ARTICLES

COLLECTIVE LABOR DISPUTES AND STRIKES IN RUSSIA: THE IMPACT OF JUDICIAL PRECEDENTS AND ENFORCEMENT

ELENA GERASIMOVA,
National Research University Higher School of Economics
(Moscow, Russia)

DOI: 10.17589/2309-8678-2017-5-2-5-32

The right to strike is recognized in the Constitution and the Labor Code of the Russian Federation as a means to resolve collective labor disputes. However, in Russia labor protests come up for discussion much more frequently than strikes. In recent years the number of labor protests in Russia, including various forms of work stoppage, has increased significantly compared to previous years, but the number of legally constituted collective labor disputes and strikes has remained very low. The legislation on resolution of collective labor disputes and mounting strikes is quite restrictive in Russia, and its enforcement also encourages employees to seek alternative ways to settle collective labor conflicts. There is little empirical research on the judicial implementation of these norms and its influence on the enforcement of legislation. Therefore, this paper analyses the reasoning of courts in cases on the legality of strikes, their interpretations of the law, and the impact these decisions have on the enforcement of the legislation on resolution of collective labor disputes and strikes. Our conclusion is that the courts act as another restrictive influence on the resolution of collective labor disputes and the exercise of the right to strike in Russia.

Keywords: collective labor disputes; strikes; judicial precedent; enforcement; Russian labor law; labor protests.

Recommended citation: Elena Gerasimova, *Collective Labor Disputes and Strikes in Russia: The Impact of Judicial Precedents and Enforcement*, 5(2) Russian Law Journal 5–32 (2017).

Table of Contents

Introduction

Strikes have always been the most effective method in the struggle for workers' rights. The right to strike has been widely recognized in the 20th century. It has been proclaimed in a series of international agreements and national constitutions and regulated in legislation. It is guaranteed by the International Covenant on Economic, Social and Cultural Rights of December 16, 1966 and the European Social Charter (ESC) of 1996.[1] The right to strike follows from Art. 3 of ILO Convention No. 87 according to which organizations of workers and employers have the right to independently organize their activities and determine their programs of action. The ILO has elaborated an imposing collection of guidance on freedom of association

[1] Ratified by the Russian Federation with Federal law from July 3, 2009 No. 101-FZ "On the Ratification of the European Social Charter (Revised) from May 3, 1996" [Ратифицирована Российской Федерацией Федеральным законом от 3 июня 2009 г. № 101-ФЗ "О ратификации Европейской социальной хартии (пересмотренной) от 3 мая 1996 г."] (Apr. 17, 2017), available at www.consultant.ru.

including the right to strike. The ILO Committee on Freedom of Association (CFA) and the Council of Experts on the Application of Conventions and Recommendations (CE) have taken the lead in this process together with the tripartite Conference Committee on the Application of Standards (Conference Committee). What came out of these oversight bodies of the ILO has been called the "liberal interpretation of freedom of association."[2]

A proclamation of the right to strike appears in the constitutions of 95 governments that are members of the ILO, including the Russian Federation. More than 150 countries regulate strikes in their national legislation (laws on labor, employment, government service, the criminal code, etc.), and about 50 countries have enacted specific laws on the topic (pertaining to strikes, "essential services" and the like) or have acknowledged in their practice the right to strike.[3]

In 2012 this approach was challenged during the International Labor Conference when the Employers' Group took exception to the right to strike and refused to discuss a list of 25 countries that had infringed conventions these countries had ratified. The Group alleged that the right to strike was not directly proclaimed in Convention No. 87 and that the CE had exceeded its authority by interpreting the Convention.[4] Despite this effort to settle this controversy,[5] no final decision has been made. However, the inception of this kind of discussion has in itself had a negative impact on legislation and enforcement surrounding the right to strike.[6] It has been observed that the right to strike is being infringed in one way or another by 117 governments that submit regular reports to the ILO. In just the past five years 89 governments have enacted measures that weaken legislation or practices in this area. Restrictions of the right to strike in the last five years have come about through limiting the categories of workers

---

[2] Teri L. Caraway, *Freedom of Association: Battering Ram or Trojan Horse?*, 13(2) Review of International Political Economy 210 (2006).

[3] Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, February 23–25, 2015) (ILO, Geneva, 2015) (Nov. 11, 2016), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_344248.pdf.

[4] Provisional Record No. 19 (Rev.), Part One, ILC, 101st Session, Geneva, 2012, at 48–49, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_183031.pdf. *Also see* Claudia Hofmann, (*The Right to) Strike and the International Labour Organization: Is the System for Monitoring Labour and Social Standards in Trouble?*, Friedrich-Ebert-Stiftung (2014) (Nov. 2, 2016), available at http://library.fes.de/pdf-files/iez/10775.pdf.

[5] Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, February 23–25, 2015), Outcome of the Meeting, at 2–4 (Nov. 4, 2017), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_346764.pdf.

[6] Edlira Xhafa, *The Right to Strike Struck Down?*, Friedrich-Ebert-Stiftung (2016) (Nov. 4, 2017), available at http://www.fes.de/cgi-bin/gbv.cgi?id=12827&ty=pdf.

that may exercise that right as well as by restricting the manner of organizing legally permitted strikes. Regardless of their degree of economic development of a country, both trends are observed.[7]

The right to strike in Russia is severely restricted. However, the tendency to limit the application and acknowledgment of the right to strike long predates the confrontation over it within the ILO.

Based on state statistics for strikes and collective labor disputes, there is a widespread opinion that these forms of protection of labor rights rarely happen in Russia. Legal academic specialists writing in Russian usually take these figures at face value and focus on analyzing the legislation and judicial practices that apply it only as they pertain to fulfillment of the law because the state statistics provide reassurance that the law is fair and effective. While critical analyses questioning the implementation of laws against strikes are put forward in some countries,[8] such analyses are absent in Russia. However, in practice the restrictive nature of Russian legislation on the resolution of collective labor disputes and strikes is persistently signaled, and issues have been raised in critical legal studies concerning the non-compliance of this legislation with international labor standards.[9]

This discrepancy between statistics and the actual level of conflict raises questions about the status of the implementation and enforcement of this legislation in practice. In particular the role of the courts in interpreting the legislation and enforcing compliance with it is of interest.

We find on the contrary that collective labor conflicts do occur often in Russia; but, because the legal mechanisms for resolving collective labor disputes and strikes are so seldom employed to settle them, most of these conflicts are not officially recognized as such. Existing practices in interpreting and implementing the legislation leave workers little hope of relying on them when a conflict arises. Workers and trade unions face negative attitudes and pressure from all levels of the state bodies that deal with collective labor protests, conflicts and strikes. Ever since legislation on strikes was enacted in Russia in 1995, the courts have also adopted an anti-strike stance.[10] Consequently, workers and trade unions seek ways to resolve collective labor

---

[7] Xhafa, *supra* note 6, at 5.

[8] *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (B.A. Hepple at al. (eds.), Milano: Franco Angeli, 2015).

[9] Nikita Lyutov, *The Right to Strike: Russian Federation* in *The Right to Strike: A Comparative Overview* 451 (B. Waas (ed.), Alphen aan den Rijn: Kluwer Law International, 2014); Elena Gerasimova, *The Resolution of Collective Labour Disputes and the Realization of the Right to Strike in Russia* in *Labour Law in Russia: Recent Developments and New Challenges. Iss. 6* 259 (M. Tiraboschi et al. (eds.), Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2014).

[10] Павлов И.Н. Трудовые конфликты в организациях Конфедерации труда России: отношение работодателей, органов власти и общества к коллективным трудовым спорам (забастовкам) // Коллективные трудовые конфликты: Россия в глобальном контексте: Монография [Igor N. Pavlov, *Labor Conflicts in Organizations of the Confederation of Labor of Russia: The Attitude of Employers,*

conflicts that lie outside the burdensome provisions of the law. This explains why so few collective labor disputes are resolved by using the formal procedures and why extra-legal methods are used in so many cases to settle collective conflicts.

