



**Ivane Javakhishvili Tbilisi State University**  
**Faculty of Law**

# **Journal of Law**

**№1, 2021**



**უნივერსიტეტის  
გამომცემლობა**

**Khatuna Loria\***

## **Dismissal of Officer due to Redundancy as a Result of Reorganization in the Public Institution (Legislation and Court Practice)**

*The Law of Georgia on Public Service of 27<sup>th</sup> October 2015, effective from 1<sup>st</sup> July 2017, proposed a public service based on the meritocratic principle, where the stability of the public officer and the continuity in their career development plays a distinct role. The aim of the law, to provide a legal basis for the formation and functioning of the stable public service based on career promotion, merit, integrity, political neutrality, impartiality, and accountability, becomes especially relevant in the reorganization process, especially, if it is followed by the redundancy. The law provides for the dismissal of an officer due to redundancy, which is a rather sensitive issue. The role and responsibilities of a public institution in the reorganization process, the scope of judicial control over the decision made are reviewed in the present paper. The concept of mobility plays an important role, which is the main novelty for the management of the reorganization process painlessly and with less professional loss; it is this notion that guarantees the protection of the officer in this difficult process.*

**Keywords:** *Public service, a qualified public officer, reorganization, redundancy, reinstatement in employment, mobility, equal position, protection of rights, legal dispute.*

### **1. Introduction**

The modern model of public service is based on the concept of a qualified public officer, who is independent of politics. The development of a new draft Law of Georgia on Public Service<sup>1</sup> was conditioned by the necessity to increase the efficiency and proper functioning of the public service.<sup>2</sup>

One of the most important tasks of the public service is to ensure a high quality of public service;<sup>3</sup> the modern state faces a significant challenge to strengthen the public service with qualified public officers, ensure their professional growth, provide high quality services to citizens and, at the same time, to reduce bureaucracy, which is translated into the optimization of personnel. The obligations of public officers in different countries focus on the requirement – “serve the society”<sup>4</sup> reflecting on the main purpose and spirit of the legislation.

---

\* Doctor of Law, Associate Professor of Ivane Javakhishvili Tbilisi State University, Faculty of Law.

<sup>1</sup> Law of Georgia on Public Service, 27.10.2015, Legislative Herald of Georgia (LHG), 11/11/2015.

<sup>2</sup> Decision of July 23, 2020, № 38(K-20), Supreme Court of Georgia.

<sup>3</sup> Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D., Handbook of General Administrative Law, Tbilisi, 2005, 69 (in Georgian).

<sup>4</sup> Public Services Statistics, organization and regulations, Project with the support of the European Commission, May, 2010, 9.

In the United States, the “Pendleton Act”<sup>5</sup> laid the foundation for a merit-based public service preceded by a patronage system. In the European countries, mainly after the Second World War, a merit-based public service was established. Prior to the establishment of the meritocratic principle, a commonly used phrase – “To the victor belong the spoils of the enemy”<sup>6</sup> – considered the making of personnel decisions based on the principle of patronage by the winner of the elections, which has been replaced by a system based on career promotion, stability and merit. The stability of an officer, ensuring the place in office, “officer – for the life time”<sup>7</sup> plays distinct role in a meritocratic system.

## **2. The Aim of Reorganization**

Reorganization, as well as the liquidation or merger<sup>8</sup> of a public institution with another public institution serves to ensure effective governance of the public service. As established by the Law, the reorganization is the change of the institutional structure of a public institution, resulting in a completely or partially new structure of the public institution. Reshuffling or reduction in the number of posts in a public institution is also considered as reorganization. The change in the subordination or the name of a public institution or its structural unit, and/or the assignment of a new function to a public institution shall not be considered as reorganization.

The main purpose of the reorganization should be based upon the interests of the public service, which may differ considering the specifics of the activities of the public institution. The main purpose of the reorganization should be the strengthening of the principle of “good governance”, which implies the arrangement of a public institution that ensures orientation on citizen, high quality of service, reduction of bureaucracy, simplification of decision-making mechanisms, increased level of engagement and management efficiency.<sup>9</sup> The interest of the public service also includes increasing the credibility, respect and authority towards it. To achieve this goal, it is important to ensure systemic and effective governance. In this case, reorganization can be considered as the best solution to achieve the legitimate goal of the service. The Article 102 of the Law on Public Service uses the term “is possible” to this measure, which is related to some extent to discretionary power of a public institution, to use the reorganization as the most convenient and effective means to achieve a specific goal. Effective governance is stated at the outset of the public service concept,<sup>10</sup> according to which the reform aims to establish an effective and efficient public service, which will be based on the

---

<sup>5</sup> *Milkovich G.T., Wigdor A. K., Broderick R. F., Mavor A. S. (ed.)*, National Research Council; Division of Behavioral and Social Sciences and Education; Commission on Behavioral and Social Sciences and Education; Committee on Performance Appraisal for Merit Pay for Performance: Evaluating Performance Appraisal and Merit Pay, 1991, Washington, D.C., 14-15.

<sup>6</sup> Ibid.

<sup>7</sup> *Oppermann T., Classen K., Nettesheim M.*, European Law, Teaching Manual, *Erkvania T., Japarashvili I. (transl.)*, Tbilisi, 2021, 118 (in Georgian).

<sup>8</sup> For the purposes of this paper, reference is to the reorganization only.

<sup>9</sup> Reorganization of a public institution, guide, <<https://bit.ly/3gkwRww>> [22.05.2021] (in Georgian).

