

ПРАВОВА ДОКТРИНА ДОТРИМАННЯ ТРУДОВИХ ПРАВ

Анотація. Неодмінною умовою побудови оптимальної моделі правової та соціальної держави в Україні є створення ефективних механізмів реалізації та захисту трудових прав, які посідають центральне місце у системі прав особи. Але однією з основних проблем є створення та вдосконалення системи гарантій, які забезпечать реалізацію та захист громадянами права на працю. Тому основна мета роботи полягає у аналізі підходів до розуміння сутності правової доктрини щодо дотримання трудових прав. Для досягнення поставленої мети автором були використано формально-логічний, системний, порівняльно-порівняльні методи. Сфокусована увага на тому, що правова доктрина дотримання трудових прав працівників відображає систему методів оцінки стану забезпечення трудових прав через призму відповідності духу закону. Встановлено, що правову доктрину необхідно розглядати як систему ідей, наукових поглядів, теорій про право, які розробляються юридичними науками. Порівняльно-правовий аналіз міжнародних трудових норм та законодавства України щодо основних трудових прав дозволив встановити, що законодавство України не повністю відповідає вимогам міжнародних трудових норм про основні трудові права, хоча в окремих випадках, зокрема, щодо захисту прав дітей та підлітків, містить навіть більш високі стандарти. Окреслено три значення розглядуваної доктрини. Під правовою доктриною дотримання трудових прав працівників розуміються: загальні наукові правові концепції забезпечення трудових прав працівників; правові концепції забезпечення трудових прав працівників, сформовані судами; точки зору вчених-трудоників з приводу окремих питань, проблем механізму забезпечення трудових прав. Виявлено її консервативність, викладено вираження доктрини дотримання трудових прав в законодавстві. Окрема увага приділяється основним проблемам дотримання трудових прав. Однією з яких є укладання між роботодавцем та працівником цивільно-правового договору на виконання робіт та надання послуг, а не трудового договору.

Ключові слова: доктрина в трудовому праві, дотримання трудових прав, охорона трудових прав, права працівників, трудові права.

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LEGAL DOCTRINE OF COMPLIANCE WITH LABOUR LAW

Abstract. Indispensable condition to construct the optimal model of law-based and social state in Ukraine is creation of efficient mechanisms of implementation and protection of labour rights that are central in the system of rights of an individual. However, one of the main issues is cre-

ation and improvement of guarantee system that ensure implementation and protection of labour rights. That is why the purpose of the study is to analyse approaches to understanding of the essence of the legal doctrine of observance of labour rights. In order to achieve the purpose, the author used formal and logical, systematic, comparative methods. The attention is focused on the fact that the legal doctrine of compliance with labour rights of employees reflects a system of methods for evaluation the state of ensuring labour rights through consistency with the spirit of the law. It has been established that the legal doctrine is needed to be considered as the system of ideas, scientific views, theories on law that are being developed by legal sciences. Comparative analysis of international labour norms and the legislation of Ukraine on main legal rights has led to the conclusion that Ukrainian legislation does not fully correspond to requirements of international labour norms on the main labour rights, though in certain cases, in particular, concerning protection of children's and adolescents, it has even higher standards. The author outlines three meanings of the doctrine. The legal doctrine of observance of employees' labour rights can be understood as: 1) general scientific legal concepts of ensuring labour rights; 2) legal concepts of ensuring labour rights formed by courts; 3) the views of legal scholars on certain issues of the mechanism of ensuring labour rights. The author reveals its conservatism, depicts the manifestation of the doctrine of observance of labour rights in legislation. Special attention is paid to the main problems of compliance with labour rights. One of them is conduction of a civil and legal treaty between an employee and an employer for works and services instead of an employment contract.

Keywords: doctrine in labour law, observance of labour rights, protection of labour rights, employees' rights, labour rights.

INTRODUCTION

Ensuring labour rights of workers of various segments of the economy is a strategic goal of any state. The main effective tool in this vector is the legal doctrine of compliance with labour rights of workers, which should penetrate the natural labour and legal fabric. It is impossible not to notice that the process of labour and legal reform in Ukraine is not completed due to subjective and objective factors. It is worth agreeing with the assertion that the draft Labour Code of Ukraine (hereinafter referred to as the draft LC of Ukraine) does not fully take into account the developments in the legal doctrine of compliance with workers' labour rights, and therefore rethinking is required, and in some cases a reassessment of certain approaches highlighted in the draft LC of Ukraine. Participating in various legal events (legislative, judicial, scientific) it is possible to come to the conclusion that the legislator, the courts, and scientists agree that the draft LC of Ukraine should not create the illusion of taking into account the doctrine of methods, measures for the protection of labour rights. Without appropriate consideration of the doctrine of compliance with labour rights, the draft Labour Code of Ukraine will look like a modern eclectic.

The doctrine of compliance with labour rights should not be isolated in the crystal tower of labour and legal science, because the effectiveness of labour law depends on science, labour legislation and judicial practice in their logical interaction [1-3]. Unfortunately, today we are witnessing a number of cases of lack of such interaction. Not

always achievements of scientific and judicial doctrine are being taken into account in the development and adoption of normative legal acts that adversely affects law enforcement [4-6].

As a result, the science of labour law and legislator continue to search for a balanced approach to the implementation of the doctrine of compliance with labour rights. That is why the outlined state of the existing block of legal problems and discussions about understanding the doctrine of compliance with labour rights give a powerful impetus to creation of new perspectives through the prism of scientific intelligence.

