

Legal guarantees of the realization of the labor rights of the employee in the conditions of martial law in ukraine

Garantías jurídicas para el ejercicio de los derechos laborales del empleado en condiciones de ley marcial en ucrania

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Abstract

The study is devoted to topical issues of legal guarantees for the implementation of the labor rights of the employee in the conditions of martial law in Ukraine. The importance of proper legislative consolidation of the catalog of mutual labor rights and obligations of the employee and the employer, ways and means of their implementation and protection in accordance with international and European standards was emphasized. It is noted that the legal regime of martial law drastically affected the labor sphere, and the introduction of changes to the labor legislation contributed to the partial elimination of gaps in labor law regarding the grounds for terminating an employment contract. It was concluded that the legislative changes do not completely solve the problem of terminating the employment contract. It is the clear legal regulation of the specifics of terminating an employment contract, international standards and precedent practice on these issues that can ensure the quality existence of labor relations in the conditions of a special legal regime.

Keywords: Labor market; Bor rights; Employer; Employee; Termination of employment contract; Martial law regime.

Resumo

El estudio está dedicado a cuestiones de actualidad sobre las garantías legales para la implementación de los derechos laborales de los empleados bajo la ley marcial en Ucrania. Se destacó la importancia de una consolidación legislativa adecuada del catálogo de derechos y obligaciones laborales mutuos del empleado y del empleador, las formas y medios de su implementación y protección de acuerdo con las normas internacionales y europeas. Cabe señalar que el régimen jurídico de la ley marcial tuvo un profundo impacto en el ámbito laboral, y la introducción de cambios en la legislación laboral contribuyó a la eliminación parcial de las lagunas en la legislación laboral en cuanto a los motivos para rescindir un contrato de trabajo. Se concluyó que los cambios legislativos no resuelven completamente el problema de la rescisión del contrato de trabajo. Es la regulación jurídica clara de las particularidades de la rescisión de un contrato de trabajo, las normas internacionales y la práctica precedente en estas cuestiones lo que puede garantizar la existencia de calidad de las relaciones laborales en las condiciones de un régimen jurídico especial.

Palabras-clave: Mercado laboral; Derechos laborales; Empleador; Empleado; Terminación del contrato de trabajo; Régimen de ley marcial.

1 Introduction

In recent years, the Ukrainian labor market has undergone significant changes. The COVID-19 pandemic and the full-scale war on the territory of Ukraine negatively affected the development of the labor market, which caused: an increase in the level of unemployment, hidden unemployment (leaves without salary), impoverishment of the population and deterioration of the quality of human resources due to the loss of qualifications of a part of the workforce, a decrease in the economic activity of self-employed persons, the growth of the digital divide between remote workers, the drop in the level of social protection, and others. At the same time, the specified global changes in society became a catalyst for the acceleration of the digital transformation of the labor sphere and the spread of digital forms of employment.

Any type of reform of labor law is closely related to the creation of such legal acts that would ensure normal regulation of labor relations in the labor market. However, the means and methods of human rights protection enshrined in legal norms are not always really effective in practice. In such a situation, a system of guarantees for the protection of the rights of subjects of labor relations requires detailed consideration and study. The greatest attention should be paid to the guarantees of protection of a person's right to work upon termination of employment relations with him, since, as practice shows, it is in this situation that the rights of both employees and employers are most violated.

The instability of Ukraine's labor legislation, caused by outbreaks of the coronavirus disease and Russian aggression, has a rather bad effect on labor relations between employees and employers. Therefore, to ensure the proper implementation of legal relations between the parties, it is necessary to find out the trends in the development of labor legislation in accordance with modern development conditions, to develop effective mechanisms for ensuring labor rights.

2 Methodology of the study

To achieve the goal of the research and to solve the tasks, the authors of the study widely used general and special methods of scientific knowledge. The research is based on systemic, synergistic and programmatic approaches, as well as a set of methods that ensure their implementation, namely:

- ♦ induction, deduction, systemic and dialectical analyzes (for the purpose of researching modern labor relations in Ukraine);
- ♦ comparison, selection and description (when clarifying the legislative activity in regulating the legal relationship between the employee and the employer in case of termination of the employment contract);
- ♦ grouping, modeling and forecasting (for the purpose of clarifying the

legal guarantees of employees in case of termination of the employment contract and formulating relevant conclusions and proposals for improving the mechanism of their implementation in the conditions of special legal regimes).

