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Termination Of The Work Contract Unilaterally By The Employer Due To The Establishment's Exposure To A Loss In Light Of The Labor Law And The Palestinian Judiciary

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Abstract :
This study came to raise a fundamental, basic and legal issue in cases of unilateral termination of the work contract by the employer in terms of preserving the interests of the two production parties (the laborer and the employer) with the laborer retaining all his rights to obtain the notice allowance and that was through the contractual orientation and the judicial orientation of these cases. The researcher has highlighted cases of unilateral termination of the contract by the employer in which the laborer is not notified, reviewing the contractual approach in this issue and the judicial opinion on it, in search of the concepts mentioned in the relevant labor legislation texts regarding the definition of a confirmed (serious) occupational mistake, legally and jurisprudentially, and relying on its personal and objective criteria. Moreover, the researcher examined the extent of the judiciary's control over these two criteria, which is the subject of the present study. This led to a number of conclusions, that the mistake is not assumed, and that if it occurs, it may come out of the scope of the serious mistake and be the result of a confirmed and proven negligence and that it results in a serious loss, up to the last condition for its verification and proof, which is that the employer, within a period of forty-eight hours, has to inform the competent authority of the occurrence of this mistake and to inform the laborer in writing of the termination of the contract and its reasons. Moreover, this termination must take place within two weeks from the date of the occurrence of the mistake and to verify it by considering the termination of the contract as arbitrary.

Keywords: Termination of the work contract, unilateral will, facility, confirmed mistake, personal standard.

Introduction:
The laborers and employers is one of the largest classes in the hierarchy in Palestine, as the number of laborers and employers, according to a study conducted by the Central Statistics Authority, is about 856 thousand laborers and employers[1]. The legislator took care of this class and made a special law for it called the Palestinian Labor Law No. (7) of (2000). In this law, the legislator regulates the relationship of the laborer with his employer in a detailed and precise manner, and sets peremptory rules that consider the minimum rights and rewards of the laborer to be protected and may not be waived. With the extension of the scope of the aforementioned law, several problems emerged in how to implement and interpret the provisions of the

law, and the misuse of the provisions of the law by employers, which prompted the judiciary and jurisprudence to intervene in order to interpret the provisions of the law in line with the vision of the legislator**.**

Among the problems that arise is the issue of unilateral termination of the work contract by the employer. In this context, the Palestinian Labor Law dealt with this issue in the texts of its articles, including Article (40) which talked about the termination of the work contract by the employer without notifying the laborer, and Article (41) which talked about the termination of the work contract for technical reasons or the establishment's exposure to a loss while maintaining that the laborer receives a notice of dismissal. These texts are considered one of the means that employers resort to in order to terminate employment contracts without paying the dues resulting from this termination, as improper understanding of the texts of these articles can lead to the destabilization of the social and economic status of the category of laborers, which is considered an influential group in the Palestinian society. It is necessary to discuss these texts and all that is related to them within the scope of the doctrinal and judicial orientation in Palestine, and to try to extract the legislative and judicial deficiencies in these issues. In this context, the current study revolves around the aforementioned two articles, especially the paragraphs related to the establishment's exposure to a loss, because of the laborer or because of the establishment itself. Termination of a contract by the employer's unilateral will is considered permissible in exclusive cases in the texts of the law. In order for the researcher to be able to determine the intent of the legislator in the cases mentioned in the texts of the law, it is necessary to analyze the text of Article (40/2 and 41) and try to extract the legislator's intent from the text on this case.

The role of the trial court in applying the provisions of the law and achieving the legislator's goal will also be studied, all within the scope of the Palestinian labor law and the provisions of jurisprudence, the Palestinian judiciary and neighboring countries. The study of the provisions of the labor law in general has a great specificity as it concerns a large group of society and contributes to controlling the judicial and legal reality of the provisions of the law. Therefore, it is important to extract the legislator's intent in stipulating rules and provisions that are sometimes misunderstood. Since the termination of the employment contract has significant effects on the social and economic level, it is necessary to establish well-thought-out rules that contribute to preserving the social and economic interdependence between this large group of laborers and employers. Therefore, the researcher aims to try to delve deeper into the text of Articles (40/2 and 41) and understand the intent of the legislator and the problems of application in jurisprudence and the judiciary**.**The researcher also tries to measure the text of Articles (40/2 and 41) on the judicial reality, knowing the judiciary's opinion and jurisprudence in it, the extent of the judiciary's flexibility in its interpretation, analyzing the concept of loss that the facility may be exposed to, and the impact of the laborer's error on this loss and the criterion for its measurement**.**

Chapter One: Cases of unilateral termination of the work contract by the employer:

The work contract is distinguished from other contracts by a special feature as it has regulated the cases of its termination according to the Palestinian Labor Law, and it is like other contracts in that it ends with the agreement of the two parties or the end of the agreed work, and the rest of the cases mentioned in Article (35)[2]