1. The Right to Strike in Russia

Regulation of strikes by law in modern Russia began with the enactment of the Law of the USSR of October 9, 1989 No. 580-I "On the Procedure for Resolving Collective Labor Disputes (Conflicts)." This was the first law in the history of the USSR and Russia to specifically address the settlement of collective labor disputes, the grounds for strikes, and the manner in which strikes are to be conducted. The law regarded strikes exclusively as a way to settle collective labor disputes (Art. 7) and regarded strikes as the means "of last resort."

Another important phase in the development of legislation on strikes was the adoption of the Constitution of the Russian Federation.[11] According to Art. 37, part 4 of the Constitution of the Russian Federation, the right to enter into individual and collective labor disputes is recognized when they employ the means for their settlement established by federal law, including the right to strike.

The Soviet law on collective labor disputes was replaced in 1995 by the Russian Federal law of November 23, 1995 No. 175-FZ "On the Manner of Resolving Collective Labor Disputes." As things now stand, matters pertaining to strikes are governed by the Labor Code of the Russian Federation (Labor Code) enacted at the close of 2001 and in force since February 1, 2002.[12] In contrast to the International Covenant on Economic, Social and Cultural Rights, the European Social Charter, and ILO standards – all of which recognize the right to strike in a broad range of circumstances – the concept of the right to strike is quite limited in Russia.

Among the grounds for a strike that are permissible in the judgment of the ILO oversight bodies are: to resolve issues in economic and social policy and also issues arising within enterprises that have a direct impact on the interests of workers;[13] to

Governmental Authorities, and Society toward Collective Labor Disputes (Strikes) in *Collective Labor Conflicts: Russia in the Global Context: Monograph*] (Yu.P. Orlovsky & E.S. Gerasimova (eds.), Moscow: Kontrakt, 2016).

11 Конституция Российской Федерации, принята всенародным голосованием 12 декабря 1993 г., Собрание законодательства РФ, 2014, № 31, ст. 4398 [Constitution of the Russian Federation enacted by the national referendum on December 12, 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

12 Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ, Собрание законодательства РФ, 2002, № 1 (ч. 1), ст. 3 [Labor Code of the Russian Federation No. 197-FZ of December 30, 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3].

13 *See* Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (ILO, Geneva, Fifth (revised) edition, 2006), paras. 526, 527 (Apr. 20, 2017), available at http://www.ilo.org/public/libdoc/ilo/2006/106B09_305_engl.pdf.

protest economic and social policies of the government (although purely political strikes are outside the scope of the principles of freedom of association);[14] to resolve labor disputes, including collective ones;[15] to express solidarity provided that the strike being supported is a lawful one;[16] to secure recognition of a trade union (including as one of the parties in collective bargaining);[17] to recover wages unpaid over many months;[18] and to protest the murder of trade union leaders and members.[19]

However, in Russia pursuant to Art. 398, part 4 of the Labor Code, a strike is a voluntary refusal by workers to carry out their assigned jobs (either partially or completely) in order to resolve a collective labor dispute. The norm in Art. 409, part 1 of the Labor Code is consistent with this definition. That norm stipulates that, in accordance with Art. 37 of the Constitution of the Russian Federation, the right to strike is recognized as a way to settle collective labor disputes.

Comparing these legal acts with the position of ILO bodies shows that the right to strike as it is recognized in the Russian Federation excludes strikes to express solidarity, strikes to protest the government's economic and political policies, strikes to achieve recognition of a trade union, strikes to resolve issues arising from economic and social policy, and strikes to resolve problems arising within an enterprise that directly affect worker interests.

The CFA has addressed comments to the Government of the Russian Federation stating that its legal definition of strikes as it pertains to the purposes for them does not conform to the ILO's norms.[20] To date, however, these comments have provoked no reaction.

The European Committee of Social Rights (ECSR) adheres to a similar interpretation of the right to strike with regard to Art. 6, para. 4 of the ESC.[21] The ECSR has mentioned[22] that:

---

14 Freedom of Association, *supra* note 13, paras. 529, 531, 541, 542, 543.

15 *Id*. Paras. 484, 489.

16 *Id*. Para. 534.

17 *Id*. Paras. 535, 536.

18 *Id*. Para. 537.

19 *Id*. Para. 544.

20 333nd Report of the Committee on Freedom of Association on Case No. 2251, International Labour Office, Administrative Council, 289th session, Geneva (March 2004), para. 1001 (Apr. 20, 2017), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907631.

21 ECSR Conclusions IV, Germany, at 50, Conclusions XIX-3 (Germany) (2010), and Digest of the Case Law of the European Committee of Social Rights (2008), at 56 (Apr. 20, 2017), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

22 Digest of the Case Law, *supra* note 21, at 56.

> Article 6 § 4 applies to conflicts of interests. It does not concern conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement and to the violation of a collective agreement.[23] Within those limits, the right to strike should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute. Consequently prohibiting strikes not aimed at concluding a collective agreement is not in conformity with Article 6 § 4.[24]

The question about the purposes of strike actions was raised again with Russia by the ITUC (International Trade Union Confederation) in 2014.[25]

In accordance with the legislation in Russia, the right to strike occurs in the circumstances directly specified in the Labor Code. Art. 409 of the Labor Code states that workers or their representatives have the right to declare a strike against an organization if procedures for reconciliation have not produced a settlement of a collective labor dispute (Art. 406 of the Labor Code), or if the employer (or its representatives) or the employers (or their representatives) do not comply with the agreement arrived at by the parties to the collective labor dispute in the course of resolving that dispute (Art. 408 of the Labor Code), or if they fail to carry out a decision resulting from labor arbitration.

Hence, the right to strike in Russia is tightly bound to collective labor disputes and is recognized only as the last stage in their resolution following the reconciliation procedures which the parties to the dispute are advised to use in conducting a collective labor dispute.

The concept of a collective labor dispute is likewise strictly defined by legislation as an unsettled disagreement between workers (or their representatives) and employers (or their representatives) on issues listed in Art. 398, part 1 of the Labor Code. Collective labor disputes may be initiated:

– to establish or modify work conditions (including wages);

– in connection with concluding, modifying or executing collective bargaining agreements;

– in response to refusal by an employer to take into account the opinion of a workers' representative body concerning internal procedures and policies.

If workers state demands on matters that are beyond this list, then those demands may not be the basis of a collective labor dispute, and the employer (or his representatives) is under no obligation to enter into negotiations in order to accommodate those demands.

---

[23] ECSR Conclusions I, Statement of Interpretation of Article 6 § 4, at 56, and Digest of the Case Law, *supra* note 21, at 56.

[24] ECSR Conclusions IV, Germany, at 50, and Digest of the Case Law, *supra* note 21, at 56.

[25] ECSR Conclusions 2014 (Russian Federation) (Apr. 11, 2017), available at http://hudoc.esc.coe.int/eng#{«ESCDcIdentifier»:[«2014/def/RUS/6/4/EN»]}.

Furthermore, disagreement among the parties in the course of collective bargaining does not constitute a collective labor dispute, and a strike may not be called even if the collective bargaining has resulted in a statement of disagreement that specifies all the points on which the parties to the bargaining differ. In order for workers to settle disagreements arising during collective bargaining, they must state their demands via a special procedure for collective labor disputes. If the employer then rejects those demands, a collective labor dispute exists.

The procedure for mounting a collective labor dispute and also the procedures for resolving one impose a multitude of restrictions and formal requirements that are difficult for workers to satisfy. A strike may be declared illegal on the basis of any missed deadline, either for one of the procedures required in a collective labor dispute, or in submitting the dispute to reconciliation procedures, or even missing the deadline for declaring and mounting the strike. As will be detailed below, when the courts consider cases on the legality of strikes, even the most insignificant technical faults are regarded as grounds to find against workers.

This means that, according to Russian law, the right to strike is directly attached to the resolution of a collective labor dispute, and a strike may not be conducted in the absence of such a dispute.

Nevertheless, the law does grant as a separate right to individual workers permitting them to refuse to work.

