[31] As per Article 41 of the LCG[32] a collective bargaining agreement defines working conditions; regulates relationship between en employer and an employee; regulates relationship between one or more employer or one or more employers' associations and one or more employees' associations. Collective agreement is the focus of ILO Recommendation N91, which defines, that collective agreements mean all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers, on the other.[33]

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28 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T*., *Zaalishvili V.(ed.),* Tbilisi, 2016, 2016, 358 (in Georgian).

29 Ibid, 357.

30 Paragraph 1(g) of Article 37 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

31 *Zeinashvili A.,* Commentary on Labour code of Georgia, Tbilisi, 2015, 104 (in Georgian).

32 Labour Code of Georgia, Article 41, №4113-RS, Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

33 Collective Agreements Recommendation, 91 (adopted on 29 June 1951), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312429:NO>, [20.12.2016].

An individual agreement regulates individual employment relationships. This agreement is executed directly between an employer and an employee.[34] As per Paragraph 9 of Article 6 of the LCG the essential terms of an employment agreement are: the date of commencement of work and the duration of employment relationships; working time and rest time; the workplace; the position and type of work to be performed; the amount of remuneration and the payment procedure; the procedure of compensating for overtime work; and the duration of paid and unpaid leaves of absence and the procedure for granting thereof.[35] An important stipulation is contained in Paragraph 10 of Article 6 of the LCG as well, under which Paragraph a term or condition of an individual employment contract is void when it contradicts the Labour Code or a collective agreement executed with the same employee, except when the individual employment contract improves the condition of the employee.

According to general principle of law an agreement is valid when executed on the basis of party equality principle, through the declaration of free will of the parties. In employment relationships a collective and individual agreements can be presumed as such, whilst the determination of internal labour regulations is the right of an employer. This is an apparent example of subordination in employment relationship.[36] It should be mentioned that, owing to its nature, internal labour regulations is very much alike the standard terms and conditions, as both standard terms and conditions and internal regulations are set forth by one party for another.[37] An important stipulation about internal regulations is also provided contained in Paragraph 4 of Article 3 of the LCG - that any provision of internal labour regulations that contradicts the individual employment agreement, or collective bargaining agreement or Labour Code, is void.

Under Paragraph 1 of Article 13 of the LCG,[38] an employer is obliged to communicate internal regulations to an employee. The Law does not stipulate whether the familiarization with the regulations should be conformed in writing or orally, however it should be presumed that in the case of a dispute, the burden of communication of internal regulations to the employee would be borne by the employer.[39]

Communication of internal labour regulations is of major practical importance, specifically, according to Paragraph 2 of Article 37 of the LCG,[40] gross breach of internal labour regulations may become grounds for termination of employment contract when it is a part thereof. As per Paragraph 5 of

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34 *Dzamukashvili D.,* Labour Law, Tbilisi, 2013, 41 (in Georgian).

35 For further details about essential terms and conditions of an employment agreement see: *Khazhomia T.,* Form and Essential Terms and Conditions of an Employment Agreement, Legal Aspects of Recent Changes to Labour Law, *Chachava S.(ed.),* Tbilisi, 2014 (in Georgian).

36 *Shvelidze Z.,* Characteristics of Legal Status of an Employee under the Labour Code of Georgia, Collection of Articles on Labour Law I, *Zaalishvili V.(ed.),* Tbilisi, 2011, 94 (in Georgian).

37 *Inasaridze T.,* Purpose of Reform of 12 July, 2013 with Regard to Essential Terms and Conditions of Employment Agreement, Collection of Articles on Labour Law III, *Zaalishvili V.(ed.),* Tbilisi, 2014, 228 (in Georgian).

38 Paragraph 1 of Article 13 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne", (Legislative Herald of Georgia), as of 09.01.2017.

39 *Zenaishvili A.,* Commentary on Labour Code of Georgia, Tbilisi, 2015, 41.

40 Paragraph 2 of Article 37 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

Article 6 of the same Code,[41] it can be provided by an employment contract that internal labour regulations is a part thereof. In this case an employer is required to communicate internal labour regulations (if there is such) to an individual before the execution of employment contract, and later, any amendments made thereto. Hence the analysis of the above articles demonstrates that gross breach of obligation prescribed by internal labour regulations may become grounds for termination of an employment contract, when internal labour regulations constitute a part of the employment contract and the employer has communicated the internal regulations to the employee.

Correct determination of the essence of individual or collective employment agreement or/and internal labour regulations and the obligations assumed by the parties on the basis thereof is of major practical importance as the lawfulness of dismissal of an employee can be examined based on their content.