The Palestinian Labor Law has mentioned certain cases in which the employer can terminate the work contract unilaterally, in accordance with the provisions of Articles (40 and 41) of the Labor Law. According to the text of these two articles, termination of the work contract by the employer is not considered arbitrary, and that the issue of arbitrary termination is a legal and objective issue, as the emergence of arbitrary termination on the issue of termination must violate the provisions and texts of the Labor Law, in addition to the trial court deducing arbitrary termination from among the facts of the case, which is confirmed by the Palestinian Court of Cassation in its decision No. (182/2004), according to which "the new labor law did not lay down provisions specifying the grounds on which the dismissal of a worker from his work is considered arbitrary".In this regard, it is true to cite the text of Article 2/66 of the Jordanian Civil Code, which defines the cases in which the use of the right to terminate the work contract is unlawful, as: "(a) if the intent of infringement exists (b) if the desired interest in the dismissal is illegal (c) if the benefit is not commensurate with the harm that befalls others (d) if it exceeds what has been done by custom, and an assessment of whether the dismissal was arbitrary or not shall be referred to the court according to the circumstances and conditions. It is also possible to cite the legal rule stipulated in Article (91) of the Code of Judicial Judgments, which is that legal permissibility is incompatible with the guarantee.Whoever legitimately uses his right does not guarantee the harm resulting from that." Therefore, the question of whether the dismissal that occurred on the laborer was arbitrary or not is one of the issues of the trial court, and it can be drawn from the circumstances and conditions of each incident. Since the employer's act of dismissing laborers has a social and economic impact on a wide class of individuals, which leads to the instability of the social and economic conditions of this group, it is necessary for the researcher to study the previously mentioned cases within the scope of labor law, jurisprudence and the Palestinian judiciary.These cases included in the Palestinian Labor Law No. (7) of (2000) will be clarified in two sections. The first section is titled cases of unilateral termination of the work contract by the employer without notice, while the second section is entitled cases of unilateral termination of the work contract by the employer with the laborer retaining his right to receive a notice allowance.

The first topic: cases of unilateral termination of the work contract by the employer, with the worker retaining his right to receive a notice allowance:

The Palestinian Labor Law has provided a single case that enables the employer to dismiss the laborer with the right of the laborer to obtain the notice allowance, in the text of Article (41) which stipulates that "the employer may terminate the work contract for technical reasons or a loss that necessitated reducing the number of laborers while the worker. "… has the right to a notice allowance and end-of-service gratuity, provided he informs the Ministry of that". We note that the legislator intended from the text of the aforementioned article to relieve the employer of the loss suffered by his establishment, without harming the laborer who reserves his right to receive a notice of dismissal allowance. It also aims to relieve the employer of the

compensation to which the laborer is entitled if his dismissal is considered arbitrary, given that the compensation for arbitrary dismissal bears the employer additional costs in addition to the loss incurred. To clarify this, it is necessary to refer to jurisprudence and the judiciary in this matter. The researcher divided this topic into two parts; the first part deals with the doctrinal orientation on this issue, while the second topic deals with the judicial orientation in the interpretation of this issue**.**

The first section: The legal orientation:

The issue of terminating the work contract for technical reasons or a loss that necessitated reducing the number of laborers is one of the cases in which the law permitted the unilateral termination of the work contract. In order to restrict the expansion of this issue, the law made this case a necessity to inform the Ministry of Labor, because the allegation that the facility was exposed to a loss or the existence of technical reasons is one of the means that will open the way for employers to evade the laborer's entitlements in relation to unfair dismissal, and also leads to tension in the employment of laborers, which negatively affects the social and economic life of these individuals.

By reading the text of Article (41), we can say that four conditions must be met in order for the employer to be entitled to exercise this right, which are**:**

1. That there is a loss or technical reasons.
2. That this loss or the technical reasons call for a reduction in the number of laborers with the employer.
3. That the employer pays the notice allowance to the laborer and the rest of rights to the laborers.
4. That the employer informs the Ministry of Labor of the dismissal of the laborer and its reasons.

It is necessary to clarify the concept of loss and the concept of technical reasons that allow the employer to use of his right to dismiss the laborer. Loss means that the business owner or establishment has become more expenses than revenue, in the case that the business or establishment aims at profit. But if the business owner or facility is a charitable association or a non-profit company, this description of the loss does not apply to it, because the nature of the work of non-profit associations or companies depends on aid and gifts, and the legislator had to add this case and allow those who engage in a non-profit activity by benefiting from Article (41) in the case of a financial deficit that threatens the continuation of the work**.**The degree of loss is to be a loss for the entire facility or project, and not just the loss in a single transaction or operation**.**

As for the technical reasons, it relates to the concept of organizing the facility administratively or seeking to develop the performance of the facility. Among the applications of this concept is the issue of restructuring, which allows the employer to terminate the worker's services while retaining the laborer's right to a notice allowance, which was confirmed by the Court of Cassation in its decision No. (856/2016) which states:[3]

And since the Court of Appeal concluded that the second respondent had terminated the work of the appellant due to the restructuring of its business and its

cessation of providing cleaning services, and that it had notified the Ministry of Labor and the appellant of this, and that the meeting was held between the laborers, including the appellant and the two companies challenged against, in the presence of a representative of the Ministry of Labor, and the court found that the restructuring falls under the concept of technical reasons referred to in the aforementioned Article 41, which concluded that the fact that the appellant was dismissed on the basis of the provisions of Article (41) of the Labor Law, so its judgment and this case was in accordance with the provisions of the law.[4]

The Second Section: The Judicial Orientation:

Palestinian courts are considered a way through which one can find out the judicial interpretation of ambiguous texts of the law that bear more than one interpretation. By searching for the judicial orientation in the interpretation of the text of Article (41), the researcher found many judicial decisions, including Resolution No. (1610/2017), issued by the Palestinian Court of Cassation, which stipulates that "this completion must be accompanied by informing the Ministry of Labor of his intent to reduce his laborers and end their contracts for the reasons specified in the aforementioned article, in order for the Ministry to verify the justifications given by the employer to terminate those contracts and whether his justifications are realistic**,** and fearing that his justifications do not exist, but the aim is to dismantle the rights of his laborers and deprive them of their rights... And that the failure of the employer to report negates his justifications that he gave to terminate the work contract, since through the evidence presented, it was not proven that the contested party notified the Ministry. Therefore, she has thus lost her right to adhere to the justifications of the technical reasons she gave to justify the termination of the appellant's contract of work, and thereby deprive her of the rights resulting from the termination of this contract"[5]**.**

