Iryna LAHUTINA,
Doctor of Legal Sciences, Associate Professor,
Head of Labour Law and Social Security Law Department
of National University «Odessa Law Academy»,
lagutinaiv13@mail.ru

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DEFENCE OF THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS AS A JURISDICTIONAL FORM OF EMPLOYMENT PROTECTON

The article proves that the question of the rights and freedoms of a person and a citizen has a significant place in all sectors of government, because it is their most important constitutional duty. Gross violations of economic and social rights are among the main causes of conflict and the lack of a systematic struggle against discrimination and inequality in the enjoyment of those rights may undermine the process of post-conflict reconstruction. The author emphasizes the critical importance of ensuring the personal non-property labour right by courts of general jurisdiction, supervisory authorities, the Verkhovna Rada Commissioner for Human Rights. It is stated that proactive successful combating of discrimination ensures respect for the principle of equality, prevents violations of human and other legally guaranteed rights, and indirectly leads to their better observance and protection. The article emphasizes that the use of temporary employment leads to increased inequality and insecurity that undermines prospects for economic development, causing a steady decline in the living standards of employees, which relate to the problem of legislative regulation of relations between employers and employees, and private employment agencies.

Keywords: labour right, personal non-property right, employee, the Verkhovna Rada Commissioner for Human Rights, form of protection.

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One of the main tasks of labour law should be the protection of individual and collective, property and personal non-property labour rights.

Among the mechanisms of protection of personal non-property labour rights occupies a special place the ombudsman institution — the Commissioner of Verkhovna Rada of Ukraine on Human Rights.

The Council of Europe has provided strong support to ensure the effective functioning of the Ombudsman's Office. Co-operation activities have contributed to reinforcing the capacity and competences of the Ombudsman institution to effectively address a wide range of human rights violations. Human rights violations of all types were addressed both by the Ombudsman Office screening the compatibility of national laws, regulations and administrative practices with human rights, as well as by providing non-judicial means of redress to individuals, especially from vulnerable groups. Through further co-operation, the operational capacities of the Ombudsperson's Office in Ukraine will be bolstered, particularly in the areas of ill-treatment in places of deprivation of liberty, non-discrimination, and data protection [1].

Issues of jurisdictional forms of protection of human and civil rights are studied by representatives various branches of public and private law. The most significant contribution to the research of the protection of employees' labour rights are the works of legal scholars, such as: A. Aleksandrov, S. Alekseev, V. Andreev, M. Baru, V. Burak, G. Chanysheva, E. Yershova, L. Ginzburg, G. Goncharov, M. Inshyn, I. Kiselev, E. Khokhlov, K. Krylov, R. Livshits, A. Lushnikov, M. Lushnikova, S. Mavrin, A. Nurtdinova, A. Pashkov, P. Pylypenko, S. Prylypko, A. Protsevskyy, V. Skobelkin, V. Venediktov, V. Zhernakov, O. Yaroshenko etc.

The purpose of the article is to research the activity of the Commissioner of Verkhovna Rada of Ukraine on Human Rights as a body for the protection of personal non-property labour rights.

Jurisdictional form of protection of personal non-property labour rights is an activity provided by independent statutory bodies (courts, bodies considering the labour dispute, supervisory bodies, ombudsman) for the protection of violated or disputed rights and interests. The essence of this form is that the person whose rights and legitimate interests have been infringed by unlawful actions, apply for the protection in the state or other competent body that is authorized to take necessary measures to restore the violated rights, prevent the offences and seeking redress.

In English-language legal writings, the concept of «jurisdiction» is generally used for that of State competence. It is the power, assigned by international law to the State, to regulate and influence the conduct of individuals and to attach consequences to events. State competence springs from State (territorial) sovereignty, which constitutes its foundation. This general jurisdiction may be divided into two general classes of jurisdiction: «prescriptive jurisdiction» (*or «compétences normatives»*) and «enforcement jurisdiction» (*or «compétences d'exécution»*). For example, law, regulations adopted by governments (royal orders in Belgium, decrees in France, etc),

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judgments, etc, come under the State's prescriptive jurisdiction, while all procedures of enforcement, seizure, expulsion, arrest, finding of evidence, etc, are the upshot of the State's enforcement jurisdiction. It will be noted, however, that legal opinion in the matter makes distinctions and qualifications of other kinds which we shall not examine in detail for present purposes [2].