The legal and empirical basis of the scientific article is the Constitution of Ukraine, international and national legal documents that form the system of state regulation in the social and labor sphere in the conditions of special legal regimes, explanations and scientific works on the specified issues.

3 Analysis of recent research

The set of modern challenges, such as the informativeness of society, globalization, the pandemic, the war of Ukraine against the Russian Federation and the rapid development of international law, could not leave the field of labor law out of consideration. The specified challenges have a rather intense impact on the development of labor relations, which naturally requires a proper response to them by partially improving the labor legislation that regulates them. Currently, the issue of careful analysis of certain provisions of the Ukrainian legislation on labor relations, which exist under the conditions of the martial law regime, is very relevant.

The purpose of the article is a study of modern labor relations in Ukraine, a scientific analysis of changes in labor legislation that occurred in connection with the introduction of the legal regime of martial law. Problems related to the implementation of labor rights, caused by the imperfection of the legal protection of the right to work and the practice of their application, do not lose their relevance. One of the most relevant issues today is to clarify the legal guarantees of employees in case of termination of the employment contract.

4 Results and discussion

The implementation of the labor rights of employees is inherently a complex socio-legal phenomenon, namely a way of objectifying the provisions of the current legislation of Ukraine on labor, which takes place within the limits of the relevant forms of implementation of the labor legislation. The corresponding forms of realization of the labor rights of employees are special regulatory ways of realization of these rights, carried out within groups of active and passive forms of implementation of labor legislation, which are forms that either enable the realization of these rights, or are the model in which the employee is directly exercised his labor rights (Ostapenko, 2021).

In an inextricable connection with the state, legal guarantees are reflected in legal acts, which are a set of conditions and special legal techniques and means that

determine the conditions and procedure for the undisputed exercise of a person's rights and freedoms, as well as their protection, protection and restoration in case of violation.

Legal guarantees play an official role in relation to the rights and obligations that make up the core of a person's legal status, as they ensure their effective functioning and affect their scope. Of great theoretical and practical importance is the issue of employee guarantees upon termination of the employment contract, in particular upon termination of the employment contract at the initiative of the owner or a body authorized by him. The improvement of the Labor Code of Ukraine and the draft Labor Code of Ukraine, aimed at ensuring guarantees of the labor rights of employees upon termination of employment, in accordance with European requirements, remain relevant.

The right to work, as a natural and inalienable right of a person to own and use his abilities to work, requires the state to provide mechanisms for the realization of this right. In particular, in accordance with Art. 43 of the Constitution of Ukraine, every citizen has the right to work, primarily as an employee. The state provides an opportunity to earn a living by work that is not prohibited by law and that a person freely chooses or freely agrees to (Constitution of Ukraine, 1996). Realization of the maximum available opportunity to exercise the right to work of Ukrainian citizens in the conditions of martial law remains a priority task of the state.

The Law of Ukraine "On the Legal Regime of Martial Law" (On the Legal Regime of Martial Law. Law of Ukraine, 2015) marked a new stage in the development of labor relations. In a relatively short period of time, legislative activity in the regulation of labor relations has significantly intensified (Hryshina; Chanysheva, 2022), in particular, the Law of Ukraine "On amendments to some legislative acts of Ukraine on strengthening the protection of labor rights of employees" came into force Ukraine regarding the optimization of labor relations. (On amendments to some legislative acts of Ukraine regarding the optimization of labor relations, 2022). It is with the help of these acts that the parties have the opportunity to regulate labor, socio-economic relations at different levels of social dialogue, taking into account the interests of each of the parties, in this difficult period (Hryshina; Chanysheva, 2022).

The changes introduced by the said Law to the Labor Code of Labor and Employment relate, in particular, to specifying the employer's obligations before the employee begins work under an employment contract, establishing new grounds for terminating an employment contract and the procedure for terminating (dismissing employees) based on some of these grounds. In this regard, the new edition sets out Art. 29 of the Criminal Code, amended by Art. 36, Art. 41, Article 49-2 of the Criminal Procedure Code, etc. (Labor Code of Ukraine, 1971).