However, the Palestinian Court of Appeals went against the previous reading, as it ignored the issue of informing the Ministry of Labor. We note this in the decision of the Court of Appeal No. 79/2009, in which it was stated, "We also find that the defendant and in his answer sheet stated that the claimant left work due to the arbitrary Israeli measures on the roads. Through these statements, we clarify that the period of the intifada…, while we note that the provisions of the Article (41) of the Labor Law permits the employer to terminate the work contract for technical reasons or a loss that necessitates reducing the number of laborers, with the laborer retaining his right to notice allowance and end-of-service gratuity**.**

By applying the provisions of this article to the facts set forth in the case, we find that what the respondent (the defendant) did was to terminate the work contract of the plaintiff (the appellant) without giving notice of this, as the plaintiff could not prove that the defendant had arbitrarily dismissed him without right . Accordingly, we find that this reason is not included in the appealed decision and requires a response. [6]Therefore, this decision contradicts what was stated in Article (41) of the Labor Law, and it is an

illegal approach with respect to the esteemed Court of Appeal**,** as the termination of the employment contract by the employer is considered permissible in limited cases that cannot be deviated from. In order for the employer to benefit from these texts, it is necessary to prove them and apply the conditions contained therein**.**

The Second Topic: Cases Of Unilateral Termination Of The Work Contract By The Employer Without Notifying The Laborer:

Article (40) of the Palestinian Labor Law has mentioned several cases in which an employer can dismiss a laborer without notice**.**The aforementioned article stipulated that "the employer may unilaterally terminate the employment contract without notice, with the right to claim all other rights of the laborer if he commits any of the following violations**:**

1. Impersonating a person other than his identity or submitting false certificates or documents to the employer.
2. He committed a mistake as a result of confirmed negligence that resulted in a serious loss for the employer, provided that the employer informs the competent authorities of the accident within forty-eight hours from the time he became aware of its occurrence.
3. Repeated violation of the facility's internal system approved by the Ministry of Labor or written instructions related to work safety and Laborers' health despite being duly warned of them.
4. His absence without an acceptable excuse for more than seven consecutive days, or more than fifteen intermittent days during one year, provided that he has been warned in writing after an absence of three days in the first case or ten days in the second**.**
5. The laborer's failure to fulfill his obligations under the work contract despite being duly warned.
6. Disclosing work-related secrets that would cause serious harm.
7. Convicting him by a final judgment of a felony or misdemeanor that violates honor, trust or public morals.
8. His presence while at work in a state of drunkenness or under the influence of a narcotic substance, punishable by law.
9. His beating or humiliation of the employer, his representative, or his immediate superior**.**

In this context, the current research revolves around the second paragraph of the aforementioned article, which states: "2. He committed a mistake as a result of confirmed negligence that resulted in a heavy loss for the employer, provided that the employer informs the competent authorities of the accident within forty-eight hours from the time of his knowledge of its occurrence." Any direct reading of the above shows that the Palestinian legislator has granted the employer the right to terminate the employment contract in the case that the laborer commits a mistake as a result of certain negligence resulting in a heavy loss to the employer.

In order for the researcher to develop a full understanding of what was stated in the previously mentioned paragraph, and the actual application of this paragraph, it is necessary to investigate the jurisprudential opinions on this subject in addition to reviewing the judicial interpretation of the aforementioned paragraph on the basis of the decisions of the Palestinian courts. To this end, the researcher divided this topic into two topics; the first is the doctrinal approach to the application of this article, while the second is the judicial orientation**.**

The First Topic: Doctrinal Orientation:

Article (40/2) is among the cases in which the employer can dismiss the laborer. And "it is conditioned to terminate the contract in this case that the laborer has committed a mistake that resulted in a serious loss. But if the loss was minor, or the error did not result in any harm to the employer, he cannot terminate the contract without notice. It is not required that the negligence is serious, and it is enough to result in a huge loss." The law requires the employer to take a procedure so that he can benefit from the aforementioned paragraph, which is to inform the competent authority within 48 hours from the date of his knowledge of the occurrence of the mistake. The competent authority also differs according to the mistake made by the laborer. "If the mistake attributed to the laborer constitutes a crime, then the competent authority is the police and the Public Prosecution. But if the mistake does not constitute a crime, the Ministry of Labor is notified." In the case that the conditions for mistake or serious loss are not met, but the loss is realized to the employer, the employer may dismiss the laborer from the job, but the laborer shall retain the claim for notification of dismissal.

The second topic: Judicial orientation:

The researcher can derive the judicial orientation regarding Article (40/2) from the decisions of the Palestinian courts. Among these resolutions that examined the aforementioned article is the resolution of the Court of Appeal No. (91/2016), in which it was stated, "As for the serious mistakes, it is not enough to say that there are mistakes, but rather, it must, in addition, according to the provisions of Article (40/2) of the Labor Law, that the laborer made a mistake as a result of confirmed negligence that resulted in a heavy loss for the employer[7]." In order for the researcher to reach a full understanding of this article, it is necessary to search for the concept of error as a result of certain negligence, which will be addressed in the second chapter.