Jurisdictional form of protection of personal non-property labour rights of employees can be classified on the international and national. International forms include administrative (ILO supervisory mechanism) and judicial (the jurisdiction of the European Court of Human Rights). Accordingly, national jurisdictional forms of protection of personal non-property labour rights include protection of personal non-property labour rights in courts of general jurisdiction, supervisory authorities, by the Ukrainian Parliament Commissioner for Human Rights.

Thus, the legal personality of the jurisdictional bodies in labour law — it is determined on the basis of labour law norms the ability of authorized jurisdictional authorities have (to acquire, implement) the system of supervisory and controlling powers and labour rights and obligations that are directly linked with them.

Article 55 of the Constitution of Ukraine envisages that human and citizens' rights and freedoms are protected by the court; the right of every individual to challenge in court the decisions, actions or acts of omission of central and local authorities, officials and officers is guaranteed; everyone has the right to appeal for the protection of his or her rights to the Ukrainian Parliament Commissioner for Human Rights.

Legal status of the Ombudsman, his or her rights and authorities are determined by the Law of Ukraine «On the Ukrainian Parliament Commissioner for Human Rights». This Law provides for that activity of the Commissioner supplements legal remedies for violation of constitutional human and citizens' rights and freedoms; it neither repeals them nor results in reviewing the competence of the authorities which ensure protection and restoration of violated rights and freedoms, in particular judges (art. 4 of the Law). Considering the above-mentioned constitutional provisions the Law on the Ombudsman also determines that the Commissioner shall not consider petitions on issues which are under review in courts and shall terminate his or her proceedings that have been initiated if the person concerned has brought a suit (action), filed a petition or a complaint to the court (art. 17 of the Law).

So, while addressing complaints to the Ombudsman with regard to trial, appeals against courts decisions, activities or acts of omission of judges, individuals should know that under the legislation in force the Ombudsman is not entitled to interfere with legal proceedings carried out by the courts and to assess and revise court decisions for their legality and validity, change or cancel them, bring judges to liability. The validity of court decisions shall be checked only in a manner prescribed by the procedural law. Any control other that under the procedural law over the

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examination of cases by judges is prohibited by the Constitution and the legislation of Ukraine in force.

The activities of the Ukrainian Parliament Commissioner for Human Rights in the sphere of labour rights protection, including appeals of citizens, shows a progressive trend of reducing of employment protection, growth in the number of violations of labour legislation by employers.

Can be effective Ombudsman's efforts in situations where the use of other form and methods to protect personal non-property labour rights of employees, for whatever reason, in practice, do not give the desired results. For instance, discrimination in employment limits the freedom of individuals to obtain the type of work to which they aspire. It produces inequalities in labour market outcomes and places members of certain groups at a disadvantage.

Discrimination in working life is taken to mean, as the starting-point, any unwarranted difference in treatment, rejection or favouring on the basis of the discrimination factors mentioned in the relevant provisions which has the effect of undermining or restricting equality of opportunity and equal treatment in the context of the labour market and the practice of an occupation.

Eliminating discrimination starts with dismantling barriers and ensuring equality in access to training, education as well as the ability to own and use resources such as land and credit. It continues with fixing conditions for setting up and running enterprises of all types and sizes, and the policies and practices related to hiring, assignment of tasks, working conditions, pay, benefits, promotions, lay-offs and termination of employment. Merit and the ability to do a job, not irrelevant characteristics, should be the guide.

Equality in employment and occupation is important for the freedom, dignity and well-being of individuals. Stress, low morale and lack of motivation are prevalent sentiments among those subject to discrimination. This not only undermines their self-esteem and reinforces prejudices against them, it also affects their productivity — and, by association, the productivity of the workplace as a whole.

