



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 27 November 2017
Ref. No.:RK1157/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI87/17

Applicant

Hilmi Asllani

**Constitutional Review of Decision No.9199 on termination of
employment relationship issued by Kosovo Electricity Distribution and
Supply Company J. S.C. of 4 November 2015**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Hilmi Asllani from Village Stanovc i Ulët (hereinafter: the Applicant) represented by Afrim Salihu, lawyer in Prishtina.

Challenged Decision

2. The Applicant specifically challenges Decision No.9199 on termination of employment relationship issued by Kosovo Electricity Distribution and Supply Company J. S.C. (hereinafter: KEDS) dated 4 November 2015.

Subject Matter

3. The subject matter is the constitutional review of the challenged decision which has allegedly violated the Applicant's right as guaranteed by paragraph 5 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal Basis

4. The Referral is based on Article 113, paragraph 7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 28 July 2017, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 31 July 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama Hajrizi and Gresa Caka Nimani.
7. On 4 August 2017, the Court notified the Applicant of the registration of the Referral and requested him to fill in the referral form and to specify which decision of a public authority he was challenging before the Court.
8. On 10 August 2017, the Applicant submitted the completed referral form and specified that he was challenging Decision No.9199 on termination of employment relationship issued by KEDS, dated 4 November 2015.
9. On 14 August, the Court sent a copy of the Referral to KEDS.
10. On 24 August 2017, KEDS submitted a letter with comments pertaining to the Applicant's allegations.
11. On 14 November 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

12. The Applicant was an employee of KEDS (hereinafter: the Employer).

13. On 15 June 2015, the Basic Prosecution in Prishtina (PP.I. No. 400/2015) filed an indictment accusing the Applicant for committing the criminal offense foreseen in Article 428 [Taking bribe] in conjunction with Article 31 [Cooperation] of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).
14. On 4 November 2015, the Employer rendered Decision No.9199 on the termination of the Applicant's employment relationship (hereinafter: the Decision of KEDS).
15. In its Decision, the Employer stated that: "*The employee – Hilmi Asllani in cooperation with his colleague [...] agreed-with the [...] consumer to hide the manipulation of the electrical meter, on which occasion as a return they have accepted the offer made by the consumer in the amount of money [...], who were arrested in flagrancy [...] by the KPS Police Officers [...]. From this misconduct the employee has committed serious violation of work duties under Article 7, paragraph 7.1, subparagraph (f), (g), item (i) and subparagraph (h,) of the KEDS Disciplinary Code. [...] For misconduct - the violations under the previous item, the employment contract is terminated to the abovementioned from 23.10.2015.*"
16. On 10 November 2015, against the Decision of the Employer, the Applicant filed an appeal with the Employer's second instance authority.
17. On 25 November 2015, the Employer rejected the appeal of the Applicant as ungrounded. In this decision, the Applicant was instructed to initiate court proceedings at the competent courts against the Employer's decision.
18. Based on the case file, it shows that the Applicant had not used the possibility to continue with legal proceedings before the competent courts.
19. With regard to the criminal procedure against the Applicant, on 14 September 2016, the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court), by Judgment PKR.nr. 334/15 acquitted the Applicant from the criminal offence as it wasn't proven that the Applicant committed the criminal offence he was charged for.
20. On 2 February 2017, the Basic Prosecution in Prishtina (PP.I.no.400/2015) filed an appeal with the Court of Appeals alleging violation of Criminal Law, erroneous and incomplete establishment of factual situation and the decision on the criminal sanction.
21. On 25 April 2017, the Court of Appeals (Judgment PAKR.nr.93/17) rejected the Basic Prosecution's appeal as ungrounded and upheld the Judgment of the Basic Court.

Applicant's allegations

22. The Applicant alleges violation of "*his right to the presumption of innocence until proven guilty*" as foreseen in paragraph 5 of Article 31 of the Constitution.