The text of Art. 102-1 of the Criminal Code of Ukraine regarding the concept and payment of co-operation, Part 4 of Art. 115 regarding the term of payment of wages to employees for the entire period of vacation. Amendments were made to Art. 116 of

the Labor Code, in particular, in the first part of the mentioned article, the employer is obliged to notify the employee in writing about the amounts accrued and paid upon dismissal, on the day of their payment. The new version of the text of Art. 117 of the Labor Code of Ukraine, which, in particular, reduced the period of payment of the average salary to the employee for the time of delay in the calculation upon dismissal to six months (Labor Code of Ukraine, 1971).

The Law of March 15 No. 2136-IX supplemented Art. 15 “Reimbursement to employees and employers of money related to labor relations, lost as a result of armed aggression against Ukraine” and Art. 16 “State supervision (control) of compliance with labor legislation during the period of martial law” (Part 1 of Article 14 refers to the provision by professional unions of public control over the minimum labor guarantees provided for by this Law) (On the Organization of Labor Relations Under Martial Law, 2022).

Another trend in the development of labor law under martial law is the strengthening of the flexibility of the legal regulation of labor relations and employee mobility when exercising the right to work, which is manifested in the legislative regulation of some non-standard forms of employment, in particular, the introduction of a new type of labor contract - a labor contract with unfixed working hours. Employees with whom such a contract is concluded are called freelancers. An employment contract with non-fixed working hours does not provide for a specific time of performance of the work, the employee is obliged to perform the work only if it is provided by the employer, in the absence of guarantees that such work will be of a permanent nature. Under an employment contract with non-fixed working hours, the employee receives wages for the time actually worked or for the work actually performed (On making changes to some legislative acts of Ukraine regarding the regulation of labor relations with non-fixed working hours, 2022).

In the new edition, Art. 13 of the Law of Ukraine “On the Organization of Labor Relations in the Conditions of Martial Law”, which refers to the suspension of the employment contract. This concerns the specification of the procedure for suspending the employment contract and its execution, providing for the possibility and procedure of appealing the relevant order (order) of the employer in case of disagreement with it by the employee (employees). By separate legal acts, the employer and the employee are invited to regulate the relations regarding the creation and termination of employment relations, the wage system, labor standards, wage rates, allowances, surcharges, bonuses, bonuses, norms for the duration of working hours and rest, etc. at their own discretion and by mutual agreement. In addition, it is allowed to dismiss an employee at the initiative of the employer without explanation of the reasons, provided that compensation is paid, employees are deprived of their right to trade union protection, as well as the actual loss of guarantees for socially unprotected categories of persons (On

amendments to some legislative acts of Ukraine regarding the optimization of labor relations, 2022; On making changes to some legislative acts of Ukraine on simplifying the regulation of labor relations in the field of small and medium-sized entrepreneurship and reducing the administrative burden on entrepreneurial activity, 2022).

In the encyclopedic literature, the termination of the employment contract is defined as the termination of the employee's employment relationship with the employer in all cases provided for by labor legislation. The employment contract is terminated only if there are grounds for its termination. The basis for terminating an employment contract is a legally established legal fact or a set of legal facts necessary for terminating an employment contract" (Big Ukrainian legal encyclopedia, 2018).

As evidenced by the analysis of the practice of labor relations, there are problems of non-compliance with the guarantees of the position of employees established by the labor legislation compared to the requirements of the labor legislation.

A number of legal guarantees for employees in the event of termination of the employment contract at the initiative of the owner or a body authorized by him follow from the content of the norms of labor law. Such guarantees, in turn, are divided into general and special. In particular, all employees are guaranteed the right to work under fixed-term and open-ended employment contracts, the early termination of which is possible only on the grounds provided for by law (Articles 40, 41 of the Labor Code of Ukraine) (Labor Code of Ukraine, 1971). Special guarantees for employees upon termination of an employment contract at the initiative of the owner of an enterprise, institution, or organization are established for a certain range of employees (Articles 42, 42-1, 43, 44, 47, 49-2, 49-4 of the Labor Code of Ukraine) (Labor Code of Ukraine, 1971). At the same time, the guarantees of the employee provided for in Art. 49-2 of the "Procedure for dismissal of employees" and Art. 49-4 "Employment of the population", aimed specifically at the creation of a legal regime of assistance to employees in realizing their right to work.