<sup>10</sup> Resolution № 627 of the Government of Georgia on the Approval of the Public Service Reform Concept and some related measures, 19.11.2014, LHG, 20/11/2014.

meritocratic principle and ensure the encouragement, support and appreciation of professionalism. Also, one of the most important principles of public service – economy and efficiency<sup>11</sup> is noteworthy, implying not only the obligation of individual officer in the public service – to use service resources economically and efficiently, but also association of the principle with economic and effective management of organizational and institutional processes applicable for management of public service, and the participation of the officer in achieving economy and efficiency of the process. The principle of unity of public servants and public institutions, which are difficult to imagine without each other, gives the basis for this assumption.

In the process of reorganization, protection of both the legitimate interests of the public service and the public servants' right to work is a significant challenge. Therefore, the role of the public service is especially important in planning and conducting the reorganization process. Given the need for reorganization, the personnel optimization will be carried out at discretion of the administrative body, "the administrative body itself has the exclusive competence to determine, which position is added or removed or unification of which positions contributes to the effective exercise of public administration."<sup>12</sup>

Reorganization is a sort of method of public service management focused on the expediency, efficiency, economy, etc. of functions. The reforms, to be implemented in the public service, including reorganization, which are pre-planned processes, are not always predictable in months or years in advance. The need for such reforms may arise at a certain stage of development, responding to the existing needs and challenges. The above discussed circumstances make questionable important principles such as the stability of staff and the principle of appointment of an officer for an indefinite term. The public service considers the objective of continuous employment throughout the life of the officer.<sup>13</sup> As prescribed by the Constitutional Court, "any measure limiting a person's right must be a necessary, least restrictive means of achieving a legitimate aim."<sup>14</sup> Regulation, established by law, serves the protection of this balance and interests, to ensure that unreasonable, unjustified interference in the rights of the officer does not take place in the process of reorganization.

According to the modern concept, a public officer is considered as a "caring servant"; the society expects a kind of "sacrifice"<sup>15</sup> from him/her. Of course, in the literal sense it does not require human life as a sacrifice, although, in the modern world one of the motivators conditioning a person's choice to serve the country is perceived exactly in this spirit. Research carried out in different countries has revealed several factors that represent the motivator for people to take a post in the public service, such as: willingness to participate in the definition of state policy, serve the society and

---

<sup>11</sup> See, Article 10 of the Law of Georgia on Public Service, 27.10.2015, LHG, 11/11/2015.

<sup>12</sup> Decision of February 13, 2020, № BS-179(2k-19), Supreme Court of Georgia.

<sup>13</sup> *Oppermann T., Classen K. Nettesheim M.*, European Law, Teaching Manual, *Erkvania T., Japarashvili I. (transl.)*, Tbilisi, 2021, 118 (in Georgian).

<sup>14</sup> Decision of April 11, 2014, № 1/2/569, Constitutional Court of Georgia on the case: "Georgian citizens – David Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia".

<sup>15</sup> *Motivating Public Servants: Information and Conclusions for Practitioners*, GCPSE, 2014, 6 (in Russian).

the country,<sup>16</sup> willingness to be loyal to the public interest and the state, self-sacrifice and sympathy<sup>17</sup>. Empathy, compassion and collegiality,<sup>18</sup> among other key requirements, are important requirements towards the public officers, provided for by the legislation of EU countries. The court practice is interesting in this regard; with regard to one of the cases the Supreme Court explains, “the main function of the public service is to serve the lawful interests of the society and each of its members, the unconsciousness and improper fulfilment of obligations directly affects the existence of the legal state. The public service should be considered in the consciousness of every public servant as an honourable mission – to serve, to make a personal contribution to the development of the state.”<sup>19</sup>

The selection of staff during the reorganization process is an important challenge. It is true that the legislation does not consider reorganization and redundancy as an indicator for testing the officer's qualifications and skills; however, in this situation the decision-making official actually faces such a fact. Notwithstanding such broad powers, the principles applicable in administrative law oblige the head of the public service or the person authorised to justify a decision made within his/her discretionary powers. Such an approach should exclude bias and resolving the issue based on non-objective criteria. The resolution of Government of Georgia<sup>20</sup> defines the procedure for selection of officers to be dismissed – although remaining within the authority of the decision-making official it defines a standard – what should become a precondition for such a decision. The legislation provides for the possibility of setting up a commission to address this issue. The commission is obliged to take into account the competence of the officer, the results of the evaluation (if any) and other objective circumstances and, if necessary, is authorized to conduct an interview and reflect the substantiated results in the minutes of the meeting. Similar regulations are established by the legislation of different countries. For example, in Estonia, if decision on redundancy is to be made between two officers performing a similar job, then the advantage of retaining the job belongs to the officer with higher level of alignment of education, work experience, knowledge and skills with the requirements set for the performance of the job. If it is not possible to slot an official on the basis of the specified criteria, priority shall be given to the officer with the child under the age of seven, and then the persons to whom there is a higher degree of lawful confidence.<sup>21</sup>

According to the practice of the Supreme Court, “the grounds for dismissal during reorganization shall not be incompetence or lack of qualifications of any officer. The basis for dismissal of an officer as a result of reorganization is the actual absence of the place of employment as a result of termination of a post, which was occupied by the official prior to reorganization. The reorganization process is not based on the principle of selection of the best, unlike, for example, the

---

<sup>16</sup> *Bauby P., Similie (POPA) M. M.*, Mapping of the Public Services, Public Services Statistics, Organisation and Regulations, Project with the support of the European Commission, May, 2010, 9.

