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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

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## REPORT WITH RECOMMENDATIONS

**A. No. 160/2015**

**Bajram Kadrija**

**against**

**Municipality of Gjakova**

**To:** Mrs Mimoza Kusari-Lila, Mayor  
Municipality of Gjakova

**Copy to:** Mr Arban Abrashi, Minister  
Ministry of Labour and Social Welfare

Mrs Violeta Xërxa-Thaçi, Director  
Main Family Medicine Centre in Gjakova

Mr Vaton Durguti, President Judge  
Basic Court in Gjakova

**Subject:** Violation of rights deriving from the employment relationship

**Legal grounds:** Constitution of the Republic of Kosovo, Article 135, paragraph 3, Law on Ombudsperson no. 05/L-019, Article 16, paragraph 8 and Article 27

Prishtina, 10 October 2016

## ACTIONS OF THE OMBUDSPERSON INSTITUTION

1. On 20 March 2015, Mr Bajram Kadrija (complainant) filed a complaint with the Ombudsperson Institution (OI) against the Mayor of Gjakova and Main Family Medicine Centre (MFMC) in Gjakova, regarding the failure to enforce plenipotentiary decisions of the Independent Oversight Board of the Kosovo Civil Service (IOBKCS), and plenipotentiary decisions of Executive Body of the Labour Inspectorate (EBLI), regarding his return to the previous work position: “*Chief Executive of the Family Medicine Department in MFMC in Gjakova*”.
2. On 30 March 2015, the complaint registered within OI (no. of complaint 160/2015).
3. On 2 April 2015, OI representative talked to the Head of Personnel Office in the Municipality of Gjakova, regarding the issue of the complainant. He informed him that Municipality of Gjakova received the IOBKCS decision (*Decision no. A. 02/301/2014*), but they’ve sent it to MFMC due to incompetency, explaining that what followed was also the notice of IOBKCS (*Notice no. 653/2015*), addressed to the Office of the Prime minister, requesting the undertaking of disciplinary measures against responsible persons due to the failure to execute the IOBKCS decision. According to him, meeting the obligations of the decision falls under the competence of the MFMC Commission: therefore, he submitted letters to MFMC, in order for them to proceed further with this issue.
4. On 15 April 2015, OI representative discussed with MFMC Director, regarding the issue of the complainant. She was not open in her responses regarding the actions undertaken by MFMC in the issue of the complainant, therefore, she asked for several days’ time in order that she could clarify this with MFMC Administration, promising that OI will be informed on the developments of the event.
5. On 5 May 2015, OI representative met the MFMC Director, who informed him that according to Municipal Director of Directory of Health and Social Welfare (DHSW), the complainant’s case was dealt with by court proceedings; therefore, a court decision was to be expected. She provided no documentation to the OI representative regarding this issue, but the entire event, according to her, was based on the statements of DHSW Director.
6. On 12 June 2015, OI representative discussed with the Chief Labour Inspector within Ministry of Labour and Social Welfare (MLSW), regarding the issue of the complainant. He informed him that EBLI Labour Inspectors have issued two decisions on the complainant’s favour, on both instances, and according to them, MFMC has not initiated any administrative dispute against EBLI decision. According to him, regardless of this, the complainant may realise his right through enforcement procedure at the court based on the legal grounds of enforcement of administrative decisions.
7. On 22 June 2015, OI representative discussed with DHSW Director in order to be informed on the procedures carried out in the issue of the complainant. He was hesitant in providing information regarding this issue and pointed out that in order to obtain the information required; one should address him with a written request.
8. On 23 June 2015, OI representative had a joint meeting with the Mayor of Gjakova and DHSW Director, to whom he discussed about the issue of the complainant. They expressed their regret that OI was dealing with the complainant’s issue, because

according to them, the complainant: "Is a person extremely politicised and comes from the Municipality of Deçan". The expressed their stance that the complainant was successful in convincing relevant institutions in deciding on his favour, apostrophising also OI. According to them, no one has asked how the complainant managed to come to this position, without respecting any legal criteria, but after his dismissal, all institutions are asking for the implementation of decisions, which according to them are politically influenced. At the end of the meeting, they expressed their stance that this issue will be analysed again by responsible municipal authorities and depending on the epilogue we will be informed about their developments.