Based on what we have already mentioned in the first and second sections, the issue of terminating the work contract due to the establishment or the employer's exposure to a loss or for technical reasons that necessitated reducing the number of laborers, which we mentioned in the first topic, becomes clear, unlike the issue of dismissal of the laborer who commits a mistake as a result certain neglect, dealt with in the second topic, which the researcher will address in the second chapter.

Chapter Two: The Concept of Certain (Serious) Mistake:

Mistake is considered the main point in convicting a person, in addition to the availability of the element of harm and the element of the causal relationship between the mistake and the damage, as the individual is not asked for any harm unless it is caused by him. We find that the Palestinian legislator did not give the mistake mentioned in Article (40/2) of the Labor Law any name, but rather combined the existence of the mistake with confirmed negligence, meaning that the mentioned mistake is not restricted, and that the mistake is related to the action of the laborer whether he violated a condition of the contract or breached an obligation

that he required. The law must or prevent him from doing so. The decision of the Cabinet, in the list of rules regulating penalties in accordance with Labor Law No (7) of 2000, included a table showing details of violations and their penalties, and a reference was made to the text of Article (40/2) where it is stated: "Confirmed negligence or confirmed (big) mistake at work, Paragraph 40/2 of the Labor Code".This means that the judgment criterion is that the laborer committed "certain negligence or certain (big) error", and that the simple or average mistake contained in the law "(simple) negligence at work – (moderate) negligence at work" is not one of the justifications for dismissing the laborer because it requires conditions that must be met. Thus, the legislator described the mistake intended in Article (40/2) of the Labor Law as "a mistake occurs as a result of certain negligence," which is synonymous with the "confirmed (serious) mistake" included in Cabinet Resolution No. (121) of 2005.

In order to understand the intent of the Palestinian legislator from this concept, the researcher divided this chapter into two topics; The first topic deals with the definition of a serious mistake, while the second topic deals with the Palestinian judiciary's control over the measurement of the confirmed (big) mistake.

The first topic: Defining the confirmed (serious) mistake:

The term mistake has been mentioned frequently in the Palestinian laws, but the Palestinian legislator avoided setting a clear and specific definition for this term and left the issue of defining it to the Palestinian jurisprudence and judiciary. In order for the researcher to determine the concept of mistake as a result of certain neglect, this topic is dealt with in three sections: The first section is devoted to defining the mistake resulting from confirmed negligence, in language and terminology, the second section addresses the definition of the mistake resulting from legally confirmed negligence, while the third section addresses the criterion for estimating the mistake resulting from legally confirmed negligence.

The first section: Defining the confirmed (serious) mistake in language and terminology:

We always say, this is a mistake / he made a mistake about / he erred in, he erred, and we say he missed the target and/ he erred on the target: he crossed it and did not hit it, the man erred: committed a sin. Almighty says: "We provide for them and for you. Indeed, their killing is ever a great sin[8]"

That is, it carries the sense of sin and guilt, and it is said "serious mistake". As a term, it means the extraordinary negligence that occurred by the employee unintentionally (legal term)[9].It is also said that somebody erred if he took the wrong path intentionally or unintentionally. It is also said to the one who wanted something and did something else or did something wrong: he made a mistake. And it is said that the mistake of the shooter: he did not hit the target, and in work: he deviated from the right, and the way: he turned from it astray. The term can also carry the meaning of neglect, neglected: (verb).

The second section: Defining the confirmed (serious) mistake in legal terms:

We have previously explained that despite the multiple use of the term mistake in general in the Palestinian laws, the Palestinian legislature did not provide a clear definition of it in any of its legislations, in order to open the way for jurisprudence and the judiciary to update the definition of this term to conform with contemporary matters taking place in the field of litigation. The term mistake is often considered the main support in the subject of conviction. Referring to jurisprudence in an attempt to choose a clear definition of mistake in general, we find that Professor Planiol defined it by saying: "A mistake is defined as a breach of a previous obligation[10]," and another opinion says, "The mistake is a harmful and unlawful act[11]," and another opinion said, "A mistake is a breach of an existing condition in which the perpetrator is liable to be held accountable[12]." A previous law is associated with the violator's awareness of this breach without intending to harm others. The mistake was also defined in the context of article (40/2) by lawyer Nael Fattouh as "that the laborer performs work in a way that is in violation of what he is accustomed to or in violation of the administrative and technical instructions given to him by the employer or his representative."

Accordingly, the laborer's mistake in carrying out a work he was not accustomed to performing or did not receive administrative or technical instructions in this regard is not considered a mistake that justifies the employer's dismissal of the laborer unless this mistake is described as a confirmed negligence committed by the laborer, so that the natural person wouldn't not have done the same mistake[13]. Referring to the Palestinian law, we find that the legislator has followed the concept of a serious confirmed mistake in Article (40/2) with the occurrence of a heavy loss to the employer, or "serious damage"[14]. As for the concept of serious mistake, there are several contractual definitions of it, and I have chosen the definition that says, "A serious mistake is that action by a laborer that causes damage to the interests of the employer or his property, violates one of his material obligations, or causes losses and damages to the employer or other laborers", which makes the laborer in the workplace unacceptable because of his danger or because of maintaining public order and stability in the workplace[15]."

But due to the different opinions and definitions, the intentions of this concept varied. Some of them mean the mistake that reaches an extent that allows for the assumption of the bad faith where there is no evidence for it, and sometimes it means negligence and lack of insight that reaches an extent of seriousness that makes it of special importance. In the labor law, it means a mistake that occurs on the part of a person of little intelligence and care, and it can only be committed by a person who is indifferent[16].