<sup>17</sup> *Motivating Public Servants: Information and Conclusions for Practitioners*, GCPSE, Astana, Kazakhstan, 2014, 6 (in Russian).

<sup>18</sup> *Der Europäische Bürgerbeauftragte, Grundsätze des öffentlichen Dienstes für EU-Beamte*, 2012, 5-7.

<sup>19</sup> Decision of April 4, 2017, № BS-644-637(K-16), Supreme Court of Georgia.

<sup>20</sup> Resolution № 199 of the Government of Georgia on the Rules of Mobility of Professional Public Servants, 20.04.2017, LHG, 21/04/2017.

<sup>21</sup> Civil Service Act of Estonia, <<https://www.riigiteataja.ee/en/eli/ee/525032019003/consolide>> [12.05.2021].

employment of an officer that is carried out observing this principle. The reorganization does not result in the dismissal of employees employed in retained positions, even if these persons were unqualified compared to the officer made redundant as a result of the reorganization, as there are no factual-legal grounds for their dismissal.”<sup>22</sup> Therefore, the reorganization, of course, is not considered as a necessary precondition for the dismissal of an officer. With respect to reorganization, retaining of the position is a prior right, unless there is a need to terminate it. In addition, dismissal of an officer on the grounds of reorganization is a discretionary authority of the public service. The law protects the rights of qualified public officers, however, also, ensures that public institution reshuffles or reduces the number of posts without any complicated procedures, just by making changes to the staff list.<sup>23</sup>

The reorganization process should be distanced from politics. It is inadmissible to use political criteria when solving the personal issues. The process itself should be aimed at defining of governance policy in a new way in a particular area. Proper planning and management of the process is especially important. Understand the purpose and task towards which the organization is directed, is priority, following which the future results, that the institution expects to accomplish, shall be assessed correctly.

We have a negative experience in Georgia, when officers were fired on the grounds of reorganization, while the change of name of a public institution and maintaining of the same function took place. This proves that dismissal of an officer under the guise of reorganization took place in the public institutions, presented as a decision within the legal framework under the false pretence. To avoid this vicious practice, the applicable Law on Public Service specifies the essence and purpose of reorganization, which guarantees protection of an officer from dismissal on this basis. As for the discretion of the decision-making official in the reorganization process, it is aimed at reorganization and not at the dismissal of the officer, since unless it is followed by a redundancy there is no legal basis for the dismissal of the officer.

There are numerous decisions related to the reorganization in court practice, where the court finds the dismissal of an officer unlawful. The court practice determines that “changing the title of a position will not be considered as reorganization unless the content, function and authority of this staff unit are changed. In order to define the identity of specific positions, the following should be evaluated: a) their place in the official hierarchy of the administrative body; b) scope of key authorities; in addition, the Court of Cassation emphasizes that formally reducing some of the functions or adding any minor requirements does not change the situation; c) requirements necessary to hold a particular position after reorganization; d) in some cases – remuneration.”<sup>24</sup>

Thus, it is important to distinguish whether we are dealing with an organizational process or the reorganization of public service. The organizational process can be carried out without substantial changes and transformation, which is not the basis for dismissal of an officer.

---

<sup>22</sup> Decision of February 13, 2020, № BS-179(2K-19), Supreme Court of Georgia.

<sup>23</sup> *Turava P., Pirtskhalaishvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia E.*, Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 332 (in Georgian).

<sup>24</sup> Decision of December 8, 2020, № BS-449-442(K15), Supreme Court of Georgia.

### 3. Legislative Basis

The Law of Georgia on Public Service establishes the grounds and rules for dismissal of a public officer. The grounds for dismissal of a qualified public officer are divided into compulsory (Article 107) and non-compulsory, facultative (Article 108) grounds. Prerequisite for such differentiation are defined as objective criteria, as well as the discretionary power of the official with decision-making power, which may be related to a number of objective circumstances (officer's health status, experience, status, public service interest, etc.). Dismissal of an officer on the grounds of reorganization, if it is followed by the redundancy, represents a non-binding ground provided for by the Article 110 of the Law on Public Service.

Regardless of the fact that the law provides for the possibility of making decisions based on discretionary powers, it must be said that the legitimate interest of equality before the law, the principle of the rule of law, and the exercise of public service should not be jeopardized. There are cases when the professionalism of an individual officer, his/her experience, institutional memory, is significant representation of the public interest for retaining the person in the public service; such case cannot be equated with the subjective interest and the approach in individual cases may be different. It is true that professional activities are carried out during the life, with the aim to achieve institutional strengthening of public administration;<sup>25</sup> however, this circumstance does not exclude the termination of the officer's authority before the time, in accordance with the conditions and procedures provided by the law.

### 4. Guarantees

Reorganization should not become an unconditional basis for the dismissal of an officer; the public "institution should undertake an obligation to ensure the horizontal reshuffling (if there is such an opportunity) of an officer as far as possible; thus, the redundancy shall be considered as an extreme, last option."<sup>26</sup>

Ensuring the stability of a qualified public officer, the continuity of his/her activities and the protection of his/her rights reflects the main spirit of the law. To ensure the principle of stability, the new law suggested a previously unprecedented opportunity – officer's mobility. The concept of mobility represents a guarantee for the officer not to be left without job in case of reorganization, if the redundancy takes place. The preferential right is related to internal mobility, and if that is not possible, the law also provides for the possibility of external mobility. In case of impossibility for mobility, the last solution is to enrol in reserve. "The reserve of public officers is a legal guarantee that will maintain the continuity of the activities of a qualified public officer in the public service and will enable him/her to continue his/her career in the public service system in the future."<sup>27</sup>

---

<sup>25</sup> *Izoria L.*, Modern State, Modern Administration, Tbilisi, 2009, 89 (in Georgian).