9. On 10 July 2015, OI representative send an e-mail to the Mayor of Gjakova, asking for information regarding the developments undertaken by them on the issue of the complainant.
10. On 14 July 2015, OI received an e-mail from DHSW Director in Gjakova, informing that regarding the issue of the complainant, MFMC has initiated an administrative dispute with Basic Court in Prishtinë (BCP), Department for Administrative Matters, but without presenting a copy of the suit or a number of the case in the court.
11. On 3 September 2015, OI representative met again the MFMC Director, from whom he received a physical copy of the suit against the EBLI and IOBKCS decision sent to Basic Court in Prishtina, to Department for Administrative Matters (*postal delivery no. 1482097, dated 17 December 2014*), as well as a physical copy of the suit of MFMC addressed to the abovementioned court against the IOBKCS decision (*postal delivery no. 1477859, dated 10 October 2014*).

## I. CIRCUMSTANCES OF THE CASE

Facts which could be confirmed so far are based on the claims of the complainant, as well as based on other information available with the Ombudsperson; can be presented as below:

12. Mr Bajram Kadrija, with qualification General Practitioner entered into an employment relationship with the former Health House in Gjakova (now MFMC) in 1983, while from 1993 (after graduating in the specialist studies), he was systemised in the position of a *Paediatric Specialist Physician* in MFMC in Gjakova.
13. On 12 April 2013, MFMC announced an internal vacancy for staffing the vacant job position: "*Chief Executive of Family Medicine Department*", according to the job vacancy no. 233/2013, dated 12 April 2013, however, since none of the candidates applying met the conditions required according to the job vacancy, MFMC had extended the job vacancy for five (5) more days, according to the notice published with no. 233/2, dated 22 April 2013.
14. On 30 April 2013, following the completion of the recruitment procedures, MFMC took a decision to appoint Mr Bajram Kadrija in the position of *Chief Executive of Family Medicine Department*, with a three (3) year mandate (decision no. 263/2013, dated 30 April 2013).
15. On 11 May 2013, Association of Family Doctors (AFD), branch in Gjakova, filed a written reaction with Municipal Institutions (Mayor, DHSW Director, representative of political parties in the Municipal Assembly) Health Inspectorate, Labour Inspectorate, President of the Kosovo Health Union, media etc., asking to cancel the

advertisement no. 233, dated 12 April 2013, and announce a new advertisement which would advertise all positions whose contracts have expired, and the announced advertisement should respect all criteria and legal procedures.

16. On 21 May 2014, DHSW Director recommended the MFMC Director to complete the selection of the Chief Executive of Family Medicine Department within ten days' time (*Recommendation no. 05-officialy, dated 21 May 2014*).
17. On 30 May 2015, MFMC took a decision (*no. 332, dated 30 May 2014*) through which Mr Bajram Kadrija is discharged from the position of Chief Executive of Family Medicine Department within MFMC in Gjakova.
18. On 2 June 2014, MFMC announced a job vacancy for staffing the vacant job position: "*Chief Executive of Family Medicine Department in MFMC*" (*notice no. 334/2014, dated 2 June 2014*).
19. On 10 June 2014, MFMC cancelled the advertisement announced according to the above-mentioned paragraph (*decision no. 374/2014, dated 10 June 2014*).
20. On 10 June 2014, Mr Bajram Kadrija filed a complaint against the decision no. 332 dated 30 May 2014 of MFMC asking to cancel the advertisement and return him to the work position.
21. On 12 June 2014, MFMC re-announced the advertisement with some changes in the paragraph regarding conditions required for candidates (*notice no. 380/2014, dated 12 June 2014*).
22. On 13 June 2014, MFMC responded in writing to the complaint of Mr Bajram Kadrija, recommending him to file a complaint with the Labour Inspectorate (*notice no. 332/3, dated 13 June 2014*), regarding the alleged violations from the employment relationship.
23. On 7 July 2014, Mr Bajram Kadrija filed a suit with the Basic Court (BC) in Gjakova against the defendant MFMC, regarding the request for dissolution of the MFMC Decision no. 332, dated 30 May 2014.
24. On 22 August 2014, Labour Inspectorate of Ministry of Labour and Social Welfare (MLSW) took a decision that the complaint of Mr Bajram Kadrija (*no. 436/2014, dated 1 July 2014*) is founded and MFMC committed violation of Law on Labour No. 03/L-212, Article 70, paragraph 1, item 4.1, 1.4.2, 1.6.2, as well as paragraph 2, 3 and 4, and Article 71.2.
25. On 29 August 2014, IOBKCS took a decision (*no. A 02/301/2014, dated 29 August 2014*) which determined: "*Commission for resolution of disputes and complaints is obliged to review the complaint no. 332 dated 10 June 2014*" and "*Mayor and Personnel Manager of the Municipality are obliged to implement this decision within 15 days from the day of receipt of the decision*".
26. On 30 October 2014, Executive Body of Labour Inspectorate acting as a second instance body (*according to MFMC complaint against the decision of first instance inspectors*) decided to reject the MFMC complaint and confirmed the decision of Labour Inspectors with no. 543/2014, dated 22 August 2014.
27. On 3 March 2015, IOBKCS informed the Prime minister of Republic of Kosovo through a letter (*no. 653/2015*), regarding the failure of Municipality of Gjakova to execute decisions of the Council, and asked the Prime minister that disciplinary and

