



## СЕКЦІЯ 4 ПРАКТИКА РОЗГЛЯДУ СУДАМИ ЦИВІЛЬНИХ СПРАВ

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### LEGAL REGULATION OF EMPLOYMENT CONTRACTS: CURRENT ISSUES OF JUDICIAL PRACTICE

Klockho A.M., Candidate of Legal Sciences,  
Associated Professor  
Sumy State University

Стаття присвячена актуальних питань судової практики правового регулювання трудових договорів в Україні. Автор вивчає деякі проблеми дискримінації працівників.

*Ключові слова:* суд, трудовий договір, контракт, права, жінки.

Статья посвящена изучению актуальных вопросов судебной практики правового регулирования трудовых договоров в Украине. Автор изучает некоторые проблемы дискриминации работников.

*Ключевые слова:* суд, трудовой договор, контракт, права, женщины.

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The article deals with the current issues of judicial practice of regulation of employment contracts in Ukraine. The author studies some problems of discrimination against employees.

*Key words:* court, employment agreement, contract, rights, women.

The constitutional rights of workers shall be guaranteed by the state. Ukraine as a democratic state creates terms for realization by the citizens of the constitutional right to work. With the purpose of providing realization of this right Ukraine adopted a number of normatively-legal acts. The Labour Code of Ukraine (the Code) [1], adopted in 1971, is the primary source of law governing employment relationships in the Ukraine. The other sources of labour and employment law in Ukraine are: the Constitution of Ukraine and the labour regulations issued by the Cabinet of Ministers of Ukraine, the Ministry of Social Policy, and local state administrations. The Code regulates all kinds of labour relations, such as conclusion and termination of labour contracts, rights and responsibilities of employees and employers, labour safety rules, invalidity of employment and collective agreements, etc.

Article 43 of Ukrainian Constitution [2] guarantees to each citizen of working age the right to labour (work), including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees. The State creates conditions for citizens to fully realize their right to labour, guarantees equal opportunities in the choice of profession and of types of labor activity, implements programs of vocational education, training and retraining of personnel according to the needs of society. Under the current Labour Law, employees are protected from illegal termination of labour relationship.

Ukraine as a member of the International Labour Organisation ("ILO"), has signed and

ratified a number of ILO conventions that supersede conflicting or overlapping provisions of Ukraine's labour laws. The ILO is a specialized agency of the United Nations that deals with labour issues pertaining to international labour standards. Its headquarters is in Geneva, Switzerland. Its secretariat — the people who are employed by it throughout the world — is known as the International Labour Office [3]. Ukraine has been a member of ILO since May 12, 1954 and ratified 61 ILO conventions. At the time of her independence in 1991, Ukraine was elected to the Governing Council — for the period 1996-99 and 1999-2002. In June 2012 the Ministry of Labour and Social Policy of Ukraine and the International Labour Organization signed the new Decent work program in Ukraine for 2012-2015. The main objective of this program is to promote decent work as a factor of productivity and as a key element of social and labour branch of Ukraine. The program defines the main objectives and expected results of joint activities implemented jointly with the ILO tripartite partners of Ukraine [4]. Ukraine has entered into a number of bilateral and multilateral international agreements that contain provisions on labour, employment, and social protection.

On the 19th of September, 2006, the Ministry of Justice of Ukraine issued a formal registration of the Confederation of Employers of Ukraine, which is a professional lobbying public organization that unites all-Ukrainian associations of employers' organizations, established in accordance with the Law of Ukraine "On Employers' Organizations, their Associations,



Rights and Guarantees of their Activity” [5]. The main reason for the creation of Confederation is representation and protection of the interests of employers and associations of employers in economic, social and labour relations, protection of their rights and interests, consolidation of actions of the members of Confederation for the achievements of positive results and enhancements of their influence on the social and economic policy development, improvement of social and labour relations and development of social dialogue [6].

According to the article 2 of the Code, employees realize the right to work through an employment contract of work in the enterprise, institution or organization. Employer is the owner of an enterprise, institution, organization or an authorized body, regardless of ownership, type of activity, management, and the individual who uses paid work. Employee is a person who works at an enterprise, organization, institution and performs duties or functions under the employment agreement (contract) (article 1 of the Law of Ukraine on Protection of Labour) [7].

Such Ukrainian scientists and legists as V.S. Venediktov, M. I. Inshin, A.M. Sotsky, V.I. Sherbyna paid attention to the problems of the legal regulation of the conclusion of an employment agreement. The article is aimed at specifying certain legal regulatory issues of this process, which is constituted by legislation.

The Labour Code distinguishes between employment agreements, which are indefinite in duration and may be reached in the form of an oral agreement. Alternatively, it is possible to conclude an employment contract, which is a special form of employment agreements. In a labour contract, the resolution of certain issues may be determined by the parties.

Article 9 of the Code, states that provisions of a labour contract may not deprive an employee of the rights and benefits that are guaranteed by the labour laws of Ukraine. A labour contract may be used only if it is expressly authorized by law, and it always must be executed in writing. In contrast, although it is common for a written labour agreement to be concluded by the parties, the absence of such an agreement does not prevent an employment relationship from being established. When a written labour agreement does not exist, the parties are bound by an implied labour agreement, and the relevant provisions of the Code strictly regulate the employment relationship.

