Prishtina, on 16 May 2022
Ref. No.:AGJ 1989/22

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JUDGEMENT

in

Case no. KI78/21

Applicant

Raiffeisen Bank Kosovo J.S.C.

Constitutional review of the second item of the enacting clause of the Judgment Rev.no.257/2019 of the Supreme Court of Kosovo, of 2 June 2020

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gerxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Raiffeisen Bank Kosovo J.S.C., with headquarters in Prishtina (hereinafter: the Applicant), represented by Fatlind Shala, Legal Adviser at Raiffeisen Bank Kosovo J.S.C.

Challenged decision

2. The Applicant challenges item II of the enacting clause of the Judgment [Rev. No. 257/2019] of 2 June 2020 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

3. The Applicant received the challenged Judgment on 28 December 2020.

Subject matter

4. The subject matter of the case is the constitutional review of item II of the enacting clause of the Supreme Court's above-mentioned Judgment, alleging that the applicant has been violated the fundamental rights and freedoms guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to a Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, on Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 27 April 2021, the Applicant submitted the application by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 30 April 2021, the President of the Court Arta Rama-Hajrizi appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of the Judges Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 17 May 2021, the Court notified the Applicant about the registration of the Referral and requested from him to complete the application form and submit the authorisation for representation to the Constitutional Court.

9. On 17 May 2021, based on paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of the President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph (4) of Rule 12 of the Rules of Procedure and the Court Decision KK-SP 71-2/21 of 17 May 2021, it was determined that Judge Gresa Caka-Nimani, the President of the Court, takes office after the expiry of the term of office of the current President of the Court, Arta Rama-Hajrizi, on 26 June 2021.

10. On 25 May 2021, based on point 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of judge to the Constitutional Court.

11. On 31 May 2021, the President of the Court, Arta Rama-Hajrizi, by Decision KK160/21, determined that Judge Gresa Caka-Nimani would be appointed Presiding Judge in the Review Panels in cases where she was appointed as a member of the Panel, including the present case.

12. On 3 June 2021, the Court received: (i) the authorization for representation in the Court and (ii) the completed application form submitted by the Applicant.

13. On 7 June 2021, the Court sent a copy of the Referral to the Supreme Court. On the same day, the Court sent to the Basic Court in Prishtina, the General Department (hereinafter: the Basic Court) the request to submit the receipt that proves when the Applicant received the challenged Supreme Court Judgment.

14. On 22 June 2021, the Basic Court in Prishtina handed over the requested receipt that proves that the Applicant received the challenged Supreme Court Judgment on 28 December 2020.

15. On 26 June 2021, based on paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21, of 17 May 2021 of the Court, Judge Gresa Caka-Nimani assumed the office of the President of the Court, while based on paragraph 1.1 of paragraph 1 of Article 8 (Termination of the mandate) of the Law, the President Arta Rama-Hajrizi terminated the term of office of the President and the Judge of the Constitutional Court.

16. On 28 June 2021, the President of the Court, Gresa Caka-Nimani, rendered Decision KSH.KI78/21 appointing Judge Bajram Ljatifi as a member of the Review Panel in place of Judge Arta Rama-Hajrizi, as presiding.

17. On 7 October 2021, the Court with regard to the present referral, namely KI78/21 and referral KI133/20 sent to the Supreme Court the request for answers to the questions*: "(i) As far as possible, please inform the Court, in accordance with the Supreme Court's practice, in which cases the provisions of the Law on Labour Relationship, of SAPK no. 12/89 or the Basic Law on Labour [UNMIK Regulation 2001/27] and (ii) Please clarify to us what is the relevant case law related to the interpretation and application of the Law on Labour Relationship of 1989 and the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] in the case of termination of the employment relationship through the Employer's Notice, as a result of finding violations of employment duties by the Employee. More specifically, please explain whether the Supreme Court has a unified case law in these cases or the issue of interpretation and application of the provisions of the Law on Labour Relationship, of SAPK no. 12/89 or the Basic Law on Labour [UNMIK Regulation 2001/27] is reviewed on a case-by-case basis. If the Supreme Court has a unified and consistent practice regarding the above-mentioned cases, please also explain to us from what period exactly the unification of the Supreme Court's case law has started."*

18. On 10 October 2021, the Supreme Court delivered a letter to the Court with the responses to the aforementioned questions of the Court.

19. On 9 December 2021, the Court considered the preliminary Report proposed by the Judge Rapporteur and unanimously decided that the consideration of the request with additional supplements should be postponed to another session of the Court.

20. On 22 February 2022, the Court notified B.K. [claimant in the contentious proceedings, which is the subject of the assessment of the referral] regarding the registration of the referral.

21. On 7 March 2022, the Court received the letter submitted by B.K., requesting that the Court reject the Applicant's referral as inadmissible.

22. On 30 March 2022, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the referral. On the same day, the Court unanimously decided: (i) to declare the referral admissible; and (ii) found that the Judgment [Rev. no. 257/2019] of 2 June 2020 is not in compliance with Article 31 [Right to a Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

23. According to the case files, on 1 July 2007, the Applicant, in the capacity of employer and B.K., in the capacity of employee, had concluded an employment contract for an indefinite period of time. Based on the employment contract, B.K. was employed as the manager of the claimant's sub-branch in Malishevë.

24. On 13 February 2009, as a result of the receipt of information from the Applicant that the credit of a client had been approved under the responsibility of B.K. based on the falsification of documentation, the Applicant’s Fraud Commission made a decision that B.K. be suspended.

25. On 23 February 2009, the Fraud Commission recommended to the Applicant that B.K. remain suspended and recommended that an internal audit be conducted to confirm which rules of the Applicant were violated in order to prepare the notice of dismissal of B.K.

26. On 3 March 2009, the Applicant's internal auditors in their audit report had ascertained the violation committed by B.K., namely that B.K. as a responsible person had made possible the approval of the Applicant's client’s loan, including an uninformed party as guarantor of the loan whose signature had been falsified and his car which had been left under lien, had been reported as stolen to the police.

27. On 24 March 2009, the General Director of the Applicant based on the aforementioned internal audit report issued the Notice for termination with immediate effect of the employment contract of B.K. (hereinafter: the Notice, of 24 March 2009).

28. In his notice for termination of the employment contract, the Applicant, among others, had argued that B.K. had severely violated the duties in the line of action of the Applicant's personnel because in June 2007 *"contrary to the rules of the job duties, he ordered the proceeding of such loan, and by falsifying the signature and documentation he managed to create the unlawful conditions for the benefit of the loan to the third party"*.

29. On 22 March 2010, as a result of the criminal report filed by the Applicant, the Municipal Public Prosecution Office in Prizren had filed against B.K. an indictment [PP.nr. 300/2010] under suspicion that the same had committed the criminal offense of "falsification of official document" from Article 348, paragraph 1 of the Provisional Criminal Code of Kosovo (hereinafter: PCCK).

30. On 24 April 2009, B.K. filed a claim with the Municipal Court in Prishtina, seeking the annulment of the Notice of 24 March 2009 and requesting the return to his previous place of work.

31. On 19 January 2012, the Municipal Court in Prishtina, as a result of the initiation of the criminal proceedings against B.K., terminated the controversial proceedings corresponding to his claim of 24 April 2009 until the end of the criminal proceedings.

32. On an unspecified date, the Court of Appeals by Resolution [Ac. no. 4008/2012] quashed the aforementioned Resolution of the Municipal Court in Prishtina by deciding to proceed with the assessment of the findings of the disciplinary commission and to assess the same within the limits of the requirements presented in the procedure.

33. On 21 November 2013, the Basic Court in Gjakova, Serious Crimes Department, by Judgment [P. no. [93/2010] had dismissed the charge against B.K. due to absolute statute of limitations.

34. On 29 August 2014, the Basic Court in Prishtina (hereinafter: the Basic Court) in the context of the contentious procedure, initiated under the B.K. claim of 24 April 2009 by Judgment [C.nr. 315/14]:

    I. Approved as grounded the claim of B.K. by cancelling as unlawful the Notice of 24 March 2009 of the Applicant to terminate the employment contract;
    II. It ordered the Applicant to reinstate B.K. to the previous place of work, compensating the salaries for the period 24 March 2009 to 30 November 2011 in the amount of 24,171.71 euros and to pay the procedural costs to B.K..

35. The Basic Court in its Judgment considered that: "The *claim of [B.K.] is based on the grounds that the respondent [the Applicant] did not carry out any proper disciplinary proceeding for proving the liability of B.K., respectively the nature of the disciplinary violations"*. According to the finding of the Basic Court, the loan was allowed in 2007 and the actions of the Applicant had started from February 2008, and in this regard, it found that the actions taken by the Applicant, according to the court's assessment, are outside the legal time limit

allowed. The Basic Court pointed out that the notice of the Applicant to terminate the employment contract was based on the Applicant's assessment that B.K. as manager at the Raiffeisen Bank sub-branch in Malishevë, with the loan approval of the borrower A.B., acted contrary to point 4.3, paragraph 3 of the Policy on personal loans.

36. The Basic Court then also referred to the content of the Notice of 24 March 2009 on the termination of the contract and the internal audit report and the Fraud Commission. According to the Basic Court, since the Applicant failed to prove that it had conducted a disciplinary proceeding against B.K. within the legal time limit provided by Article 67 of the Essential Rights from Law on Labour Relationship of the SFRY, promulgated on 28 September 1989 (hereinafter: ERLLR), and also failed to prove the contrary of B.K.'s assertions that the loan issued in the name of A.B. has been approved by the Branch manager in Prizren. As a result of this assessment, the Basic Court found that the Notice of 24 March 2009 of the Applicant is contrary to Article 11 of the Essential Labour Law, promulgated by UNMIK Regulation no. 2001/27 (hereinafter: Essential Labour Law [UNMIK Regulation no.2001/27]).

37. On an unspecified date, against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals.

38. On 23 April 2019, the Court of Appeals, by Judgment [Ac.nr.6/15]:

I. Refused as partially unfounded the Applicant’s appeal pertaining to: (i) the Notice of 24 March 2009; and (ii) the obligation to reinstate B.K. to his previous place of work, and in this connection upheld the Judgment [C.nr. 315/14] of 29 August 2014, of the Basic Court.

II. Approved as partially grounded the Applicant's appeal pertaining to: (i) the compensation of salaries to B.K. for the period 24 March 2009 to 30 November 2011; (ii) and procedural costs; and in this connection annulled the aforementioned Judgment of the Basic Court by remanding the case to the Basic Court for retrial.

39. The Court of Appeals, in regard to paragraph I of its Judgment, first found that: (i) the legal position and conclusion of the Basic Court with regard to this item of the enacting clause of the Judgment is fair and lawful, since the same is not involved in a substantial violation of the provisions of the contentious procedure, including those alleged by the Applicant in its appeal; (ii) that the allegations of the appeal for an erroneous substantiation of the factual situation do not stand on the part of the Basic Court, and the latter has fully assessed all the factual circumstances, which consequently support its finding that B.K's claim under item I of the enacting clause of the Judgment is grounded; and (iii) the claim of the Applicant that the Basic Court has erroneously applied substantive law also does not stand. With regard to the latter, the Court of Appeals referred to the provisions of the Employee Manual V1.0 of the Applicant on Labour Policy, Article 67, paragraph 1 of the ERLLR and Article 10, paragraph 1 and Article 11 of the Essential Labour Law which defines the causes of termination of the employment relationship. In this context, the Court of Appeals found that the ERLLR is the law applicable in the circumstances of this case, and according to

Article 67, paragraph 1 of this law *"The statute of limitation for initiation of the disciplinary proceeding is 6 months from the day when it is learned of the violation of the duty of work and for the perpetrator of the offense, respectively within one year from the day when the violation was committed".*

40. Consequently, the Court of Appeals found that*: "the court of first instance rightly applied the substantive law and proved that the notice of [the Applicant] with which [B.K] had been discontinued the employment contract was obtained in an unlawful manner, is not fair and contrary to the above-mentioned legal provisions, because the disciplinary measures of discontinuation of the employment contract can be imposed against the employee according to the procedure in the manner and circumstances provided by law, normative acts and the collective contract, which are applicable in Kosovo, which provide that the disciplinary proceeding is carried out by the disciplinary commission at the request of the competent body, due to the violation of the job duties, for which violation is imposed the measure of termination of the employment relationship, according to the procedure established by law. In this case, the notice for termination of the employment contract was taken with the violation of the procedure preceded by the provisions mentioned above, because [B.K] has realized the rights and obligations from the employment relationship, at [the Applicant] and with no single evidence the grounds for termination of the employment relationship were argued, for which he alleges that [the Applicant] because the procedure for ascertaining the worker's responsibility for the violation of the work duties the disciplinary proceeding should be initiated and terminated in the aforementioned legal time frame and respecting all the worker's rights. In this case, the [Applicant] has not complied with the time limit for initiating and completing the investigations, in case of initiating and completing the disciplinary proceeding, has not informed him of the alleged violation in a timely manner and has not given him the possibility to declare the alleged violation in writing and has not given him the opportunity to consult with the legal adviser of his choice."*

41. Finally, the Court of Appeals found that*: "In addition to the facts, the guilt of [B.K] was not argued in the criminal procedure with a final judgment, nor in the disciplinary proceeding for the alleged violations, while [the Applicant] unreasonably stalled the disciplinary proceeding, because the respondent was aware of the alleged violation on 05.02.2008, the meeting to discuss the case of the worker [B.K] was held on 13.02.2008, the notice of suspension was made on 13.02.2009, the notice of termination of the contract was made on 24.03.2009, while the alleged violation occurred on 15.06.2007, so the procedure in this case took more than 1 year - namely 1 year, 7 months and 8 days, after the alleged violation occurred, which is in complete contradiction with the above provisions. Based on this case situation, it appears that the court of first instance rightly applied the substantive law, because the termination of the employment relationship on the basis of the contested notice, against the claimant by the respondent, was made in full contradiction with the provisions of the Labour Law and the provisions of the Employee Manual on Labour Policies V1.0, mentioned above."*

42. The Court of Appeals finally relied on its decision to partially approve the Applicant's appeal under item II of the enacting clause and had based it on the

finding that the expert's expertise: (i) was deficient and unclear; (ii) that the Basic Court had not clearly defined the duties of the expert to calculate the amount of compensation; (iii) that the same had not invited him to the hearing to provide relevant clarifications and supplementation of expertise. Consequently, the Court of Appeals found in this point that the Judgment of the Basic Court is involved in a substantial violation of the provisions of the contentious procedure.