The Labor Code espouses the concepts of "work stoppage because of unpaid wages"[26] and "self-defense of labor rights."[27] According to Art. 142 of the Labor Code, a worker may refuse to work in the event that she has not been paid within 15 days for a completed pay period and has submitted written notice of her refusal to the employer. Art. 379 of the Labor Code stipulates that a worker may refuse jobs not specified in an employment contract or that directly threaten his life and health. Even if large groups of workers refuse to work, such work stoppages are not regarded as strikes under the law.

2. Collective Labor Disputes and Strikes: Prevalence in Russia

An estimate of the number of collective labor disputes and strikes in Russia may be derived from three official sources of information: data on strikes from the Federal State Statistics Service of the Russian Federation (Rosstat); on collective labor disputes from the Federal Labor and Employment Service (Rostrud); and on court cases determining whether strikes are illegal from the Judicial Department of the Supreme Court of the Russian Federation (JD Supreme Court RF and Supreme Court RF respectively).

[26] Art. 142 of the Labor Code.

[27] Art. 379 of the Labor Code.

According to Rosstat statistics that track the number of strikes in Russia, their number has fallen steadily since the passage of the Labor Code in 2001. Between 1991 and 2000 the number of strikes in Russia ran from the thousands to more than ten thousand each year. From 2001 on, Rosstat recorded much lower figures for strikes (in 2002 – 80 strikes; 2003 – 67; 2004 – 5,933; 2005 – 2,575) and only single digits for all years from 2006 to the present (2006 – 8; 2007 – 7; 2008 – 4; 2009 – 1; 2010 – 0; 2011 – 2; 2012 – 6; 2013 – 3; 2014 – 2; 2015 – 5).[28]

This sharp reduction in strikes is usually attributed to improving social and labor relations and to greater well-being throughout the population. However, we would maintain that this reduction is due not so much to those factors as it is to the way in which strikes are counted. Not every work stoppage is recorded as a strike, but only those stoppages that are directed at resolution of a collective labor dispute as understood in the Labor Code. Moreover, Rosstat summarizes only the information provided by the employers themselves. Any strike that is not reported to Rosstat by an employer is not included in the statistics.

The second official source is Rostrud's tabulation of collective labor disputes. Testimony to the effect that a collective labor dispute exists must be presented directly to the territorial agencies of Rostrud by all the legal entities engaged in them, and Rostrud's territorial agencies in turn report them to Rostrud itself. The officially published Rostrud data shows that the number of collective labor disputes in Russia from 2006 through 2012[29] has also been rather low (Table 1).

Table 1. Number of collective labor disputes recorded by Rostrud from 2006 through 2012[30]

Year	**Number of collective labor disputes recorded**	**Number of unsettled collective labor disputes**	
		Total	Number in which Rostrud participated
2006	18	18	8
2007	9	7	7
2008	17	16	13

[28] Федеральная служба государственной статистики (Росстат), Российский статистический ежегодник – 2014 г. [Federal Service of State Statistics (Rosstat), Russian Statistical Yearbook 2014] (Apr. 11, 2017), available at http://www.gks.ru/bgd/regl/b14_13/Main.htm; Социально-экономическое положение России – 2015 г. [Socio-Economic Situation in Russia 2015] 230 (Apr. 11, 2017) available at http://www.gks.ru/free_doc/doc_2015/social/osn-12-2015.pdf.

[29] Unfortunately, the data on collective labor disputes from 2013 to 2015 has not been published.

[30] From the official website of the Federal Labor and Employment Service (Apr. 11, 2017), available at http://www.rostrud.ru/control/sotrudnichestvo-i-partnerstvo/?ID=236470&sphrase_id=135689.

2009	6	6	2
2010	9	9	7
2011	7	7	3
2012	10	9	5

The third (and final) existing source of state information is the JD Supreme Court RF statistics on court cases considered by courts of the Russian Federation on whether strikes are illegal and in which damages are assessed.[31] Table 2 presents the statistics from the JD Supreme Court RF for the past several years which show the number of cases determining the legality of strikes and their disposition.

Table 2. Statistics on the court caseloads where the legality of strikes is at issue and damages are assessed in connection with them from the Judicial Department of the Supreme Court of the Russian Federation (JD Supreme Court RF)[32]

Year			**Cases decided in court**					
	Cases filed	Carried over from the preceding year	Total considered	Pleas granted (Number of cases/as a percentage of those considered)	Pleas denied	Cases closed	Cases still in litigation	Cases concluded
2009	79	20	64	40/62.5%	24	18	4	90
2010	38	9	34	24/70%	10	8	3	45
2011	39	2	31	21/67%	10	7	3	41
2012	100	0	27	19/70%	8	65	4	97
2013	327	3	38	24/63,1%	14	289	1	328
2014	24	2	10	10/100%	0	6	3	20
2015	19	6	18	16/89%	2	20	5	20

[31] The number of cases in each of these categories is not recorded separately, but it is beyond question that the vast majority of these strikes are judged illegal.

[32] The author has compiled statistics from the website of the JD Supreme Court RF (Apr. 11, 2017), available at http://www.cdep.ru. Statistics on decisions about the legality of strikes for 2016 have not been published as of April 11, 2017.

An attempt to reconcile the statistics from Rosstat, Rostrud, and the JD Supreme Court RF during the years when data is available from all three bodies (Table 3) shows the absence of correlation. The number of cases in courts determining the legality of strikes is significantly higher than the number of recorded collective labor disputes and strikes.

Table 3. Number of strikes recorded by Rosstat, collective labor disputes recorded by Rostrud, and cases determining the legality of strikes filed/considered from 2009 through 2012 by courts of the Russian Federation

Year	Number of strikes recorded by Rosstat	Number of collective labor disputes recorded by Rostrud	Number of cases determining the legality of strikes filed/ considered by courts in the Russian Federation
2009	1	6	79/64
2010	0	9	38/34
2011	2	7	39/31
2012	6	10	100/27

A comparison of Rostrud's statistics on the number of collective labor disputes with those from the JD Supreme Court RF on cases on the legality of strikes highlights the unreliability of the former. Filing a plea in court to rule that a strike is illegal must occur after the declaration of a strike to resolve a collective labor dispute. This means that the number of collective labor disputes should be at least comparable to the number of cases in court about the legality of strikes. The unreliability of Rostrud's statistics would seem to arise from the way in which they are compiled, which depends upon the willingness of employers to report and to judge on their own whether there is a collective labor dispute.

Is the data of the JD Supreme Court RF indicative of the number of strikes? There is no information about how frequently employers (or prosecutors who have the same prerogative) file pleas in court to find strikes illegal. From experience we see that this prerogative is employed quite broadly. However, because filing such a plea in court is usually a means to head off a strike (and most often succeeds in doing so), it would be wrong to infer a particular number of strikes from the number of court cases.

Could the number of strikes in fact be as low as Rosstat statistics indicate?

The data collected by the Center for Social and Labor Rights (CSLR) beginning in 2008 is based on analysis of information from mass media, internet websites, and news sites; it shows that in 2008 there were 60 instances of work stoppages, 106 stoppages in 2009, 88 in 2010, 91 in 2011, 95 in 2012, 102 in 2013, 97 in 2014, 168 in 2015, 158 in

2016.[33] Work stoppages are not the only and not even the most widespread form of labor protest. Making demands, meetings outside the workplace, and appeals to the authorities are far more widespread.[34] Complete or partial work stoppages at enterprises accounted for as much as 64% of protests in 2008 (the maximum percentage for the whole period from 2008 to 2016) and as little as 33% in 2013 (the minimum percentage during that period). The recent figures for the percentage of work stoppages are 37.7% in 2015 and 38.4% in 2016.[35] The proportion of collective labor disputes and strikes following the procedures prescribed by law was negligible.

The Center for Monitoring and Analysis of Labor Conflicts, which tracks social and labor conflicts and is affiliated with the Saint Petersburg University of the Humanities and Social Sciences, found 186 instances of social and labor conflicts (SLC) in 2016 (140 SLC in 2014, and 161 SLC in 2015) including 42 strikes and 22 refusals by workers to carry out job assignments because of wage arrears.[36]

The non-governmental monitoring aimed at assessing the actual situation provides statistics for strikes, labor protests, and labor conflicts that are significantly higher than the official figures. As they show, workers involved in labor conflicts employ means other than the formal procedures for resolving collective labor disputes or mounting strikes to work out their problems. Why is this the case from legal point of view?