The third section: The criterion for estimating the confirmed (serious) mistake:

The Palestinian Labor Law did not set any criterion for defining the concept of a confirmed (serious) mistake[17], but linked this concept to the realization of a serious loss to the employer or "serious harm" thus leaving the matter of estimating the criterion to jurisprudence and the judiciary. By researching jurisprudence, we find that the jurists have differed in defining a criterion for estimating the confirmed (serious) mistake, some of them followed the objective criterion, while others followed the personal criterion. The researcher will clarify each criterion in the following two sections.

First sub-section: The personal standard:

This criterion entails looking at the actor, not at the act itself, as it looks at the actor in terms of his age, gender, education, and health or psychological condition, and then it looks at the actor through the nature of his act. If the actor is on a great degree of vigilance and care, the least deviation is considered a confirmed (serious) mistake. If his vigilance or care is less than the average, then his deviation is not considered a definite (serious) mistake, unless it is out of the ordinary. And if his vigilance or care is in the average degree, then the deviation is not considered a definite (serious) mistake unless someone in his degree considers it as such[18].

But this criterion is not fit to be a basis for measuring a definite (serious) mistake, because the investigation of the intelligence and vigilance of the actor is difficult to detect. Moreover, looking at the personality of the perpetrator brings out the scope of the act to a criminal matter, because the penalty for the error that causes the loss is compensation and the employer benefits from Article (40/2) and that the criminal act looks at the personality of the victim before looking at his act, unlike the civil act that looks at the act before looking at the actor. This criterion is considered strict against the prudent person, who will be held accountable for the slightest mistake that comes from him, in contrast to the negligent person who is not lenient with the application of this criterion, and is not held accountable for the negligence that he is accustomed to[19].

As a result of the criticism directed at this criterion, another criterion has emerged that follows the objective, rather than the subjective, criterion, which will be addressed in the second sub-section.

Second sub-section: The objective criteria:

The proponents of this criterion look at the committed act itself, as they estimate the confirmed mistake from their point of view by looking at the behavior of the perpetrator. If the act took place after exerting the care of the average person, it is not considered a confirmed mistake, and if the opposite happens, it is considered a confirmed mistake. The average caring man is not very clever and intelligent, nor is he limited in vigilance, but rather he is the average of the qualities that appear through research such as insight, intelligence, integrity, care and others.

Referring to the Palestinian Labor Law, especially Article 33, which stipulates that "the laborer is obligated to perform his work faithfully and honestly

and to preserve the secrets of work and its tools, and the laborer is not held responsible for the failure of the tools or their loss as a result of any emergency circumstance outside his control or force majeure," it becomes obvious that the legislator follows the objective criterion in determining mistakes. It is assumed, according to this article, that the laborer is obligated to perform his work faithfully and honestly and to preserve the secrets of the profession, and that violating this is considered a mistake that enables the employer to dismiss the laborer, as well as to mention the serious loss that must be proven**.**It is necessary to refer to the resolutions of the Palestinian courts in order to delve into the standard used in measuring the confirmed (serious) mistake and to know the Palestinian judiciary's interpretation of the provisions of Article (40/2). This will be addressed in the following topic**.**

The second topic: The Palestinian judiciary's supervision in measuring the confirmed (serious) mistake:

The field of Palestinian courts is one of the most important fields that establish general principles and rules for the interpretation of legal texts that the legislator failed to formulate. In the legal texts that were mentioned previously, it is necessary to refer to the Palestinian judiciary and review the decisions of the courts in order to reach a full understanding of the provisions of the law, especially those that need interpretation.

Referring to Article (40/2) of the Labor Law and searching for the legal principles and rules approved by the Palestinian courts in order to implement this text, we find that judicial rulings in this matter are very few. The reason is that the Labor Law is a new law, that the Palestinian Courts Authority and the Palestinian reality did not appear until a few years ago. Accordingly, the researcher found through searching on approved websites such as (Maqam website, Qastas website, Al-Muqtafi website) some decisions that were poured into interpreting the texts of the articles raised in the current study. Those texts include Court of Appeal Resolution No. (91/2016), which states: "As for serious mistakes, it is not sufficient to say that there are mistakes, but rather, it must, in addition, according to the provisions of Article (40/2) of the Labor Law **,** be that the laborer has committed a mistake as a result of confirmed negligence resulting in a serious loss to the employer, provided that the employer informs the competent authorities of the accident within forty-eight hours from the time of his knowledge of its occurrence. Accordingly, proving mistakes alone is not considered productive." In this context, we refer to the Court of Appeal's decision No. (567/2015), which stated, "With regard to the incident of arbitrary dismissal, the evidence of the respondent about this incident is what was stated in the testimony of witness Awad Zaid Makhamra, as He says, "There was a problem between the plaintiff and the defendant regarding the differences in the offer, and a meeting took place between us and them in order to resolve the dispute. However, the dispute was not resolved because they were accusing us of differences in the offer, and we say that there are no differences in the offer and the company asked the plaintiff to leave work, while the appellant claims that the reason for terminating the work of the respondent according to what was stated in the letter of termination of his work is due to the violation of the incentive plan to sell