43. On an unspecified date, against the above-mentioned Judgment of the Court of Appeals, the Applicant filed a review with the Supreme Court due to the erroneous application of substantive law and the violation of procedural provisions.

44. The Applicant in the motion for review specifically challenged the Court of Appeals' finding that: (i) the notice on termination of the employment contract was made in the absence of the disciplinary commission; and that (ii) the proceedings were taken outside the legal time limits.

(i) Regarding the stalling of the procedure, the Applicant specifies that: "*From all the aforementioned evidence, it is clear that the entire procedure from the receipt of the statements to the termination of the contract was completed within one and a half months, and as the Court of Appeals found that the disciplinary proceeding lasted 1 year and 7 months and 8 days [...]*".

(ii) Regarding the non-opening of the disciplinary proceeding, the Applicant pointed out that: "*The provisions of the Labour Law of the former SAPK of 1989, respectively Article 112 stipulates that the authorized body submits a request for the initiation of the disciplinary proceeding and in the specific case to the [Applicant] the request was initiated by the competent person and the higher body of the [Applicant] acting in the capacity of the Commission with a member starting from the General Director, other Members of the Management Board, the Head of the Legal Office, the Head of the Office for Human Resources etc. (see the report of the Fraud Committee as in the case files)". The mentioned committee, composed of the most competent and senior persons in the hierarchy of [Applicant] after identifying the violations committed by the Claimant according to the report of the Fraud Committee and the findings of the Special Audit, had issued the decision to suspend and then to terminate the Employment Contract. Different naming of the Disciplinary Commission as a Committee in the present case does not provide grounds to annul the decision of the same as the Basic Court in Prishtina and the Court of Appeals of Kosovo have ascertained, because it is not of importance how the legal instrument is named, but it is of importance how the same is applied and whether it is applied as the legal provisions establish it and whether it serves the same purpose as the lawmaker had provided and not how the same is named. The Disciplinary Commission has the fundamental purpose of identifying the violations and making a decision in accordance with the findings of the competent persons of the employer in order to avoid arbitrariness when taking the decision against the certain employee".*

45. The Applicant further pointed out that*: "The fact that [B.K.] had committed a criminal offense in the workplace during the performance of his work duties implies that the same has committed a serious misdemeanour violation, i.e. a criminal offense, for which according to the provisions of the ELLK [Essential Labour Law] is not necessary the Disciplinary Commission but only the procedure described as above [the Applicant], yet to avoid arbitrariness, has had the disciplinary proceeding by taking all the steps described as above. In addition to the provisions of ELLK Reg.2001/27 and also the provisions of the Labour Law of SAPK 1989, in Article 157 the employer by automatism discontinues the employment contract in case the employee tends to commit or commits a criminal offense against the employer [...]".*

46. On 2 June 2020, the Supreme Court, by Judgment [Rev.no.257/2019]:

I. Partially approved as grounded the revision of the Applicant regarding the obligation for the Applicant to reinstate B.K. to his previous place of work, and consequently quashed the Judgment of the Court of Appeals and remanded the case to the Basic Court for retrial; and
II. It rejected as ungrounded the Applicant's revision of the motion, namely the annulment as unlawful of the Notice of 24 March 2009 on termination of the employment contract.

47. The Supreme Court by its Judgment initially found that the lower instance courts, by justly and fully assessing the factual state, have applied the provisions of the contentious procedure and the substantive law, when they found that the claim of B.K. is grounded because the Applicant violated the legal provisions and did not apply the provided procedures either in time or content. According to *the Supreme Court: "The procedure for assigning disciplinary responsibility refers to the violation that occurred in June 2007, while in the case files it turns out that [the Applicant] became aware of the violation on 5 February 2008, did the suspension on 13 February 2009, while the notice of termination was made on 24 March 2009. This is contrary to the provisions of Article 67 of the Essential Rights from the 1989 Labour Relationship Law which was applicable under UNMIK/REG/1999/24 where it is provided that the statute of limitation for the initiation of the disciplinary is within 6 months from the day when it learns of such violation".*

48. Secondly, with regard to the Applicant claim that B.K. violated the provisions of the Line Personnel Action Manual and that the contract was terminated based on Article 5 of the Manual and in accordance with Article 11, paragraph 1 of the Essential Labour Law, the Supreme Court considered as unsustainable allegations arguing that Article 5.3 of the Manual numbers violations which serve as a basis for immediate dismissal from work, which are: "Obligation to maintain confidentiality; Violations of conflict of interest; Personal conduct (misconduct, failure in work and duty and not subordination); Fraud and Repeated violation of the labour discipline and that following the written and oral remark of the employee". In the context of this reasoning, the Supreme Court, referring to Article 111, paragraph 2 of the Law on Labour Relationship, of SAPK no. 12/89 stressed that *"the worker is only responsible for violations that have been normed by law or internal act".*

49. Thirdly, with regard to the claim of the Applicant that the violation of the B.K. has to do with the violation specified in Article 11, paragraph 1, point c of the Essential Labour Law, according to which it is stipulated that the Employment Contract is terminated by the employer in cases of serious misconduct, the Supreme Court found that the Court of Appeals has provided sufficient and fair clarification referring to point 4.3, paragraph 3 of the Policy on Personal Loans *"which is an internal regulation of responsibilities, stipulating that personal loans in the amount of €5,001.00 and up to €10,000.00 are signed by the supervisor, only after the approval of the manager and in the present case [B.K] in the capacity of the manager of the sub-branch in Malishevë has signed it after the approval of the manager of the branch in Prizren*. Consequently, the Supreme Court found that *"these revision allegations were considered unfounded for the fact that with no evidence it was proven that [B.K] had direct disciplinary responsibility and that by his actions, the bank suffered damage"*.

50. Consequently, the Supreme Court found that: (i) the notice of 24 March 2009 of the Applicant did not respect the party's provided time for hearing and that the alleged violation of the B.K. does not correspond to the disciplinary sanction; and (ii) that no disciplinary proceeding was conducted against B.K. to substantiate his eventual responsibility and no adequate measures were imposed for the violation provided by the internal act.

51. Whereas, with regard to the first paragraph of the provision of the Judgment, the Supreme Court argued that the Judgments of the Basic Court and the Court of Appeals were involved in a substantial violation of Article 182, paragraph 2, point n) of the LCP. In regard to this finding, the Supreme Court concluded that in the retrial procedure, the Basic Court should eliminate the ambiguities in this respect and ascertain: (i) whether the position of manager entails special responsibility; (ii) how the selection to this job position is made; and (iii) whether this place of work has been filled in by the Applicant and whether there is an alternative to reinstate the same or a similar place of work.

Applicant's allegations

52. The Applicant alleges that the challenged Judgment [Rev.no.257/2019], of 2 June 2020, of the Supreme Court, namely item II of its enacting clause, was rendered in violation of the fundamental rights and freedoms guaranteed by Article 24 [Equality Before the Law]; Article 31 [Right to a Fair and Impartial Trial] of the Constitution in conjunction to Article 6 (Right to a fair trial) of the ECHR.

53. The Applicant alleges a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, due to: (i) lack of a reasoned court decision; and (ii) violation of the principle of legal certainty as a result of the divergence in the case law of the Supreme Court.

54. Secondly, with regard to the allegation of a violation of Article 24 [Equality Before the Law] of the Constitution, the Applicant specifies that his right to equal treatment has been violated as a result of discriminatory differences in the treatment of *"entirely same cases"*.

I. Regarding the allegation of violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR

(i) Regarding the allegation of lack of reasoning of the court decision

55. The Applicant points out that the Supreme Court in its challenged Judgment did not provide: "*... sufficient and clear reasoning regarding the rejection of [his] request to apply the provisions of the Essential Labour Law, UNMIK Regulation 2001/27 [hereinafter referred to as the "Essential Labour Law"], as the law applicable in the present case, a position which the Supreme Court until the moment of rendering the contested Judgment has consistently applied in its practice. More precisely, the Supreme Court in the challenged Judgment initially determines what the applicable law is, and contrary to its own determination and without providing any clear legal reasoning it applies the repealed provisions of the Law on Labour Relationship of the SAPK no. 12/89 [hereinafter referred to as the "Law on Labour Relationship"].*

56. In this context, the applicant specifies that the work dispute started in 2008, and according to it the legislation applicable in the Republic of Kosovo according to UNMIK Regulation no. 1999/24, includes: *"(a) Regulations promulgated by the Special Representative of the Secretary-General and ancillary instruments issued pursuant thereto; and (b) Legislation in force in Kosovo on 22 March 1989. More specifically, at that time the Essential Labour Law promulgated by UNMIK Regulation 2001/27 dated 8 October 2001 was applied. Article 27 of this Law stipulates that "This Regulation repeals any provision of the applicable law that is contrary to it". Consequently, as long as the Essential Labour Law has regulated a matter from the employment relationship, the provisions of the Law on the Employment Relationship have not found application. Thereafter, the Essential Labour Law, through Article 11, regulates in detail the termination of the employment contract and the content of the notice on termination of the employment contract".*

57. In addition, the Applicant contends that *"Despite the existence of clear legal provisions, the Supreme Court in the challenged Judgment fails to argue clearly which legal provisions apply in the present case".*

58. The Applicant specifies that the challenged Supreme Court Judgment is "unclear and deficient" because on the one hand it stipulates that*: "[...] the provisions of the Law on Labour Relationship do not apply when they contradict the Essential Labour Law, and on the other hand it approves the conclusions of the lower instance Courts which have actually disregarded the provisions of the Essential Labour Law as a whole".*

59. Further, the Applicant underlines that the challenged Judgment*: "[...] in addition to applying the repealed provisions of a law, also applies the provisions of the applicable law, i.e. the Essential Labour Law, but without having managed to reason the logical interrelationship between the facts of the case and the applicable legal provisions".*

60. The Applicant considers that the Supreme Court Resolution did not address his allegations regarding the application of the provisions of the Essential Labour

Law, based on which the Notice of 24 March 2009 on termination of the employment contract was also rendered.

61. The Applicant further specifies that the Supreme Court's reasoning that*: "The notice [of the Applicant, of 24 March 2009] does not contain elements provided by law such as instruction or legal advice, does not respect the party's provided time for hearing, and the alleged violation of the worker does not correspond to the disciplinary sanction"* does not find any legal support in the Essential Labour Law. According to the Applicant, *"The applicable law does not provide for the obligation to include the instruction or legal advice in the notice, it does not specify any time provided for hearing the party*. According to the *Applicant, "such a requirement existed under the Law on Labour Relationship, but the same requirement is not provided by the provisions of the Essential Labour Law."* In this sense, the Applicant concludes that*: "The Supreme Court has not argued the legality and reasonableness of the obligation to include the instruction or legal advice, the time provided to hear the party, since there was no legal provision or reason to establish these obligations"*.

62. Finally, the Applicant refers to his above-mentioned claims for lack of reasoning of the court decision and supports them with reference to the court practice of the Court, namely KI87/18, *"IF Skadeforisikring" (*Judgment of 15 April 2019); KI35/18, *"Bayerische Versicherungsverbrand"* (Judgment of 11 December 2019); KI135/14, "*IKK Classic*" (Judgment of 10 November 2015) and KI72/12, "*Veton and Ilfete Haziri*" (Judgment of 5 December 2012) and the court practice of the European Court of Human Rights (hereinafter: ECtHR), the *Higgins case and others v France (*Judgment of 19 February 1998); *Van de Hurk v Netherlands* (Judgment of 19 April 1994), Buzcu *v Romania (*Judgment of 24 May 2005).

(ii) Regarding the allegation of violation of the principle of legal certainty, as a result of the divergences in the relevant case law of the Supreme Court

63. In the context of this allegation, the Applicant first points out that he has investigated the case law of the Supreme Court in cases with the same factual and legal issues as in the present case. Based on this, the Applicant specifies that: *"[…]The Supreme Court has rendered decisions and reasonings completely different from the decision and reasoning of the challenged Judgment"*. Further, the Applicant underlines that *"The case law of the Supreme Court stipulates that in the disputes prior to the entry into force of Law no. 03/L-212 on Labour, the same consistently applies only the relevant provisions of the Essential Labour Law, UNMIK Regulation 2001/27 in cases of termination of the employment contract due to serious violations. As a result of the divergence in decision-making, the right to legal certainty has also been violated as a guarantee established by the right to a fair trial under Article 31 of the Constitution and Article 6, paragraph 1 of the ECHR"*.