material measures are undertaken in conformity with the law against responsible persons who were under legal obligation to enforce decisions.

28. On 24 July 2015, following the proposal on enforcement, BC in Gjakova determined the request of Mr Bajram Kadrija as permissible regarding *the proposal on enforcement of decision of Labour Inspectors no. 543/2014, dated 22 August 2014, of final form according to the decision of Chief Labour Inspector in Prishtina with protocol no. 93/14 dated 30 October 2014 (decision E. no. 321/15 dated 24 July 2015)*.
29. On 28 October 2015, MFMC used *objection* against decision E. no. 321/15 dated 24 July 2015, asking the Court *to annul* the decision for allowing enforcement.
30. On 3 November 2015, Mr Bajram Kadrija filed a response in the objection against MFMC, asking the Court to annul the MFMC objection and the court should proceed with enforcement procedures.

## II. RELEVANT INSTRUMENTS

31. Article 21, paragraph 2 and 3 of Constitution of the Republic of Kosovo (hereinafter “Constitution”) determines as follows.:

*“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution”.*

*“Everyone must respect the human rights and fundamental freedoms of others.”*

32. Article 49, paragraph 1 of Constitution determines as follows: “The right to work is guaranteed”, while Article 53 of Constitution determines: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.*
33. Article 14 of European Convention on the Protection of Human Rights and Fundamental Freedoms (4 November 1950), (hereinafter Convention) determines: *“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, **political** or other **opinion**, national or social origin, association with a national minority, property, birth or other status.”*
34. Article 5 of Law on Labour No. 03/L in the paragraph 1 determines *“ Discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, **cancellation of the contract of employment** or other matters arising out of the employment relationship and regulated by Law and other Laws into force”,* while Article 70, paragraph 1 sets forth: *“An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when”:*
  - a. *such termination is justified for economic, technical or organizational reasons;*
  - b. *The employee is no longer able to perform the job;*
  - c. *serious cases of misconduct of the employee; and*
  - d. *because of dissatisfactory performance of work duties”.*