5. Gross Breach of Obligation

Under Paragraph 1(g) of Article 37 of the LCG, the ground for termination of an employment contract is gross breach of obligation by an employee, imposed thereon by an individual employment contract or collective agreement or/and internal labour regulations.

This Article provides for the possibility of cessation of an agreement in employment relationship by an employer in the case of gross breach of obligations by an employee. The preconditions to the foregoing under the Article concerned are as follows: the existence of a valid bilateral agreement, gross breach of obligation and the fact, that violated obligation was prescribed by collective or/and individual agreement or internal labour regulations. However, for correct interpretation of the Article and for the protection of parties against its abuse the account should necessarily be taken of general rule, prescribed by the Civil Code of Georgia, on cessation of an agreement in the case of breach of an obligation.[42]

Pursuant to Part 1 of Article 405 of the Civil Code of Georgia (CCG),[43] if either of the parties to an agreement breaches an obligation arising from a bilateral agreement, the other party may repudiate the contract after unavailing lapse of an additional period of time set by him for the performance of the obligation. If no additional period is applied owing to the nature of the breach of obligation, the warning is equalised to setting an additional period of time. If the obligation has been breached only partially, the creditor may repudiate the agreement only if he is no more interested in the performance of the remaining part of obligation.

This Article states that breach of obligation by either party to long-term contractual relationship empowers the other party to cancel the agreement. The Article concerned sets forth the preconditions for the cessation of the agreement: setting additional period and losing interest in the remaining part of

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41 Paragraph 5 of Article 6 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

42 *Sturua N.,* Cancelation of an Employment Contract, Law Journal of the TSU, №1, 2015, 232 (in Georgian).

43 Civil Code of Georgia, Article 405, №786-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

obligation.[44] However, setting additional period is not necessary if it is apparent that this will be futile in a priori and it is reasonable to terminate the agreement on extraordinary grounds, with due consideration of bilateral interests.[45]

The foregoing stems from *pacta sunt servanda*[46] principle, which prevails in contractual relationships, hence in the case of termination of an agreement, the Law sets forth certain preconditions for the purposes of recognition of the reasonability of termination, specifically - the agreement should be valid, the other party should be in breach of obligation envisaged by the agreement and the creditor of the claim should give the opportunity to the counteragent to fulfil the obligation through granting him the additional period or giving a warning. Normatively, these preconditions are embodied in Article 352-405 of the CCG. The priority of fulfilment of an agreement is absent when a party has lost interest in the fulfilment of the agreement or when it is clear and apparent, that the continuation of contractual relationships will be complicated or even become impossible. These circumstances are mainly characteristic of long-term legal relationships and are considered as valid reasons for the termination (cessation) of these relationships.[47][48]

Although the Labour Code provides for the breach of obligation as one of the grounds for termination of an employment contract, warning and granting of additional period, as stipulated by the Civil code of Georgia, is an important right of an employee and should be applied in employment relationships as well, though with certain specificities.

For better interpretation of gross breach of obligation it will be interesting to analyse the procedure of cancellation of agreement for the breach of obligation in the light of ILO Convention N158, according to Article 11 of which Convention an employer is empowered to cancel the agreement, if misconduct is of such a nature that it would be impossible to continue employment.[49]

Based on LCG, it was interpreted by Georgian case law, that any misconduct of an employee should be evaluated according to frequency of its commitment, gravity and, what is most important, according to its consequences. Respectively, in labour law the *ultima ratio* principle requires for an employer to evaluate employee's behaviour prior to his dismissal from consequential point of view, accounting for striking a reasonable balance between the breach (misconduct) and dismissal.

The *ultima ratio* principle has long-standing history and it had always been important both in social or political and legal context. In order to take a closer look at this principle, it would, at first, be

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44 *Chanturia L., Zoidze B., Shengelia R., Khetsuriani J.,* Commentary on the Civil Code of Georgia, Book III, 2001, 439 (in Georgian).

45 *Sturua N.,* Cancellation of an Employment Contract, Law Journal of the TSU, №1, 2015, 232 (in Georgian).

46 *Pacta Sunt Servanda* - Agreement should be Fulfilled – Means the Principle of Commitment to an Agreement in Civil Law and International Law – see *Kapanadze N., Kvachadze N., Kvachadze M.,* Latin-Georgian Law dictionary (ed.: *Chanturia, L., Tabidze M.),* Tbilisi, 2008, 86.

47 Decision №2B/7207-14 of Civil Chamber of the Tbilisi Appeals Court of 30 June 201.

48 For details with regard to this issue, see Decision №2B/62-14 of Civil Chamber of the Tbilisi Appeals Court of 21 October 2014.