3. Reasons for Resolving Labor Conflicts without Resorting to Formal Collective Labor Disputes and Strikes

An analysis of the use of alternative mechanisms, as well as interviews with participants in labor conflicts, indicates that workers and their representatives reject the means established by law for resolving collective labor disputes, including officially declared strikes, and that for a number of reasons they prefer to use other informal methods.

---

[33] Бизюков П. Трудовые протесты в России в 2008–2016 гг.: Аналитический отчет по результатам мониторинга трудовых протестов ЦСТП (15 февраля 2017 г.) [Pyotr Bizyukov, *Labor Protests in Russia from 2008 to 2016: Analytical Report on Results of Monitoring of Labor Protests of the Center for Social and Labor Rights (February 15, 2017)*] (Apr. 18, 2017), available at http://trudprava.ru/expert/analytics/protestanalyt/1807. This is an analytical report by Pyotr Bizyukov outlining the results of the monitoring of labor protests conducted by the Centre for Social and Labor Rights.

[34] *Id*.

[35] *Id*.

[36] Обзор социально-трудовых конфликтов в Российской Федерации в 2016 году (по материалам годового анализа Научно-мониторингового центра «Трудовые конфликты» Санкт-Петербургского гуманитарного университета профсоюзов) (16 февраля 2017 г.) [Survey of Social and Labor Conflicts in the Russian Federation in 2016 (adapted from the annual analysis of the Labor Conflicts Research and Monitoring Center of the Saint Petersburg University of the Humanities and Social Sciences) (February 16, 2017)] (Apr. 20, 2017), available at http://industrialconflicts.ru/lib/27/obzor__sotsialyno-trudowyh_konfliktow_w_rossiyskoy_fed.html.

3.1. Procedural Hurdles

The first one is the increasingly complicated procedures imposed on collective labor disputes and strikes by the law. Workers understand that the legally authorized procedures require substantial organizational capacity and are more like obstacles than means to a settlement. These procedures are discouragingly complicated whether examined in isolation or in comparison with the legislation in many foreign countries.[37] The most serious limitations concern the requirements for stating demands in collective labor disputes and declaring a strike (Arts. 399 and 410 of the Labor Code). In particular, the right to state demands and declare a strike, which would usually fall to trade unions, has been stripped from workers' representatives. Instead, there are stringent requirements for a quorum of all workers of an enterprise before stating demands and declaring a strike (to hold the necessary conference a quorum of two thirds of the delegates is required). There is also a limited procedure for taking those steps by collecting signatures (permitted only when a general meeting of all workers at an enterprise or the normally required conference cannot be arranged). There are also restrictive norms that determine how a collective labor dispute officially may begin. One of these is that, if the parties to collective bargaining have signed a protocol of disagreements, they may not later withdraw from the collective bargaining process and instead directly initiate a collective labor dispute on the same issues. Once such a protocol has been signed, employees would have to state and confirm in a general meeting or conference any demands that had already been set aside in the course of the previous collective bargaining (Art. 398 of the Labor Code). To declare a strike when there is an unresolved disagreement, workers would once more have to hold a general meeting or conference adhering to the same requirements as for stating demands. There is a series of other challenging steps that must be taken.[38] Even though the complicated nature of these procedures has long been acknowledged and discussed, nothing has been done toward making them simpler.[39]

3.2. Deviations from International Standards

Some norms of the Labor Code on resolving collective labor disputes and strikes are inconsistent with international labor standards. Russian trade unions brought a few complaints about the deviation of the Labor Code norms on resolution of

---

[37] Lyutov 2014; Gerasimova 2014.

[38] *See for example* Герасимова Е.С. Законодательство России о коллективных трудовых спорах и забастовках: проблемы и направления совершенствования, 1 Трудовое право в России и за рубежом 29 (2012) [Elena S. Gerasimova, *Russian Legislation on Labor Disputes and Strikes: Problems and Ways to Improve*, 1 Labor Law in Russia and Abroad (2012)]; Герасимова Е.С. Изменен порядок разрешения коллективных трудовых споров и организации забастовок. Достигнута ли цель?, 1 Трудовое право 51 (2012) [Elena S. Gerasimova, *The Manner of Resolving Labor Disputes and Organizing Strikes Has Changed. Did It Reach the Goal?*, 1 Labor Law 51 (2012)]; Lyutov 2014; Gerasimova 2014.

[39] *Supra* note 3.

collective labor disputes and on strikes from the relevant international labor standards before the ILO Committee on Freedom of Association (Cases No. 2216, 2251, 2244 and 2199), and the Committee issued a series of recommendations for revising Russian legislation. The ILO Committee of Experts and the European Committee of Social Rights also issued recommendations prompted by noncompliance with international standards. Among the issues pointed out were restrictions on the level at which collective bargaining may take place; on the goals for strikes; on requirements for a quorum for valid general meetings and conferences; trade unions' ability to state demands in a collective labor dispute; limitation of the right to strike for broad categories of workers; and on the requirement during a strike to maintain too many kinds of work as minimally necessary.[40] Only a few of these recommendations to change the Labor Code were implemented, but the amendments did not change the basically restrictive nature of provisions in the Labor Code.[41]

3.3. Exclusion of Categories of Workers from the Right to Strike

The right to strike is prohibited for many categories of workers that are clearly not subject to such restrictions according to international labor standards.[42] Some categories of workers who earlier enjoyed the right to strike (rail road workers, air traffic controllers, etc.) now were deprived of the right to strike, and they have to seek other informal means not governed by the law to defend their interests.

3.4. Negative Consequences for Workers Who Defend Their Rights

Participants in collective labor disputes face hostile attitudes from employers, local and government officials (such as police, prosecutors, etc.) toward collective labor conflicts and protests. Law enforcement bodies are used as a means of intimidating workers to get them to refrain from collective disputes and strikes.[43] Participants in conflicts report that enforcement agencies, prosecutors, the Ministry

---

[40] For more on this topic *see* Лютов Н.Л., Герасимова Е.С. Международные трудовые стандарты и российское трудовое законодательство: Монография [Nikita L. Lyutov & Elena S. Gerasimova, *Russian Labor Law and International Labor Standards: Compatibility and Prospects for Reconciliation: A Practical and Academic Guide*] 39–48 (2nd ed., augmented and revised, Moscow: Centre for Social and Labor Rights, 2015); Gerasimova, *Russian Legislation on Labor Disputes and Strikes*; Лютов Н.Л. Признание права на забастовку на уровне Международной организации труда: важно ли это для России и других стран?, 9 Актуальные проблемы российского права 118 (2015) [Nikita L. Lyutov, *Acknowledging the Right to Strike at the Level of the International Labor Organisation: Is It Important for Russia and Other Countries?*, 9 Actual Problems in Russian Law 118 (2015)].

[41] Gerasimova, *The Manner of Resolving Labor Disputes*, at 51–60 etc.

[42] Lyutov & Gerasimova 2015, at 45.

[43] Свобода объединения в России: практика, проблемы реализации и защиты прав: Доклад о нарушениях профсоюзных прав членских организаций Всероссийской конфедерации труда и Конфедерации труда России [Freedom of Association in Russia: Practices and Problems in Exercising and Defending Rights: A Report on the Infringement of the Trade Union Rights of Member of the Confederation of Labor of Russia and the All-Russia Confederation of Labor] (Moscow: All-

of Internal Affairs, and other *siloviki* use their authority to put pressure on people to relinquish not only their right to strike but even the mechanism for engaging in a collective labor dispute. For a large number of people defending their interests exacts such an unacceptably high price that they either abandon any defense of their interests or seek out means that are more roundabout and less confrontational.