35. Article 71 of Law on Labour, paragraph 1 sets forth: *The employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:*
- from six (6) months - 2 years of employment, thirty (30) calendar days;*
  - from two (2)- ten (10) years of employment: forty-five (45) calendar days;*
  - above ten (10) years of employment: sixty (60) calendar days.*
36. Article 82 of Law on Labour sets forth: *“An employee may submit an appeal to the Labour Inspectorate at any time for issues falling under the competencies of this body”* while Article 83 sets forth: *“**The disciplinary measures** related to the violation of the provisions of this Law by the employer, shall be issued by the Labour Inspectorate according to the Law on Labour Inspectorate”*.
37. Article 2, paragraph 2, under a), of Law on Labour Inspectorate in Kosovo no. 2002/9, determines *“Labour Inspectorate shall insure implementation of the labour law, conditions of work and protection at work [...]”*, while Article 3, paragraph 3 of this Law determines: *“For the purpose of implementation of the law, in its activities the Labour Inspection Authority shall co-ordinate and co-operate with municipal governments, tax inspectors, health inspection and other relevant authorities as well as with Kosovo Police”*.
38. Law on Labour Inspectorate in Kosovo no. 2002/9, Article 5, paragraph 5 sets forth: *“Labour inspectors within their powers shall issue written notice about irregularities found and set the time limit within which they must be eliminated”* whereas according to Law No. 03/L-017 on amendment and supplementation of Law on Labour Inspectorate No. 2002/9, Article 5 sets forth: *“Labour inspectors within their powers shall note within an official report the non-observance or violation of certain legal provisions. Labour inspector shall serve the penalty according to a decision [...]”*.
39. Law on Labour Inspectorate in Kosovo no. 2002/9, Article 6, paragraph 3 sets forth: *“An administrative challenge can be made to the court of legal jurisdiction against the Labour Inspection Authority within thirty (30) days’ time limit”*, whereas paragraph 4 of this Article determines: *“An appeal filed against the decision of a labour inspector cannot stop its execution”*.
40. Article 4, paragraph 1 of Law on Obligational Relationships (LOR) No. 04/L-077 determines: *“When concluding obligational relationships and when exercising the rights and performing the obligations deriving from such relationships the participants must observe **the principle of conscientiousness and fairness**”*, while Article 6, paragraph 3 of this Law determines: *“Any action by which the holder of a right acts with the sole or clear intention of harming another shall be deemed as **misuse of the right**”*.
41. Article 124, paragraph 1, of LOR determines: *“The general terms and conditions set out by one contracting party, whether contained in a formulaic contract or referred to by the contract, shall supplement the special agreements between the contracting parties in the same contract and shall as a rule be equally binding”*, while paragraph 3 of this Article sets forth: *“The general terms and conditions shall be binding for a contracting party that knew or should have known thereof when the contract was concluded”*.
42. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 221 sets forth: *“Whoever knowingly **fails to comply with the law** or a collective contract relating to*

*employment or termination of labour relations; salaries or other income; the length of working hours, overtime work or shift work; vacation or absence from work; or, the protection of women, children or disabled persons, and thereby denies or restricts the rights to which an employee is entitled shall be punished by a fine or by imprisonment of up to one (1) year”.*

43. Law on Enforcement Procedure No. 04/L-139, Article 21 sets forth: *“The enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law”*, while Article 22 sets forth: *“Enforcement documents are:*
- a. enforcement decision of the court and enforcement court settlement (reconciliation);*
  - b. enforcement decision awarded in administrative procedure and settlement [...]”.*
44. Law on Independent Oversight Board of Kosovo Civil Service No. 03/L-192, Article 13, sets forth: *“Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision”*, while Article 14, of the same Law sets forth: *“The aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board’s decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision. Initiation of an administrative dispute shall not stop the execution of the Board’s decision”.*

## Legal analysis

45. Constitution as the highest legal act of a country protects and guarantees human rights and fundamental freedoms; therefore, the practical implementation and realisation of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protection of human dignity and functioning of the rule of law. Constitution in Article 21 explicitly sets forth the obligation of all bodies to respect the human rights and fundamental freedoms of others; therefore, this principle is imperative and must be respected by all, including MFMC and other health institutions.
46. Article 49, of Constitution in paragraph 1 sets forth that **the right to work is guaranteed**, therefore taking this as a starting point, there are a wide range of laws and other associated (sublegal) acts created, including the establishment of special mechanisms for oversight of the implementation of this legislation. Legislation has foreseen the failure to respect this right as sanctionable and has regulated this area with imperative norms *jus cogens*, therefore, failure to respect this right according to current applicable legislation constitutes a criminal offense (see paragraph 42).
47. The Ombudsperson observes that in conformity with Article 53 of Constitution, Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights (hereinafter “European Court”). Taking into account cases of Constitutional Court of the Republic of Kosovo in the case of KI 89/13, dated 12 March 2014, it can be seen that the complainant, entered into an employment contract with Prishtina

International Airport for an indefinite period of time, in the position of a land stewardess, but after one year, her employer informed her for immediate termination of the employment contract. The Court found that termination of employment contract was in contradiction with Regulation 2001/27, for BLLK (Basic Labor Law in Kosovo), which was applicable at the time, determining that the employment contract is terminated by the employer in serious cases of misconduct by the employee or because of dissatisfactory performance of work duties. The court found that these violations were not present; therefore it found that the employer has violated Article 24 and Article 31 of Constitution and Article 6.1 of European Convention on Human Rights.