<sup>26</sup> United States Office of Personnel Management, Guide To The Senior Executive Service, Washington, DC, 2017, 23.

<sup>27</sup> *Turava P., Pirtskhalaishvili A., Dvalishvili M., Kardava E., Tsulaia I., Sanikidze Z., Makalatia E.*, Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 342-343 (in Georgian).

Prerequisites for the implementation of mobility are: 1. Reorganization, liquidation or merger, followed by the redundancy; 2. Availability of an equivalent vacant position; 3. Consent of an officer; 4. Consent of a public institution. The decision made by a public institution towards a specific officer on the basis of mobility represents an individual administrative-legal act; therefore, “it should be preceded by administrative proceedings. The implementation of the mobility process, the possibility of protection of the rights of the officer participating in this process should be directed towards the purpose of administrative proceedings – to exercise the public legal authority based on the law and within the law,”<sup>28</sup> which is one of the important indicators of good governance. In addition, other requirements prescribed by the General Administrative Code of Georgia<sup>29</sup> must be observed.

Reorganization is usually a pre-planned measure that considers following the procedural rules in accordance with the legislation. Accordingly, the law obligates the public institution to notify the officer in writing at least one month prior to expected dismissal. By signing the prior notice on the dismissal, the officer does not consent, but rather confirms that he/she is aware of such a consequence. This procedure is related to the officer’s interest to be able to plan his/her own future and make it predictable. This implies to find another job as well as use the possibility to continue a legal dispute.

In general, dismissal from office means the termination of the status of an officer, as well as the termination of an authority. One circumstance is noteworthy, namely, during the reorganization, in case of impossibility for mobility, the law provides for the enrolment of officers in the reserve; in this case although a person is dismissed from office, he/she retains the status in the period of being in the reserve. The dismissal of an officer on this basis shall not result in the termination of the status of an officer during the period of stay in the reserve.

In case of redundancy, during appointment of an officer to another position, the law provides for the interests of both the officer and the relevant public institution, therefore, the transfer of an officer to the same or another public institution takes place with the consent of the recipient public institution and the officer, obviously, without competition.<sup>30</sup> The Cassation Court interprets that “making a decision to refuse appointment under mobility scheme, does not at the same time mean dismissal of a person from office.”<sup>31</sup> The purpose of mobility – re-employment and continuity of official activities of an officer – is outlined here. Accordingly, a person may request from public institution to transfer him/her to another equal position through mobility, obviously, if such a position exists. In case of impossibility of mobility, the extreme measure is enrolment of officers in the reserve.

Female officer may not be dismissed from the office during raising a child of less than three years old or during pregnancy due to reorganization, liquidation or merger of a public institution, also, due to the outcomes of officer evaluation. The above regulation serves the legitimate purpose of protection the interests of the pregnant person and the child. This goal was initially stated in the legislation of foreign countries as well. For example, in Austria, in recent years, owing to the

---

<sup>28</sup> Decision of July 23, 2020, №BS-38(K-20), Supreme Court of Georgia.

<sup>29</sup> General Administrative Code of Georgia, 25.06.1999, LHG, 32(39), 15/07/1999.

<sup>30</sup> *Turava P., Pirtskhalaishvili A., Dvalishvili M., Kardava E., Tsulaia I., Sanikidze Z., Makalatia E.*, Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 136 (in Georgian).

<sup>31</sup> Decision of July 23, 2020, №BS-38(K-20), Supreme Court of Georgia.



numerous measures for the promotion of women, the share of women in public services is constantly increasing. The share of women in the Federal Public Service is currently at 42.5 percent.<sup>32</sup>

According to the practice of the Constitutional Court, the right to work is associated with and ensures the material well-being of person, however, it is inadmissible to perceive the realization of the right to work only as a source of income.<sup>33</sup> Dismissal of an officer, especially under the conditions where there are expectations for stability, requires the creation of not only legal but also financial guarantees. The law obliges a public institution to issue compensation to an officer. The amount of compensation equals to three months' salary. In addition to compensation, the law allows payment of one-month salary to an officer notified about dismissal less than a month earlier. The law discusses the violation of the term, which can not imply the notification to be issued more than one month earlier. Violation of rule implies the limitation of the established right, if the officer is notified more than one month earlier, obviously, this is not perceived as violation of the officer's right and it is not followed by the obligation to pay additional compensation.

“The right of appointment is nothing without the right of dismissal”,<sup>34</sup> this opinion is related to the effectiveness of public institutions and, in general, public administration. There are cases when institutional and structural-organizational changes are inevitable and necessary, therefore, such changes require the reshuffling of officers or, in worst case, their removal from the process.

The opinion that reorganization could be used as a “hidden leverage” to dismiss a person is not ungrounded;<sup>35</sup> however, at the same time, it should be noted that “in countries with a career principles, a public servant does not leave the service due to the liquidation of the institution or the redundancy.”<sup>36</sup> Therefore, substantiation of its expediency is especially important. The Court of Cassation explains that “the legal obligation to substantiate an individual administrative-legal act is conditioned by the need to bind the administrative body under the law and ensure its activities are within the framework of self-control”.<sup>37</sup> Existence of discretionary power cannot protect the public institution from the obligation to adhere to both the legality and expediency of the decision made. “The constitutional right to work, along with its social character, has the meaning of a classical right, the purpose of which is expressed in giving a person the right to protect himself/herself from unlawful interference by the state.”<sup>38</sup>

---

<sup>32</sup> Bundesministerium Kunst, Kultur, öffentlicher Dienst und Sport, Frauen und Männer, Österreich, <<https://www.ioffentlicherdienst.gv.at/>> [12.05.2021] (in Georgian).

