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Current Challenges of the Labour Law of Ukraine:

On the Way to European Integration

1. Introduction

Ever since the declaration of independence in 1991, reforms to the legal system and various associated codification processes have been under way in Ukraine. In most branches of Ukrainian law, we now have modern codified acts, and in some spheres the acts of law have already been updated several times.

At the same time, in the field of regulating labour relations, the situation surrounding adoption of the new Labor Code has remained unclear for a long time. In particular, political, economic, and scientific-legal discussions are still in progress with regard to the various possible ways of reforming labour legislation.

The current labour law in force in Ukraine is a kind of 'hybrid' between a proclamation of market-based principles and a somewhat modernised form of the old framework 'inherited from' Soviet times but providing better guarantees of labour rights. This has led to an imbalance between the norms of labour law inscribed on paper and the real-world relations between workers and employers. Piecemeal efforts by the state to increase liability for violating the norms and guarantees provided for employees under the current labour legislation tend to have the opposite effect, and the corresponding reaction from employers is to avoid – in every way possible – applying 'inconvenient' norms, to utilise the gaps in the legislation, or to simply ignore the law. This has led to a situation wherein the proportion of illegal or undeclared work in Ukraine, according to the State Statistics Committee of Ukraine in 2017, is over 23%, which means that for 3.7 million Ukrainians, or every third working citizen, there is no formal registration of labour relations^{*1}.

These circumstances render it all the more regrettable that the process of improving the legal regulation of labour relations is not systemic but chaotic, generating numerous inconsistencies of legal norms. Against this backdrop, there is a visible tendency to put greater weight instead on judicial practice in cases of labour disputes, particularly the legal positions taken by the Supreme Court of Ukraine, in which the legislation is not interpreted as actually having been modified.

One of the significant problems with the labour legislation in Ukraine is the lag it displays in accounting for the forms of social relations that exist and the practical needs arising from the rapid development of information technologies and innovations in tandem with advances of modern post-industrial society – in particular, the spread of the virtual labour market and the entry into of non-standard labour contracts.

In summary, the necessity for recodifying Ukrainian labour law is rooted in several factors: 1) that most of the labour-law norms do not truly function in practice; 2) the large amount of undeclared and illegal

¹ Демографічна та соціальна статистика. Ринок праці. Зайнятість та безробіття. Available online in Ukrainian at http://www.ukrstat.gov.ua/operativ/menu/menu_u/rp.htm (most recently accessed on 11 June 2018).

work; 3) the existence of new forms of employment, which remain beyond the scope of legal regulation; and 4) lack of flexibility of Ukrainian labour law. Alongside these reasons there exists the inescapable conclusion that Ukraine has no other way open to it than integration into the European Union. Therefore, the need to adapt national labour legislation to EU standards is not in doubt.

2. Labour contracts: The need to revise traditional approaches

The draft of the Labor Code of Ukraine (bill 1658), approved on its first reading in 2015, is designed to establish the rights and obligations of the subjects of labour relations. This is aimed at ensuring implementation of the employee labour rights and guarantees provided for by the Constitution of Ukraine, the creation of adequate work conditions, the provision of workers' and employers' rights, and protection of their interests (Part 1, Article 1)². All this is in one way or another enshrined in the current Labor Code of Ukraine, but the question of a qualitative, meaningful updating of labour legislation, rather more than a formal change of name and structure coming about via the codified act, holds particular relevance in modern conditions.

In light of the latest trends in the development of labour legislation in other countries, as well as active legislative work on the draft of the new Labor Code in Ukraine, the question of the necessity and advisability of revisions to the classical view of the signs of an employment contract and its legal definition is still subject to vigorous discussion and is the stuff of lively debate.

The theoretical material on what constitutes an employment contract has, apart from some terminological clarifications, been transposed virtually unchanged from what is found in Article 21 of the currently valid instrument, the Socialist Labor Code of 1971, to the draft for the new Labor Code of Ukraine. The contract is formally presented as an agreement between an employee and an employer in which the employee undertakes to personally perform work (a labour function), specified by said agreement, in compliance with labour laws, collective agreements and contracts, and internal labour rules under the direction and control of the employer, and in which the employer undertakes to provide the employee with work under the agreement; proper, safe, and healthy work conditions; proper sanitary conditions; and wages paid in full and on time³.

On the one hand, the consistency thus shown by lawmakers has attracted approval, because the socio-economic essence of hired labour, in the era of socialism and the time of the market economy alike, remains fundamentally unchanged, and, therefore, according to some scholars, the inviolability of the basic legal structures in the field of labour law is thereby articulated⁴.