48. In the decision of European Court on the issue of *Lukendas vs. Slovenia*, dated 6 October 2005 (final decision dated 06 January 2006); the applicant complained that legal remedies available in Slovenia on issues of extension of proceedings, were ineffective. He was mainly based on Article 13 of Convention which sets forth: “*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*”. After the Court reviewed this case, it declared the request as admissible, and it assessed that there was a violation of Article 6 paragraph 1 of Convention, found that there was violation 13 of Convention, and ascertained that the violation found originate from the malfunctioning of legislation and internal practice. Similarly in the case of the complainant, irrespective that legal remedy available were found to be on his favour, they showed to be ineffective as they were not observed by authorities responsible and did not bring justice to the proper place.
49. In the decisions of the European Court on the case of “*Qufaj co. shpk vs. Albania*,” dated 2 October 2003, and case “*Ramadhi and others vs. Albania*”, dated 13 November 2007, regarding the violation of the rights of complainants to a fair trial, as a result of the failure of responsible authorities to execute final administrative decisions and final court decisions, the Court draw the attention that the execution of decisions is an integral part of “trial” for the purposes of Article 6 and the delays in the execution of decision may violate the essence of the right to a fair trial. European Court observes that, **notwithstanding the fact that we are before a final court decision or administrative decision, the domestic law and Convention sets forth that the decision must be executed, otherwise there is violation of Article 6, paragraph 1 of Convention.**
50. In the light of the provision of Article 14 of European Convention on Human Rights, Ombudsperson recalls that Convention determines that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In complainant’s issue, it can be clearly seen that first complaints started from AFD regarding the claims that advertisement criteria were violated, because the complainant has not met the criteria necessary to be selected for the specific position, since he comes from the Municipality of Deçan. Ombudsperson observes that according to the MFMC advertisement, for this position, the candidate should have been *a permanent inhabitant of the Municipality of Gjakova* (see MFMC advertisement no. 233/2013, dated 12 April 2013, as well as the AFD reaction, which among the claims of violations of advertisement items is mentioned the fact that *the complainant is from Deçan and is a Municipal Assembly member of this*



*Municipality.* In the light of this provision, one can see that there is an unequal treatment of MFMC employees, between those living in the Municipality of Gjakova with those living in other Municipalities of Kosovo; therefore, we can conclude that this provision is discriminatory.

51. Article 5 of Law on Labour No. 03/L in paragraph 1, determines that discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, **cancellation of the contract of employment or other matters arising out of the employment relationship** and regulated by Law and other Laws into force. Law determines that the employer is obliged to determine criteria and equal opportunities when recruiting employees, for the same job position, while provision of Law against Discrimination shall be directly applicable when it is about the employment relationship entered into between the employee and employer. In the concrete case, there is a discrepancy of wills for termination of contract between the complainant and MFMC; therefore, the employer unilaterally and in conflict with the law took a decision to dismiss the complainant from the position of Chief Executive.
52. Article 70 of Law on Labour No. 03/L in paragraph 1, determines cases when An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when: such termination is justified for economic, technical or organizational reasons, in cases when the employee is no longer able to perform the job, in serious cases of misconduct of the employee or because of dissatisfactory performance of work duties, while paragraph 3 of the same Article, requires that the employer should hold a meeting with the employee to explain termination of an employment contract or for the purpose of issuing a warning, while Article 71, paragraph 1 of the same Law determines terms when the employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:
- *from six (6) months - 2 years of employment, thirty (30) calendar days;*
  - *from two (2)- ten (10) years of employment: forty-five (45) calendar days;*
  - *above ten (10) years of employment: sixty (60) calendar days.*

From analysis of this case it can be clearly seen that premises of Article 70 to terminate the employment contract of the complainant are missing, therefore, Labour Inspectorate as a mechanism for oversight of the implementation of Law on Labour found that MFMC has committed violation of Law on Labour.

53. Article 82 of Law on Labour explains cases of protection of rights of employees determining how an employee may submit an appeal to the Labour Inspectorate at any time for issues falling under the competencies of this body, while Article 83 determines situations when **the disciplinary measures** related to the violation of the provisions of this Law by the employer, shall be issued by the Labour Inspectorate according to the Law on Labour Inspectorate. Practically the complainant acted according to Law filing the case to Labour Inspectors, who reviewed this request, issued a decision regarding violations of Law on Labour, both at first and second instance. Labour Inspectors and EBLI have taken no disciplinary measures against the employer who violated law, but the level of these actions remained only at the level of findings. This action of Inspectors made for these legal remedies to be ineffective, therefore, the complainant was obliged to address the Court with a

proposal to enforce these final administrative decisions by force and the Court allowed for the enforcement.