<sup>33</sup> Decision of April 19, 2016, № 2/2/565, Constitutional Court of Georgia on the case: “Georgian citizens – Ilia Lezhava and Levan Rostomashvili against the Parliament of Georgia”.

<sup>34</sup> Sajó A., *Limiting Government, An Introduction to Constitutionalism*, Ninidze T. (ed.), Maisuradze M. (transl.), Tbilisi, 2003, 281 (in Georgian).

<sup>35</sup> Shvelidze Z., Bodone K., Todria T., Khazhomia T., Gujabidze N., Meskhashvili K., *Georgian Labour Law and International Labour Standards, a Guide for Judges, Lawyers and Law Teachers*, Bakakuri N., Todria T., Shvelidze Z. (eds.), Tbilisi, 2017, 228 (in Georgian).

<sup>36</sup> Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., *Kitoshvili D., Handbook of General Administrative Law*, Tbilisi, 2005, 77 (in Georgian).

<sup>37</sup> Decision of November 19, 2013, № BS-301-292 (2K-13), Supreme Court of Georgia.

<sup>38</sup> Ibid.

The participation of the Public Service Bureau in the reorganization process serves the protection of the interests of the officer. Although the legislation does not provide for the consent of the Bureau to carry out the reorganization, however, the obligation for notification ensures, first of all, the protection of the interests of the officers. In this regard the Bureau is authorised to seek information on relevant vacancies in the system of public service through unified electronic system of human resource management in the public service; the Bureau shall ensure the search for an equivalent vacant position; in addition, providing of methodological assistance to the public institution upon such request is a competency of Bureau.

## **5. Protection of Rights**

A professional public officer, who is appointed to a position for life, has a legitimate expectation that he/she will be provided with both the position of a public officer as well as economic well-being for life (before reaching retirement age), since the right to work is associated with the right to a dignified life; when this right is restricted, another right of officer – to protect himself/herself from possible illegal consequences – arises. The right to resist is one of the signs of the legal state.<sup>39</sup> The right to court hearing means that court case can be initiated against any person.<sup>40</sup> The legislation considers the possibility for the interested person (in this case public officer) to make disputable any decision concerning him/her. An officer has the right to apply to a court to protect his/her rights. According to the legislation, an officer has an obligation<sup>41</sup> to use the opportunity to appeal the disputable decision (if any) to a superior authority or to a superior official before filing a lawsuit in court. Such regulation is related to a certain subordinate approach existing in the public service, therefore, the initial appeal of the decision and assessment of the legality of the act under dispute should be made with a high official or a superior body.

According to the Law on Public Service, dismissal of an officer on the basis of reorganization shall be considered legal if the following conditions are met:

1. The decision on dismissal is made by an authorized official;
2. The grounds for dismissal are provided for by the Law on Public Service (imperative requirement);
3. The form of decision-making, established by law is observed;
4. The decision-making procedure established by law is observed.

These requirements must be observed in whole, otherwise, the decision made cannot be considered lawful.<sup>42</sup>

---

<sup>39</sup> *Khubua G.*, Legal Theory, Tbilisi, 2004, 99 (in Georgian).

<sup>40</sup> *Sajó A.*, Limiting Government, An Introduction to Constitutionalism, *Ninidze T. (ed.), Maisuradze M. (transl.)*, Tbilisi, 2003, 270 (in Georgian).

<sup>41</sup> See, Part 5, Article 2 of the Administrative Procedure Code of Georgia, 23.07.1999, LHG, 39(46), 06/08/1999.

<sup>42</sup> The listed conditions are of general nature in assessing the legality of an individual administrative-legal act; for the purpose of this paper, the basis for making the decision is separated and linked to the Law on Public Service; otherwise, of course, the material grounds are determined in accordance current legislation.

The legality of the decision on dismissal of the officer due to the redundancy based on reorganization is influenced by the following conditions: it must be checked whether the newly created staff unit considers the same powers; it must be also checked whether the relevant public institution has offered the mobility to the officer. As for the subject of dispute, as established by the law, the individual administrative-legal act on dismissal of an officer is subject to appeal in this case. The so-called presumption of legality is applicable for the administrative-legal acts, which implies that it is considered as lawful until proven otherwise. According to the administrative procedural law, the burden of proof is placed on the public institution issuing<sup>43</sup> this act under dispute, although, this does not exempt the plaintiff of the obligation to substantiate the claim.<sup>44</sup>

In the case regulated under the Law on Public Service, based on the purpose of protection of the right, the circle of interested person should be understood in narrower sense and he/she (the interested party/plaintiff) is directly represented by the officer in relation to whom a specific disputed decision has been made, in our case, the officer dismissed on the basis of reorganization. Consequently, in the present case, we are not dealing with a broad definition of the person concerned, since the act under dispute does not relate to a third party.