On the other hand, given the emergence of new forms of employment, there have arisen among legal scientists many supporters of modernisation of the main institutions of labour law; of implementation of the flexicurity (that is, flexibility of labour relations for employers while workers are provided with a stable situation in the labour market); and of granting the parties greater contractual freedom in terms of establishing the work conditions, particularly the work times, the workplace, and related elements.

In this regard, it would not be superfluous to mention innovation that is interesting from the perspective of 'classical labour law'. This innovation connected with the adoption of the law of Ukraine titled 'On Scientific and Technical Activities', of 26 November 2015 addresses elements that do not quite 'fit' the design of an employment contract that is stipulated in the draft Labor Code. These are, in particular, remote work of scientists and specialists with scientific institutes and institutions of higher education, stipulated in Article 6, and the concept of longer scientific trips and internships in scientific fields (addressed in Articles 33 and 34 of the law)⁵.

² Draft Labor Code of Ukraine, bill 1658, dated 27 December 2014, adopted on first reading on 5.11.2015. Available online in the Ukrainian language at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221 (most recently accessed on 11 June 2018).

³ Labor Code of Ukraine, ratified on 10 December 1971 as a set of labour laws for Ukraine, no. 322-VIII. Available in Ukrainian at <http://zakon3.rada.gov.ua/laws/show/322-08> (most recently accessed on 11 June 2018).

⁴ A.F. Nurtidinova / Нуртдинова А. Ф. Трудовой договор в современных условиях [The labour contract in modern conditions]. *Государство и право* [State and Law] 1994/2, p. 40.

⁵ Law of Ukraine No. 848-VIII of November 26, 2015, on Scientific and Technical Activities. Available in Ukrainian at <http://zakon3.rada.gov.ua/laws/show/848-19> (most recently accessed on 11 June 2018).

It appears that, as the need for a more flexible approach to the regulation of labour relations becomes clearer and with the spread of new forms of employment (remote work, outsourcing, outstaffing, etc.), some of the classic signs of an employment contract that were readily applicable 20 years ago are gradually losing their fundamental importance. This applies especially to the criterion of the employee being subject to organisation-internal labour rules. It is obvious that considering such a feature as the employee being required to follow internal rules regulating the labour to be fundamental to the concept of an employment contract should be abandoned. Especially in today's circumstances, it is not a tenable position that such elements must be present if an employment contract is to be deemed to exist.

Also questionable is the need to set forth in the formal employment contract the obligation of the employer to provide, in addition to proper, safe, and healthy work conditions, 'appropriate sanitary conditions'. This can be addressed instead by a special article that directly establishes obligations of the employer; there is no need to 'clutter up' the definition with a detailed list of those obligations. Consequently, the notion of an employment contract enshrined in the current legislation needs to be changed in light of the emergence in practice of new types of employment.

Equally relevant today remains the problem of the actual empowering of the participants in labour relations with contractual freedom, which should exist at all stages of the existence of labour relations. In this regard, it should be considered a positive development that the the draft Labor Code of Ukraine introduces the requirement that an employment contract take purely written form, with a separate article in the draft law setting forth the requirements related to the content of the employment contract – in particular, with a list of its main and additional conditions, which should allow avoiding many controversial issues in the process of labour activities. The requirement of a written contract extends to any changes of the terms of the employment contract as well (see Article 34 of the draft)⁶.

The general procedure for the entry into of an employment contract is currently regulated by Article 24 of the Labor Code of Ukraine. Until recently, part 4 of this article contained a provision according to which an employment contract is considered concluded even if, while no corresponding order was issued by the employer, the employee was actually admitted to work. A national law was passed to combat 'hidden' labour relations, 'On Amendments to Certain Legislative Acts of Ukraine Regarding the Reform of Mandatory State Social Insurance and Legalization of the Labour Fund', of 28 December 2014 (no. 77-VIII). Under this law, in effect since 1 January 2015⁷, Article 24 of the Labor Code of Ukraine has been changed such that an employee no longer may be admitted to work without there having been an employment contract concluded and the employee having been appointed by order of an employer, who must report the admission of said employee to work to the central executive body that oversees issues of ensuring the creation and implementation of state policies for administering a single-point contribution to compulsory state social insurance.

As practice has shown, this step by the legislator was not an effective way of addressing the new forms of labour relations in the law, because this 'makes life more complicated' for employers, forcing them to move over to civil contracts for the performance of work. Actually, it is hard to answer now, if the laws should treat the various forms of employment differently with excess specificity or just provide the possibility of them. In terms of global social and economic changes the second option seems to be more efficient. Therefore, it is our opinion that the procedure specified in the new Labor Code of Ukraine for concluding labour contracts should be as clear and simple as possible for the parties to the contract. At the same time, for purposes of ensuring protection of the interests of the employee within the social assignation of labour law, in the sphere of application of individual labour relations, the presumption of the fact of labour relations should be legislatively fixed by law. Herein, we find that it should be incumbent on the employer, rather than the employee, to prove the nature of the relationship that arose between the two in relation to the application of labour. In connection with this, it is necessary for the new Labor Code to consolidate the norm with the following content: 'In the event of a dispute over the legal nature of an agreement entered into by the parties under which a person performs work for remuneration for another person, a labour contract is considered concluded between the parties if the employer does not prove the contrary.'

