***TO***
***The scientific jury for conducting a defence for acquiring the scientific degree of 'Doctor of Science'***
***Professional Field 3.6 Law, Higher education domain 3. Social, Economic and Legal Sciences, appointed by Order No. 3-PK-17 of 05.10.2022 of the Rector of New Bulgarian University***

# OPINION

*given by Assoc.Prof. Dr. Andrey Alexandrov, Department of Civil Law Sciences, Institute of State and Law at the Bulgarian Academy of Sciences, member of the scientific jury*

**Dear colleagues,**

At the first meeting of the Scientific Jury under the procedure for conferring the scientific degree of 'Doctor of Science' on Assoc.Prof. Dr. Ivaylo Ivanov Staykov, I was assigned the preparation of this opinion. It is based on the dissertation through which the author applies for acquisition of the scientific degree of 'Doctor of Science', namely ***'Unpaid Leave under Art. 160, Para. 1 of the Labour Code'***, published as a monographic study in 2016.

**1.** According to Art. 12, para. 4 of the Law on Academic Staff Development in the Republic of Bulgaria (LASDRB), the dissertation paper, which should be successfully defended for acquisition of the degree of 'Doctor of Science', must contain **theoretical generalizations and solutions to major scientific or scientifically applied issues that correspond to modern achievements and represent a significant and original contribution to science**. I find that these prerequisites are present, in particular:

**A)** The dissertation is the first comprehensive, independent study of the problems of unpaid leave under Art. 160, para. 1 of the Labour Code (LC) in Bulgarian labour law doctrine. Undoubtedly, the legal regime of this type of leave deserves a thorough theoretical consideration, on the basis of which the current positive legal framework can be improved. The clarification of some controversial issues is also important for law enforcement. Because of the above, I believe that the dissertation offers *'solutions to major scientific or scientifically applied problems'* not only in terms of alternatives (as required by the law as a minimum), but also in terms of cumulativeness. Unpaid leave under Art. 160, para. 1 LC is the most commonly used type of unpaid leave, which makes the scientific and scientifically applied problems associated with it 'great', i.e. particularly significant. The lack of a comprehensive study of the issues so far reveals a gap in labour law, and this dissertation fills it. At the same time, the analyzed judicial and administrative practice, the analysis and systematization of the problems arising in connection with the legal regime of this leave, etc., also give substantial importance of scientific application to this dissertation.

**B)** As for the contributing points in the study, I would focus on the detailed clarification of the concept of 'leave-legal possibility', which has not been questioned in the literature so far, but has been regarded as something implied that does not need any special reasoning. It is obvious that, unlike the paid annual leave, for example, the unpaid leave under Art. 160, para. 1 of the Labour Code is not a subjective right of the employee. It will be used – or, as the author rightly points out, it will become a subjective right – when it is authorised by the employer, which is also considered a private hypothesis of an alteration of the employment relationship within the meaning of Art. 119 LC. It is therefore necessary to conclude an agreement between the parties on the use of the leave, its starting date and its duration.

I share the author's opinion that, both in the legal literature and in practice, it is sometimes allowed to confuse the regime of paid annual leave with the one of the unpaid leave under Art. 160, para. 1 LC, including the cases where, by inertia, the latter is also designated as 'annual'. It is also true that the provision of Art. 160, para. 1 of the Labour Code does not lay down an explicit requirement for a written form of the employee's request for unpaid leave, and respectively, a written consent on the part of the employer. The requirement for the employer's 'written permission' of the leave under Art. 173, para. 1 LC should not be used 'by analogy', because it refers to another type of leave. However, the adoption of the construction, according to which the use of unpaid leave under Art. 160, para. 1 of the Labour Code is based on an agreement between the parties on a temporary amendment (suspension) of the employment relationship gives a sufficiently clear answer to the question of the form in which the agreement must be reached and it is the written form. It is desirable that the requirement for a written form should be explicitly included in Art. 160, para. 1 LC.

**C)** Next, it is worth noting that **the other types of unpaid leave** (those under Art. 160, para. 2 of the Labour Code, Art. 54 of the Ordinance on Working Time, Rest and Leave (OWTRL), etc.) have been meticulously analyzed, including the ones regulated by Labour Code provisions which, at the time of publication of the monograph, were not a valid law (in particular, § 3e, para. 1 of the Transitional Provisions of the Labour Code). On this basis, the various types of unpaid leave are classified according to different criteria, which helps to clarify the differences among them and to better understand and study them. From a practical point of view, I find it most useful to divide the types of unpaid leave into: (a) unpaid leave – a legal possibility; (b) unpaid leave – a subjective right of the employee and (c) unpaid leave the unilateral granting of which is a subjective potestative employment right of the employer.