When appealing, the purpose of the interested person/plaintiff is to annul the act under dispute. Such a result is achieved by annulment of the appealed act. As established by the law, an administrative-legal act is void if it contradicts the law or if other requirements for its preparation or publication established by the legislation are substantially violated.<sup>45</sup>

The legality of the act under dispute is checked by examining its formal and material legality criteria.<sup>46</sup> In the event of reorganization, the lawfulness of the dismissal must pass a kind of “test” with the principle of “if-then” (wenn-dann),<sup>47</sup> where “if” defines a redundancy on the basis of reorganization as precondition, and “then” envisages the consequence following such redundancy – the dismissal. There is a cause-effect relation between the reorganization process, the redundancy and the dismissal. According to the explanation provided by the Supreme Court, “the decision to dismiss a person is made by an institution in which it is impossible for an officer to remain due to redundancy”.<sup>48</sup> Based on the above, it can be said that the reorganization, as a basis for the dismissal of the officer, is related to the following major circumstances:

1. The reorganization process is followed by the redundancy;
2. Officer’s mobility could not be implemented.

Thus, these two preconditions are cumulative and should be discussed simultaneously when assessing the legality of dismissal of an officer on this basis.

---

<sup>43</sup> *Kopaleishvili M., Kharshiladze E., Turava P., Loria Kh., Gvaramadze T., Ghvamichava T.*, Administrative Procedural Law Manual, Tbilisi, 2018, 214 (in Georgian).

<sup>44</sup> Article 17, the Administrative Procedure Code of Georgia, 23.07.1999, LHG, 39(46), 06/08/1999.

<sup>45</sup> See, Article-60<sup>1</sup>, General Administrative Code of Georgia (GADG), 25.06.1999, LHG, 32(39), 15/07/1999.

<sup>46</sup> See, *Turava P.*, General Administrative Law, 3<sup>rd</sup> ed., Tbilisi, 2020, 172-181 (in Georgian).

<sup>47</sup> *Schmidt R.*, Allgemeines Verwaltungsrecht, Hochschule für Angewandte Wissenschaften Hamburg, 20. Aufl., Hamburg, 2017, 93.

<sup>48</sup> Decision of July 23, 2020, № BS-38(K-20), Supreme Court of Georgia.

The administrative body or court, reviewing the dispute (depending on whether a complaint or lawsuit is in place), should examine whether the disputed decision complies with both the procedural and contextual requirements established by law. According to the established doctrine, “in order to the decisions made by the administration be considered lawful, it needs to be in full compliance with the established procedural order as well as the material norms.”<sup>49</sup> Thus, when assessing the legality, the dispute reviewing body/court checks whether the reorganization process was carried out in accordance with the law and following its spirit, whether there was an equal or lower position offered to the officer by the service based on his/her qualifications. “In resolving a dispute, the court should be guided by the requirements of the legislation and not just consideration of expediency, as the discretionary power is not absolute right and its use is limited by the requirements established by the legislation.”<sup>50</sup>

In the event of appealing the decision on dismissal, the officer usually requires the annulment of the appealed decision, as well as reinstatement in service and compensation for the missed pay. Of course, only making a demand is not sufficient. The person must indicate the circumstances that he/she considers to be the legal basis for making this demand. This means that the complaint/claim must be substantiated. Of course, a person's assumption on a possible violation of his/her right is not sufficient basis for considering the violation of that right as proven. Generally, a person, in evaluating the decisions made towards him/her, acts based on personal interests and personal well-being, which does not represent objective criteria for evaluating the issue. The presumption on possible violation of the right originates the interest of appeal and does not take into account the unequivocal illegality of the disputed decision in the literal sense. Clearly, examining the legality of the disputed decision is transferred to the competence of the superior body or the court reviewing the dispute.

The right to appeal must be exercised within the time limit established by law. The expiration of limitation period causes the loss of significance of validity of claim and deprives a person of the opportunity to satisfy a complaint or claim. The right of appeal to be made within the time limit forces a person to obey the lawful order and to exercise this right during the period permitted by law and not when it is desirable for him/her. As a rule, a complaint is made to a superior authority or claim is made to the court within one month from the notification on the decision. Thus, counting of the time is linked to the notification on the decision (act on dismissal of the officer). One of the important procedures related to the realization of the right of appeal is getting familiar with the disputed decision in the manner prescribed by law, as the period for appeal commences from getting familiar with the disputed decision (individual administrative-legal act). As established by the court practice, “the period for appeal can start only from the moment when a person has an objective opportunity to receive information about the content of the act. By getting officially familiar with the act, person becomes aware of what became the basis for the issuance of the act and, consequently, whether his/her appeal has any prospects, as well as what legal means can he/she use to protect his/her rights and

---

<sup>49</sup> *Badura P., Erichsen H., Martens W., Münch I., Ossenbühl F., Rudolf W., Rüfner W., Salzwedel J., Allgemeines Verwaltungsrecht, 4 unveränderte Auflage, Berlin, 1975, 244.*

<sup>50</sup> Decision of October 4, 2016, № BS-211-210(K-16), Supreme Court of Georgia.

interests, what arguments he/she should use to defy the decision.”<sup>51</sup> The Court of Cassation refers to the explanation of the Supreme Court of Georgia, according to which, “the right to appeal includes the presumption that the person is familiar with the content of the act, the appeal implies knowledge of the motives for issuing the act. In this regard, the substantiation of the act has the burden of ensuring of the right of appeal.”<sup>52</sup>