64. In support of his allegation, namely regarding the criterion of whether there are "deep and long-term differences", the Applicant refers to six (6) Judgments of the Supreme Court, respectively the Judgment [Rev. no. 377/2018] of 20 November 2018; Judgment [Rev.no. 212/2019] of 11 July 2019; Judgment [Rev. Nr. 1/2019] of 26 February 2019; Judgment [Rev. Nr. 52/2019] of 11 March 2019, Judgment

[Rev.no. 60/2020] of 6 April 2020; and Judgment [Rev. Nr. 104/20] of 25 February 2021.

65. Regarding the aforementioned Supreme Court Judgments, submitted by the Applicant, the latter underlines that: "*The Supreme Court has rendered judgments with reasoning that are different from the challenged Judgment both before the rendering of the challenged Judgment and after it"*.

66. Regarding the criterion whether "*the laws of the country provide for a mechanism which may overcome this contradiction" and "whether this mechanism has been applied and, if so, to what extent*, the Applicant refers to Article 14 [Competencies and Responsibilities of the President and Vice-President of the Court] of Law no. 06/L-054 on the Courts, and in this connection specifies that: "*The mechanism of harmonization of case law is provided by law"*. The Applicant points out that: "*It is the responsibility of the Supreme Court to take action to harmonize case law in order to comply with the principle of legal certainty, guaranteed by Article 31 of the Constitution, in conjunction to Article 6 of the ECHR"*. In this connection, the applicant concludes that: "Such a mechanism has not been applied by the Supreme Court".

67. In support of his allegation for violation of the principle of legal certainty as a result of the divergence in the ECtHR's case law, the Applicant refers to the case law of the ECtHR, namely the case Rozalia *Avram v Romania* (Judgment of 16 September 2014) and the case law of the Court of Appeals, namely cases KI35/18, with the Applicant *Bayerische* Rechstverbrand (Judgment of 11 December 2019) and case KI89/13 with the Applicant Arbresha *Jonuzi* (Judgment of 12 March 2014).

68. Finally, the Applicant, based on the case law of the Supreme Court, reflected in the aforementioned Judgments, and in this context referring to the case law of the ECtHR and that of the Court, considers that the practice of the Supreme Court in comparison with the challenged Judgment has revealed: (i) deep and long-term divergences *"in terms of the legal provisions that apply in the employment relationship disputes filed before the entry into force of Law no. 03/L 212, in comparison to the legal provisions that apply in the challenged Judgment;* and (ii) the established legal mechanisms for overcoming the contradictions have not been applied by the Supreme Court. Consequently, according to the Applicant, all the criteria established to assess whether *"deviations from the practice, judging in the last instance, violate the requirement of a fair trial" are met.*

II. Regarding the allegation of a violation of the "right to equal treatment" because of the discriminatory differences of treatment of entirely the same cases

69. In regard to this, the Applicant specifies that: "*According to the comparative analysis presented above, it is evident that in all the disputes of the employment relationship with the same factual and legal situation, as a respondent or employer is the Kosovo Energy Corporation Sh.A. [hereinafter referred to as "KEK"]. According to Law. no. 03/L-087 on Public Enterprises, KEK is a central public enterprise. The Applicant notes that in all these cases, the Supreme Court of Kosovo has applied only the Essential Labour Law, concluding that the Law*

on the Labour Relationship does not find application. Therefore, in all cases, it was decided in favour of the Respondent - KEK, while in the case of [the Applicant], which is a private company, it was decided differently".

70. In this context, the Applicant refers to the content of Article 24 of the Constitution, underlining that*: "This article guarantees the equality of all persons before the law and establishes the right to equal judicial protection, without any distinction between them. In fact, the purpose of this article is to prohibit discrimination, as a fundamental prerequisite for ensuring that all other human rights guaranteed by the Constitution are respected"*. In addition, the Applicant refers to the Court case KI04/12 with the Applicant *Esat Kelmendi*, in which the Court, among others, found a violation of Article 24 of the Constitution, in conjunction to Article 14 of the ECHR, as well as the case of ECtHR Lithgow *and others v. United Kingdom* (Judgment of 8 July 1986).

71. Consequently, the Applicant considers that he is*: "...placed in an unequal position with other persons, namely with KEK, who won its own cases with the same factual and legal situation as [the Applicant]"*.

72. Finally, the Applicant requests the Court to: (i) declare his referral admissible; (ii) find that there has been a violation of Article 24, and Article 31 of the Constitution in conjunction to Article 6 of the ECHR; (iii) declare void the Judgment [Rev.no.257/2019] of 2 June 2020, of the Supreme Court; and (iv) remand the case to the Supreme Court for retrial.

Response of the Supreme Court, submitted on 10 October 2021

73. The Court recalls that on 7 October 2021, in regard to the present referral, namely KI133/20 and KI78/21, *it sent the Supreme Court a request for responses to the following questions: (i) As far as possible, please inform the Court, in accordance with the practice of the Supreme Court, in which cases the provisions of the Law on Labour Relationship of the SAPK no. 12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] apply and (ii) Please clarify to us what is the relevant case law related to the interpretation and application of the Law on Labour Relationship of 1989 and the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] in the case of termination of the employment relationship by the Employer's Notice, as a result of the Employees' finding of violations of employment duties. More specifically, please explain whether the Supreme Court has a unified case law in these cases or the issue of interpretation and application of the provisions of the Law on Labour Relationship, of SAPK no. 12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] is reviewed on a case-by-case basis. If the Supreme Court has a unified and consistent practice regarding the above issues, please also explain to us from what period exactly the unification of the Supreme Court's case law has started.*

74. In its reply, submitted on 10 October 2021, the Supreme Court replied to the Court's questions as follows:

> *"We first inform you that in the case of interpretation and application of the provisions of the two aforementioned Laws in the case of termination of the*

employment relationship through the employer's notice, as a result of the finding of violations of employment duties by employees, the Supreme Court of Kosovo does not have a unified case law, but the interpretation of these two Laws, in the aforementioned cases, is made for each particular case, just from case to case. However, it should be clarified that within the Supreme Court panels, in civil matters, there is a consensus as follows: the Law on Labour Relationship, of SAPK no. 12/89, and the Essential Labour Law (UNMIK Regulation 2001/27) has been in force until the entry into force of the Labour Law of the Republic of Kosovo on 17.12.2010 promulgated in the Official Gazette no. 90 on 1.12.2010, when in accordance with Article 99 par. it is provided that "With the entry into force of this Law, the UNMIK Regulation no. 2001/27 on Essential Labour Law in Kosovo (UNMIK Regulation no. 2001/27), the Law on the Labour Relationship of SAP Kosovo of 1989 (it is about this Law promulgated in the Official Gazette of the SAPK no. 12/89) and the Labour Law of Yugoslavia of 1977 with the corresponding amendments.

It appears from this provision that the Law on Labour Relationship of the SAP of Kosovo of 1989 was in force and applied until the issuance of the New Labour Law of 2010, however, in its entirety it has not had the possibility to be implemented, because with Article 27 of the Essential Labour Law in Kosovo (UNMIK Regulation no. 2001/27) it is envisaged that this Regulation repeals any provision of the Law in force that is inconsistent with it. In view of the fact that this Essential Labour Law of 2001 does not provide for any disciplinary proceeding for serious breaches of work duties by the employee, the Supreme Court has considered that the finding of these serious breaches, the performance by the employee, and the responsibility for their performance, should be proven in a disciplinary proceeding provided by the aforementioned Law on Labour Relationship, since the Essential Labour Law of 2001 does not provide for any disciplinary proceeding, nor the manner of finding these disciplinary breaches, nor the authority of the employer who imposes disciplinary measures for various disciplinary breaches. Now, with the Labour Law of 2010, we are completely clear that no disciplinary proceeding is provided, but it is left to the employers to issue regulations for disciplinary proceeding with their internal acts.
This means that in terms of the disciplinary proceeding in a complementary manner in practice, the Law on Labour Relationship of 1989 was also applied. In this situation in practice, however, the Supreme Court has made some differences from case to case, so for example in the 5 cases described in the follow-up letters to the request for the delivery of this notice, in which the Supreme Court has rendered judgement, which relate to the dispute between the employees and KEDS, this Court has concluded that for the fact that in the case of internal audit, internal control of KEDS, through ad-hoc commissions the disciplinary violation of the employees who have been involved in the theft of KEDS' property, electricity, by not blocking the electrical meters or by intervening contrary to the Law in those meters and in other ways, the fact that the internal control has also proven through the professional control of these meters by "calibration", has resulted in the fact that the factual situation has been fully and precisely proven in terms of disciplinary violations, while the disciplinary sanction has been imposed by

the body of first and second instance as provided in the Regulation of Internal controls and compliance with the KEDS Disciplinary Code. Moreover, with these two internal legal acts of KEDS it is provided that in these cases the procedure is short, so the Supreme Court has argued not to develop a very specific disciplinary proceeding in addition to the correct and fair confirmation of the factual situation by the auditor respectively the internal control of KEDS, thus coming to the conclusion that there is no arbitrariness in the case of imposition of disciplinary sanction against the responsible employee, whose disciplinary violation and responsibility has been ascertained by the internal auditor of the employer.

Regarding the two judgments that are in the proceedings before the Constitutional Court, I cannot give any explanation, because everything was said about them in those judgments and we do not aim to interfere in any way."

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 24
[Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.

4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

European Convention on Human Rights

Article 6
(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[...]

Law on Labour Relationship [Official Gazette of the SAPK no. 12/89]

Article 73

During the time of termination of work that was caused by no fault of the worker, the worker enjoys the right to remuneration of personal income, the worker is entitled to the remuneration of average personal income realized in the last three months.
[...]

Chapter VIII
RESPONSIBILITY OF THE WORKER

1. Responsibility due to breach of work duty

Article 111

Upon entering into employment in the basic organization, the worker assumes the obligations in respect of employment [labour obligations], established by the general self-government act of the basic organization and by law.

The worker is only responsible for the violation of the labour obligation, which at the time of performance was defined by the provisions and by the general self-government act of the basic organization.

Article 112

The authorized bodies have the duty to submit a request for the initiation of the disciplinary proceeding within eight days after finding out about the breach of work duty and about the perpetrator.

The disciplinary commission has the duty to consider the request for initiation of the procedure and to take it in the procedure within 15 days after the request is submitted.

The disciplinary proceeding is urgent.

Article 113

The governing body, respectively the worker assigned with special authorizations and responsibilities may for minor violation of work duties impose the disciplinary measure of warning and public warning and dismiss the worker temporarily from the basic organization, respectively from work and work duties under the conditions and in the manner specified by the general self-government act.

Before imposing the disciplinary measure, respectively dismissing the worker from work by paragraph 1 of this Article, the managing body, respectively the worker assigned with special authorizations and responsibilities has the duty to question the worker.

Against the decision for the imposition of disciplinary measure and dismissal from paragraph 1 of this Article, the worker may submit an objection to the competent body within 8 days from the day of delivery of the decision on the imposed measure, respectively temporary dismissal.

ESSENTIAL RIGHTS FROM LAW ON LABOUR RELATIONSHIP OF SFRY [of 28 September 1989, promulgated in the Official Gazette on 6 October 1989]

Article 67

The statute of limitation for initiation of the disciplinary proceeding is after three months from the date when knowledge of the breach of work duties is obtained and for the perpetrator, respectively, within six months from the day when the breach was committed.

If the breach of work duties contains the features of the criminal offense, the statute of limitation for initiation of the disciplinary proceedings is six months from the date when knowledge of the breach of work duties and of the perpetrator is obtained.

The statute of limitation to conduct the disciplinary proceeding shall be six months from the date when knowledge of the breach of work duties and of the perpetrator is obtained, respectively one year from the date when the breach was committed.

The disciplinary measure imposed cannot be applied if 60 days have passed from the date of the final decision by which the same was imposed.

UNMIK Regulation no. 2001/27 on Essential Labour Law in Kosovo

Section 11
Termination of a Labour Contract

11.1 A labour contract shall terminate:
(a) upon the death of the employee;
(b) by a written agreement between the employee and employer;
(c) on the grounds of serious misconduct by the employee;
(d) on the grounds of unsatisfactory performance by the employee;
(e) following the expiration of the term of employment; and
(f) by operation of law.
11.2 A labour contract shall be terminated by the employer on the grounds of serious misconduct or unsatisfactory performance by the employee.
11.3 Serious misconduct shall include the following:
(a) unjustified refusal to perform the obligations set out in the labour contract;
(b) theft, destruction, damage or unauthorized use of the employer's assets;
(c) disclosure of business secrets;
(d) consumption of drugs or alcohol at work; and
(e) behaviour of such a serious nature that it would be unreasonable to expect the employment relationship to continue.
11.4 Unsatisfactory performance shall include the following:
(a) unjustified absence from work; and
(b) repeated mistakes not sufficient in themselves to justify a dismissal, but which given their frequency and seriousness disrupt the normal course of the employment relationship.
11.5 In cases where Article 11.2 applies: (a) the employer shall notify the employee in writing that it intends to terminate the labour contract. Such notice shall include the grounds for termination; and (b) a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination. If the employee is a member of a union, the employee shall be entitled to have a union representative present at such meeting.
11.6 A labour contract shall be terminated by operation of law where the employer determines that the employee, due to medical reasons, is no longer able to perform the work or services for which he/ she was employed, and where there is no alternative work available that he/ she would be able to perform. The employer shall give the employee 1 month's notice of termination.
11.7 A labour contract may be terminated by an employer due to economic, technological or structural changes to the enterprise.
11.8 Where a labour contract is terminated, the employer, if requested by the employee, shall provide the employee with a certificate that indicates the name of the employee; the nature or type of work or services for which he/ she was employed; the period of employment; the basic salary/wage

and any additional entitlements and emoluments; and an evaluation of his/her performance during the period of employment.