In general, there are three types of employment agreements: 1) indefinite term; 2) fixed term; and 3) as being fit for the duration of a particular job. Article 23 of the Code states that a labour agreement may be concluded for a limited term only if the nature of the employee's work and/or “the employee's interests” make it impossible to establish an employment relationship for an unlimited term. This provision affects

only a labour agreement, and is not applicable to a labour contract.

Pursuant to Article 21 of the Code, the parties to a labour contract have discretionary powers to determine the term of such a contract. Other provisions, upon which the parties may agree in a labour contract, include: validity period, rights, liabilities and responsibilities of the parties, salary, conditions of material security and organization of employee's work, conditions of termination of the contract. The principal advantage of a labour contract is the discretion that the parties of the contract may exercise with respect to the terms and conditions of the employment. On the other hand, the principal disadvantage of a labour contract is that, unlike a labor agreement, it may be concluded only if it is expressly authorized by law.

According to Ukrainian legislation, an employment agreement can be terminated only based on statutory grounds set forth in the Labour Code. Article 36 of the Code provides an exhaustive list of grounds for such termination:

- agreement of the parties;
- expiration of the term, except for the cases when factual labour relations continue and neither party requests their termination;
- employee's entry to military service;
- termination of the agreement at the initiative of an employee, at the initiative of an employer or at the request of trade union;
- employee's transfer by his consent to other enterprise or his transfer to an elective post;
- employee's refusal to relocate with the enterprise, as well as his refusal to continue to work due to change of substantial labour conditions;
- when a court verdict, providing for imprisonment of an employee, comes into force, except for some cases;
- the grounds set fourth in the labour contract.

It is possible to note, that the procedure for terminating a valid employment agreement varies depending on the party that initiates the agreement's termination and the other circumstances.

Law of Ukraine “On Equal Rights and Opportunities for Women and Men” [8] forbids discrimination against employees based on gender, race, ethnicity, religion, or “political or economic orientation”. Pursuant to the article 6 of this law gender-based discrimination is prohibited. Special protection of women during pregnancy, childbirth and breastfeeding shall not be considered gender-based discrimination. Human Rights Watch recently reported that these laws are poorly enforced, and that sexual harassment is prevalent [9]. Because women can take up to three years off after the birth of a child and employers very often express hiring preferences for men. It is a pity, but this question is still not so well regulated by law and some provisions



of Ukrainian labour legislation are merely formal with little compliance in practice. Current Ukrainian legislation provides other guarantees in order to protect women's health. An article 10 of the Law of Ukraine on Protection of Labour states: "Prohibited employment of women in the hard work and for work with hazardous or dangerous working conditions in underground mines, except for some underground work (non-manual work or work related to sanitary and household services), and involvement of women in lifting and moving things, whose weight exceeds the maximum norm for them, according to the list of heavy work and work with harmful and dangerous working conditions, rules limiting lifting and moving heavy items to be approved by specially authorized central executive body in health. The work of pregnant women and women who have a minor child is governed by legislation".

Criminal legislation of Ukraine prescribes liability for the criminal offenses against electoral, labour and other personal rights and freedoms of the human being and the citizen. It is necessary to pay special attention to the following criminal norms: "Gross violation of labour law", "Gross violation of an employment contract" (articles 172, 173 of the Criminal Code of Ukraine (CC of Ukraine). For example, according to provisions of article 172 of the CC of Ukraine, unlawful dismissal of an employee for personal reasons, and also any other gross violation of labor law, – shall be punishable by a fine up to 50 tax-free minimum incomes, or deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years, or correctional labor for a term up to two years. The same actions committed in regard of a minor, or a pregnant woman, or a mother with a child under 14 years of age or a disabled child, – shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or deprivation of the right to occupy certain positions or engage in certain activities for a term up to five years, or correctional labor of a term up to two years, or arrest for a term up to six months [10].

Consider the following as an example in point. A mother with a child under 14 years of age tries to find a job. She has the relevant education required for her prospective job, an experience of work and all the possible recommendations. An employer agrees to conclude an employment agreement with such a woman in the form of employment contract. A labour contract is con-

cluded in a written form, for a definite period of time, it settles all rights and obligations of the parties in details, including organization of work, remuneration terms, liabilities and other conditions. It looks like the labour contract is a form of employment agreement, having a lot of advantages. But from another side it also gives an opportunity for an employer to terminate the labour relations without any difficulties. For example, if a contract with such a woman mentioned above is concluded for one year, it can be terminated according to the second part of article 36 of the Labour Code of Ukraine because of the completion of validity period of the contract. It means that such women have no guarantees of long-term employment. This, we assert, contradicts the provisions of the second section of article 172 of the CC of Ukraine.

In order to avoid conflicts while entering into labour contracts it is better to include in the provisions of the contract reasonably phrased clauses regulating the employee's conduct and the conditions of work during employment. As a closing remark, it is pertinent to mention that Ukrainian labour legislation is not perfect and needs reforming to not only reflect but give corrective treatment where necessary to the current realities and vagaries of the Ukrainian labour market.

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