It is important to note that the Annual Report of the Ukrainian Parliament Commissioner for Human Rights on the state of human rights and freedoms in 2015 indicated that the modern features of the labour market is threatening the pace of conversion to non-standard forms of employment (outsourcing, outstaffing, staff leasing, homeworking, teleworking) the so-called borrowed work, also related to the violation of labour rights, in particular the failure to ensure employees even minimum state guarantees [3, p. 449].

At the same time, non-standard forms of employment contacts are being widely used also in Ukraine.

Ukraine is the largest Eastern European country supplying IT outsourcing services all over the world. Over 5 years, its outsourcing sector has been constantly evolving striving to be among top outsourcing destinations [4].

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Ukrainian outsourcing companies are becoming more experienced in the business continuity. Some bigger companies have opened new locations in CEE or Western Europe, and relocated there some teams. Furthermore, Ukraine keeps its 4th place in the world by the number of IT professionals (230,000 according to the government). The annual number of technical graduates is still around 15,000. This number does not include junior specialists using non-formal education like online courses, webinars and schools for developers, which is becoming enormous (in 2014 we have counted up to 20 course/training providers only in Kyiv).

IT Ukraine Association and Ukrainian Hi-Tech Initiative are the two biggest and the oldest associations of IT outsourcing companies in Ukraine [5].

Very little is known about actual practices of private employment agencies in Ukraine. Their services are not frequently used by unemployed workers seeking a job. The most popular job search methods in Ukraine involve public employment service.

While the average Ukrainian agency has typically started operating in the period 2005–2009, there is a whole variety of firms in this sector. On the other side, a licensed private employment agency is predominantly small and owned by a Ukrainian private entrepreneur. The sector of licensed private employment agencies consists of two distinguished subsectors. Almost half of firms recruit mariners and slightly less than — recruit for international companies (migration). This dichotomy is observed in many aspects of actual operations. Firms use their existing database to build up a pool of potential candidates and mostly recruit mariners (71 percent) [6, p. 49]. Agencies that prefer to proceed on an ad-hoc basis are more likely to recruit migrants. Companies in the first group advertise in the media significantly less often when compared to agencies from the second group.

Also, it is important to note that art. 23 of the Law of Ukraine «On Protection of Personal Data» provides powers to the Commissioner for Human Rights in the sphere of protection of personal data.

Personal data is defined as any information related to an identified or identifiable employee. An employee is identifiable if by putting together different data contained in one or more files or documents the employee's identity can be determined.

Data protection refers to limits on the processing and use of personal data. This includes data about employees, such as personal health records, and data created or used by employees in emails or internet use.

The purpose of data protection is to protect individuals from the consequences of any form of processing of personal data, but particularly computer processing, and thereby to safeguard the right of self-determination over personal data.

In labour law, the employer may lawfully store personal data about employees provided that it is necessary in order to achieve the purpose of the employment relationship. This is generally the case as regards data on the employee's age, training and performance.

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It is clear that Information and communication technologies (ICT) now play a significant role in enterprises, with growing use of computers in all aspects of operations and increasing communication and dissemination of information through the internet, internal intranets and the use of e-mail. For both employers and employees, there are new dangers linked to the development of ICT. Notably, as far as employees and their representatives are concerned, the main danger lies in the new capacity that exists for monitoring and surveillance. New technology may allow employees' work and productivity to be monitored, and also aspects of their personal lives, while their use of the internet and e-mail can be subject to monitoring (not least because of the traces any such use leaves). This raises questions of both privacy and the relationship of control at the workplace. These dangers can be even greater, and the surveillance technology even more advanced, in situations where there is a physical distance between the employee and the employer [7].

The ILO Code of Practice does not prohibit monitoring of employees, but it does restrict it in two ways. First, the employees must be informed in advance. Second, employers must take account of the consequences on employees' privacy, etc. in choosing their methods of monitoring. Furthermore, the Code very much limits the use of secret monitoring to cases where it is necessary for health and safety reasons or for the protection of property.

The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms states in Art. 8 («Right to respect for private and family life»).