smoke, since the plan requires giving the merchant one free packet for each cruise that is purchased, while the appellant gave one cruise for each cruise, which resulted in differences of (9) packages for each cruise over the period from 01/07/2010 to 15 /09/2010, amounting to (135) thousand shekels**.**Because he did not provide any justification, he was informed of the termination of the work, and the appellant claims that the termination was pursuant to the provisions of the second paragraph of Article (40) of the Labor Law. It also notified the Ministry of Labor of this incident. This was also stated in the report of the official of the Hebron warehouse, according to whom he informed the management of the appellant company that there are differences in sales with the Hebron staff, amounting to (135) thousand shekels for the period between 01/07/2010 to 15/09/2010, and that the reason for the difference is the release of a bonus in Jamal class cigarettes, contrary to the company's instructions**.**This was also stated in the testimony of the witness Youssef Khalil Zain, responsible for the Hebron region to the appellant, who stated that the offer is to take out a pack of cigarettes on top of every ten packs for those who buy with cash. The appellee used to take out ten boxes for every ten boxes, which is contrary to the offer. I reviewed the matter with him and asked him for a justification, but he did not justify. A meeting took place at the company's headquarters in the presence of the sales manager, Sakhr Al-Nimri, and his deputy, Ahmed Mosleh. It was found through the statements that the differences because of that reached up to (135,000) shekels, and we demanded that he and his colleague return the amount, but they did not comply with that**.**

In the text of the second paragraph of Article (40) of the Labor Law, "The employer has the right to unilaterally terminate the work contract without notice, with his right to claim all other rights of the laborer when he commits a mistake as a result of confirmed negligence resulting in a serious loss to the employer, provided that he informs the business owner and the competent authorities of the accident within forty-two hours from the time he became aware of its occurrence. In view of the great loss caused by the appellant due to the violation of the appellant company's instructions**,**and since the appellant notified the Ministry of Labor of this, the termination of the work contract is part of a legal procedure and is not considered arbitrary dismissal. Therefore, the appeal and this case respond to the appealed judgment."

This approach is the proper application of the legislator's goal from the text, which is that the court must be convinced that what the perpetrator has done constitutes a serious loss, and that the competent authorities must be informed of the mistake committed by the laborer, and that the subject court must search for the legislator's goal from the text because the criterion of arbitrary dismissal is not specified in the text. This was confirmed by the Court of Cassation in its resolution No. (185/2019), in which it states **"**While the provisions of the Labor Law originally came to protect the rights of the laborer as the weakest party in the work relationship, the balance of the relationship in achieving the justice of the judgment requires a search for the legislator's intent from these texts, as the legal text came in the smoothness of its words consistent with its meaning and content."

However, in the same context, the Court of Appeal, in its decision number (113/2018) went to another interpretation of paragraph (40/2), as it said in its aforementioned decision, "Second: Regarding the reason 1 of the group of the reasons for the appeal related to the allowance for arbitrary dismissal and this incident, we find that the plaintiff stated that she was arbitrarily dismissed without written notice by the Director General on 19/11/2013**.**The defendant submitted a reply statement denying her arbitrary dismissal, stating that the plaintiff committed serious breaches and did not abide by the defendant's financial and accounting system by keeping an amount of more than 2,000 shekels in the fund, as the fund for which she was responsible was inventoried and a shortage of 8134 shekels was found. An investigation committee was formed and recommended her dismissal and submitted a counterclaim to claim the plaintiff for the rest of the fund differences. After studying the evidence and the regulations and with reference to the text of Article 40 which states (The employer may terminate the work contract by one party without notice with his right to claim the laborer for all other rights when he commits any of the following violations**:**He committed a mistake as a result of confirmed negligence that resulted in a serious loss for the employer, provided that the employer informs the competent authorities of the accident within forty-eight hours from the time he became aware of its occurrence). The plaintiff returned part of the fund's deficit, amounted to 3,200 shekels a week after the termination of her services, and if it was proven that there was a certain negligence on the part of the plaintiff represented in not depositing the amounts exceeding 2000 shekels in the bank account and there was a mistake on her part that there was a difference in the fund that is in her custody**.** This is because the plaintiff is a charitable association that is subject to financial and administrative oversight from official government agencies and private parties, and what the plaintiff has done affects the reputation and continuity of the association's work, and thus constitutes a major moral loss for the business owner, and despite the material financial loss achieved by the fund's difference, an amount of 8134 shekels on the date of the investigation and completion was lost. Paragraph 2 of Article 40 of the Labor Law is verified from this aspect." It appears from the foregoing that the esteemed Court of Appeal has examined and implemented the legislative purpose of Article (40/2).

Accordingly, and since the Palestinian judiciary has dual opinions on the issue of the need to inform the competent authorities, and since this, according to the analysis of the text of Article (40/2), is a condition for benefiting from this article, and without it, the employer's dismissal of the worker laborer is considered arbitrary. In the same context, the law was applied In the matter that the employer's claim has dismissed the laborer based on Article (40/2), and this point requires proving the elements of this article represented in proving the occurrence of the error and proving that the mistake was the result of confirmed negligence **,**and also the occurrence of a large moral or material loss to the business owner. Therefore, it can be said that the Palestinian judiciary, due to its confusion in interpreting the texts of the law, and its contradiction with itself, has created a state of judicial instability among the category of laborers, which has led to this