⁶ Draft Labor Code of Ukraine, bill 1658 (see Note 2).

⁷ Law of Ukraine No. 848-VIII of November 26, 2015, on Scientific and Technical Activities (see Note 5).

3. Atypical work in Ukraine

In the mid-1990s, the International Labour Organization (ILO) recognised the advisability of a differentiated approach to the settlement of non-standard employment, adopting its convention on part-time jobs (no. 175)^{*8} in 1994, its convention on home work (no. 177)^{*9} in 1996, and the Private Employment Agencies Convention (no. 181)^{*10} in 1997. None of these has been ratified by Ukraine so far.

Since then, European labour law has seen the issuing of several directives dedicated to certain forms of non-standard employment, among them Council Directive 97/81/EC (of 15 December 1997), on part-time work^{*11}; Council Directive 1999/70/EU (of 28 June 1999), on fixed-term work^{*12}; and Council Directive 2008/104/EC (of 19 November 2008), on temporary employment agencies^{*13}.

It is obvious that at the current stage in post-industrial society's development, with the rapid spread of information technology, processes of globalisation, and European integration, the Ukrainian legislator soon or later will be forced to seek appropriate ways to increase the flexibility of the labour market, one of which entails the legal regulation of new forms of work organisation.

It is worth noting that in most Western and post-Soviet countries, these issues have already been resolved at the level of codes or laws. For example, in August 2007, a legal definition of telework and other relevant regulation on the subject were incorporated into the Polish Labour Code, triggering a crucial shift in public policy on telework. The new rules came into force in October of the same year. Thereby, one of the major obstacles that stood in the way of development of telework in Poland for many years was eliminated^{*14}.

In Bulgaria, amendments to the Labour Code of 2011 explicitly provide for home work, telework, and temporary-agency work as being work performed under an employment relationship. The Labour Code specifies that workers in these relationships possess the same rights as other workers employed under an employment contract, thereby ensuring their rights to payment, health and safety, social and health insurance, training and retraining, work times in line with labour law, and use of social benefits. They have a right to join a trade union in the relevant enterprise or be covered by a suitable collective agreement, along with the right to information and consultation^{*15}.

The Labour Code of the Russian Federation dating from 5 April 2013 includes a separate chapter that regulates the features of distance work, and since 1 January 2016 the code has included rules in force to govern the work carried out by the employee on the employer's orders for the benefit of and under the management and control of natural or legal persons that are not the employer (see Chapter 53-1 of the Labour Code of the Russian Federation)^{*16}.

⁸ ILO. C175 – Part-Time Work Convention, 1994 (No. 175), of 24.6.1994. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C175 (in Ukrainian at http://zakon3.rada.gov.ua/laws/show/993_040) (most recently accessed on 11 June 2018).

⁹ ILO. C177 – Home Work Convention, 1996 (No. 177), of 20.6.1996. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C177 (in Ukrainian at http://zakon4.rada.gov.ua/laws/show/993_327) (most recently accessed on 11 June 2018).

¹⁰ ILO. C181 – Private Employment Agencies Convention, 1997 (No. 181), of 19.6.1997. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C181 (in Ukrainian at http://zakon3.rada.gov.ua/laws/show/993_046) (most recently accessed on 11 June 2018).

¹¹ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [Union of Industrial and Employers' Confederations of Europe, European Centre of Enterprises with Public Participation, and European Trade Union Confederation]. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997L0081> (in Ukrainian at <http://www.minjust.gov.ua/file/32380>) (most recently accessed on 11 June 2018).

¹² Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31999L0070> (in Ukrainian at <http://old.minjust.gov.ua/45891>) (most recently accessed on 11 June 2018).

¹³ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1459618662174&uri=CELEX:32008L0104> (most recently accessed on 11 June 2018).

¹⁴ Jan Czarzasty. Telework in Poland. Published by Eurofound at <https://www.eurofound.europa.eu/observatories/eurwork/articles/telework-in-poland> (most recently accessed on 15 June 2018).

¹⁵ Tatiana Mihailova, Nadezhda Daskalova. Bulgaria: Annual review 2011. Published by Eurofound at <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/bulgaria/bulgaria-annual-review-2011> (most recently accessed on 15 June 2018).

¹⁶ The Labour Code of the Russian Federation of 30 December 2001, as of 1 January 2016. Available in Russian at <http://logos-pravo.ru/page.php?id=6086> (most recently accessed on 11 June 2018).