In 1970, the Council of Europe's committee of experts in human rights stated that the right to respect for private life is mainly based on recognition of the interest that individuals have in being protected from all intrusions into their private lives and any parts of their lives that they legitimately want to keep to themselves. This interest, the committee went on, concerns personal communications and relationships, in addition to all matters touching the individual's privacy and person, and in particular refers to his or her image, voice and home, and to all goods that relate to his or her personal life.

The right to privacy of workers covers all forms of privacy: information privacy (relating to «intimate» or «sensitive» information, such as details regarding beliefs, off-duty conduct, trade union affiliation or health), but also medical privacy, communication privacy and personal autonomy or self-determination.

Applying information and communication technologies in the labour process is being widely used also in Ukraine.

It should be emphasized that, the norm of the draft Labour Code of Ukraine, which grants employers the right to monitor the implementation of the employees labour duties, including the use of technical means, if this is due to the «features production», is controversial (Art. 30 of the draft). Such conditions do not take into account the possibility to control

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the quality of performance of labour duties by other means (the relevant documents, for example).

On the other hand, it is impossible to agree with entrenchment the rights of the employer to implement surveillance technology unilaterally and the possibility of creating, in this way, an unjustified psychological pressure on employees in the labour process. Furthermore, it entails a violation of the right to labour honour and dignity

By their legal nature the right to labour honour and dignity is a basic labour law, individual labour law and personal non-property labour law.

It is important to pay attention that human dignity may be infringed when a person is treated as an object, a tool for the achievement of a national, public or individual objective. An individual may not resign of human dignity and the legal subjectivity which stems from it. The defence of human dignity is the task of the entire democratic community rather than a decision of a particular subject. Also the dignity of a person as a social value is created by following public social norms. Honour becomes its part. Every individual creates his own personal dignity, which may differ due to different individual properties and abilities of every human being.

Monitoring of employees is a sensitive issue, because dignity is fundamental to well-being and to human and organizational thriving.

In this context, it is important to strike a balance between the employees' fundamental rights, in particular that to privacy, and the employers' legitimate interests. Whilst this appreciation is carried out on a case by case basis, the question is raised whether it is advisable to have a framework of guidelines and rules regulating in a specific way processing of personal data in the employment field.

Furthermore, the results of the monitoring of the Ukrainian Parliament Commissioner for Human Rights indicated that it is due to mismatch between the effective provisions of labour legislation and other legal acts and contemporary social and economic developments, international trends and standards, as well as due to the lack of efficient state policies over the labour market and employment sector. It is especially manifested through the problems such as creation of decent workplaces, reduction of 'shadow' employment and payment of wages, informal and non-standard employment, and improper and untimely response to new challenges emerging at the labour market with regard to greater globalization.

Therefore, a number of legislative amedments are proposed to solve the above-mentioned problems, such as: bringing labour legislation in conformity with the requirements of European Social Charter (revised) and the conventions of International Labour Organization; ensuring the observance of the right to judicial protection and unconditional implementation of the court judgments; improving of the functions of state surveillance and control over the observance of labour legislation [8, p. 357].

Ukraine ratified the Revised European Social Charter on 21/12/2006, accepting 74 of the 98 paragraphs of the Charter, including

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Art. 26 «Right to dignity in the workplace». Ukraine has submitted the second report on the application of the provisions of the European Social Charter (revised) in the Council of Europe on 6 October 2009.

Moral harassment creating a hostile working environment characterized by the adoption towards one or more persons of persistent behaviours which may undermine their dignity or harm their career shall be prohibited and repressed in the same way as acts of discrimination. And this independently from the fact that not all harassment behaviors are acts of discrimination, except when this is presumed by law.

Thus, it is the employer's responsibility and legal obligation to assess and manage psychosocial risks in the workplace.

In such situation, the most substantive problem is that once work-related stress and ill health set in, absenteeism is usually already on the increase, and therefore productivity and innovation are already in decline.

Ukraine has submitted the Second Report on the application of the provisions of the European Social Charter (revised) in the Council of Europe on 6 October 2009. However, the European Committee of Social Rights Committee asks for precise information on laws, administrative acts or case law which guarantee the right of persons to effective protection against moral harassment in the workplace or in relation to work. The report contains no information about the liability of employers and means of redress.