3.5. Absence of a Tradition of Negotiated Settlements

As we analyze the situation, Russia lacks any broad, deeply rooted experience of working out disagreements through open negotiations in good faith that end in an agreement. In many cases employers are simply not prepared to examine a problem brought up by workers; or else, although they may understand the problem's importance, they are not ready to enter into dialogue, negotiations, and a sincere search for a way to resolve it. This comes about as a consequence of knowing that there is a whole catalogue of ways to evade substantive discussion by resorting to platitudes, force, the authorities, and other means – this is a consequence of living in a hierarchical society.[44] That problem afflicts various aspects of life in general and of labor relations, including collective labor relations, which constitute just one area where the phenomenon appears. It may be just one such area, but it provides a very crucial and significant insight into the social ranking and perceptions, as well as into the overall condition of society.

However, in the context of this article it is important to refer to these broadly pervasive circumstances because they enable us to understand why the complicated practices for applying the laws on collective labor disputes and strikes end up distorting the use of the law not to settle the matter under dispute, but to divert it into futile extralegal actions, or to "bury" it in bureaucratic procedures.[45] As a result workers and their representatives spend much effort on organizing collective labor disputes and on resolving them by legal procedures, but that effort may be useless for resolving disputes and managing problems that workers encounter.

In addition to the reasons already cited, we find that judicial treatment of cases involving collective labor disputes is implicated most of all in cases where the legality of strikes is at issue.

This role of the courts has been studied very little and has received scant attention in discussions of the effectiveness of regulating collective labor disputes

Russia Confederation of Labor, 2009) (Apr. 14, 2017), also available at https://publications.hse.ru/books/69541345.

[44] Петрановская Л. Почему мы такие злые?, Нескучный сад, 21 мая 2012 г. [Lyudmila Petranovskaya, *Why are We So Nasty?*, Neskuchny Sad, May 21, 2012] (Apr. 14, 2017), available at http://www.nsad.ru/articles/pochemu-my-takie-zlye.

[45] *See further, for example*, Герасимова Е.С. Забастовка как средство защиты трудовых прав граждан, 3 Право и экономика (1999) [Elena S. Gerasimova, *The Strike as a Means to Defend the Labor Rights of Citizens*, 3 Law and Economics (1999)].

and strikes. In the remainder of this paper, we shall examine the legal reasoning and court precedents in cases involving collective labor disputes and judgments on the legality of strikes.

4. The Role of Court Decisions in Collective Labor Disputes and Strikes

In addition to the reasons already cited for avoiding official mechanisms for resolution of labor conflicts, we find that judicial treatment of cases involving collective labor disputes is implicated most of all in cases where the legality of strikes is at issue.

This role of the courts has been studied very little and has received scant attention in discussions of the effectiveness of regulating collective labor disputes and strikes. In the remainder of this paper, we shall examine the legal reasoning and court precedents in cases involving collective labor disputes and judgments on the legality of strikes.

We find that the courts are a major factor in making the legal mechanisms for resolving collective labor disputes and strikes extremely burdensome and ineffective in practice. The principal reason for this is that employers and prosecutors have long employed entering a plea in court to rule a strike illegal as an effective manoeuver to discourage strikes from happening.

Upon a petition by an employer or a prosecutor, a strike may be declared illegal in courts for a variety of reasons. The decision that a strike is illegal will have undesirable consequences for workers and trade unions: workers must abandon the strike and return to work no later than the day after a copy of the court's decision is delivered to whatever body is in charge of the strike. Workers who have not promptly abandoned an illegal strike may be liable to disciplinary action and penalties imposed by governmental agencies for losses suffered by the employer during the illegal strike.

The statistics from the JD Supreme Court RF (Table 2) show that the majority of strikes considered in court proceedings are declared illegal (from 62.5 to 100% of cases). The trend increased in 2014, as the courts considered the smallest number of cases on the legality of strikes in the last six years (10 cases out of 24 filed in 2014), in all ten cases the strikes were found illegal.

When a plea is rejected, the grounds are usually that the court has found that there was no collective labor dispute, which is a necessary precursor of a legally constituted strike. For many years there have been only a few isolated cases in which a court did not declare a strike illegal when there was a collective labor dispute.[46]

---

[46] One example is the Decision of the Supreme Court of the Russian Federation of June 21, 2013 No. 80-APG13-1 [Определение Верховного Суда РФ от 21 июня 2013 г. № 80-АПГ13-1].

Employers usually file a suit on the legality of a strike before the strike begins after it has been just declared in order to head it off.[47] The courts have a very "accommodating" attitude toward such pleas. Even though the civil procedural legislation does not provide a special short term for considering pleas in this category,[48] court hearings for examining are set promptly after filing complaints. The courts almost always accept immediately a plea for the postponement of a strike that has not begun (or for the suspension of a strike in progress) for 15 days.

A court case on the legality of a strike is always considered during its postponement or suspension, after which the court generally finds that the strike is illegal. Thus court cases about the legality of strikes are an effective tool for preventing strikes. After such a court decision workers almost never start or continue the strike because they would then become liable for their participation in an illegal strike.

If a strike has already happened, the employer has no motivation to take the case to court, as it is too late for a court decision to forestall the strike.

5. The Role of Judicial Reasoning in Cases on the Legality of Strikes

As we see from the judicial statistics and practical experience, all or almost all strikes are ruled illegal. How does this occur?

The reasons for declaring strikes illegal are set out in the Labor Code. A strike is illegal if it is called without regard for the time limits, procedures, and requirements imposed by the Labor Code or if it is declared in workplaces where strikes are prohibited by the Labor Code or federal laws.

In practice grounds are "discerned" for finding almost any strike illegal. There are evident infractions of law that provide nearly incontestable justification for finding in favor of pleas. The law makes no distinction between serious and trivial violations of the time limits, procedures, and requirements; and neither do the courts. In consequence, the legal burden of "time limits, procedures, and requirements" is so onerous that it is practically impossible to bear. Hence, there is a predominance of decisions that strikes are illegal.

An analysis of court decisions on finding strikes illegal because of a violation of one of the unambiguous procedural norms of the law would not be of much interest. However, there is group of court decisions on strikes that are extremely interesting to analyze.

---

[47] For circumstances in which it is to the employer's advantage to file a suit on the legality of a strike, *see* Герасимова Е.С. Как работодателю реагировать на забастовку, 9(70) Кадровик.ру 8 (2012) [Elena S. Gerasimova, *How Employers React to Strikes*, 9(70) Kadrovik.ru 8 (2012)].

[48] Such cases fall under the general two-month term set by the Civil Procedure Code of the Russian Federation (GPK RF) (Art. 154 of the Labor Code).

The study of judicial precedents shows that they contain a wealth of interpretations on matters that are either not addressed or left ambiguous in the law. In these circumstances the legal reasoning of the courts becomes a crucial source of law and exerts a strong influence on the application of the legislation on collective labor disputes and strikes.

It seems that many of these interpretations are ambiguous, very broad, or inconsistent. They indicate that the courts favor ruling strikes illegal.

Therefore, it appears that the courts are a distinct and essential added factor in inhibiting strikes. They restrict the already narrow course for collective labor disputes, encumber the right to strike, and leave almost no way to mount a strike legally in Russia.

In what follows we examine some of these problems and some of the more questionable approaches in judicial precedents.

5.1. Uncertainties about the Existence of a Collective Labor Dispute

A clear understanding about the existence of a collective labor dispute is of great importance for workers initiating labor disputes, primarily because that decision determines the applicability of procedures for resolving the dispute, which are costly and time-consuming. However, the distinction between individual and collective labor disputes is not always clear. There are several debatable issues,[49] no matter how widespread a dispute may be, that bear on whether a dispute is individual or collective according to the terms of a collective bargaining agreement and on how it should be settled.

According to Art. 381 of the Labor Code, an unsettled disagreement about the *applicability* of a collective agreement may result in an *individual* labor dispute. According to Art. 398 of the Labor Code, a *collective* labor dispute is an unsettled disagreement about the *fulfilment* of such agreements.