[...]

Section 27
Applicable Law

The present regulation shall supersede any provision in the applicable law which is inconsistent with it.

Section 28
Entry into Force

This Regulation shall enter into force on 8 October 2001.

UNMIK Regulation no. 1999/24 on the Applicable Law in Kosovo, adopted on 12 December 1999

Section 1
Applicable Law

1.1 The law applicable in Kosovo shall be:

(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and

(b) The law in force in Kosovo on 22 March 1989.

In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.

Section 3
Entry into force

The present regulation shall be deemed to have entered into force as of 10 June 1999.

Assessment of the admissibility of the Referral

75. The Court first examines whether the referral has met the admissibility criteria set by the Constitution, provided by Law and further specified by the Rules of Procedure.

76. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provide:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

77. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides*: "Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

78. In this regard, the Court notes that the claimant, in his capacity as legal person, respectively banking institution, has the right to submit a constitutional complaint, invoking on the violation of his alleged fundamental rights and freedoms, which apply to individuals and legal persons (see Court case KI41/09, Applicant *Universiteti AAB-RIINVEST L.L.C.,* Resolution on inadmissibility of 3 February 2010, paragraph 14).

Article 47
(Individual Requests)

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/ her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/ she has exhausted all the legal remedies provided by the law."

Article 48
(Accuracy of the Referral)

"In his/ her referral, the claimant should accurately clarify what rights and freedoms he/ she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
(Deadlines)

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

79. As to the fulfilment of these criteria, the Court finds that the Applicant is an authorized party, who disputes an act of a public authority, namely item II of the enacting clause of the Judgment [Rev. no. 257/2019], of 2 June 2020, of the Supreme Court. With regard to item I of the enacting clause of the above Judgment of the Supreme Court, the Court recalls that the latter had remanded for retrial the case to the court of first instance, the Basic Court, respectively. However, regarding to item II of the enacting clause of this Judgment, which the Applicant challenges, the Court notes that this Judgment in this item is final, and consequently finds that the Applicant has exhausted all the remedies established by law.

80. The Applicant has also clarified the fundamental rights and freedoms that he alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the referral in accordance with the time limits set out in Article 49 of the Law.

81. The Court finds that the Applicant's referral also meets the admissibility criteria set out by paragraph (1) of rule 39 of the Rules of Procedure. Furthermore, and finally, the Court considers that this referral is not manifestly ill founded as it is established by paragraph (2) of Rule 39 of the Rules of Procedure and consequently, it should be declared admissible and its merits examined.

Merits of the Referral

82. The Court first recalls that the circumstances of the specific case are related to the Notice of the Applicant, of 24 March 2009, for the termination of the employment contract of B.K. Consequently, on 24 April 2009, B.K. filed a claim with the Municipal Court in Prishtina, by which he requested the annulment of the Notice, of 24 March 2009, and requested to be reinstated to his previous workplace. At the same time, criminal proceedings were also under way against B.K., which ultimately by Judgment [PA.nr. 93/2010], of 21 November 2013, of the Basic Court in Gjakova, found that the criminal offense for which B.K. was charged had reached the absolute statute of limitation and consequently rejected the charge brought against him. Regarding the claim of B.K. made in the context of the contentious procedure, on 29 August 2014, the Basic Court by the Judgment [C.nr. 315/14] had: (i) approved as grounded the claim of B.K.; (ii) had annulled as unlawful the Notice of 24 March 2009 of the Applicant of termination of the employment contract; and (iii) had obliged the Applicant to reinstate B.K. to the previous workplace by compensating the wages for the period 24 March 2009 to 30 November 2011 in the amount of 24,171.71 euros. The Basic Court in its Judgment found that the Applicant had failed to prove that it had conducted a disciplinary proceeding against B.K. within the legal time limit preceded by Article 67 of the ERLLR and had also failed to prove the contrary of B.K.'s assertions that the loan issued in the name of A.B. has been approved by the Branch manager in Prizren. As a result of this assessment, the Basic Court found that the Notice of 24 March 2009 of the Applicant is contrary to Article 11 of the Essential Labour Law. As a result of the appeal filed by the Applicant before the Court of Appeals, the latter by Judgment [Ac.nr.6/15], of 23 April 2019: I. Rejected as ungrounded the Applicant's appeal pertaining to: (i) the Notice of 24 March 2009; and (ii) the obligation to reinstate B.K. to his previous workplace, and upheld the Judgment [C. no. 315/14] of 29 August 2014, of the Basic Court. Whereas II. It partially approved as grounded the Applicant's appeal pertaining to: (i) the compensation of salaries to B.K. for the period 21 April 2008 to 21 June 2015; (ii) and procedural costs, and in relation to this, it quashed the above-mentioned Judgment of the Basic Court by remanding the case to the Basic Court for retrial. The Court of Appeals found that the Notice of 24 March 2009 of the Applicant: (i) is unlawful because the same was taken in contravention of the provisions of the Employee Manual V1.0 of the Applicant on Labour Policy, Article 67, paragraph 1 of the ERLLR and Article 10, paragraph 1 and Article 11 of the Essential Labour Law; and (ii) in the case of B.K., the Applicant has not conducted a disciplinary proceeding according to the relevant legal provisions in force, respectively has not complied with the time limit set by Article 67,

paragraph 1 of the ERLLR for the initiation and completion of investigations, in case of initiation and completion of the disciplinary proceeding, has not given timely notice of the alleged violation and has not been given the possibility to declare the alleged violation in writing. Applicant, against the Judgment [Ac.nr.6/2015] of the Court of Appeals, namely against item I of the enacting clause of this Judgment, submitted a revision to the Supreme Court, alleging, among other things, the erroneous application of substantive law by the Basic Court and that of the Court of Appeals. In this context, the Applicant specified that the applicable law pertaining to the termination of the employment contract of B.K. was the Essential Labour Law. On 2 June 2020, the Supreme Court, by the Judgment [Rev. no.257/2019]: I. Partially approved as grounded the revision of the Applicant regarding the obligation for the Applicant to reinstate B.K. to his previous workplace, and consequently quashed the Judgment of the Court of Appeals and remanded the case to the Basic Court for retrial; and II. It rejected as ungrounded the Applicant's revision regarding the annulment of the finding by the Court of Appeals of unlawful Notice of 24 March 2009 on the termination of the employment contract. Regarding the second item of the enacting clause of its Judgment, the Supreme Court had found that: (i) the Notice of 24 March 2009 of the Applicant did not respect the party's provided time for hearing and the alleged violation of the B.K. did not correspond to the disciplinary sanction; and (ii) that no disciplinary proceeding was conducted against B.K to substantiate his eventual responsibility and no adequate measures were imposed for the violation provided by the internal act.

83. The Applicant challenges the findings of the regular courts, and specifically in relation to item II of the enacting clause of the Judgment [E.Rev.no.257/2019] of 2 June 2020, of the Supreme Court, alleging that the latter was rendered in violation of his rights guaranteed by:

I. Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, due to: (i) the lack of reasoning of the court decision; (ii) the violation of the principle of legal certainty, because according to the Applicant, the Supreme Court in rendering this Judgment had acted in violation of its case law; and

II. Article 24 of the Constitution because of the violation of his right to equal treatment, according to him, as a result of "discriminatory differences of treatment in entirely the same cases".

84. Consequently, the Court will begin by examining the Applicant's allegations of violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR due to the lack of consistency in the case law of the Supreme Court and will consider this based on the case law of the ECtHR, in harmony with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

85. That being said, regarding the allegation of the Applicant on violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR due to the lack of consistency in the case law of the Supreme Court, the Court will first elaborate the general principles, and then apply the same in the circumstances of the specific case.

I. Regarding the allegations of the Applicant on violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR as a result of the lack of consistency in the case law of the Supreme Court

A. General principles as developed by the case law of the ECtHR and the Court

86. Regarding the principle of legal certainty as a result of the lack of consistency in the case law of the Supreme Court, the ECtHR in its practice: (i) has developed the basic principles; and (ii) has established the criteria whether an alleged divergence of judicial decisions constitutes a violation of Article 6 of the ECHR. The ECtHR has applied the criteria established by the ECtHR, when examining the allegations of the applicants for violation of the principle of legal certainty, as a result of the contrary decisions also in its case law (see, among others, the aforementioned cases of the Court KI35/18 and KI87/18, where the Court found a violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR, as a result of the divergence in the case law of the Supreme Court, as well as the cases KI74/19 with *Suva* Rechtsabteilung, Judgment, of 28 April 2021, KI119/19 with *Suva* Rechtsabteilung, Judgment, of 28 April 2021 and KI09/20 with *Suva* Rechtsabteilung, Judgment, of 28 April 2021, judgements in which the Court in dealing with the merits of the claims for divergence in the case law of the Supreme Court found that there was no violation of Article 31 of the ECHR, in conjunction to Article 6 of the Constitution).

87. In addition, the Court notes that the ECtHR's case law has resulted in basic principles that characterize the analysis regarding the consistency of case law. In this context, the Court notes that the ECtHR in its *Albu and Others v. Romania* case (Judgment of 10 May 2012, paragraph 34) had affirmed all the principles established through its case law, re-emphasizing and adding as follows:

(i) It is not the function of the [ECtHR] Court to deal with matters of fact and law allegedly made by the local courts unless they may have infringed the rights and freedoms protected by the ECHR *(referring to the case Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28). *Similarly, it is not the function of the [ECtHR] Court except in cases of apparent arbitrariness to compare different decisions of the local courts, even if they are taken in distinctly similar procedures, because the independence of these courts must be respected* (referring to the case *Ādamsons v Latvia,* Judgment of 24 June 2008, paragraph 118);

(ii) The possibility of adversarial decisions is an indivisible feature of any judicial system based on the network of basic and appellate courts, with authorizations within their territorial jurisdiction, and an avoidance may also occur within the same court, which avoidance cannot be considered contrary in itself (referring to the *Santos Pinto v. Portugal case,* Judgment of 20 May 2008);

(iii) *The criteria guiding the Court's assessment of the conditions [ECtHR] in which the contradictory decisions of the last instance of the local courts are in violation of the requirement for fair trial embodied in Article 6, paragraph 1 of the [ECHR] Convention consist in determining whether there are "deep and long-term differences in court practice", whether the local law provides for a mechanism to overcome these contradictions,*

*and whether this mechanism is used, and if so, to what effect (*referring to the *Iordan Iordanov and Others v Bulgaria,* Judgment of 2 July 2009, paragraphs 49-50; Beian *case (no. 1) Ştefan v Romania,* Judgment of 6 December 2007, paragraphs 34-40; Ştefan *and Ştef v Romania*, Judgment of 27 January 2009; *Tudor and Tudor v Romania,* Judgment of 24 March 2009, paragraph 31*; and Ştefănică and others v Romania*, Judgment of 2 November 2010, paragraph 36*);*

(iv) The ECtHR's assessment is always based on the principle of legal certainty which is inseparable in all articles of the [ECHR] Convention and constitutes one of the essential components of the rule of law *(Beian case (no.1),* cited above*, paragraph 39, Iordan and Iordanov and others, cited above,* paragraph 47*, Ştefănică and others v Romania,* cited above*,* paragraph 31);

(v) *The principle of legal certainty guarantees, among other things, a certain certainty in legal situations and contributes to public trust in the courts. The continued issuance of counter decisions, on the other hand, could create a situation of legal uncertainty, which could undermine public confidence in the judicial system, in as much as such confidence is clearly one of the essential components of a rule of law-based state (referring to the cases Paduraru v Romania, paragraph 98, Vinčić and Others v Serbia,* Judgment of 1 December 2009, paragraph 56*;* Ştefănică *and Others v Romania,* cited above, paragraph 38);

(vi) However, requests for legal certainty and protection of the legitimate belief of the public do not represent an acquired right to consistency of court practice *(*referring to Unedić *v. France*, Judgment of 18 December 2008, *paragraph 74)*. According to the ECtHR: *"The development of case law is not in itself contrary to the proper administration of justice since failure to ensure a dynamic and developmental approach would risk obstruction (Atanasovski v. The former Yugoslav Republic of Macedonia,* Judgment of 24 June 2010*)"*.