54. Article 2, paragraph 2, under a), of Law on Labour Inspectorate in Kosovo No. 2002/9, determines duties that the Labour Inspectorate shall insure implementation of the labour law, conditions of work and protection at work, while Article 3, paragraph 3 of this law determines possibilities that for the purpose of implementation of the law, in its activities the Labour Inspection Authority shall co-ordinate and co-operate with municipal governments, tax inspectors, health inspection and other relevant authorities as well as with Kosovo Police. This provision gives room to inspectors when they encounter cases of failure to enforce law, which according to the Criminal Code are determined as criminal offenses, they can cooperate with the Police and other mechanisms in order to file criminal charges, but regardless of legal possibilities, these actions did not occur in the complainant's case.
55. Law on Labour Inspectorate in Kosovo No. 2002/9, Article 5, paragraph 5 determines the obligation that Labour inspectors within their powers shall issue written notice about irregularities found and set the time limit within which they must be eliminated. Regardless of legal possibilities and powers available with Labour Inspectors and EBIL, they have taken no such action, while not requiring MFMC to eliminate irregularities found and have not acted in conformity with Law No. 03/L-017 on Amendments and Supplementation of Law on Labour Inspectorate No. 2002/9, Article 5 which determines that **Labour inspectors within their powers shall note within an official report the non-observance or violation of certain legal provisions and shall serve the penalty according to a decision.**
56. Law on Labour Inspectorate in Kosovo No. 2002/9, Article 6, paragraph 3 determines the possibility that an administrative challenge can be made to the court of legal jurisdiction against the Labour Inspection decision within thirty (30) days' time limit, whereas paragraph 4 of this Article determines that **an appeal filed against the decision of a labour inspector cannot stop its execution.** In reality, in the complainant's case, MFMC initiated an administrative dispute, but it did not enforce decisions of Inspectors and EBIL, thus creating an impression of a legal uncertainty before other MFMC employees and public wide with a perception that MFMC is more powerful than the law.
57. Article 4, paragraph 1 of Law on Obligational Relationships (LOR) No. 04/L-077 points out that when concluding obligational relationships and when exercising the rights and performing the obligations deriving from such relationships the participants must observe **the principle of conscientiousness and fairness**, while Article 6, paragraph 3 of this Law determines that any action by which the holder of a right acts with the sole or clear intention of harming another shall be deemed as **misuse of the right**. Analysing it from the facts presented in the complainant's case, it can be concluded that the principle of conscientiousness and fairness was not implemented, because the purpose of MFMC was to express the angers of AFD and the fact that we are dealing with a revoking of a decision without legal grounds and after the expiry of legal time limit can be considered misuse of the right of one subcontracting party, namely by MFMC.
58. Article 124, paragraph 1, of LOR, determines that the general terms and conditions set out by one contracting party, whether contained in a formulaic contract or referred to by the contract, shall supplement the special agreements between the contracting parties in the same contract and shall as a rule be equally binding, while paragraph 3

of this Article sets forth that the general terms and conditions shall be binding for a contracting party that knew or should have known thereof when the contract was concluded. From what was said above, it can be clearly seen that MFMC as a public institution (employer) using the supremacy in relation to the complainant (employee), has acted in conflict with its previous actions, cancelling its actions after 13 (thirteen) months of implementation, regardless of the obligations it accepted by contract for three years.

59. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 221 sets forth that whoever **knowingly fails to comply with the law** or a collective contract relating to employment or **termination of labour relations**; salaries or other income; the length of working hours, overtime work or shift work; vacation or absence from work, or, the protection of women, children or disabled persons, and thereby denies or restricts the rights to which an employee is entitled shall be punished by a fine or by imprisonment of up to one (1) year. If we analyse this legal provision carefully and from circumstances and evidences of this case, we can understand that MFMC has knowingly failed to comply with the law (and continues to fail to comply with it), irrespective that legal violations were found by some of competent authorities and courts, which allowed for the enforcement of these decisions.
60. Law on Enforcement Procedure No. 04/L-139, Article 21 sets forth that the enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law, while Article 22 sets forth that enforcement documents are enforcement decision of the court, enforcement court settlement (reconciliation) and enforcement decision awarded in administrative procedure. Regarding the issue whether MFMC should have enforced administrative decisions, there is no dilemma, but the reason why these decisions were not enforced to date leave room for interpretation and suspicions that these actions were done for specific purposes.
61. Law on Independent Oversight Board of Kosovo Civil Service No. 03/L-192, Article 13, sets forth that decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Law points out that **execution shall be effected within fifteen (15) days from the day of receipt of the decision**, while Article 14, allows the possibility that the aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board's decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision, specifying that **initiation of an administrative dispute shall not stop the execution of the Board's decision**.