Even one court or judge does not always uniformly interpret what constitutes an individual or collective labor dispute. For example, during 2008 and 2009 the Savyolovsky district court of Moscow considered several suits brought by the Federal Union of Air Traffic Controllers of Russia (FPAD) regarding fulfilment of the terms of collective bargaining agreements between FPAD and the State Air Traffic Management Corporation. In one case FPAD cited the defendant's failure to adhere to the applicable collective bargaining contract by refusing to index base wages to reflect a percentage increase in revenues over previous revenues. The case was dismissed by the Savyolovsky district court of Moscow[50] on the grounds that "the

---

[49] Стародумов Ю.О. Защитит ли профсоюз коллективный договор?, 1 Трудовое право в России и за рубежом 9 (2015) [Yury O. Starodumov, *Are Trade Unions Protected by Collective Agreements?*, 1 Labor Law in Russia and Abroad 9 (2015)].

[50] Определение Савеловского районного суда г. Москвы от 13 октября 2013 г. по делу № 2-5291/09 [Decision of the Savyolovsky district court of Moscow of September 13, 2013 on case No. 2-5291/09].

dispute is a collective labor dispute pursuant to an unsettled disagreement between workers and their employer about changes to and fulfilment of the collective bargaining agreement;" however, the base wages had earlier been altered by agreements between the parties, and the court could not condone the argument of FPAD that alterations to the base wages required only an order from the employer. The decision was affirmed by the Moscow City Court upon appeal by FPAD.

FPAD brought another case against the State Air Traffic Management Corporation on behalf of a group of workers to the effect that their additional leave days had been improperly calculated and that leave should have been calculated according to the terms of their collective bargaining agreement and that these workers were entitled to compensation for punitive damages. The decision of the Savyolovsky district court of Moscow was to dismiss the case on the grounds that it was outside the court's jurisdiction because there was a collective labor dispute.

This decision was annulled by the Moscow City Court,[51] and the case was to be reconsidered. The Moscow City Court reasoned that no labor dispute had arisen between collective participants, and this dispute did not constitute a collective labor dispute.

A similar situation was also considered by the Supreme Court RF in its decision on a plea entered by the Perm Pork Complex Trade Union against the Perm Pork Complex Corporation about indexation of salaries.[52] The trade union cited the collective agreement requiring indexation of salaries and requested that the employer be required to index salaries. The Supreme Court RF held that there had been an unsettled disagreement between workers and their employer, and thus a collective labor dispute existed; and as result the court agreed that the case was outside its jurisdiction.

We consider this reasoning infringes the legal principle that collective agreements must be upheld.[53] Failure to fulfil conditions of the collective agreement would come under Art. 381 of the Labor Code as basis for an individual labor dispute, and the choice of the legal mechanism to defend workers' right – either through individual labor disputes or by initiating a collective labor dispute – must be left to the workers. Uncertainty and absence of a clear judicial position create obstacles in resolution of labor disputes concerning implementation of collective agreements.

---

51 Определение Московского городского суда от 19 февраля 2009 г. по делу № 33-3704 [Decision of the Moscow city court of February 19, 2009 on case No. 33-3704].

52 Апелляционное определение Верховного Суда РФ от 25 января 2013 г. по делу № 44-КГ12-5 [Appellate Decision of the Supreme Court of the Russian Federation of January 25, 2013 on case No. 44-KG12-5].

53 Art. 24 of the Labor Code.

5.2. Cases in Which Strikes are Permissible

According to Art. 398 of the Labor Code, a strike is exclusively a means to resolve a collective labor dispute. Art. 37, part 4 of the Constitution of the Russian Federation is less definite and allows debate about whether a strike may be suitable for individual labor disputes.[54] The ILO Committee on Freedom of Association has advised that strikes must be recognized in Russia also as a means either to obtain recognition for a trade union, or to protest the economic and social policies of the government, or to demonstrate solidarity.[55]

We will examine the need to legalize strikes to obtain recognition for a trade union. In Russia trade unions are authorized to act without registering as legal entities, merely on the basis of taking a decision to create a trade union, electing governing and oversight bodies and approving a charter. No legal procedure for recognition of a trade union exists, and trade unions do sometimes encounter non-recognition by employers. Also, strikes that demand recognition of a trade union do actually occur.

As one illustration, the Supreme Court RF heard a case brought by the Kurgan-energoremont Company against its grassroots trade union, Zashchita-Remont, on the legality of a strike.[56] The demands during the strike were to cease discrimination against members of the union and to provide conditions suitable for the operation of the union. The court found that no collective labor dispute had arisen and did not find the strike illegal. Nevertheless, the case demonstrates the need for granting the right to strike to obtain recognition of trade unions and also the pertinence of the recommendations on this issue.[57]

5.3. Broad and Ambiguous Interpretations of the Grounds for Ruling Strikes Illegal

When the resolution of a collective labor dispute or a strike are in overall conformity with the Labor Code, the grounds for finding a strike illegal may be found by courts by means of a broad or ambiguous interpretation of the law. A few examples follow.

---

[54] Нуртдинова А.Ф. Прекращение работы в связи с невыплатой заработной платы: попытка правового анализа, 8 Журнал российского права 27 (2000) [Aliya F. Nurtdinova, *Work Stoppages Caused by Unpaid Wages: A Preliminary Legal Analysis*, 8 Russian Law Journal 27 (2000)]; Герасимова Е.С. Процессуальные особенности рассмотрения судом дел о признании забастовки незаконной: Дис. … канд. юрид. наук [Elena S. Gerasimova, *Distinctive Procedural Features in Judicial Consideration of Cases on the Legality of Strikes: PhD thesis*] 20–24 (Moscow, 2002); Кливер Е.П. Право на забастовку в Российской Федерации: Дис. … канд. юрид. наук [Evgeny P. Kliver, *The Right to Strike in the Russian Federation*: *PhD thesis*] 12 (Tomsk, 2000).

[55] For more on this topic *see* Lyutov & Gerasimova 2015, at 41–43.

[56] Определение Верховного Суда РФ от 7 июля 2006 г. № 82-Г06-2 [Decision of the Supreme Court of the Russian Federation of July 7, 2006 on case No. 82-G06-2].

[57] Lyutov & Gerasimova 2015, at 41–43, 182–183.

The Labor Code stipulates rules for conducting general meetings of workers and conferences during a collective labor dispute (both to state demands on a collective labor dispute and to call for a strike). Meetings are duly constituted if more than half the workers are in attendance, and conferences are if at least two thirds of the elected delegates attend. Demands via a collective labor dispute must be supported with a majority of the votes of the workers (or delegates) at the meeting (or conference). If holding a meeting of workers (or convening a conference) is not possible, a workers' representative body may validate its motion by collecting the signatures of more than half of the workers in favor of the demands to be put forward or in favor of calling a strike. Courts interpret these requirements rather broadly.

Thus, the presence of persons who work for a different employer, at a meeting held to elect delegates to a conference has been considered by court as violation of law. In its decision on the legality of a warning strike at the Faurecia auto parts plant, the Supreme Court RF found that persons who were not workers on the permanent staff of Faurecia were present at the meeting and concluded that it could not ascertain that "the demands had been made at the behest of the workers at Faurecia or that the delegates so elected were acting in the interests of these workers."[58]

In another case on the legality of a strike at the Mechel Remservis Company, registration of delegates to a conference without proper documents establishing their identity, absence of records listing the delegates, and omissions in such a list, among other findings, were counted by the Supreme Court RF as infractions, although the Labor Code has no such requirement on these issues.[59]

The Court found that the strike was illegal because

> the official registration of each delegate present at the conference… did not proceed *on the basis of documents establishing their identity* and inasmuch as related documentation (records and forms with the names of delegates in attendance and absent)… The records of the credentials committee for the conference… that confirmed that authorization of the 32 delegates in attendance also *failed to maintain a schedule of those in attendance at the conference that included their names*… and… the documentation for the conference of the labor collective concerning the declaration of a strike… was signed by Mr. T., the chairman of the conference. However, the documentation *lacks any information about the election of Mr. T. to the post of chairman of the conference* of the labor collective.