88. Following these principles*, the Court,* based on the case law of the ECtHR, has also emphasized that there cannot be considered to be any divergence in the case law when the factual states of the case are objectively different. Equally, the treatment of the two disputes differently cannot be considered to give rise to a divergent case law when this is justified by a change in the factual situations in question (see, in this context, the Court's case, KI35/18, cited above, paragraph 76; and see case KI123/19, Applicant *Suva Rechtsabteilung*, Judgment of 13 May 2020, paragraph 52).

89. The ECtHR, in its *Albu v. Romania* case, had also stressed that the continued issuance of adversarial decisions, in particular when the controversy raised or alleged involved *"a massive number of submitters, may in certain circumstances create a situation of legal uncertainty, which may reduce public confidence in the judicial system, which is clearly one of the essential components of a State based on rule of law"*. According to the ECtHR*: "Differences of approach can arise between courts as part of the process of interpretation of legal provisions by adapting them to the material situation. These divergences can be tolerated when the domestic legal system is able to accommodate them (see Nejdet Şahin and Perihan Şahin,* cited above, paragraphs 86-87). *While, adapting divergences in isolated cases (see Karakaya case, cited above) may in practice*

prove less demanding, however, when the divergence involves court cases affecting a large part of the public, their confidence in the judicial system, in particular, may be undermined. This is why the system must put in place effective mechanisms that must be fully and promptly implemented through the highest courts responsible to guarantee the uniformity of case law, in order to correct at the right moment any discrepancies in the decisions of the various local courts and thus preserve the public's trust in the judicial system (paragraph 38 of the Judgment in the case *Albu v. Romania*)".

90. The Court recalls that the ECtHR, in developing its basic principles through its case law, has established three basic criteria for determining whether a divergence of judicial decisions alleged constitutes a violation of Article 6 of the ECHR, which criteria are also affirmed in the Court's case law (see specifically the above-mentioned cases KI35/18 and KI87/18). The criteria defined by the ECtHR are the following:

(i) whether there are "*deep and long-term differences*" in case law;
(ii) whether local law establishes mechanisms capable of resolving such divergences; and
(iii) whether those mechanisms have been implemented and to what effect (in this context, see ECtHR cases, *Beian v. Romania* (no.1), Judgment of 6 December 2007, paragraphs 37 -39; Greco-Catholic Parish Lupeni *and Others v Romania*, Judgment of 29 November 2016, paragraphs 116 - 135; *Iordan Iordanov and Others v Bulgaria,* Judgment of 2 July 2009, paragraphs 49-50; Nejdet Şahin *and Perihan Şahin v Turkey,* cited above, paragraph 53; and see Court case Kl29/17, *Adem* Zhegrova Resolution on inadmissibility of 5 September 2017, paragraph 51; and see also Court cases cited above, KI42/17, *Kushtrim Ibraj*, paragraph 39; KI87/18 Applicant *IF Skadiforsikring*, paragraph 67, KI35/18 Applicant *Bayerische Versicherungsverbrand*, paragraph 70).

91. The Court further notes that the concept of "*deep and long-term differences*" was elaborated by the ECtHR, inter alia in the case of the Greek-Catholic Lupeni Parish *and others v. Romania*, the case in which the ECtHR had found a violation of Article 6 of the ECHR due to a violation of the principle of legal certainty (see, in the case of the ECtHR, the Greek-Catholic Lupeni Parish *and others v. Romania,* cited above, paragraph 135). Likewise, the ECtHR in its cases *Iordan and Iordanov v Bulgaria (*Judgment of 2 July 2009) found a violation of Article 6 of the ECHR as a result of "deep and long-term differences" in the case law of a single court, namely the Supreme Court and by not using the mechanism to ensure the harmonisation and consistency of case law (see, in this context, also the other cases of the ECtHR where the latter found a violation of Article 6 of the ECHR, as a result of the violation of the principle of legal certainty due to the contradictory case laws of the supreme courts, Beian *v. Romania (no. 1),* cited above; *Hayati Celebi and Others v Turkey*, Judgment of 9 February 2016; *Ferreira Santos Pardal v Portugal,* Judgment of 30 July 2015).

92. The Court also points out in this regard that the ECtHR has not found a violation of Article 6 of the ECHR in cases of divergent case law even if the same has affected a large number of people in relation to the same case over a short period of time before the respective contradictions were resolved by the higher courts,

thus enabling state mechanisms to ensure proper consistency (see, inter alia, the case of the ECtHR, *Albu and Others v Romania*, cited above, paragraphs 42, 43; see also the Court case KI35/18, cited above, paragraph 73).

93. The latter is related to the second and third criteria, namely the existence of a mechanism capable of resolving discrepancies in case law and whether this mechanism has been used and to what effect. In this regard, the ECtHR first found that the lack of such a mechanism constitutes a violation of the right to a fair trial guaranteed by Article 6 of the ECHR (see, in this context, *Tudor v Romania*, cited above, paragraphs 30-32; *and Ştefănică and others v Romania,* cited above, paragraphs 37-38; and Nejdet *Sahin and Perihan Sahin v Turkey,* cited above, paragraph 54). In this regard, the ECtHR has reiterated on many occasions the importance of establishing mechanisms to ensure consistency and uniformity of court practice. It has also stated that it is the responsibility of states to organise their legal systems in such a way as to avoid divergences in case law (see ECtHR cases *Vrioni and Others v. Albania,* Judgment of 24 March 2009, paragraph 58; Mullai *and Others v. Albania,* Judgment of 23 March 2010, paragraph 86; and Nejdet *Sahin and Perihan Sahin v. Turkey,* cited above, paragraph 55). The ECtHR has also stressed that the role of a supreme court is precisely to resolve such contradictions (in this context, see ECtHR case *Beian v. Romania (no. 1)*, cited above, paragraph 37; and the *Greek-Catholic Parish (Lupeni and Others v. Romania,* cited above, paragraph 123). This is because, if the adversarial practice takes place within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thus undermining the principle of legal certainty and weakening public confidence in the judicial system (see, in this context, the case of the ECtHR *Beian (no. 1),* cited above, paragraph 39; and the *Greek-Catholic Parish (Lupeni and Others v. Romania,* cited above, paragraph 123). These principles established in the ECtHR's case law have also been accepted through the Court's own practice in its aforementioned cases KI35/18 and KI87/18 (see paragraph 172 of the Judgment in case KI35/18).

B. Application of these principles in the circumstances of the present case

94. Next, the Court will apply the principles outlined above in the circumstances of the present case, applying the criteria on the basis of which the Court and the ECtHR deal with the issues of divergence pertaining to the court practice, starting with the assessment of whether in the circumstances of the present case, (i) the alleged contradictions in the court practice are "*deep and long-term*"; and if this is the case, (ii) there is a mechanism to resolve the relevant divergence; and (iii) the assessment of whether these mechanisms have been applied and to what effect in the circumstances of the present case.

95. Based on the Court's case law, in particular in case KI35/18, the Court, when applying the above criteria in the case of the Applicant, will take into account the basic principles relating to the consistency of case law and elaborated above, consequently: (i) the importance of legal certainty; (ii) the fact that the principle of legal certainty and the importance of consistency of case law do not guarantee a fairness in this consistency in case law; (iii) that, in fact, the divergences in case law do not necessarily result in a violation of the Constitution and the ECHR; and

(iv) that the ECtHR finds such violations, in case of manifested arbitrariness (see paragraph 75 of the Judgment in the aforementioned Court case KI35/18).

96. In this context and based on the above, the Court reiterates that it is not its function to compare different decisions of regular courts, even if they are taken in significantly similar procedures. It must respect the independence of the regular courts.

97. In applying the principles elaborated above and assessing the three above criteria, the Court: (a) will recall the circumstances of the termination of the employment relationship by the Applicant and the law applied in his case; (b) will present the summary of the six (6) Judgments submitted by the Applicant at his request to the Court on 17 September 2020; (c) will refer to the Supreme Court's response of 10 October 2021.

(a) Circumstances of termination of the employment relationship by the Applicant and the law applied in his case

98. Subsequently, the Court recalls that the Applicant specifies that the employment dispute started in 2009, and according to him the termination of the contract is based on the Essential Labour Law [UNMIK Regulation no. 2001/27], and which law according to him *"through Article 11 regulates in detail the termination of the employment contract and the content of the notice on termination of the employment contract"*. Consequently, the Applicant specifies that the regular courts, and specifically the Supreme Court erroneously applied the provisions of the Law on Labour Relationship of the SAPK [no. 12/89] and ERLLR, of 28 September 1989 on the grounds that according to him the applicable law in his case was only the Essential Labour Law.

99. In this context, and in particular with the applicable laws, the Court refers to UNMIK Regulation no. 1999/24 of 12 December 1999 on the Law in force in Kosovo, which by its Section 1 established that*: "The law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989"*.

100. In the circumstances of the present case, Article 67 of the ERLLR of 28 September 1989 and the provisions of the Essential Labour Law [UNMIK Regulation no. 2001/27]. Whereas the Supreme Court by its Judgment had found that: (i) The Notice of 24 March 2009 of the Applicant did not respect the party's provided time for hearing and the alleged violation of the B.K. did not correspond to the disciplinary sanction; and (ii) that no disciplinary proceeding was conducted against B.K. to substantiate his eventual responsibility and no adequate measures for the violation provided by the internal act were imposed. With regard to the latter, the Supreme Court had gone one step further and specified that the Applicant did not comply with the laws and its internal act to terminate the employment relationship, namely Article 5.3 of the Applicant's Line Manual enumerating the types of violations that serve as a basis for immediate dismissal, and according to the Supreme Court, the Notice of claimant does not enter into any of the types of violations set out in this provision. In the context of this reasoning, the Supreme Court applied Article 111, paragraph 2 of the Law on

Labour Relationship, which stipulates that: "*The worker only responds to violations normed by law or internal act*".

101. In this respect, the Court notes that the Essential Labour Law was promulgated by UNMIK Regulation no. 2001/27, on 8 October 2001. Section 27 of this Regulation provides that: *"The present regulation shall supersede any provision in the applicable law which is inconsistent with it"*.

102. In the circumstances of the specific case, the Court recalls that the Applicant claims that in his case the regular courts had to apply the Essential Labour Law [UNMIK Regulation no. 2001/27] which according to him was applicable in the circumstances of this case. In support of this claim, the Applicant specifies that the Supreme Court has applied the Essential Labour Law in cases related to circumstances similar to those in his case. In support of his arguments, he refers to and has delivered six (6) Supreme Court Judgments, namely the Judgment [Rev. Nr. 104/20] of 25 February 2021; Judgment [Rev.no. 60/2020] of 6 April 2020; Judgment [Rev. Nr. 1/2019] of 26 February 2019; Judgment [Rev. Nr. 52/2019] of 11 March 2019; Judgment [Rev.no. 212/2019] of 11 July 2019; and Judgment [Rev.no. 377/2018] of 20 November 2018.

103. Based on the above, the Court observes that the Applicant alleges violation of legal certainty, as a result of the divergence, only in the context of the Supreme Court's case law.

104. Before analysing whether: (i) The challenged judgment of the Supreme Court, namely the Judgment [E. Rev. no.257/2019] of 2 June 2020 was issued by the Supreme Court contrary to its case law; and (ii) if the factual and legal circumstances are similar to the cases, which the Applicant alleges to have been settled differently by the regular courts, the Court will in the following and initially present the relevant parts of the aforementioned Judgments, namely those related to the circumstances of the termination of the employment contract by the employer, the positions of the regular courts and specifically the finding of the Supreme Court in relation to the applicable law in the circumstances of these cases.

(b) Summary of the six (6) Judgments of the Supreme Court

1. Judgment [Rev. no. 104/20], of 25 February 2021.

105. The circumstances of this case are related to the Raiffeisen Bank Notice of 21 April 2008 for the termination of the employment contract of S.R. as a cashier at the Prizren branch of this institution due to serious breaches of duties, namely he had carried out an unauthorized banking transaction. Consequently, on 5 May 2008, S.R. filed a claim with the Municipal Court in Prizren, seeking the annulment of the Notice of 21 April 2008 and requesting the reinstatement to his previous workplace. At the same time, criminal proceedings had also been instituted against the S.R., which ultimately by the Judgment [PA.II.nr.2/2014], of 21 March 2014 of the Supreme Court found that the offense for which S.R. was charged had reached the absolute statute of limitation and consequently rejected the charge brought against him. The Basic Court in Prizren by the Judgment [C.nr.458/14] of 7 December 2015 had approved his claim and had obliged

Raiffeisen Bank to reinstate S.R. to his previous workplace, also granting him compensation for lost wages. The Basic Court had argued that the Raiffeisen Bank Notice was unlawful, because the latter had not conducted a disciplinary proceeding as defined by Articles 111, 112 and 113 of the Law on Labour Relationship of the SAPK no. 12/89. As a result of the complaint filed by Raiffeisen Bank, in the capacity of Respondent, the Court of Appeals by the Judgment [*Ac. Nr. 1280/16]* of 4 December 2019 rejected the appeal and upheld in its entirety the position of the Basic Court in Prizren. Consequently, Raiffeisen Bank, in its capacity as employer, was obliged to reinstate the employee to his previous workplace. Raiffeisen Bank, in its capacity as the respondent, filed a revision with the Supreme Court against the above-mentioned Judgments of the Basic Court and the Court of Appeals. The Supreme Court by this Judgment had approved as grounded the revision of the Respondent Raiffeisen Bank by amending in its entirety the Judgment of the Court of Appeals as well as the Judgment of the Basic Court in Prizren and at the same time rejected in its entirety the claim of the employee, in the capacity of claimant. The Supreme Court in the present case with reference to the provisions of the Essential Labour Law [UNMIK Regulation no. 2001/27] found that: "*The actions of an employee are qualified in the group of actions that constitute serious violations of the work duties for which the measure of termination of the employment relationship is equivalent to the nature of the violation and consequently also to the Personnel Action Line Manual, specifically the provisions cited in the notice on termination of the employment contract, setting out the responsibilities of employees and violations." In this context, it is evident that the actions of [S.R.] on the occasion of the granting of the financial means of the company/exchange "Currency" without registration in the respective banking system represent actions contrary to the responsibilities of the claimant, which should have been prevented precisely by the claimant, and not undertaken by him, therefore, it is right that [Raiffeisen Bank] alleges that [S.R.] misused the rights and duties from the employment relationship even because the claimant in an unauthorized manner has exploited the property/assets of the respondent"*. The Supreme Court had not accepted the finding and position of the lower instance courts that the notice of termination of the employment contract was illegal, arguing that Raiffeisen Bank had received a statement from the claimant in the internal audit procedure, and consequently it was considered that S.R. was heard in this procedure and that the notice of termination of the contract was made in accordance with paragraph 5 of Article 11 of the Essential Labour Law.