In contrast, the draft Labor Code of Ukraine, which is positioned by its developers as a modern legal-normative act that meets the needs of the modern day, does not even mention the possible existence of atypical employment contracts. The only article in the draft that regulates home working, Article 43, is not sufficiently reflective of the relationships that have developed in practice. At the same time, the prevailing approach in European law and research on the subject is reasoning that draws a distinction between the concept of 'home working', as mostly manual labour with low skill requirements that involves using simple equipment, and that of 'telework', as intellectual work by highly qualified professionals that is aimed at functional duties and involves modern information and telecommunication technologies. The ILO views home working as clearly distinct from telework: home workers are sometimes called 'outworkers' and are generally poorly paid people with poor job security or working on a piecework basis with no contract of employment. In contrast, a teleworker may be a manager, a senior professional, or another relatively highly paid employee who finds it more convenient to work at or near home some of the time^{*17}. Hence, there is an objective need for legal regulation of the peculiarities of telework in the new Labor Code of Ukraine.

Equally important is articulation of a clear position of the Ukrainian legislator on such phenomena as 'labour lending' (also known as outsourcing or outstaffing), another phenomenon not mentioned in the draft Labor Code. This shortcoming exists even though the currently valid Ukrainian law titled 'On Employment of the Population', from 5 July 2012, represents some legal regulation that does address the activities of business entities that hire employees to further perform work in Ukraine for another employer, through its Article 39^{*18}.

In foreign practice, the phenomenon called 'secondment' – referring to temporary attachment with a second organisation, elsewhere – is gaining popularity. Depending on the purpose, secondment can be considered to be variously a technique for training of personnel, a form of mobility of labour resources, or one of the forms of labour lending. In essence, it is a temporary referral to work for another employer (with suspension of the employment contract but with preservation of labour relations with the main (initial) employer), which implies an obligation for the employee to return to the original employer at the end of the term agreed by the parties. Among the positive aspects of such a 'business trip' for an employee may be the development of a career, the opportunity to acquire new skills and experience (which also benefit the employer), and corresponding professional development of the employee (training etc.)^{*19}. In our opinion, in the process of adaptation of the labour legislation of Ukraine to EU legislation, the legal regulation of the institution of secondment should be given due attention.

It would seem expedient for the code, as a comprehensive legal act in the field of labour relations, to be the instrument determining the main provisions that address the peculiarities of non-standard forms of engagement, to outline the scope and procedure for the entry into of special 'atypical' labour contracts, and to clearly establish the rights and guarantees for employees who work under such labour contracts.

4. Conclusions

Adjusting the legal regulation of labour relations in Ukraine in line with the legislation of the European Union cannot be done without taking into account the main tendencies in the development of labour law in European countries, among which we should note these: 1) ensuring decent work, efficient employment, and higher-quality human life; 2) facilitating the creation of labour-market conditions that should combine flexibility and security; 3) reducing illegal employment; 4) and eliminating discrimination in all its forms and manifestations.

With the signing of the Association Agreement with the European Union, the process of harmonising national labour legislation with the European legal space requires of Ukraine not only the development of documents certifying such intentions but, first of all, carrying out concrete reforms to improve the current normative-legal acts and adopting radically new ones.

¹⁷ Eurofound. Homeworking. Published at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/homeworking> (most recently accessed on 11 June 2018).

¹⁸ On Employment of the Population, Law of Ukraine no. 5067-VI, of 5 July 2012. Available online in Ukrainian at <http://zakon3.rada.gov.ua/laws/show/5067-17/page2> (most recently accessed on 11 June 2018).

¹⁹ Net Lawman Limited. Arranging a secondment: Practical and legal considerations. Available at <http://www.netlawman.co.uk/ia/secondment-agreements> (most recently accessed on 11 June 2018).

The overhaul to Ukraine's labour legislation should take into consideration the current state of social relations in the field of labour, the practice of law enforcement, the positive experience of the European Union countries with regard to regulation of labour relations, and the need to ensure that the level of rights and guarantees for hired employees does not fall.

Accordingly, we can identify certain key directions for reforming the Ukrainian national labour legislation on the way to European integration. Firstly, the legislative definition of the concept of an employment contract can be revised in terms of the mandatory subjection of an employee to rules of internal labour regulations, as well as the employer's provision of adequate sanitary and other domestic work conditions, alongside commensurate introduction of new types of employment contracts. Second is, by eliminating excessive 'over-regulation' of labour relations, granting the parties to employment contracts greater contractual freedom for determining the conditions of work, the workplace, the work times, etc., hence making labour legislation more flexible. Thirdly, we can deepen the differentiation in legal regulation of labour relations and legalisation of non-standard types of employment with the purpose of bringing labour rights and guarantees to employees involved in such activities.