It is important that in the event of completion of dispute in favour of the plaintiff, the decision is executed as soon as possible. As for reinstatement in employment, this becomes possible only if the position in question is vacant. It should be noted that a necessary precondition for reinstatement in employment is a vacant position or existence of an equal position. By making the amendment<sup>53</sup> to the Resolution No.199 of the Government of Georgia on 21<sup>st</sup> May, 2020 on the Rules of Mobility of Professional Public Servants, the notion of equivalent position has been added to the definition of terms, according to which, the equal position is the position with the same rank and category, the job description/duties-responsibilities and qualification requirements of which are identical or mostly similar. Prior to this change, the burden of definition of equivalent position was shifted to the court. Although, the Law on Public Service provided for the concept of an equal position from the very beginning; however, the normative regulation of its content was not given. If it is impossible to reinstate an unlawfully dismissed officer due to non-existence of an equal vacant position in the system of the same public institution, the public institution is obliged to immediately apply to the Bureau with request to find an equal vacant position in the public service system. According to the Supreme Court, “cases of impossibility of reinstatement in service are the absence of this position, or the holding of this position by another person.”<sup>54</sup> This proves that the reinstatement of an unlawfully dismissed officer by the dismissal of another officer appointed to this position is inadmissible. Article 106 of the Law of Georgia on Public Service imperatively stipulates that an officer is dismissed from service only if there are grounds provided for by this law. The applicable law does not provide for the dismissal of an officer due to reinstatement of an unlawfully dismissed officer, which excludes the preferential right of an unlawfully dismissed officer over an officer appointed later to the same position. The Law of Georgia on Public Service of 1997,<sup>55</sup> in particular, Article 97, provided for the dismissal of an officer upon reinstatement of an unlawfully dismissed officer, creating an unstable environment. Under the law of 1997, the advantage of being in office belonged to an unlawfully dismissed officer, that is inadmissible under the current valid law. Consequently, the new regulation categorically excludes the application of the principle – “*primo in tempore, potior in iure*” (first in time, greater in right).<sup>56</sup> In the current legislation, such regulation of the issue is aimed at ensuring

---

<sup>51</sup> Decision of October 10, 2013, № BS-854-836(K-12), Supreme Court of Georgia.

<sup>52</sup> Decision of October 6, 2016, № BS-770-762(K-15), Supreme Court of Georgia.

<sup>53</sup> Resolution № 315 of the Government of Georgia on the amendments to the Resolution № 199 of 20<sup>th</sup> April, 2017 of the Government of Georgia on the “Rules of Mobility of Professional Public Servants”, 21/05/2020.

<sup>54</sup> Decision of May 21, 2020, № BS-1162(K-18), Supreme Court of Georgia.

<sup>55</sup> Law of Georgia on Public Service of 1997 (repealed, 27/10/2015, № 4346).

<sup>56</sup> In this regard, see papers: *Kardava E., Kasradze I.*, Legal Grounds and Factual Preconditions for Reinstatement of an Unlawfully Dismissed Officer, also, *Getsadze Sh.*, Practice of General Courts of

legal trust and legal stability. Otherwise, the system will again face a legal dispute in this case due to dismissal of another officer from the same position. Thus, the primary goal in this particular case is to achieve stability of the officer appointed to the vacant position. If the position is no longer vacant, an unlawfully dismissed officer must be reinstated to the equal position; according to the law, in the absence of such a position – to an equal position in the system of the same public institution.

As for the costs of legal proceedings related to labour disputes in the public service, the common courts are governed by the Administrative Procedure and Civil Procedure Codes of Georgia, as well as the Law on State Duty, and these disputes are exempt from the state duty. As for the expenses of the representative (lawyer), in case of completion of the case in favour of the plaintiff presenting the relevant evidence, the court imposes reimbursement of the costs incurred by the plaintiff's representative on the defendant public institution.

## **6. Conclusion**

As established by the legislation, the reorganization in the public service serves not the purpose of redundancy but ensuring the effective governance. Nevertheless, this process is often accompanied by redundancy. For the above reasons it is important to follow the procedures established by law – the maintenance of human capital becomes a significant challenge for public institutions. In the worst case, when there is no possibility of mobility of the officer, there is no equal or lower position, a public institution, of course, is equipped with the right to make a choice before making a decision on dismissal, which should be guided by objective criteria. An appropriate commission can be set up to resolve this issue, although the latter is not of obligatory nature and this means that the decision on the issue is to be made mainly by the head of the institution.

Thus, although the initiation of the reorganization process itself belongs to the discretionary power of the public institution, the dismissal of officers on this basis should be subject to strict criteria and requires substantiation. The requirements that will have to be envisaged by the decision-maker for the selection of an officer should be specified; the above could include the length of service, experience, professional achievements, potential for further professional development and etc.

### **Bibliography:**

1. Administrative Procedure Code of Georgia, 23.07.1999, LHG, 39(46), 06/08/1999.
2. General Administrative Code of Georgia, 25.06.1999, LHG, 32(39), 15/07/1999.
3. Law of Georgia on Public Service, 27.10.2015, LHG, 11/11/2015.
4. Law of Georgia on Public Service of 1997 (repealed, 27/10/2015, № 4346).
5. Resolution № 315 of the Government of Georgia on the amendments to the Resolution № 199 of 20<sup>th</sup> April, 2017 of the Government of Georgia on the “Rules of Mobility of Professional Public Servants”, 21.05.2020, LHG, 22/05/2020.