Currently, certain problems have arisen in Ukraine regarding the real implementation of procedural guarantees for persons working under fixed-term employment contracts.

The Constitutional Court of Ukraine, in the motivational part of Decision No. 6-p(II)/2019 of September 16, 2019, stated that "there can be no discrimination in the exercise of labor rights by employees, violation of their equality in labor rights" and is inadmissible, and any the restriction must have an objective and reasonable justification and be carried out taking into account and observing the provisions of the Constitution of Ukraine and international legal acts. Provisions of the third part of Article 40 of the Code establish guarantees. protection of employees against illegal dismissal, which are special legal requirements that an employer must comply with in order to comply with labor legislation. One of such guarantees is, in particular, the

law that prohibits the employer from dismissing an employee who works under an employment contract and at the time of dismissal is temporarily unable to work or is on vacation, therefore, failure to extend such a requirement to employment relations under a contract is a violation of the guarantees of the protection of employees from illegal dismissal and puts them in unequal conditions compared to employees of other categories. Thus, the Constitutional Court of Ukraine came to the conclusion that the provisions of the third part of Article 40 of the Code are such that they apply to all labor relations and do not contradict the Constitution of Ukraine” (The decision of the Constitutional Court of Ukraine, 2019).

Clause 1 of Art. 6 of the Convention of the International Labor Organization No. 158 on the termination of employment relations at the initiative of the employer, it is determined that “temporary absence from work due to illness or disability is not a legal basis for dismissal”, and in Art. 3 states that “for the purposes of this Convention, the terms “dismissal” and “termination of employment” mean the termination of employment at the initiative of the employer.” In addition, clauses 2 and 4 of Art. 2 of the Convention provides for the legal possibility of excluding from the scope of application of the Convention some of its provisions regarding employees who are hired for a certain period of time, as well as categories of persons whose working conditions are regulated by special agreements (The decision of the Constitutional Court of Ukraine, 2019).

Such international normative conditions for regulating the order of termination of labor relations at the initiative of the employer indicate that national legislation may have certain features of the legal regulation of termination of labor relations, which corresponds to the “unity and differentiation of working conditions” as the main condition for the regulation of legal relations in the field of labor (Tangian, 2020).

This can be explained by the fact that: firstly, according to the labor legislation of Ukraine, the contract is a special form of an employment contract, and therefore, in the understanding of the provisions of international standards, the contract is an employment contract. is concluded for a certain period, and at the same time the contract is a “special agreement” about work; secondly, the ban on termination of labor relations applies to cases when the initiative to terminate these relations belongs to the employer, however, in the case of a “special agreement” on labor - a contract, it is not the employer’s initiative. Voluntary actions of the participants of the employment relationship, which arose on the basis of the contract, indicate that the parties deliberately entered into a fixed-term relationship. And in this context, domestic legislation clearly distinguishes the grounds for termination of employment relations on the grounds of the employee’s initiative (Articles 38, 39 of the Labor Code), at the initiative of the owner or a body authorized by him (Articles 40, 41 of the Labor Code) and termination of the employment contract with the initiative of third parties (Article

45 of the Labor Code of Ukraine), and, accordingly, upon the will of both parties to labor relations (paragraphs 1, 2 of Article 36 of the Labor Code of Ukraine) (Labor Code of Ukraine, 1971).

It should also be noted that during martial law there are certain features of terminating the employment contract at the initiative of the employer. In particular, during the period of martial law, it is allowed to dismiss the employee at the initiative of the employer during the period of temporary incapacity for work, as well as during the period of the employee's stay on vacation (except maternity leave and leave to care for a child until the child reaches the age of three) indicating the date of dismissal, which is the first working day after the end of the period of temporary incapacity specified in the letter of temporary incapacity, or on the first working day after the end of the vacation. In addition, during the period of martial law, termination of the employment contract at the initiative of the employer takes place without the prior consent of the elected body of the primary trade union organization (trade union representative), except in cases of dismissal of employees. enterprises, institutions or organizations elected to trade union organizations (On the Organization of Labor Relations Under Martial Law, 2022).