106. In regard to this Judgment, the Court notes that the factual and legal circumstances of this case are identical to the factual and legal circumstances of the case KI133/20 registered with the Court. S.R. and F.S. [in case KI133/20] had been dismissed from the employment relationship by the Applicant by Notices of 21 April 2008 due to serious breaches of work duties, on the grounds that, as a result of the internal audit finding, the latter had carried out an unauthorized banking transaction. Whereas in the case KI133/20 the Supreme Court by Judgment [Rev.no.12/2020] of 19 February 2020 had upheld the position of the Basic Court and the Court of Appeals that the notice of the Applicant was unlawful because in the case of F.S. the Applicant had not conducted a disciplinary proceeding as established by the provisions of the Law on Labour Relationship of SAPK no.12/89, in this aforementioned case, the Supreme Court by Judgment [Rev. no. 104/20] of 25 February 2021 had approved the revision of Raiffeisen

Bank and annulled the Judgment of the Court of Appeals finding that the Notice of 21 April 2008 complies with paragraph 5 of Article 11 of the Essential Labour Law [UNMIK Regulation no. 2001/27].

2. Judgment [Rev. no. 60/2020], of 6 April 2020, of the Supreme Court

107. The circumstances of the present case are related to the termination of a contract between the Kosovo Energy Corporation (hereinafter: KEK), in the capacity of employer and its employee, because from the report of an internal audit carried out by KEK it resulted that the employee had an unsealed meter, opened in an unauthorized manner and from inside was placed a film tape which made it impossible to read the electricity spent. The employer had issued the notice of termination of the indefinite employment contract after the meeting held with the employee and had based its termination on Article 11.3 (b) and (d) of UNMIK Regulation no. 2001/27 on the Essential Labour Law, respectively "Termination due to gross misconduct". As a result of the employee's claim for annulment of the Employer's Notice, the Basic Court in Mitrovica, Skenderaj Branch had approved the claim as grounded finding that the Employer [KEK] incorrectly applied the Essential Labour Law Regulation 2001/27 in Kosovo because in this case the applicable law is the Law on Labour Relationship, of 1989. The Court of Appeals approved the employer's complaint and found that the position of the court of first instance is not right and lawful since the court of first instance has erroneously applied the substantive law. Consequently, the Supreme Court had rejected as unfounded the revision of the employee of the KEK filed against the Judgment of the Court of Appeals, finding that*: "The Court of second instance [Court of Appeals] rightly concluded that the District Manager's decision of 3.9.2010 is legally lawful because the claimant committed a serious breach of work duties, serious misconduct, [...] theft, destruction, unauthorized damage to the employer's property, 2. Behaviour of an excessively serious nature after which it would be unreasonable to expect the continuation of the employment relationship and further provided by Article 11.3 (b) and (d) of Regulation no. 2011/27 on the Essential Labour Law, and the theft of electricity from the provisions of the Rules of Procedure for [KEK] Districts "and "* [...] *the court of first instance [the Basic Court] erroneously applied the Law on Labour Relationship no. 12/1989, this is due to the fact that at the time of the termination of the claimant's employment contract, the UNMIK Regulation 2001/27 on the Essential Labour Law in Kosovo was in force ".*

3. Judgment [Rev. no. 1/2019] of 26 February 2019, of the Supreme Court

108. The circumstances of the present case are related to the termination of a contract between (KEK), in the capacity of employer and its employee, because from the internal audit report carried out by KEK it resulted that the employee had made a temporary change of customer names without established legal procedures, and on the same day these changes were returned to the previous state. The employer had issued the notice of termination of the indefinite employment contract after the meeting held with the employee and had based the termination of the employment contract on a serious violation of the job duties pursuant to Article 11.2, Article 11.3 (d) of UNMIK Regulation no. 2001/27 on Essential Labour Law. As a result of the employee's claim for annulment of the employer's Notice, the Basic Court in Ferizaj had approved the claim as grounded finding that the

employment contract was terminated contrary to Article 70, paragraph 4 of Law no. 03/L-212 on Labour. The Court of Appeals approved as grounded the KEK appeal because the court of first instance erroneously applied the substantive law. The Supreme Court rejected as unfounded the claimant's revision, filed against the judgment of the Court of Appeals. In its position, the Supreme Court argued as follows: "[..] *the respondent has complied with the established legal procedures in case of termination of the claimant's employment contract established by Regulation no. 2001/27 on Essential Labour Law in Kosovo* [..]. *The actions of the claimant are as cases of misconduct provided by Article* 11.3 *(d) of Regulation No. 2001127 on the Essential Labour Law in Kosovo, conduct of an extremely serious nature after which it would be unreasonable to expect a continuation of the claimant's employment relationship with him. The termination of the employment contract of the claimant was made on the basis of the procedures established by Regulation no. 2001/27 on Essential Labour Law in Kosovo, which was in force at the time. [...] The acquittal of the claimant from the charge due to the absolute statute of limitation of the criminal offense related to this case has no impact on the fact that there are two different procedures in question and that the criminal procedure has no impact on the internal disciplinary proceeding of the [KEK]".*

4. Judgment [Rev. no. 52/2019] of 11 March 2019, of the Supreme Court

109. The circumstances of the present case related to the termination of a contract between KEK, in the capacity of employer and its employee due to the report of an internal audit carried out by KEK resulting in that the employee, after internal audit by KEK, had been found with an unsealed meter, and a two-way power supply was found. The employer had issued a notice of termination of the indefinite employment contract after the meeting held with the employee, in the presence of the union representative, and had based its termination due to the failure to fulfil satisfactorily the job duties on the basis of Article 11.1 paragraph (b) of Regulation no. *2001/27* on Essential Labour Law in Kosovo. As a result of the employee's claim for annulment of the Employer's Notice, the Basic Court in Prizren had approved the claim as grounded by finding that the Employer [KEK] has incorrectly applied the Essential Labour Law Regulation 2001/27 in Kosovo, because in this case the applicable law is the Law on Labour Relationship of SAPK, of 1989. The Court of Appeals had partially approved the appeal of KEK, and upheld the Judgment of the first instance regarding the annulment of the unlawful notice and the decision to terminate the employment relationship. The Supreme Court approved as grounded the revision of [KEK], amending the Judgment of the Court of Appeals as well as rejecting in its entirety the claim of the employee, in the capacity of claimant, and in its Judgment argued as follows: *"In these cases the Court of first instance erroneously applied the Law on Labour Relationship no. 12/1989, this is due to the fact that at the time of termination of the claimant's employment contract, UNMIK Regulation 2001/27 on Essential Labour Law in Kosovo was in force".*

5. Judgment [Rev. no. 212/2019] of 11 July 2019, of the Supreme Court

110. The circumstances of the present case are related to the termination of an indefinite contract between the KEK, in the capacity of employer and its employee, because it was proven that the employee had used the electricity

without right so that the energy spent was not recorded in the meter according to the KEK norms. The KEK manager after interviewing the employee had submitted the notice for termination of the employment contract, due to breaches of work duties which were qualified as serious misconduct, theft, destruction, damage or unauthorised exploitation of the employer's property as defined in Article 11.3 (b) and (d) *of UNMIK Regulation* 2001/27 on Essential Labour Law in Kosovo and Article 8.14 (a) of the Rules of Procedure for Districts in the KEK. The Claimant had also filed an objection to the Director of the Network Division in KEK. The Basic Court in Ferizaj had concluded that the termination of the employment contract between the Claimant and KEK, in the capacity of the Respondent, was illegal since the Respondent has not conducted any disciplinary proceedings against its employee. The Court of Appeals in the appeal procedure had accepted as grounded the appeal of the KEK in the capacity of the respondent by changing the Judgment of the first instance so that the claimant's claim was rejected as unfounded since the actions of the respondent pertaining to the termination of the claimant's employment relationship were lawful actions pursuant to Article 11 par. 1 point (c) of UNMIK Regulation no. 2001/27 on Essential Labour Law in Kosovo and related to Article 11 par. 3 point (b) which refers to a serious breach of work duties due to theft, destruction, damage or unauthorised exploitation of the employer's property. The Supreme Court rejected as unfounded the revision of the claimant [employee], filed against the judgment of the Court of Appeals. The Supreme Court argued that: *"[...] the respondent has complied with the procedures established by UNMIK Regulation no.2001/27 on the Essential Labour Law in Kosovo, so that based on Article* 11.5 *for the serious violations defined in Article* 11.3 *of the same Law, the claimant was notified by notice* [...] *of its intention to terminate the employment contract to the claimant based on point (b)[...]".*

6. Judgment [Rev. no. 377/2018] of 20 November 2018, of the Supreme Court

111. By this judgment, the Supreme Court rejected as unfounded the revision of the claimant [the employee] filed against the judgment of the Court of Appeals, with which the judgment of the Basic Court in Prishtina was amended, according to which the termination of the employment contract between the employee and the respondent [the KEK employer] was considered illegal. KEK had notified its former employee about the termination of the employment contract because the latter had changed the customer's electrical meter without authorisation and contrary to the procedures for changing meters. The Basic Court in Prishtina had approved the claim of the former employee arguing that the employer KEK had imposed a severe measure in so far as the employee's actions concerned conduct contrary to professional and ethical standards in the workplace. The Court of Appeals approved the KEK's appeal and found that the Basic Court had erroneously applied substantive law. The Supreme Court rejected as unfounded the revision of the claimant [employee], and argued that: *"[...] based on Article 11.5 of* the *Essential Labour Law Regulation 2001/27 which entered into force on 8 October 2001, it is established that the employment contract is terminated by the employer in serious cases of misconduct* [...]. *The employer shall notify the employee in writing of his intention to terminate the employment contract, highlighting in the notice the reasons for termination of the employment contract* [...]. *The respondent in this case has complied with the provisions of Regulation no. 2001/27 on Essential Labour Law in Kosovo [...].”*

(c) Response of the Supreme Court, of October 10, 2021

112. On 7 October 2021, the Court addressed the Supreme Court with the following specific questions:

(i) As far as possible, please inform the Court, in accordance with the Supreme Court's practice, in which cases the provisions of the Law on Labour Relationship, of SAPK no. 12/89 or the Basic Law on Labour [UNMIK Regulation 2001/27] and

(ii) Please clarify to us what is the relevant case law related to the interpretation and application of the Law on Labour Relationship of 1989 and the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] in the case of termination of the employment relationship through the Employer's Notice, as a result of finding violations of employment duties by the Employee. More specifically, please explain whether the Supreme Court has a unified case law in these cases or the issue of interpretation and application of the provisions of the Law on Labour Relationship, of SAPK no. 12/89 or the Basic Law on Labour [UNMIK Regulation 2001/27] is reviewed on a case-by-case basis. If the Supreme Court has a unified and consistent practice regarding the above-mentioned cases, please also explain to us from what period exactly the unification of the Supreme Court's case law has started.