6. Resolution № 199 of the Government of Georgia on the Rules of Mobility of Professional Public Servants, 20.04.2017, LHG, 21/04/2017.
7. Resolution № 627 of the Government of Georgia on the Approval of the Public Service Reform Concept and some related measures, 19.11.2014, LHG, 20/11/2014.
8. *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.*, Handbook of General Administrative Law, Tbilisi, 2005, 69, 77 (in Georgian).
9. *Badura P., Erichsen H., Martens W., Münch I., Ossenbühl F., Rudolf W., Rüfner W., Salzwedel J.*, Allgemeines Verwaltungsrecht, 4 unveränderte Auflage, Berlin, 1975, 244.
10. *Bauby P., Similie M. M. (POPA)*, Mapping of the Public Services, Public Services Statistics, organisation and regulations, Project with the support of the European Commission, May, 2010, 9.
11. Der Europäische Bürgerbeauftragte, Grundsätze des öffentlichen Dienstes für EU-Beamte, 2012, 5.
12. *Getsadze Sh.*, Practice of General Courts of Georgia on Public Labor-Legal Disputes, Journal of Law, № 1, 2020, 200-217, 365-383 (in Georgian).
13. *Izoria L.*, Modern State, Modern Administration, Tbilisi, 2009, 89 (in Georgian).
14. *Kopaleishvili M., Kharshiladze E., Turava P., Loria Kh., Gvaramadze T., Ghvamichava T.*, Administrative Procedural Law Manual, Tbilisi, 2018, 214 (in Georgian).
15. *Kardava E., Kasradze I.*, Legal Grounds and Factual Preconditions for Reinstatement of an Unlawfully Dismissed Officer, Journal of Law, № 1, 2020, 200-217.
16. *Khubua G.*, Legal Theory, Tbilisi, 2004, 99 (in Georgian).
17. *Milkovich G. T., Wigdor A. K., Broderick R. F., Mavor A. S. (ed.)*, National Research Council; Division of Behavioral and Social Sciences and Education; Commission on Behavioral and Social Sciences and Education; Committee on Performance Appraisal for Merit Pay for Performance: Evaluating Performance Appraisal and Merit Pay, Washington, D.C., 1991, 14-16.
18. Motivating Public Servants: Information and Conclusions for Practitioners, GCPSE, Astana, Kazakhstan, 2014, 6-7 (in Russian).
19. *Oppermann T., Classen K., Nettesheim M.*, European Law, Teaching Manual, *Erkvania T., Japarashvili I. (transl.)*, Tbilisi, 2021, 118-119 (in Georgian).
20. Reorganization of a public institution, guide, <<https://bit.ly/3gkwRww>> [22.05.2021] (in Georgian).
21. *Shvelidze Z., Bodone K., Todria T., Khazhomia T., Gujabidze N., Meskhishvili K.*, Georgian Labour Law and International Labour Standards, a Guide for Judges, Lawyers and Law Teachers, *Bakakuri N., Todria T., Shvelidze Z.*, Tbilisi, 2017, 228 (in Georgian).
22. *Sajó A.*, Limiting Government, An Introduction to Constitutionalism, *Ninidze T. (ed.)*, *Maisuradze M. (transl.)*, Tbilisi, 2003, 270, 281 (in Georgian).
23. *Schmidt R.*, Allgemeines Verwaltungsrecht, Hochschule für Angewandte Wissenschaften Hamburg, 20. Aufl., Hamburg, 2017, 93.
24. *Turava P., Pirtskhalaishvili A., Dvalishvili M., Tsulaia I., Kardava E., Sanikidze Z., Makalatia E.*, Law of Georgia on Public Service, Commentaries, *Kardava E. (ed.)*, Tbilisi, 2018, 136, 332, 342-243 (in Georgian).
25. *Turava P., Pirtskhalaishvili A., Kardava E.*, Administrative Proceedings in Public Service, Tbilisi, 2020 (in Georgian).
26. *Turava P.*, General Administrative Law, 3<sup>rd</sup> ed., Tbilisi, 2020, 172-181 (in Georgian).

27. United States Office of Personnel Management, Guide To The Senior Executive Service, Washington, 2017, 23.
28. Decision of April 19 2016, № 2/2/565 of the Constitutional Court of Georgia on the case: “Georgian citizens – Ilia Lezhava and Levan Rostomashvili against the Parliament of Georgia”.
29. Decision of April 11 2014, № 1/2/569, Constitutional Court of Georgia on the case: “Georgian citizens – David Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”.
30. Decision of July 23, 2020 № 38 (k-20), Supreme Court of Georgia.
31. Decision of May 21, 2020, № BS-1162(K-18), Supreme Court of Georgia.
32. Decision of February 13, 2020, № BS-179(2k-19) of the Supreme Court of Georgia.
33. Decision of April 4, 2017, № BS-644-637(K-16), Supreme Court of Georgia.
34. Decision of October 6, 2016, № BS-770-762(K-15), Supreme Court of Georgia.
35. Decision of October 4, 2016, № BS-211-210(K-16), Supreme Court of Georgia.
36. Decision of December 8, 2020, № BS-449-442(K15), Supreme Court of Georgia.
37. Decision of November 19, 2013, № BS-301-292 (2K-13), Supreme Court of Georgia.
38. Decision of October 10, 2013, № BS-854-836(K-12), Supreme Court of Georgia.
39. Civil Service Act, 16.07.2012, <<https://www.riigiteataja.ee/en/eli/ee/525032019003/consolide>> [22.05.2021].
40. Bundesministerium Kunst, Kultur, öffentlicher Dienst und Sport, Frauen und Männer, Österreich, <<https://www.ioffentlicherdienst.gv.at/>> [28.05.2021].