23. In essence, the Applicant claims that: “[...] *KEDS violated the Constitution of the Republic of Kosovo, namely Article 31, paragraph 5, by terminating the employment relationship before the criminal procedure was completed [...].*”
24. Finally, the Applicant requests the Constitutional Court to conclude that: “[...] *the Constitution of Kosovo was violated, more precisely Article 31, paragraph 5, because KEDS before the criminal proceedings was completed has arbitrarily evaluated the factual situation and prematurely dismissed [the Applicant] from work and terminated the Employment Contract, while it could easily overcome this situation by returning [the Applicant] to his working place, compensating him for unpaid wages and annulling the unlawful decision.*”

Comments of KEDS

25. On 24 August 2017, KEDS submitted its comments regarding the Applicant’s case and *inter alia* stated that: “*Such a claim of the Applicant to the Constitutional Court of Kosovo is ungrounded to the fact that disciplinary responsibility and criminal liability are separate and in no case this implies that the release from criminal liability implies the release of disciplinary responsibility. The disciplinary right has to do with the discipline which refers to the work and behavior of the worker at work or related to the work. In cases when a worker commits a violation or violation of his / her job duties and behaves contrary to the norms of the employment discipline, he or she shall be subject to disciplinary responsibility [...].*”
26. In its comments KEDS also stated that: “*From the Referral of 28.07.2017, submitted to the Constitutional Court of Kosovo, it can be clearly seen that there is no final decision (the challenged decision No. 9199 of 04.11.2015 of KEDS JSC is not a final decision) in order to be challenged before the court, the Applicant has not exhausted all available legal remedies, according to the applicable law [...].*”

Admissibility of the Referral

27. The Court first will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
28. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

“(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.”

29. The Court also refers to Article 47 [Individual Requests] of the Law which establishes that:

“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.”

30. Moreover, the Court recalls Rule 36 (1) (b) of the Rules of Procedure, which stipulates that:

“(1) The Court may consider a referral if:

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted”

[...]

31. The Court notes that the Applicant challenges the constitutionality of the Decision on termination of employment relationship issued by KEDS on 4 November 2015.
32. However, the Court recalls that the final decision in the Applicant’s case is the second Decision of the Employer rendered on 25 November 2015. In this regard, the Court notes that, in the aforementioned last Employers’ decision of 25 November 2015, the Applicant was informed of his right to initiate legal proceedings against the Employer’s decision at the competent courts.
33. Based on the aforementioned facts, the Court notes that the Applicant had not used the possibility to continue with legal proceedings before the competent courts.
34. Based on the foregoing, the Court considers that the Applicant’s failure to exhaust available legal remedies before the regular courts shall be understood as a waiver of the right to continue with legal proceedings before the regular courts. Thus, the Applicant has not exhausted all legal remedies afforded to him by the applicable law (See *mutatis mutandis*, Case of the European Court of Human Rights (hereinafter: the ECtHR) *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, Constitutional Court case KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paras. 28-29).
35. The principle of subsidiarity requires that the applicants exhaust all procedural possibilities in the regular proceedings in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right before coming to the Constitutional Court (See *mutatis mutandis*, ECtHR Case *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, see Constitutional Court cases KI120/11, *Ministry of Health*, Resolution on Inadmissibility of 4 December 2012, par. 32, KI118/15, *Dragiša Stojković*, Resolution on Inadmissibility of 17 May 2016, par. 34).

36. In view of the circumstances of the case and the fact that the Applicant did not exhaust the available legal remedies before the regular courts, the Court does not consider it necessary to assess whether the challenged decision issued by KEDS comes within the jurisdiction of the Constitutional Court.
37. Therefore, taking into account that the Applicant didn't exhaust all legal remedies in the regular courts proceedings before coming to Constitutional Court, the Court finds that the Applicant's Referral does not meet the admissibility requirements set forth in Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure, in its session held on 14 November 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur

Snezhana Botusharova

President of the Constitutional Court

Arta Rama-Hajrizi