## Findings of the Ombudsperson

62. Based on all evidences presented and facts gathered, as well as relevant laws, which determine the right to work and performance of an occupation, Ombudsperson **finds that the complainant's appeal is reasonable and lawful**. In the concrete case, **Ombudsperson finds that there was violation of Human Rights and Fundamental Freedoms**, since officers responsible of MFMC and Municipality of Gjakova have acted in contradiction with constitutional principles and legislation in force, exceeding official authorisations and have undertaken actions which are in

contradiction with Constitution, European Convention, Law on Labour and other legal acts which we analysed in the paragraphs above.

63. Based on facts and circumstances described above, Ombudsperson observes that MFMC has taken an unfounded and unlawful decision for discharging the complainant from the position of Chief Executive of Family Medicine Department. It is a worrying fact that as a result of neglect of IOBKCS, Labour Inspectors and EBKI decisions and allowance for enforcement by the Court, MFMC has taken no procedural actions for enforcement of decisions or to negotiate this issue with the complainant. These non-actions by MFMC leave room for interpretation for intentional purposes. During the investigation of this case and other cases against MFMC, Ombudsperson is informed that preliminary there are other cases when Labour inspectors have found legal violations committed by this institution and their decisions were not observed by MFMC, so, such actions occurred even before.
64. Ombudsperson observes that Labour Inspectors have not implemented meritoriously the substantive right, since they found legal violations and did not impose disciplinary measures in conformity with the law. Dealing with only issues of procedural violations, they have made for these legal remedies (decisions) to be inefficient and justice was not brought to its proper place. It is a meaningless fact that in decisions of the Inspectorate (in both instances), they have only found violations, thus not requiring from the perpetrator of violation (MFMC) to undertake actions necessary to eliminate violations, and to compensate the aggrieved party (complainant), thus creating a conviction that these decisions are unprofessional. As a result of this inefficiency, these final administrative decisions are sent (from complainant) to enforcement procedures before a competent court, incurring additional expenses for complainant and consuming time. Ombudsperson is right when he raises the question, who needs these institutions whose legal mandate is the oversight of enforcement of law, while their decisions are binding to parties, they are not enforced? Ombudsperson observes that such practices of ignorance and stubbornness by responsible authorities should be stopped once and for all and law offenders should face consequences.
65. Ombudsperson found that state bodies responsible for this case did not manage to undertake effective measures regarding **positive obligations**, namely protection of rights in terms of employment relationship, especially in cases when these rights are violated, while in the concrete case as a result of the inefficiency of these measures, now they are facing consequences. Ombudsperson found that previous complainant's complaints (or those of other employees) filed against MFMC were not reviewed by the Commission of Complaints and Submissions, because MFMC did not have such a commission. Taking this fact into account, IOBKCS asked the Municipality that the Commission for Resolution of Disputes and Complaints should review complaint no. 332 dated 10 June 2014, obliging the Mayor and Personnel Manager of Gjakova to implement the decision within 15 days, from the day of the receipt of decision (see paragraph 23). Notwithstanding this, these authorities did not undertake any action for establishment and functionalization of this commission within MFMC.
66. Ombudsperson observes that Basic Court in Gjakova did not act in *summary procedure* by treating the complainant's suit as a case with **priority (see paragraph 23) according to Article 475, of Law on Contested Procedure** No. 03/L-006, which sets forth that in contentious procedures in work environment, especially is setting

the deadlines and court sessions, the court will always have in mind that these cases need to be solved as soon as possible.