group's distancing from demanding the rights that the law legislated for it through the judiciary, and has led to the destabilization of confidence in the judiciary. In general, the contradiction in judicial decisions and from the highest category of litigation, the Court of Cassation, has generated a feeling of mistrust in the role of the judiciary and the law in general**.**At the end of this topic, which I could not divide into sub-topics due to the scarcity of judicial decisions, it is necessary to raise an issue that overlaps with the text of Article (40/2), which is that the laborer's making a certain (serious) mistake exposes him to accountability and enables the employer to dismiss him without notice, even if the massive loss was not realized, because the legislator in Article (33) of the Labor Law stipulated that the laborer perform his work honestly**.**And that he maintains work secrets, and that violating this constitutes a serious mistake that deserves accountability, and enables the employer to dismiss the laborer and that dismissal is not considered arbitrary. This was extended by the esteemed Court of Appeal in its resolution No. (635/2017), which stated: "In the face of the established facts, we find, at a minimum, that there is a neglect and negligence on the part of the plaintiff concerning the duties entrusted to him as director of the Admission and Registration Department and as responsible for checking the students' grades in the period that was completed, including his wife's admission, majoring in business administration, and manipulating her marks**.**This means that the plaintiff has not fulfilled his essential obligations under the work contract, including auditing and monitoring as responsible for the department, which constitutes a violation of the provisions of the Labor Law that obligate the laborer to perform his work honestly and faithfully. Accordingly, based on the circumstances and conditions that were referred to and because they were based on reasons mentioned in the work termination letter, the termination of work in this case is not considered an arbitrary dismissal as long as there are reasons that led to the termination of the work[20]**.**

But all this revealed that the decision to dismiss was for a reason in which the laborer violated the obligations imposed on him under the law or the work contract, which was indicated by the Court of Appeal in its previous resolution by saying, "Legal measures were taken, which include the formation of a committee at the highest level in the university, according to what was stated. According to witness Amin Fayed, on page 30 of the record, he was given the opportunity to express his statements, but the plaintiff refused to cooperate with the committee. Therefore, the concept of arbitrary dismissal does not apply to this incident, as arbitrary dismissal is the termination of the work contract without compelling reasons for that, according to what was stated in the third paragraph of Article 46 of the Labor Code. The legislator's determination of the cases of termination of the work contract by the employer in articles 40 and 41 of the Labor Law does not mean that the legislator has limited the right of the employer to terminate the contract with the cases stipulated in these articles. When jurisprudence has settled, whether in the cases specified in Articles 40 and 41 of the Labor Law or outside it, an employer has

the right to terminate a worker's contract for an unlimited period if there is a legitimate justification for this termination, which negates arbitrariness[21]." In this decision, the Palestinian judiciary the trial court sees that the cases mentioned in the law, including those mentioned in articles (40 and 41), that the assessment of arbitrary dismissal is a matter of the trial court**.**The employer has the right to unilaterally terminate the work contract if there are reasons for termination accepted by the trial court**.**

Here, the other conditions required by the law to regulate Article (40/2), include what is mentioned in the list of rules regulating penalties in accordance with Labor Law No. (7) of 2000, and in the indicative sanctions list template. Among those conditions is the text mentioned in Article (3) of the Regulations, which states that "in imposing penalties for violations stipulated in the penalty list approved by the Ministry, the following shall be taken into account: 1- With the exception of the penalties for verbal warning and written warning, no penalty may be imposed on the laborer until he is notified in writing**.** 2-…3-…4-…5-…The penalty shall not be imposed after two weeks from the date of ascertaining the violation.[22]" In this, it can be said that the list of rules is a supplement to the provisions and texts of the Labor Law, and that the requirement to inform the laborer in writing the imposition of the penalty on him is a condition for the enforcement of the imposed penalty in addition to the fulfillment of the aforementioned conditions, and that the legislator also restricts the authority of the employer to inflict the penalty for a period of two weeks from the date of verification of the violation, and the passage of that period in my opinion deprives the employer of inflicting the penalty, but at the same time the employer retains his right to claiming the laborer for compensation if the violation leads to serious damage or loss to him.

Conclusion:

The issue of unilateral termination of the work contract is one of the most important issues that the legislator was keen to organize because of its importance as we explained previously. The law stipulates a penalty for arbitrary termination, which is to compensate the laborer for this termination. The law dedicates an entire chapter to this topic, in which it shows the cases of termination of the individual contract, including the cases stipulated in Articles (39,40,41), which talked about cases of termination of the work contract by the employer. It can be said that the termination cases stipulated in the law are considered permissible if the conditions of the case are met, and that the Palestinian legislator came up with the Labor Law to regulate the relationship of the laborer with the employer**.**This is because the laborer is often the weak party to this contract, and the issue of dismissing the laborer from his job must be governed by precise conditions that protect the parties to the contractual relationship, and that the assessment of this is a matter subject to the trial court. The researcher investigated the purpose of the legislator from the text on the right of the employer to dismiss the laborer in the case that he or the establishment suffers a loss in articles (40/2 and 41). He also divided the research into two chapters; the first chapter

discussed the aforementioned two articles in terms of the jurisprudential and judicial aspect, then in the second chapter the researcher dealt with the subject of the confirmed serious mistake mentioned in Article (40/2), determined its definition in the language and law and the criteria for distinguishing it**.**

The researcher also dealt with the approach of the Palestinian judiciary in determining the issue of the error committed by the laborer if it enables the employer to dismiss the laborer and makes his dismissal legal. The study showed a number of findings and recommendations as follows**.**

Findings:

By reviewing the legal texts in Articles (40/2 and 41), it has been noted that Article (41) has given the employer the right to dismiss the laborer with the laborer's right to receive notice allowance, in case the facility suffers a loss or technical reasons that necessitate a reduction of the number of laborers. Moreover, the issue of loss is a matter subject to the trial court in its estimation, and Article (41) was clear in this regard. As for the text of Article (40/2), the legislator was unsuccessful in formulating it, because linking the dismissal of the laborer to the concept of mistake gives the employer justification for dismissal of the laborer in many cases, as the concept of confirmed (serious) mistake is a general concept that leads to lengthening the process in cases of dismissal of the laborer without notice. And by reading the aforementioned article and on the basis of what was mentioned in the first and second chapters of the current research, several conditions were set for the applicability of the text of Article (40/2)**:**

1. That the confirmed (serious) mistake caused by the laborer is not supposed to be caused by other laborers or the laborer himself. The fact that this mistake can occur from this laborer removes him from the scope of the confirmed mistake.