---

[58] Апелляционное определение Верховного Суда РФ от 25 мая 2012 г. № 33-АПГ12-2 [Appellate Decision of the Supreme Court of the Russian Federation of May 25, 2012 on case No. 33-APG12-2].

[59] Апелляционное определение Верховного Суда РФ от 2 марта 2012 г. № 66-Г12-2 [Appellate Decision of the Supreme Court of the Russian Federation of March 2, 2012 on case No. 66-G12-2].

In a case on the illegality of a strike by workers of the First Stevedore Company it was found that the delegates elected to participate in a conference were duly constituted to set forth demands about increases in wages and salaries (the minimum to be paid for labor), but were not authorized to call a strike.[60]

Another example demonstrates the narrow interpretive standard concerning the time limit for carrying out a warning strike. In a case to determine the legality of a warning strike at the Faurecia auto parts plant, the reason for ruling that strike illegal was an inordinate delay in mounting it.[61] In that case by November 14, 2011, no agreement between the parties to the collective dispute had been reached, and parties did not invoke labor arbitration. A one-hour warning strike was declared on November 27, 2011, that is, after the reconciliation procedures had been closed. The Labor Code at that time provided that, after five calendar days of operation of the reconciliation committee, a single warning strike limited to an hour's duration three work days prior to the inception of the actual strike may be conducted. The phrase "after five days of operation of the reconciliation committee" in Art. 410 of the Labor Code means only the earliest day on which a warning strike may be conducted rather than a limited period during which it must be conducted. However, in this case the norm was interpreted as a prohibition against a warning strike taking place after the conclusion of reconciliation procedures.

5.4. Inconsistency in the Legal Reasoning in Court Decisions

Inconsistency in the legal reasoning of the courts over time concerning issues that are not settled clearly in the legislation seems to be a serious problem. We shall take up a few examples.

5.4.1. Interpretation of the Norms on the Procedure for Declaring a Warning Strike

The Labor Code's requirements for conducting a warning strike are simpler than for an ordinary strike, but they are governed by legislation that is extremely sketchy. In particular, it is not clear which body is authorized to declare a warning strike and in what manner.

In a 2012 decision on the illegality of a strike at the Ford Motor Company the Supreme Court RF indicated that, according to Art. 410 of the Labor Code, a warning strike is not a special kind of activity that is to be concluded and conducted in manner different than a regular strike.[62] The Supreme Court RF concluded that a workers' representative body is authorized only to propose declaring a strike to

[60] Определение Верховного Суда РФ от 21 марта 2008 г. № 78-Г08-5 [Decision of the Supreme Court of the Russian Federation of March 21, 2008 on case No. 78-G08-5].

[61] Апелляционное определение Верховного Суда РФ от 25 мая 2012 г. № 33-АПГ12-2 [Appellate Decision of the Supreme Court of the Russian Federation of May 25, 2012 on case No. 33-APG12-2].

[62] Апелляционное определение Верховного Суда РФ от 23 марта 2012 г. № 33-Г12 [Appellate Decision of the Supreme Court of the Russian Federation of March 23, 2012 on case No. 33-G12].

workers, but the decision to do so belongs solely to a meeting (or conference) of workers. Because it had not followed this procedure, the warning strike at the Ford Motor Company was found illegal.

However, in considering a case in 1998 on the legality of a warning strike at the Kaliningrad Commercial Port, the Supreme Court RF[63] relied on similar norms of the Federal law "On Resolution of Collective Labor Disputes," and stated that:

> In ruling this warning strike illegal the court has applied to it the provisions of the law governing the declaration and execution of an ordinary strike. However, the procedure for declaring and conducting a warning (or hourly) strike is set forth only in Art. 14, para 3 of the Federal law "On Resolution of Collective Labor Disputes."

The Supreme Court RF thus concluded that norms on declaring and conducting ordinary strikes should not be applied.

During a strike in 2012 the workers' representatives at the Ford Motor Company had been proceeding under that assumption, but the Supreme Court RF applied a different and even opposed interpretation of the law as the justification for finding the strike illegal.

We consider the reasoning of the Supreme Court RF in the first case from 1998 properly argued. Moreover, requirements for declaring an ordinary strike[64] would make it impossible to fulfil the time limits when declaring a warning strike: under the Labor Code (as amended by Federal law of November 22, 2011 No. 334-FZ) warning strikes may be conducted during the operation of a reconciliation committee, which is 3 or 5 days depending on the level of the dispute.[65] At the same time, notification of a warning strike is to be issued 2 or 4 days in advance of the strike depending on the level of the dispute, and it may occur after the 3rd and 4th days of the operation of the reconciliation committee. Because this interpretation also stipulates that a warning strike must occur while the reconciliation committee is in operation, these time limits mean that a warning strike would have to be declared on the very first day that the reconciliation committee is convened.

Under the interpretation of warning strikes from the Supreme Court RF's decision of 2011, a warning strike is ruled out in principle. In this situation we consider it important to affirm, either through modifications to the Labor Code or by changes

---

63 Определение Верховного Суда РФ от 5 февраля 1998 г. № 71-Г97-5 [Decision of the Supreme Court of the Russian Federation of February 5, 1998 on case No. 71-G97-5]; Коллективные трудовые споры: Пособие профсоюзному активисту [*Collective Labor Disputes: Manual to the Trade Union Militant*] 249 (E.S. Gerasimova (ed.), Moscow: Centre for Social and Labor Rights, 2000).

64 Art. 410, para. 6 of the Labor Code.

65 Art. 403 of the Labor Code.

in the legal stance of the Supreme Court RF, that the decision to conduct a warning strike does not fall under the regulations pertaining to an ordinary strike.

5.4.2. Clarification of the Concept of a Free-standing Structural Division

According to the Labor Code employees can organize a collective labor dispute or a strike in organization itself, in field offices, or in representation or free-standing structural divisions of the organization. The concept of a free-standing structural division of the employer does not appear in labor legislation, but rather in the Tax Code of the Russian Federation (Art. 11, para. 2) and in the Civil Code of the Russian Federation (Art. 55) where it is not applied to collective labor disputes.

A definition of a free-standing structural division has emerged over time in cases about the legality of strikes, but the Supreme Court RF has also altered its stance over time. In 2004 in a case on a strike at Bashkirian Airlines it stated[66] that

> recognition of an organization's free-standing structural division as such may proceed whether or not its creation is referred to in the organization's founding or other organizational and administrative documentation. One of the criteria in this matter may be territorial separation and the presence of a fixed and permanent workplace where it is located…

The flight crews were assigned to a separate division. The Supreme Court RF took into consideration that the jobs of the flight crews are subject to special conditions with particular regulatory standards outside the physical facilities of the airline, and they are subject to special salary scales and pension contributions.

> Therefore, in the resolution of the collective labor dispute, the flight crews may, in view of the nature of their activities, have their own special interests that differ from those of the employees of the airline's other divisions, including with respect to setting the conditions and payment for labor.

At a later date the Supreme Court RF revised its thinking. It determined that these features were lacking for an aircraft maintenance base, which did not constitute a free-standing structural division inasmuch as "a cessation of work at the aircraft maintenance base would render the operation of the enterprise as a whole impossible."[67] The positions were similar for a theatre orchestra,[68] a truck

---

[66] Определение Верховного Суда РФ от 2 ноября 2004 г. № 49-Г04-87 [Decision of the Supreme Court of the Russian Federation of November 2, 2004 on case No. 49-G04-87].

[67] Определение Верховного Суда РФ от 10 февраля 2006 г. № 74-Г06-4 [Decision of the Supreme Court of the Russian Federation of February 10, 2006 on case No. 74-G06-4].

[68] Определение Верховного Суда РФ от 1 декабря 2006 г. № 48-Г06-20 [Decision of the Supreme Court of the Russian Federation of December 1, 2006 on case No. 48-G06-20].

maintenance shop for a mining company,[69] a distribution center, a receiving department, a customer reception center, and an expediting center of the company "Flora"[70] along with others.