If the study had been completed to date, it would probably have included issues from the recent history of our labour legislation that relate to the Corona virus pandemic and the overcoming of its consequences. According to Art. 173a, para. 2 of the Labour Code, for example, at the request of certain categories of employees, the employer is obliged to allow the use of paid annual leave or unpaid leave in case of a declared state of emergency or a declared emergency epidemic situation. It is unlikely that the non-consideration of these problems in the study can be regarded as particularly negative for its relevance, this being due to two reasons. First of all, currently the unpaid leave under Art. 173a, para. 2 is not a valid right. Second, in view of its legislative logic, it does not differ from the unpaid leave under

Art. 173, para. 2 of the Labour Code (the leave of employees who belong to a religious denomination other than the Eastern Orthodox one). In both cases, unpaid leave is regulated as a subjective right of the employee, not as a legal possibility, and the difference only concerns the reasons for which the use of the leave is requested and its duration. However, if the author returns to this topic in future again, I would recommend that he should treat these latest aspects of it as well.

**D)** I find that the **commentary upon the judicial practice of application of Art. 160, para. 1 LC** is particularly useful. Although it is difficult for me to fully agree with some of the opinions expressed by the author (I will briefly state my considerations below), the selection of relevant judicial practice is a facilitation for future enforcement and will undoubtedly increase the readers' interest in the monograph.

**E) The proposals *de lege ferenda*** are justified, clear and specific. They are formulated with sufficient precision and can be directly used for future legislative changes. (It's another matter altogether whether precision has been a characteristic of the legislative process in recent years.)

**2.** I would like to present some **critical remarks** on the dissertation, which do not change my overall positive assessment of it. They just express my own views and reflections that the author could take into account in his future work if he finds them logical and justified.

**A)** Both in the dissertation presented and in other publications, Assoc.Prof. Staykov especially insists on the statutory sequence of the parties' declarations of will regarding the use of unpaid leave under Art. 160, para. 1 LC. For example, in the analysis of Decision No. 169 of the Supreme Court of Cassation, 3rd Civil Division of 02.06.1997 on civil case No. 130 of 1997, the author's criticism is caused by the conclusion that in case of suspension of work, the employer may '*offer employees to take unpaid leave under Art. 160, para. 1 LC*'. Although the author's arguments as to why he does not accept the possibility of the employer offering the use of unpaid leave are justified in detail, my personal opinion continues to be different. It is clear that, in practice, such proposals are often made by employers, however, what matters here is whether it is legal and not whether this is actually done or not. In my opinion, the employer's proposal for unpaid leave being taken does not violate any legal provision, as long as it is not accompanied by any compulsion of accepting it. If one proceeds from the author's thesis that the use of unpaid leave is a special case of reaching an agreement on the amendment of the employment relationship, there can hardly be any doubt that the initiative to conclude an additional agreement under Art. 119 LC may originate from either party.

The author proceeds mainly from considerations of social protection as well as from the danger of the employer abusing his dominance by granting forced unpaid leave to the employee, though, of course, he does not have such a right. Nevertheless, I find that no diversions should be presumed in order to deny the rule. As it is well known, according to Art. 8, para. 2 of the Labour Code, good faith in the implementation of labour rights and obligations is presumed until the contrary is established. In other words, there is no reason to believe that the employer will always make the offer in a way that prevents the employee from refusing. On the contrary, there can be and there are real-life situations in which the use of

unpaid leave under Art. 160, para. 1 of the Labour Code corresponds to the interests of both parties to the employment relationship. In the specific case of the analyzed decision of the Supreme Court of Cassation, the suspension of work may lead to the dismissal of employees. It seems to me perfectly logical and reasonable for the employer to offer them to use unpaid leave in order to avoid possible dismissals. And if the employees decide not to accept the offer, they will have been informed in advance of the danger that their employment contracts might be terminated on the grounds of Art. 328, para. 1, item 4 LC.

**B)** Right from the introductory notes to his study, the author prepares the readers for two peculiarities that they would undoubtedly notice on their own. He points out that he has adopted the approach of presenting almost in full the opinions and arguments of other authors, quoting them word for word. He also explains that his attention in using the comparative law method of research is focused mainly on the Russian (and, formerly, the Soviet) labour law, and respectively, on Russian labour law literature.

It is needless to substantiate that each author, especially an established scientist in his/her field with extensive experience and scientific production, has his/her individual style of writing and uses his/her own typical way of presenting information, research methods, etc. I will only allow myself to share my personal impression that these two peculiarities of the presentation overload the text and make it difficult to read it in some places, especially when footnotes occupy a whole page or so. I hope Assoc.Prof. Staykov will accept my well-intentioned comment and will reduce these references if he plans a new edition of the study.

**3. Overall evaluation and conclusion**

Based on the above, it is beyond doubt for me that the dissertation '***Unpaid Leave under Art. 160, Para. 1 of the Labour Code***' contains theoretical generalizations and solutions to major scientific or scientifically applied issues that correspond to modern achievements and represent a significant and original contribution to science. The dissertation fully meets the legal requirements for obtaining the degree of Doctor of Science, which is why I give my positive evaluation and will vote for a positive decision of the scientific jury.

*Sofia, 13.12.2022* *Assoc.Prof. Dr. Andrey Alexandrov, Institute of State and Law at the Bulgarian Academy of Sciences*