The Committee recalls that it must be possible for employers to be held liable towards persons employed or not employed by them who have suffered moral harassment from employees under their responsibility or, on premises under their responsibility, from persons not employed by them, such as independent contractors, self-employed workers, etc.

The protection against moral harassment in the workplace or in relation to work, must include effective judicial remedies, comprising the right to appeal to an independent body in the event of harassment.

There are no special provisions on burden of proof. The Committee has ruled that effective protection of employees requires a shift in the burden of proof. In particular, courts should be able to find in favour of the victim on the basis of sufficient prima facie evidence and the personal conviction of the judge or judges (Conclusions 2003, Slovenia). The Committee asks what is the situation as regards burden of proof. The protection against moral harassment includes the right to obtain adequate compensation and the right and not to be retaliated against for upholding these rights. Also the Committee asks for information on how the right of persons to effective reparation for pecuniary and non pecuniary damage is guaranteed [9].

Consequently, it appears that the definition of the priorities of the Ukrainian Parliament Commissioner for Human Rights in the sphere of labour should be subordinated to the task of harmonious interaction with other entities to obtain positive results in supporting the legitimacy in labour relations, as well as to use its authority in overcoming the gaps in the coverage of other labour rights protection mechanisms.

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Лагутіна І. В. Захист Уповноваженим Верховної Ради України з прав людини як юрисдикційна форма захисту трудових прав

Обґрунтовується, що питання забезпечення прав і свобод людини і громадянина посідають значне місце в діяльності всіх державних органів, оскільки це їх важливий конституційний обов'язок. Грубі порушення економічних і соціальних прав належать до числа докорінних причин конфліктів, а відсутність боротьби із систематичною дискримінацією і нерівністю у користуванні цими правами може підривати процес відновлення після конфлікту. Підкреслено провідну роль забезпечення особистих немайнових трудових прав працівників Уповноваженим Верховної Ради України з прав людини. Встановлено, що через успішну протидію дискримінації забезпечується повага до принципу рівності, чим створюється система запобігання порушенням прав людини та інших прав, встановлених законом, що побічно призводить до покращення ситуації з їх дотриманням та захистом. Підкреслюється, що тимчасова зайнятість веде до зростання нерівності та соціальної незахищеності, підриває перспективи економічного розвитку країни, викликає неухильне зниження рівня життя працівників, що пов'язано з проблемою законодавчого врегулювання правовідносин між роботодавцями і працівниками, які працюють при нетипових формах зайнятості, та приватних агентств зайнятості.

Ключеві слова: *трудові права, особисті немайнові права, працівник, Уповноважений Верховної Ради України з прав людини, форма захисту.*

Лагутина И. В. Защита Уполномоченным Верховной Рады Украины по правам человека как юрисдикционная форма защиты трудовых прав

Обосновывается, что вопрос обеспечения прав и свобод человека и гражданина занимает значительное место в деятельности всех государственных органов, поскольку это их важная конституционная обязанность. Грубые нарушения экономических и социальных прав относятся к числу основных причин конфликтов, а отсутствие борьбы с систематической дискриминацией и неравенством в пользовании этими правами может подрывать процесс восстановления после конфликта. Подчеркивается основополагающее значение обеспечения личных неимущественных трудовых прав работников судами общей юрисдикции, органами надзора и контроля за соблюдением законодательства о труде, Уполномоченным Верховной Рады Украины по правам человека. Установлено, что при успешном противодействии дискриминации обеспечивается уважение к принципу равенства, чем создается система предотвращения нарушений прав человека и других прав, установленных законом, что косвенно приводит к улучшению ситуации с их соблюдением и защитой. Подчеркивается, что временная занятость ведет к росту неравенства и социальной незащищенности, подрывает перспективы экономического развития страны, вызывает неуклонное снижение уровня жизни работников, что связано с проблемой законодательного урегулирования правоотношений между работодателями и работниками, которые работают при нетипичных формах занятости, и частных агентств занятости.

Ключевые слова: *трудовые права, личные неимущественные права, работник, Уполномоченный Верховной Рады Украины по правам человека, форма защиты.*

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