49 Termination of Employment Convention, 158 (was adopted on 22 June 1982, entered into force on 23 November 1985), Article 11.

appropriate to consider the term itself, which comes from Latin "*ultimus*", meaning the last one, the most far or most remote, and "ratio", reasoning, is commonly understood as the last or final resort to achieve an aim pursued. Here, it is not to be understood as the chronologically last resort but as the most interfering last resort with the most far-reaching effect.[50]

In legal matters the idea of *ultima ratio* is a basic concept of many fields of law.[51] For example, in labour law the extraordinary termination of a contract by the employer is *ultima ratio*.[52]

In many aspects *ultima ratio* principle is very much like the principle of proportionality. The principle of proportionality (*Grundsatz der Verhältnismäßigkeit*)[53] in a broader sense or rather the prohibition of excessiveness is understood as a generic term for the rules of suitability, necessity and proportionality in the narrow sense.[54]

Principle of proportionality has important implication in German labour law. For example, the major right of the employees, like right to strike is also influenced by the principle of proportionality, meaning that a strike is allowed only in cases, when all the other solutions of the problem are exhausted and it is the last resort (*ultima ratio*) for the protection of right. According to case-law of German Federal Labour Court, the so-called token strike is prohibited owing to *ultima ratio* principle if the negotiations are still ongoing and are not yet accomplished.[55]

The *ultima ratio* principle is important for Georgian labour law as well, although under Paragraph 1(g) of Article 37 of the LCG, the grounds for termination of an employment contract is gross breach of obligation by an employee, imposed thereon by an individual labour contract or collective agreement or/and internal labour regulations, worth mentioning is the principle of protection of labour rights of the employees, under which principle every misconduct committed by an employee should be evaluated according to the regularity of its commitment, gravity and, what is most important, according to its consequences.

Prohibition of the abuse of a right in private law relationships acquires particular importance upon evaluation of the proportionality of the exercise of preferential right by an employer in employment relationships, granted thereto by law. In this respect the *ultima ratio* principle means that dismissal of an employee should be applied only in cases, when application of a relatively minor sanction is inconsequential for the employer owing to the nature and gravity of committed misconduct (breach).[56]

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50 *Wendt R.,* The Principle of 'Ultima Ratio' and/or the Principle of Proportionality, <Oñati Socio-Legal Series, Vol. 3, No. 1, 2013, 84 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200873>, [20.12.2016].

51 For details see *Michalski, Funke* 2010, §13 marginal №280, Gomille 2011, marginal №3, Streinz, Hammerl 2008, marginal №297 – see citation, ibid.

52 Ibid, 85.

53 This term is used by German Federal Constitutional Court, see BVerfGE 30, 292 (316); 27, 211 (219) – see citation, ibid.

54 Ibid, 86.

55 *Kirchner J., Kremp R.P., Magostch M.,* Key aspects of German Employment and Labour Law, 2010, 201, <https://books.google.ge/books?id=2gbE2lDPY2YC&printsec=frontcover#v=onepage&q&f=true>, [20.12.2016].

56 Ruling №AS-164-154-2015 of the Civil Chamber of the Supreme Court of Georgia of 27 April 2015.

In labour law the *ultima ratio* principle requires for the employer to assess the behaviour of an employee before his dismissal in the light of consequentiality accounting for striking a reasonable balance between the misconduct (breach) and dismissal. It is noteworthy that according to the same principle, in the case of a misconduct (breach) an employer should apply sanctions, which will make good the existing situation, make the employee better, improve his qualification, make him act prudently and with due diligence. Respectively, for reasonability purposes, a proportional punishment should be selected in the case of a misconduct, what, ultimately, apart from the punishment of the wrongdoer, will motivate him and the other employees to work more efficiently. Hence, for the dismissal of an employee to be regarded as an adequate, necessary and proportional measure it is necessary for the breach to be grave, what makes the application of some other, lighter sanction unreasonable.[57]

As regards the legislation of other countries, the regulation of the aspects related to termination of an agreement due to some behaviour of an employee, are different in Germany and Italy. In both jurisdictions the ordinary reasons, related to the behaviour of a dismissed differ from extraordinary ones considering the importance and scope of breach committed by the employee.[58]

According to German Protection Against Dismissal Act,[59] upon termination due to breach of obligations by an employee, the employer should take account of four preconditions: objective situation, that the employee has definitely violated a contractual obligation, high risk of future breach, the employer's interest should be overweighting the employee's interests and finally, the termination should be the only solution for the situation concerned. For example, there should not exist the possibility of transferring the employee to some other position.[60]