2. **.2**That the error was the result of a certain and proven negligence, i.e. that the worker failed to perform his obligations or that he neglected and did not abide by the instructions**.**

3. That the confirmed mistake results in a serious loss to the business owner, or serious harm, whether it is for the business owner, the business itself, the business reputation or the business of the business owner.

4. That the employer informs the competent authorities within 48 hours from the moment the employer becomes aware of the mistake. If the mistake attributed to the laborer constitutes a crime, then the competent authority is the police and the Public Prosecution, but if the mistake does not constitute a crime, the notification is made to the Ministry of Labor.

5. The laborer is informed in writing of the dismissal and its reasons.

6. That the dismissal shall not take place after two weeks from the date of verification of the violation, and the dismissal shall not be considered arbitrary**.**

With the application of all these conditions, the employer can take

advantage of his right to dismiss the laborer without notice, due to the confirmed (serious) mistake of the laborer.

Recommendations:

Based on the review of the articles referred to in the current research, and through the jurisprudential and judicial orientation included in those articles, the researcher believes that some amendments, that the legislator must consider seriously, should be made in order to regulate the issue of dismissal from work, and to restrict any further interpretation of the texts of the articles of the Labor Law. Accordingly, the researcher recommends the necessity of making adjustments that can control the issues addressed in the current research. The most important of these recommendations are:

1. It is necessary to amend the text of Article (40/2) by setting specific and controlled cases of the confirmed mistake or negligence of the confirmed laborer, and there is a need to differentiate between the intended and unintended confirmed error, and to include the issue of repetition in order to benefit from this text**.**
2. Clarify the meaning of the term (serious harm) included in the Cabinet resolution in the aforementioned sanctions list, as this concept also includes many cases that the employer can invoke in the dismissal of the laborer.
3. It is necessary to clarify what is meant by the term loss in the text of Article 41, because the employer's claim of the loss and informing the Ministry of Labor would make dismissing the laborer legitimate, even if the loss is related to a deal or business that the employer failed in, and this is considered unfair to the laborer's interest**.**
4. It is necessary to state the technical reasons that may affect the business owner or the facility, as this term is general and can be applied to many cases.
5. It is necessary to establish a follow-up unit in the Ministry of Labor to detect cases in which the laborer is dismissed, and to work on documenting the details of dismissal cases.

References:

Primary references:

1. Holy Quran
2. Palestine, Cabinet Resolution No. (121) of 2005, The Palestinian Gazette, Issue 63.
3. Palestine, Labor Law No. 7 of 2000.

Secondary references:

1. Ibn Manzur: The Arab Tongue, investigated by Abdullah Al-Kabeer, Muhammad Hassaballah, and Hashem Al-Shazly, a verified and problematic edition with detailed indexes, Dar Al-Maaref, 1994.
2. Al-Houh, Nael: A reading of the Palestinian Labor Law No. (7) of 2000, American Solidarity Center, 2017.
3. Al-Sanhoury, Abdel-Razzaq: The Mediator in Explaining Civil Law, Theory of Commitment in General – Sources of Commitment, Volume Two, revised third edition, Dar Al-Nahda Al-Arabiya, 1981.4. Al-Tabbakh, Sharif: Compensation for tort and civil liability in the light of the judiciary and jurisprudence, first edition, Dar Al-Fikr Al-Jamii, Alexandria, 2007**.**
5. Taha, Jabbar: The Basis of Civil Liability for Unlawful Action between Error and Damage – A Comparative Study in Islamic Sharia and Man-made Laws, Legal Books House, 2010.
6. Maalouf, Louis: Al-Munajjid in the Language, the new edition decorated with

forty colored plates, the nineteenth edition, the Catholic Press, Beirut, 1988-1989.
7. Nasra, Ahmed: Palestinian Labor Law, third edition, 2017.

Websites:

1. https://www.almaany.com/ar, date of visit 2/1/2022.
2. https://qistas.com.ezproxy.aaup.edu/ar, date of visit: 29/12/2021.
3. http://muqtafi.birzeit.edu/index.aspx, date of visit: 29/12/2021.
4. https://maqam.najah.edu/, date of visit: 29/12/2021.

Court decisions:

1. The Palestinian Court of Cassation, Decision No. (182/2004), dated Chapter 29/1/2005.
2. The Palestinian Court of Cassation, Decision No. (856/2016), dated Chapter 19/5/2020.
3. The Palestinian Court of Cassation, Decision No. (1610/2017), dated Chapter 1/11/2021.
4. The Palestinian Court of Cassation, Decision No. (185/2019), dated Article 23/3/2021.
5. The Palestinian Court of Cassation, Decision No. 24/2019, dated 19/4/2021.
6. The Palestinian Court of Appeal – Ramallah, Decision No. (635/2017), dated chapter 24/10/2017.
7. The Palestinian Court of Appeal – Ramallah, Decision No. (113/2018), dated chapter 28/11/2018.
8. The Palestinian Court of Appeal – Jerusalem, Decision No. (567/2015), dated Chapter 3/24/2016.
9. The Palestinian Court of Appeal – Ramallah, Decision No. 91/2016, date of Chapter 20/11/2016.
10. The Palestinian Court of Appeal – Jerusalem, Appeal No. 79/2009, date of Chapter 23/6/2010.