One of only few cases of recognition of a free-standing structural division is the decision of the Supreme Court RF in which it ruled that the "Red Cap" coal mine along with four others was a structural division of the SUBR Corporation, and the refusal of the mine's workers to perform their duties posed no threat of disruption of work at the corporation's other divisions, and thus workers of this coal mine had the right to initiate a collective labor dispute and declare a strike as a free-standing structural division of the SUBR Corporation.[71]

The approach that is now in place constitutes a severely restrictive and indeed prohibitive impediment to collective labor disputes even in divisions that are clearly free-standing. Thus the right to conduct collective labor disputes and strikes at free-standing structural divisions is a mere fiction due to the definition developed by the Supreme Court RF. We propose that the definition of free-standing structural divisions employed by the Supreme Court RF be revised to allow greater leeway for conducting collective labor disputes in them.

5.4.3. Lack of Clear Criteria for Knowing in Advance Whether a Strike is Legal

According to Art. 413 of the Labor Code strikes may be illegal and impermissible "unconditionally" and "conditionally" ("if conducting a strike constitutes a threat to the defense of the country, its government, or the life and health of individuals"). The right to strike may be also restricted by federal law.

Allowing for the possibility of a threat as an element in the grounds for ruling a strike illegal has a positive aspect because it prevents ruling a strike illegal in the fields listed in the Labor Code if there is no such threat. On the other hand, it is difficult to assess the existence of a threat. There is room for a very broad interpretation (especially because the courts generally are hostile toward strikes), and even a purely hypothetical and undemonstrated threat may be unreasonably adduced as sufficient to rule a strike illegal. Using such reasoning, any strike in the fields listed in the Labor Code could be ruled illegal.

Hence, determining the likelihood of a threat is left exclusively to the courts, and workers who declare a strike cannot know whether or not it will be deemed legal by court. The courts make that assessment only after all the procedures for resolving a collective labor dispute are exhausted. To judge from the general willingness of

---

[69] Определение Верховного Суда РФ от 26 августа 2005 г. № 93-Г05-14 [Decision of the Supreme Court of the Russian Federation of August 26, 2005 on case No. 93-G05-14].

[70] Определение Верховного Суда РФ от 28 мая 2009 г. № 19-Г09-5ю [Decision of the Supreme Court of the Russian Federation of May 28, 2009 on case No. 19-G09-5yu].

[71] Определение Верховного Суда РФ от 18 июля 2008 г. № 45-Г08-12 [Decision of the Supreme Court of the Russian Federation of July 18, 2008 on case No. 45-G08-12].

the courts to ban strikes based on their illegality, it is highly probable that any strike in one of the fields mentioned in the Labor Code will be ruled illegal.

The decision of the Supreme Court RF on the legality of a strike at the Omsk Airport Company[72] (decision of July 18, 2008 No. 45-G08-12) demonstrates this as it states:

> The court notes the requirement that the decision by the conference of the employee collective of the Omsk Airport Company may not infringe the rights of passengers, and the court may not deem it permissible merely because on January 30, 2009, between 11 and 12 o'clock local time, no flights were scheduled… One of the grounds for the present plea to declare the strike illegal is the risk of inflicting harm in the future. The gap in the schedule for traffic of aircraft with ticketed flights at the time indicated does not grant employees the right to refuse to register passengers for flights that may take place off schedule as a result of delays for various reasons, including weather conditions… The refusal of the employees of the Omsk Airport Company to register passengers may cause harm to passengers on those flights that have altered schedules because individuals would have to wait for their flight departures.

In this case the court's supposition of possible harm is purely hypothetical and without a factual basis. Nevertheless, it was employed to justify ruling the strike illegal.

Conclusion

This paper has examined official statistics on collective labor disputes, strikes, and court cases on finding strikes illegal alongside the results of monitoring by non-governmental organizations. Further we explored how the legislation on collective labor disputes and strikes is applied in practice, particularly by courts, and how these practices influence workers and trade unions in their choice of strategies for labor conflicts. We found that judicial interpretations impact the legislation on collective labor disputes and strikes to make it inapplicable for workers as a solution to their problems in labor relations.

Examples analyzed show how judicial techniques are used to prohibit strikes. They demonstrate that the courts are inclined to reject strikes even when the workers (or their representatives) try in good faith to follow the requirements of the law that they can discern. The huge organizational effort that may go into observing

---

[72] Определение Верховного Суда РФ от 26 февраля 2009 г. № 50-Г09-2 [Decision of the Supreme Court of the Russian Federation of February 26, 2009 on case No. 50-G09-2].

those requirements then ends in disaster, and the collective labor dispute or conflict remains unresolved.

We suggest that the factors we have described deprive workers of any hope of justice or means to defend their interests by using the legal procedures for collective labor disputes. This means that they will resort to strategies outside the law to settle their collective labor disputes and that the legislation is ineffective.

This outcome seems undesirable for both society and the state. The state has a direct interest in a return to procedures for resolving collective labor disputes that would regain the trust of the parties involved by providing predictable and effective ways to settle their disputes and conflicts. This requires a number of successive steps. Among them it would be essential, at least, to:

– allow cases about both collective and individual labor disputes to be heard in court with regard to the acceptance or fulfilment of collective bargaining contracts or agreements;

– restrain the broad judicial interpretations of the procedures and requirements for resolving collective labor disputes and for the declaration and mounting of strikes;

– establish criteria that would enable an understanding before the fact about whether a strike would be deemed illegal because it poses a threat to national security or to personal health and safety;

– allow that the conditions imposed on the declaration of a warning strike do not apply equally to a warning strike;

– establish a broader definition of what constitutes a free-standing structural division with the privilege of engaging in a collective labor dispute or strike.

References

Герасимова Е.С. Забастовка как средство защиты трудовых прав граждан, 3 Право и экономика 1999 [Gerasimova E.S. *The Strike as a Means to Defend the Labor Rights of Citizens*, 3 Law and Economics (1999)].

Лютов Н.Л. Признание права на забастовку на уровне Международной организации труда: важно ли это для России и других стран?, 9 Актуальные проблемы российского права (2015) [Lyutov N.L. *Acknowledging the Right to Strike at the Level of the International Labor Organisation: Is It Important for Russia and Other Countries?*, 9 Urgent Problems in Russian Law (2015)].

Нуртдинова А.Ф. Прекращение работы в связи с невыплатой заработной платы: попытка правового анализа, 8 Журнал российского права (2000) [Nurtdinova A.F. *Work Stoppages Caused by Unpaid Wages: A Preliminary Legal Analysis*, 8 Russian Law Journal (2000)].

Garaway T. *Freedom of Association: Battering Ram or Trojan Horse?*, 13(2) Review of International Political Economy (2006).

Gerasimova E. *The Resolution of Collective Labour Disputes and the Realization of the Right to Strike in Russia* in *Labour Law in Russia: Recent Developments and New Challenges. Iss. 6* (M. Tiraboschi et al. (eds.), Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2014).

Hofmann C. (*The Right to) Strike and the International Labour Organization: Is the System for Monitoring Labour and Social Standards in Trouble?*, Friedrich-Ebert-Stiftung (2014) (Nov. 2, 2016), available at http://library.fes.de/pdf-files/iez/10775.pdf.

Laws Against Strikes: The South African Experience in an International and Comparative Perspective (B.A. Hepple at al. (eds.), Milano: Franco Angeli, 2015).

Lyutov N. *The Right to Strike: Russian Federation* in *The Right to Strike: A Comparative Overview* (B. Waas (ed.), Alphen aan den Rijn: Kluwer Law International, 2014).

Xhafa E. *The Right to Strike Struck Down?*, Friedrich-Ebert-Stiftung (2016) (Nov. 4, 2017), available at http://www.fes.de/cgi-bin/gbv.cgi?id=12827&ty=pdf.

Information about the author

Elena Gerasimova (Moscow, Russia) – Associate Professor, Head of the Department of Labor Law and Social Security Law, Faculty of Law, National Research University Higher School of Economics (3 Bol'shoy Trekhsvyatitel'skiy pereulok, Moscow, 109028, Russia; e-mail: egerasimova@hse.ru).