The employer under no circumstances has the right to force the employee to write a resignation letter of his own free will. If the enterprise is located in a war zone and it is impossible to organize the work of employees, the employer can introduce remote work, home work, provide vacations at the employee's request, including without salary, and dismiss the employee through no fault of the employee. employee and terminate the employment contract.

The death of an employer - a natural person or the entry into force of a court decision declaring such a natural person missing or declaring him dead is grounds for terminating the employment contract on the basis of Clause 8-1, Part 1, Art. 36 KZpPU. The death of an employee, recognition by a court as missing or being declared dead is grounds for terminating an employment contract on the basis of Clause 8-2, Part 1 of Article 36 of the Labor Code of Ukraine (Labor Code of Ukraine, 1971).

The current labor legislation does not define the mechanism for terminating the employment contract on this basis. According to the explanation of the Main Department of State Labor in the Dnipropetrovsk region, the employment relationship between the deceased worker and the employer actually ends on the day of the worker's death, since one of the parties to the contract no longer exists. In this case, the employer must document the termination of employment with him. After the death of the employee is certified by a death certificate or a court decision, it is necessary to issue an employment book, a time sheet and a dismissal order. Information that must be provided to relatives: application in the name of the manager; supporting documents regarding the death of the employee; documents confirming kinship with the deceased employee. In the event that none of the relatives apply for the employment book or they

are absent at all, the documents are kept for 50 years. At the end of this period, they can be destroyed (Question-Answer: Termination of employment in connection with the death of an employee, 2019).

In our opinion, from the content of Clause 8-2 of Art. 36 of the Labor Code, it is not clear who can initiate the termination of employment in connection with the death of an employee, recognition by the court as missing or declared dead. It is obvious that the initiator of the termination of the employment contract can be both the employer and one of the close relatives of the deceased employee.

It should be noted that the place of work and position at the enterprise, institution, organization, farm, agricultural production cooperative, regardless of subordination and form of ownership, as well as at individual entrepreneurs, in which they worked for the duration of the project, are preserved for the mobilized. Such employees are paid financial support at the expense of the State Budget of Ukraine in accordance with the Law of Ukraine "On Social and Legal Protection of Servicemen and Members of Their Families". During the absence of a mobilized employee, the employer may enter into a fixed-term employment contract with another employee, which is subject to termination in accordance with Clause 2 of Art. 36 of the Labor Code (expiration of the contract) in case of demobilization. main employee and return to the place of work (position).

Martial law does not limit the right of the parties to terminate the employment contract by mutual agreement of the parties. In case of non-appearance of the employee for work and information about the reasons for such non-appearance for more than four months in a row, the employment contract with him is terminated on the basis of Clause 8-3, Part 1, Art. 36 of the Labor Code of Ukraine (Labor Code of Ukraine, 1971).

5 Conclusions

The main task of modern labor law in the conditions of martial law, as in peacetime, remains the development of an effective mechanism for ensuring the labor rights, freedoms and interests of employees and employers, namely properly enshrining at the legislative level the list of mutual labor rights and obligations of the employee and the employer, methods and means of their implementation and protection in accordance with international and European standards. Compliance with the employee's guarantees in the event of termination of the employment contract is an important element of the mechanism of protection of individual rights, which requires their proper legislative consolidation. The investigated legal guarantees are provided to the employee in case of termination of the contract both on his initiative and on the initiative of the employer.

The legal regime of martial law had a profound impact on all spheres of Ukrainian life, including work. The Law of Ukraine “On the Organization of Labor Relations in Martial Law” has become the key law that regulates the peculiarities of labor relations of employees of institutions, organizations and enterprises in the country, regardless of the type of activity, form of ownership and industry affiliation. The adoption of the Law of Ukraine “On Amendments to Certain Laws of Ukraine on Optimizing Labor Relations” contributed to the strengthening of the Law “On the Organization of Labor Relations in the Conditions of Martial Law” and contributed to the elimination of gaps in labor law regarding the termination of an employment contract that arose in connection with the introduction of the legal regime of martial law in Ukraine, and provided new grounds for its termination. However, they do not completely solve the problem of termination of the employment contract. It is the clear legal regulation of the specifics of terminating an employment contract, international standards and precedent practice on these issues that can ensure the quality existence of labor relations in the conditions of a special legal regime.

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