113. The Supreme Court replied to the above questions as follows:

> *"We first inform you that in the case of interpretation and application of the provisions of the two aforementioned Laws in the case of termination of the employment relationship through the employer's notice, as a result of the finding of violations of employment duties by employees, the Supreme Court of Kosovo does not have a unified case law, but the interpretation of these two Laws, in the aforementioned cases, is made for each particular case, just from case to case. However, it should be clarified that within the Supreme Court panels, in civil matters, there is a consensus as follows: the Law on Labour Relationship, of SAPK no. 12/89, and the Essential Labour Law (UNMIK Regulation 2001/27) has been in force until the entry into force of the Labour Law of the Republic of Kosovo on 17.12.2010 promulgated in the Official Gazette no. 90 on 1.12.2010, when in accordance with Article 99 par. it is provided that "With the entry into force of this Law, the UNMIK Regulation no. 2001/27 on Essential Labour Law in Kosovo (UNMIK Regulation no. 2001/27), the Law on the Labour Relationship of SAP Kosovo of 1989 (it is about this Law promulgated in the Official Gazette of the SAPK no. 12/89) and the Labour Law of Yugoslavia of 1977 with the corresponding amendments.*
>
> *It appears from this provision that the Law on Labour Relationship of the SAP of Kosovo of 1989 was in force and applied until the issuance of the New Labour Law of 2010, however, in its entirety it has not had the possibility to be implemented, because with Article 27 of the Essential Labour Law in Kosovo (UNMIK Regulation no. 2001/27) it is envisaged that this Regulation repeals any provision of the Law in force that is inconsistent with it. In view of the fact that this Essential Labour Law of*

2001 does not provide for any disciplinary proceeding for serious breaches of work duties by the employee, the Supreme Court has considered that the finding of these serious breaches, the performance by the employee, and the responsibility for their performance, should be proven in a disciplinary proceeding provided by the aforementioned Law on Labour Relationship, since the Essential Labour Law of 2001 does not provide for any disciplinary proceeding, nor the manner of finding these disciplinary breaches, nor the authority of the employer who imposes disciplinary measures for various disciplinary breaches. Now, with the Labour Law of 2010, we are completely clear that no disciplinary proceeding is provided, but it is left to the employers to issue regulations for disciplinary proceeding with their internal acts."

(d) Assessment of the three criteria set out in the case law of the ECtHR and the Court

114. As noted above, however, the Court will proceed with the review and assessment of the claim for lack of consistency in the Supreme Court's case law by taking into account the six (6) aforementioned Supreme Court Judgments, delivered at its request to the Court on 27 April 2021. Within the meaning of this allegation of the Applicant, the Court will proceed with the elaboration of the three above criteria, starting with the review and assessment: (i) whether there are deep and long-term differences.

(i) If there are deep and long-term differences

115. The court notes that it assesses the consistency of the court practice of the regular courts only in relation to the alleged violations of the Applicant. Consequently, the lack of consistency in case law must have resulted in a violation of the fundamental rights and freedoms of the applicant. In order to ascertain such a violation, and to ascertain that the fundamental rights and freedoms of the Applicant have been violated as a result of "*deep and long-term differences*" in the relevant case law, the factual and legal circumstances of the case of the claimant should coincide with those of the cases, the opposite of which is alleged.

116. In the context of the Supreme Court Judgments referred to and delivered by the Applicant, the Court first recalls that the Applicant has submitted only the copies of the six (6) Supreme Court Judgments, but not the decisions that preceded the latter or any other decision.

117. Next, the Court observes that the circumstances of the above cases in five (5) out of six (6) Supreme Court judgments delivered by the Applicant, were brought between 20 November 2018 and 6 April 2020, related to the termination of the employment relationship by the Public Company KEK. Consequently, the Court notes that in these cases, the Supreme Court had in principle found that in the cases of former employees of this company, the law applicable in connection with the procedure for termination of the employment contract was the Essential Labour Law [UNMIK Regulation 2001/27]. Next, the Court notes that only in the two (2) Judgments of the Supreme Court, respectively the Judgments [Rev. Nr. 60/2020], of 6 April 2020; and [Rev. Nr. 52/2019] of 11 March 2019, the Supreme Court found that the Basic Court had erroneously applied the

substantial law, as a result of the application of the Law on Labour Relationship of 1989. Whereas, in relation to the other three (3) judgments, namely [Rev. no. 1/2019] of 26 February 2019; [Rev. Nr. 212/2019] of 11 July 2019, and [Rev. Nr. 377/2018] of 20 November 2018, the Court notes that in these Judgments it was not mentioned which law was applied by the court of first instance, namely the Basic Court. Furthermore, with regard to the Judgment [Rev. 377/2018] of 20 November 2018, the Court notes that the employer's contract was fixed-term, and consequently the Supreme Court had considered that the issue of continuation of the employment contract is at the discretion of the employer.

118. Finally, with regard to the Judgment [Rev. no. 104/20] of 25 February 2021, delivered by the Applicant with his referral to the Court on 27 April 2021, the Court notes that the factual and legal circumstances of this case are identical to the factual and legal circumstances of the case KI133/20 registered with the Court. The circumstances of these two cases are related to the fact that S.R. and F.S. [in case KI133/20], who by the Applicant's Notices of 21 April 2008 had been terminated from the employment relationship due to serious labour violations, on the grounds that, as a result of the internal audit, the latter had carried out an unauthorized banking transaction. Whereas in case KI133/20, the Supreme Court by the Judgment [Rev.no.12/2020] of 19 February 2020 had upheld the position of the Basic Court and the Court of Appeals that the Notice of the Applicant of 21 April 2008 was unlawful because in the case of F.S. the Applicant had not conducted a disciplinary proceeding as established by the provisions of the Law on Employment Relations of the SAPK no.12/89, in this aforementioned case, the Supreme Court by the Judgment [Rev. no. 104/20] of 25 February 2021 had approved the revision of Raiffeisen Bank and annulled the Judgment of the Court of Appeals finding that the Notice of 21 April 2008 complies with paragraph 5 of Article 11 of the Essential Labour Law [UNMIK Regulation 2001/27]. Consequently, the Court observes that the Supreme Court in the same factual and legal circumstances by its two Judgments issued within one year had applied provisions of two different laws, namely the Labour Relationship Law of 1989 and the Essential Labour Law [UNMIK Regulation 2001/27], finding that in the first case the Notice of the applicant for termination of the employment relationship of F.S. was contrary to the Labour Relationship Law of 1989 and in the second case it had found that the Notice of the applicant for termination of the employment relationship of S.R. was issued in accordance with the provisions of the Essential Labour Law [UNMIK Regulation no. 2001/27].

119. The Court, reverting to the case of the Applicant, recalls the Judgment [Rev. no. 257/2019] of the Supreme Court, of 2 June 2020, by which related to the issue of interpretation and application of the law in the circumstances of the applicant, had pointed out as follows: *"The procedure for assigning disciplinary responsibility refers to the violation that occurred in June 2007, while in the case files it emerged that [the applicant] was aware of the violation on 5 February 2008, the suspension was made on 13 February 2009, while the notice of termination was made on 24 March 2009."* According to the Supreme Court, this action of the Applicant is contrary to Article 67 ERLLR of 1989, which according to its law in accordance with UNMIK Regulation 1999/24 was in force, and that according to this law the establishment of the statute of limitation of disciplinary proceeding is 6 months from the day when it learns of such violation.

120. Consequently, the Supreme Court found that: (i) the Notice of 24 March 2009 of the Applicant did not comply with the party's provided time for hearing and the alleged violation of the B.K. did not correspond to the disciplinary sanction; and (ii) that no disciplinary proceeding was conducted against B.K. under the Labour Relationship Law of SAPK no. 12/89, of 1989 to prove his eventual responsibility and no adequate measures have been imposed for the violation provided by the internal act.

121. The Court in this respect reiterates the position it has consistently maintained with regard to the fact that the application and interpretation of the law is within the jurisdiction of the regular courts; and that its role is only to ensure that the application and interpretation of the law by the regular courts is compatible with the Constitution and the ECHR (see the cases of the ECtHR*, Brualla Gomes de la Torre v France*, Judgment of 19 December 1997*, paragraph 31; Kuchoglu v Bulgaria*, Judgment of 10 May 2007, paragraph 50; Işyar *v Bulgaria,* Judgment of 20 November 2008, paragraph 48; *and Nejdet Sahin and Perihan Sahin v Turkey,* cited above, paragraph 49). That being said, the Court has also pointed out that the exception to this general principle are cases of manifested arbitrariness (see, for example, ECtHR cases *Adamsons v Latvia,* cited above, paragraph 118; Nejdet *Sahin and Perihan Sahin v Turkey,* cited above, paragraph 50; *and Albu and Others v Romania*, cited above, paragraph 34).

122. In the context of the circumstances of the case, the Court recalls that the Court has emphasized that the contradictions in case law are an integral part of each judicial system and that the divergence in case law may also occur within the same court. Such a thing is not compulsorily contrary to the Constitution and the ECHR (see ECtHR cases *Santo Pinto v Portugal,* cited above, paragraph 41; and Nejdet *Sahin and Perihan Sahin v Turkey,* cited above, paragraph 51). Moreover, and as noted above, the ECtHR has consistently stressed that requests for legal certainty and legitimate protection of public trust in the courts do not provide/ guarantee a fair trial in consistent case law. Furthermore, the development of case law is important to maintain the appropriate dynamics of continuous improvement of the administration of justice (see the case of the ECtHR, *Atanasovski v.* "*Former* Yugoslav *Republic of* Macedonia", Judgment of 14 January 2010, paragraph 38; and Nejdet Sahin and Perihan Sahin v. Turkey, cited above, paragraph 58). However, based on the ECtHR's case law, the exception to these general principles is apparent arbitrariness, and in the sense of assessing the lack of judicial consistency, assessing whether there *are "deep and long-term differences*" in the relevant case law and whether there is an effective mechanism to address the same.

123. The Court observes that, in contrast to the case under review, the Supreme Court in the above-mentioned six (6) cases submitted by the Applicant himself and pertaining to the termination of the employment relationship as a result of breaches of work duties has applied the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] during the period 2018 and 2021.

124. In addition, the Court, based on the six (6) aforementioned Judgments delivered by the Applicant, also notes that in addition to the contradictions in the issues of interpretation or application of the Law on Labour Relationship (ERLLR) of 1989 or the Essential Labour Law [UNMIK Regulation 2001/27] by the Supreme

Court, the issue of internal procedures that preceded the termination of the contract, such as those of the Fraud Commission or internal audit, is also a contradiction.

125. In the context of five (5) of the six (6) cases submitted by the Applicant and related to the Company KEK, the Supreme Court in its letter of 10 October 2021 noted that: "*[...] in terms of disciplinary proceeding, the Law on Labour Relationship of 1989 has been applied in practice. In this situation in practice, however, the Supreme Court has made some differences from case to case, so for example in the 5 cases described in the follow-up letters to the request for the delivery of this notice, in which the Supreme Court has issued judgement, which relate to the contest between the employees and KEDS, this Court has concluded that for the fact that in the case of internal audit, internal control of KEDS, through ad-hoc commissions the disciplinary violation of the employees who have been involved in the theft of the property of KEDS, electricity, by not sealing the electrical meters or by intervening contrary to the Law in those meters and in other ways, the fact that the internal control has also proven through the professional control of these meters by "calibration", has resulted in the fact that the factual situation has been fully and accurately proven in terms of disciplinary violations, while the disciplinary sanction has been imposed by the body of first and second instance as provided above by the Regulation of Internal controls and compliance with the KEDS Disciplinary Code. Moreover, with these two internal legal acts of the KEDS it is provided that in these cases the procedure is short, so the Supreme Court has argued not to develop a very specific disciplinary proceeding in addition to the correct and fair confirmation of the factual state by the auditor respectively the internal control of the KEDS, thus concluding that there is no arbitrariness in the case of imposition of disciplinary sanction against the responsible employee, whose disciplinary violation and responsibility was ascertained by the internal auditor of the employer".*

126. With reference to the content of the Supreme Court's reply, however, the Court notes that such a reasoning or justification was not offered in the challenged Supreme Court Judgment, when the latter interpreted and, among others, found that no disciplinary proceeding was instituted against B.K.

127. The Court, referring to its own case law, namely cases KI87/18 and KI35/18, recalls that it had found a violation of Article 31 of the Constitution in conjunction to Article 6 of the ECHR due to the violation of the principle of legal certainty as a result of the divergence of case law, in case KI87/18 in the assessment of 3 (three) Supreme Court cases, issued in a period of 3 (three) years, and in case KI35/18 in the assessment of 6 (six) Supreme Court cases, issued in a period of 5 (five) years, and having found that: (i) there were "*deep and long-term differences*"; (ii) the mechanism of the Supreme Court for harmonizing case law existed; but that (iii) the aforementioned mechanism was not used (see Court cases KI87/18, cited above, paragraphs 79 and 81 to 85; and KI35/18, cited above, paragraphs 70 and 110-111). Regarding the mentioned cases of the Court, the Court points out that in cases KI35/18 and KI87/18, the subject matter of the case before the regular courts in all cases was the determination of the height of the delay interest, corresponding to the requirements of private insurance companies, presented in the context of the right to subrogation.

128. The Court in this case has considered that the six (6) Judgments delivered by the Applicant at the time of submitting his referral reflect only those Judgments that the Applicant has had access to and available to support his claim, namely the lack of a unified practice in the Supreme Court. In this connection, the Court, in its question referred to the Supreme Court, did not ask it to deliver other judgments of a similar nature and circumstances to those of the Applicant, but asked this Court to clarify the issue of interpretation and application of these two laws in the case of termination of the employment relationship. In connection with this reply, the Supreme Court has confirmed that the examination of cases, related to the interpretation and application of the provisions of these two laws, takes place from case to case.