67. In this case, Ombudsperson wishes to draw the attention that in the enforcement procedure in BC in Gjakova, the Court did not act according to Legal opinion of Supreme Court of the Republic of Kosovo No. 223/2015 dated 14 July 2015, which clarifies irregularities regarding Article 72 of Law on Enforcement Procedure. Supreme Court points out that the Albanian version of law does not set a deadline for settlement according to objection, while the English version (Article 72, paragraph 1) determines that: *“On presented objection the court shall decide within fifteen (15) days from the day when the objection was filed.”* Through this legal opinion, the Supreme Court expressed its stance that Basic Courts shall decide regarding objections presented against enforcement orders issued by enforcement bodies, within 15 days, after the receipt of the same. This is so because the Albanian version contains a technical omission of the law. From circumstances of the case, it appears that MFMC filed an *Objection* on 28 October 2015, but BC in Gjakova did not respect deadlines according to this Legal Opinion and so far it did not complete the issue of the complainant in the enforcement procedure (see paragraph 28).
68. When it comes to failure of responsible authorities to cooperate (MFMC and DHSW) with OI (see paragraphs 4, 5 and 7), Ombudsperson considers that failure to provide complete documentation and failure to reflect the flow of events, according to OI request is a **contradictory action and an unlawful action**. Ombudsperson is of the opinion that the inability to access the complainant’s case was done intentionally in order to disable the complainant to use legal remedies, while this situation was overcome after the meeting that OI representative had with the Mayor of Gjakova (see paragraph 8 and 9).
69. Ombudsperson recalls that Article 132, paragraph 3 of Constitution sets forth:

*“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.”*

Further, Law on Ombudsperson No. 05/L-019, Article 18, paragraph 6, determines: *“The Ombudsperson has access to files and documents of each authority of the Republic of Kosovo, including medical files of the people deprived from liberty, in accordance with the law and can review them regarding the cases under its review and according this Law, may require any authority of the Republic of Kosovo and their staff to cooperate with the Ombudsperson, providing relevant information, including full or partial file copy and documents upon request of the Ombudsperson”*.

Article 25, paragraph 2, of Law on Ombudsperson determines that: *“Refusal to cooperate with the Ombudsperson by a civil officer, a functionary or public authority is a reason that the Ombudsperson requires from the competent body initiation of administrative proceedings, including disciplinary measures, up to dismiss from work or from civil service”*, while paragraph 3 of this Article determines: *“In case when the institution refuses to cooperate or interferes in the investigation process, the Ombudsperson shall have the right to require from the competent prosecution*

*office to initiate the legal procedure, on obstruction of performance of official duty”.*

70. Based on what was said above, Ombudsperson in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo “*The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.*” In the light of Article 18, paragraph 1.2 of Law on Ombudsperson, Ombudsperson is responsible “*(...) to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases (...)*”, and “*to recommend [...] promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo.*” (Article 18, paragraph 1.7).

Therefore, Ombudsperson **recommends:**

**Main Family Medicine Centre in Gjakova should:**

- *In conformity with powers and authority deriving from Law and in cooperation with all subordinate units undertake urgent measures for implementation of decisions of Labour Inspectors in the issue of the complainant and such actions of non-implementation of decisions should not be repeated in the future.*
- *In conformity with legal powers and authority build necessary capacities and establish the Commission for Complaints and Submissions within MFMC.*

**Mayor of Gjakova should:**

- *In conformity with legal powers and authority build professional capacities by undertaking all actions indispensable that such cases of neglect of administrative decisions of EBLI and IOBKCS are not repeated in the future.*

**Minister of Ministry of Labour and Social Welfare should:**

- *Promulgate an instruction in writing and request from all regional offices of Labour Inspectors, including Executive Body of Labour Inspectors (EBLI) which is their duty and a legal obligation to follow up the implementation of their decisions, and apply the penalty part in conformity with law, when they find violation of rights in terms of employment relationship.*
- *In conformity with legal powers and authority build capacities necessary, which within the cooperation with the Kosovo Police, when eventual cases of violation of human rights in terms of employment relationship are met, and which according to the Criminal Code are qualified as criminal offenses should be reported to the persecution bodies.*

**President Judge of Basic Court in Gjakova should:**

- *In conformity with legal powers and authority act swiftly in the cases of disputes in terms of employment relationship, in conformity with Article 475 of Law on Enforcement Procedure, whereas in enforcement procedure of decisions of EBLI and IOBKCS according to objection, the court should act*

*within legal deadlines in conformity with Legal Opinion of the Supreme Court of the Republic of Kosovo No. 223/2015 dated 14 July 2015.*

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of Law no. 05/L-019 on Ombudsperson (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, ... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), will you kindly inform us on actions to be undertaken about this issue.

Sincerely,

Hilmi Jashari  
Ombudsperson