In German law wilful and repeated absence of an employee from work without an excusable reason is sufficient grounds for dismissal, as well as failure to duly notify the employer in writing in the case of existence of an excusable reason;[61] absence from work under the pretext of illness and wilful misleading of the employer;[62] being concurrently employed with a competitor establishment without a prior consent of the employer, also the otherwise breach of "loyalty obligation", if it is prohibited by the agreement;[63] also, the neglect of safety rules, when such behaviour is related to objectively serious threats.[64]

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57 Ruling №AS-776-733-2015 of the Civil Chamber of the Supreme Court of Georgia of 2 December 2015.

58 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Tbilisi, Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* 2016, 363.

59 The Protection Against Dismissal Act (Kündigungsschutzgesetz), <http://www.eurofound.europa.eu/efemiredictionary/protection-against-dismissal-1>, [20.12.2016].

60 *Kirchner J., Kremp P.R., Magotsh M.,* Key Aspects of German Employment and Labour Law, Heidelberg, Germany, 2010, 141, in: *Sturua N.,* Cancellation of an Employment Contract, Law Journal of the TSU, №1, 2015, 232 (in Georgian), 228.

61 Preis, Staudinger OK, 626, Rn. 176, 177, see citation in: *Chachava S.,* Termination of an Employment Contract under or without the Will of the Parties – New Qualification, Introduced by Amendments of 12 June 2013, Legal Aspects of Recent Changes to Labour Law, *Chachava S.(ed.),* Tbilisi. 2014, 105.

62 Ibid, Rn. 154, see citation, ibid, 105.

63 Ibid, Rn. 21, also Preis, Staudinger OK, 626, Rn. 169 and others, see citation, ibid, 106.

64 Ibid , Rn. 136, see citation, ibid, 107.

In Italy an employee may be dismissed on the basis of a sound ground, like *giusta causa,* without warning or justified subjective grounds. *Giusta causa* is defined in Article 2119 of the Civil Code and covers cases, when the breach of obligation is so serious that continuation of employment relationships is not reasonable for the employer. However, the meaning of this formulae is still open and subject to debates.[65]

The analysis of Georgian case law demonstrates, that, for example, in one case the court of law did not find reasonable the application of the strictest measure for gross breach of obligations - dismissal of the employee together with his immediate supervisor,[66] however, in the other case gross breach of obligation by an subordinate also became the justified grounds for dismissal of the immediate supervisor thereof, as it was established that immediate supervisor was wilfully hiding the fact of gross breach of internal regulations by his subordinate.[67]

Based on the foregoing, it is necessary to thoroughly investigate the gravity of breach in the case of termination of employment contract on the grounds of gross breach of obligation, also the regularity of its commitment, inflicted damage, also to take account of the probability of the commitment of breach in future, as it is provided for by German legislation.

6. Conclusion

In conclusion it can be said, that termination of employment relationships on the grounds of gross breach of obligation is one of the most problematic aspects in employment relationships. The following circumstances are to be examined in the case of termination of employment relationships under these grounds:

- Whether or not the collective or individual agreement or internal labour regulations were definitely breached:
- Whether what kind of breach was committed, specifically, subject to evaluation is the gravity of breach, whether or not it was gross, was it the first case or of regular nature, what damage was inflicted, etc.;
- Whether the applied sanction was proportionate to the gravity of breach, could any other disciplinary measure have been applied instead of dismissal;
- Whether or not the dismissed person was given opportunity to present some arguments and explain himself before his dismissal.

The Labour Code does not provide for detailed examination of the above circumstances, what should be regarded as its shortcoming. Owing to the foregoing, during the court proceeding it becomes necessary to refer to grounds for termination of an agreement, prescribed by Civil Code, where the

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65 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed.),* Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* Tbilisi, 2016, 363.

66 Ruling №AS-1276-1216-2014 of the Civil Chamber of the Supreme Court of Georgia of 18 March 2015.

67 Ruling №2b/4864-14 of the Civil Chamber of the Tbilisi Appeals Court of 7 July 2015.

preconditions and procedures of termination of an agreement are provided for in a detailed manner. Due to this very reason the termination of an employment agreement for the breach of obligation is examined in the light of the respective provisions of the Civil Code.

The overview of the EU law and the labour law of Germany and Italy, as well as the analysis of the case-law demonstrated that despite the implemented changes the institute of termination of an agreement on the basis of gross breach of obligation, envisaged by Labour Code of Georgia, is not exhaustively regulated and still requires further improvement.

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