129. Within the meaning of the criterion *of "deep and long-term differences"*, the Court notes that in its case law it has also examined cases related to the issue of interpretation and application of the Essential Labour Law [UNMIK Regulation 2001/27], or the Law on Labour Relationship of 1989. In Court cases KI185/13, (with Applicant *Kosovo Energy Corporation*, Resolution on inadmissibility, of 18 February 2014) and KI186/13, (with Applicant *Kosovo Energy Corporation, Resolution* on inadmissibility, of 5 December 2013), the Supreme Court in these two cases had approved the revision of the employees of KEK by annulling the decisions of the first and second instance courts, respectively, and after applying the provisions of the Labour Relationship Law of 1989, it had found that the Notice of termination of the employment relationship by the Employer KEK due to poor performance was unlawful as a result of the lack of conducting of the Disciplinary Commission proceedings within the Employer. In the case KI29/17 (with the Applicant *Adem* Zhegrova, Resolution on inadmissibility, of 5 September 2017), the circumstances of this case were related to the termination of the employment relationship by the Employer KEK, as a result of finding a serious violation of the job duties, namely manipulation of the metering system and unauthorized use of electricity, which were found in the internal audit report. As a result of the Judgment of the Court of Appeals, through which the Judgment of the Basic Court was annulled, the Applicant submitted a revision to the Supreme Court and, referring to the Law on Labour Relationship of 1989, of the SAPK, claimed that the termination of the employment relationship as a result of the employer's lack of conducting the disciplinary proceeding is contrary to the provisions of this law. The Supreme Court, by its Judgment [Rev. no.343/2016] had rejected his review against the Court of Appeals Judgment and found that in his case it was the Essential Labour Law applicable law and that the Employer's (KEK's) Notice to terminate the employment relationship was made in accordance with Article 11.2 of this Law. As a result of this Supreme Court decision, the Applicant before the Court had challenged the Judgment of the Supreme Court [Rev. no.343/2016], pointing out that the Supreme Court, whose Judgment was also delivered to the Court in another case in the same legal and factual circumstances that were also related to a former employee of the KEK whose employment relationship had been terminated as a result of the manipulation of the meter and unauthorized use of electricity, the Supreme Court by the Judgment [Rev. no. 62/2014, of 20 March 2014] had approved the revision of the former employee of KEK, had annulled the Judgment of the Court of Appeals and applying the provisions of the Labour Relationship Law, of 1989, had found that the Notice to terminate the employment relationship as a result

of serious violations was illegal because the Employer had not conducted a disciplinary Commission proceeding.

130. In this case, the Court applying the above-mentioned criteria of the ECtHR related to the divergence in the court practice of the courts had considered that*: "... it is not possible to ascertain the existence of deep and persistent differences in the court practice of the Supreme Court that jeopardize the principle of legal certainty, being invoked only in a Judgment of the Supreme Court, issued 3 (three) years earlier"* (paragraph 53 of the Resolution on inadmissibility of the Court in case KI29/17).

131. Following this elaboration, the Court notes that the issue of differences in interpretation and application of the Law on Labour Relationship, 1989 or the Essential Labour Law [UNMIK Regulation no. 2001/27] by the regular courts, including the Supreme Court itself, dates back even earlier than the period for issuing the challenged decision. Consequently, the Court observes that in the present case we are also dealing with long-term differences in the case law of the Supreme Court.

132. Further, the Court recalls that the issue of contradictory decisions, within the meaning only of the interpretation of the Essential Labour Law [UNMIK Regulation no. 2001/27], namely Article 11, paragraph 5 thereof had been dealt with in the court practice of the Court (see case KI89/13*,* Applicant *Arbresha Januzi*, Judgment of 12 March 2014). In this case, although in different factual and legal circumstances, the Court had dealt with the issue of two (2) adversarial decisions in identical factual and legal circumstances within the same Employer, but within the framework of the principle of non-discrimination, guaranteed by Article 24 of the Constitution (see paragraphs 63-70 of this Judgment). However, even within the meaning of Article 31 of the Constitution, the Court had noted that within the case law of the Supreme Court in two cases, namely the Judgment of the Supreme Court in the case of the Applicant and the Judgment of the Supreme Court in the case of two colleagues within the same Employer, there was a contradiction in the interpretation of Article 11 of the Essential Labour Law [UNMIK Regulation no. 2001/27] (paragraphs 56 -57 of the Judgment in Case KI89/13).

133. From the above it results that the Supreme Court interpreting and applying two different laws, namely the Law on Labour Relationship of SAPK, 1989, and the Essential Labour Law [UNMIK Regulation no. 2001/27] in similar factual and legal circumstances in the case of dismissal or termination of the employment relationship due to breaches of duties by the Employer has resulted in contrary interpretation and practice, and as a result in its case law there are deep and long-lasting differences (see, in this case, ECtHR cases *Iordan and Iordanov v Bulgaria*, cited above, paragraphs 49-50).

134. In this context and as a consequence, the Court should find that in the circumstances of the specific case, and specifically with reference to the finding of the Supreme Court that the Notice of the Applicant is unlawful because the latter has not conducted a disciplinary proceeding provided by the provisions of the Law on Labour Relationship of 1989, there are "*deep and long-term differences*" in the case law of the regular courts.

135. On the other hand, the finding that there *are "deep and long-term differences*" in the case law related to the interpretation of the provisions of the Law on Labour Relationship of the SAPK no. 12/89 or the Essential Labour Law [UNMIK Regulation no. 2001/27], does not necessarily result in a violation of Article 31 of the Constitution in conjunction to Article 6 of the ECHR. In order to ascertain such a thing, the Court should also consider the other two criteria of the ECtHR that are related to the assessment of the lack of consistency in case law, namely whether the applicable law establishes mechanisms capable of resolving such divergences; and whether such a mechanism has been applied in the circumstances of a case and to what effect.

(ii) if the applicable law establishes mechanisms capable of resolving such divergences; and

(iii) if such a mechanism has been applied in the circumstances of a case and to what effect.

136. The Court emphasizes that the Supreme Court has a mechanism to resolve such contradictions. In this context, the Court recalls that in case KI87/18, it pointed out that based on point 10 of paragraph 2 of Article 14 (Competences and Responsibilities of the President and the Vice-President of the Court) of Law no. 06/L-054 on the Courts (hereinafter: the Law on Courts), the Presidents of the Courts through the annual meetings of all judges have the obligation, among others, to review and propose changes in procedures and practices (see the Court case KI87/18 *"IF Skadeforsikring"*, cited above, paragraph 80). Through this case, the Court also pointed out that the operation of the practice harmonisation mechanism itself is not impossible or limited to anything, which would directly reduce its application and efficiency in the court practice itself (see the Court case KI87/18 *"IF Skadeforsikring"*, cited above, paragraph 81).

137. However, the Court through case KI87/18 also pointed out that paragraph 4 of paragraph 1 of Article 26 (Competences of the Supreme Court) of the Law on Courts defines the exclusive competence of the Supreme Court to determine the principle positions, issue legal opinions and guide for the unique application of laws by courts in the territory of the Republic of Kosovo. In the case involving the circumstances of the specific case, namely the issue of interpretation of the provisions of the Law on the Employment Relationship, of SAPK no.12/89 of 1989 or the provisions of the Essential Labour Law [UNMIK Regulation no. 2001/27], the Supreme Court, through its response filed on 10 October 2021 with the Court, stated that there was no unified practice in these cases. More specifically, the Supreme Court confirmed that the issue of the application of these two above-mentioned laws is being considered from case to case.

138. In this sense, the Court considers that the Supreme Court, as a result of the lack of a unified practice in this type of cases, has itself served as a source of divergences in the case law even of lower instance courts, thus violating the principle of legal certainty.

139. The Court stresses that the ECtHR has consistently stressed that the role of a supreme court is precisely to resolve such contradictions. Moreover, it has also held that, if the adversarial practice takes place within one of the highest judicial

authorities in a country, that court itself becomes a source of legal uncertainty, thus undermining the principle of legal certainty and weakening public confidence in the judicial system (see, in this case, the case of the ECtHR Greek-Catholic Lupen Parish *v Romania*, cited above, paragraph 123; Beian *v Romania*, cited above, paragraph 39; *and Albu and Others v Romania*, cited above, paragraph 38).

(e) Conclusion

140. Consequently, the Court, taking into account the above, finds that in the circumstances of the specific case, the three criteria of the ECtHR are met, namely the assessment of whether the lack of consistency, namely the divergences in case law, have resulted in a violation of the rights and freedoms to a fair and impartial trial. The Court reiterates that in the circumstances of the present case, it finds:

(i) "*deep and long-term differences*" in the case law of the Supreme Court related to the interpretation and application of the provisions of the Law on Labour Relationship, of SAPK no.12/89 and those of the Essential Labour Law [UNMIK Regulation no. 2001/27];
(ii) That there are mechanisms of the Supreme Court to harmonize this practice; and that
(iii) This existing mechanism, as stated by the Supreme Court itself, has not been used.

141. As a result, the Court should find that in the context of the Applicant's allegations, the "*deep and long-term differences*" in the Supreme Court's case law related to the non-use of the mechanisms established by law and designed to ensure the proper consistency within the case law of the highest court in the country have resulted in violation of the principle of legal certainty and in violation of the right to a fair and impartial trial of the Applicant, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

142. With regard to the latter, the Court notes that the finding of violation of Article 31 of the Constitution in conjunction to Article 6 of the ECHR, in the circumstances of the specific case, is related only to the non-use of the mechanisms established by law and designed to ensure the proper consistency within the case law of the Supreme Court, and in no way prejudices the outcome of the merits of the case or the legal position that the Supreme Court decides and applies in the specific case.

143. Therefore, the Supreme Court, in the retrial procedure, the claimant's allegations, presented in his review before the Supreme Court, related to the legality of his Notice for termination of the employment relationship should consider and assess depending on the position or the outcome of the mechanism used by the Supreme Court related to the issue of divergence of case law of this court, namely the interpretation and application of the provisions of the Law on Labour Relations of the SAPK no. 12/89 and those of the Essential Labour Law [UNMIK Regulation no. 2001/27].

II. Regarding the allegation of violation of Article 31 of the Constitution in conjunction to Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution

144. The Court recalls that the Applicant in his referral alleges a violation of Article 31 of the Constitution in conjunction to Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution, and his allegation in relation to the latter is related to the Supreme Court Judgments, delivered to the Court, in which cases he was an employer of the Public Enterprise KEK. In addition, the Court found that in the context of the Applicant's allegations, the "*deep and long-term differences*" in the Supreme Court's case law related to the non-use of the mechanisms established by law and designed to ensure proper consistency within the case law of the highest court in the country resulted in violation of the principle of legal certainty and in violation of the right to a fair and impartial trial of the Applicant, as guaranteed by Article 31 of the Constitution in conjunction to Article 6 of the ECHR (see similarly the case *Iordan Iordanov v Bulgaria*, cited above, paragraph 54). Consequently, as a result of this finding, the Court does not consider it necessary to consider separately the allegations of violation of the rights guaranteed by Article 31 of the Constitution in conjunction to Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution.

Conclusion

145. The Court has dealt with all the allegations of the Applicant, applying to this assessment the case law of the Court and that of the ECtHR, as well as the non-reasoning of the court decision and the principle of legal certainty in terms of consistency of case law, these guarantees, with certain exceptions, are embodied in Article 31 of the Constitution and Article 6 of the ECHR.

146. First, regarding to the allegation concerning the violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR, which is related to the principle of legal certainty in the context of lack of consistency, namely the divergence of the Supreme Court's case law, the Court, after elaborating the basic principles and criteria of the ECtHR in this respect, applied the same in the circumstances of the specific case, and found that in the Supreme Court's case law there are "*deep and long-term differences*" in terms of the law applicable in cases of termination of employment contract by the employer, and consequently found that by the Judgment [Rev. no.257/2019] of 2 June 2020 was violated the principle of legal certainty, as a result of the divergences in the court practice of the Supreme Court. In this line, the Court emphasized that the Supreme Court in the retrial procedure, the allegations of the Applicant, presented in its revision before the Supreme Court, and related to the legality of his Notice for termination of the employment relationship should consider and assess in accordance with the findings of this Judgment, and depending on the position or outcome of the mechanism used by the Supreme Court related to the issue of divergence of the case law of this court, namely the interpretation and application of the provisions of the Law on Labour Relations of SAPK no. 12/89 of 1989 and those of the Essential Labour Law [UNMIK Regulation no. 2001/27], the same apply to the case of the Applicant.

147. Secondly, regarding the Applicant's allegation of a violation of Article 31 of the Constitution in conjunction to Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution of equality before the law as a result of unequal treatment, the Court, as a result of its finding of a violation of the right to legal certainty guaranteed by Article 31 of the Constitution in conjunction to Article 6 of the ECHR as a result of the contradictory court practice of the Supreme Court, did not consider it necessary to consider separately the allegations of violation of his rights guaranteed by Article 31 of the Constitution, in conjunction to Article 6 of the ECHR as a result of the non-reasoning of the court decision and Article 24 of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 30 March 2022 unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO FIND that item II of the enacting clause of the Judgment [Rev.no. 257/2019] of 2 June 2020, of the Supreme Court is not in compliance with Article 31 [Right to a Fair and Impartial Trial] of the Constitution, in conjunction to Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE void item II of the Judgment [Rev.no.257/2019] of 2 June 2020 of the Supreme Court of Kosovo;

IV. TO REMAND the Judgment [Rev.no.257/2019] of 2 June 2020 of the Supreme Court of Kosovo, for retrial in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, pursuant to Rule 66 (5) of the Rules of Procedure, of the measures taken to implement the Judgment of the Court by 30 September 2022;

VI. TO REMAIN committed to this matter pursuant to this order;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

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