The purpose of this work is to analyse the essence of the doctrine of compliance with workers' labour rights and the main problems of compliance with labour rights.

1. MATERIALS AND METHODS

In the modern world, the problem of ensuring respect for and compliance with human rights is of general importance. Ensuring human rights and freedoms is not only an internal matter, but the goal of the whole world community, for which the doctrines, standards of human rights and freedoms are a global problem. Human rights and freedoms are the universal legal values for which the establishment of common international legal standards in the field of the protection of individual rights is characteristic.

For a detailed study of the subject, the author used a variety of general scientific and special methods of cognition, the choice of which is due to the peculiarities of the object, subject, purpose and objectives of the study. The basic labour rights of employees and their interconnections have been studied using the dialectical method. The application of the historical legal method allowed to analyse the evolution of labour rights, their legislative consolidation and to substantiate the need for further scientific research of this problem.

Formal and logical and systematic methods allowed to study the peculiarities of labour rights in the system of human rights. Analysis of labour legislation in different countries was conducted using a comparative method. It has been established that the signs of legal identity are inherent in labour rights, which have common features with other basic human rights. Labour law extends only to subjects of individual and collective labour relations. The implementation of labour rights depends on the level of economic development and is connected with the fulfillment of certain responsibilities in the field of social policy by the state. Some labour rights are formulated in the form of estimated basic provisions, such as the right to fair and favourable conditions of work, the right to a fair and satisfactory reward that ensures a decent life for a human and his/her family and additional social welfare if necessary.

2. RESULTS AND DISCUSSION

The legal doctrine of compliance with labour rights of workers reflects the system of methods for assessing the state of labour rights through the prism of the spirit of

the law. The legal doctrine of compliance with labour rights of workers can be considered in three dimensions. In the first sense, the legal doctrine of the compliance with workers' labour rights, is understood as the *general scientific legal concepts of ensuring the labour rights of workers*. They are formed by scientific schools of labour law. In Ukraine, there are Kiev, Kharkiv, Lviv, Odessa School of Labour Law. In Ukraine, as a rule, this does not stand out as a source of law, as it is considered within the framework of the methodological coordinates of the principles of labour law. For a long time, it was believed that the general concepts of ensuring labour rights of workers are inherent in not Anglo-Saxon, but only in the continental system of law. However, Van Erp refutes this approach, pointing out that in this given (general concept) doctrine as a source of law is characteristic to the legal systems of both types [7].

In the second sense, the legal doctrine of compliance with workers' labour rights is understood as the *legal concepts of ensuring the labour rights of employees formed by the courts*. In other case, courts use the so-called "rubber standards" as a basis, use the right to court and form one or another concept of ensuring labour rights. Otherwise, the court forms the concept of ensuring labour rights on the basis of imperative rules of law. Recently, Ukrainian labour legislation implements many imperfect, and sometimes imperfect imperative norms, which are not properly integrated into the regulatory canvas that leads to parallel regulation of the ensuring of labour rights, inconsistency with the content of the norms of various legal acts. For example, the legislator at the level of the three laws fixes various definitions of the term "worker" (Article 1 of the Law of Ukraine "On Labour Protection", Article 1 of the Law of Ukraine "On Trade Unions, their Rights and Guarantees of Activity", subsection 14.1.195, Art. 14 of the Tax Code of Ukraine), which is inadmissible from the point of view of legislative technique, because it complicates the application of law for not only to the participants of labour relations, but also for courts.

In both cases, the Supreme Court can establish the limits of a particular judicial concept of ensuring labour rights, which crystallises the constancy of the concept. Thus, courts block the mistakes of other bodies of state power, abuse of labour rights. In the third sense, the legal doctrine of employees' labour rights reflects the *views of scholars of labour on certain issues and problems of the mechanism for the provision of labour rights*. These points of view may be the basis for the judicial doctrine in this area.

The legal doctrine of the compliance with labour rights of workers is inextricably linked with the doctrine of preventive labour rights protection, the doctrine of self-defence of labour rights, the doctrine of good practices (when an agreement is in the field of labour, an employment contract is concluded with the use of a dependent position of an employee, abuse of trust of an employee), personal freedom of an employee. All of them are outlined by the only concept of protection of labour rights.

It is incorrect to assume that the doctrine of compliance with workers' labour rights cannot be found in labour law. Undoubtedly, this is facilitated by the work of scientists

and the general practice of the courts. However, it should be noted that a legislator, as a rule, restricts the scope of the application of doctrine in the law, taking into account the normative principles and labour and legal freedoms of labour law. At the level of law, the doctrine under consideration should be reflected in standards that are not in doubt both from the part of the scholars of labour law and from the court. That is, the normative provisions of the doctrine of observance of labour rights should be cut in one single key as a science of labour law and judicial practice, which has recently been rarely observed. A striking example of the imbalance of approaches is the Draft Labour Code of Ukraine, which does not take into account the scientific and judicial doctrine of the protection of labour rights (in particular, the system of ways to protect labour rights, the mechanism of protection of labour rights in case of non-fulfillment or improper performance of an outsourcing contract or outstaffing contract, etc.) is not reflected.

The legal doctrine of the compliance with labour rights of workers is endowed with a sign of mobility, because unlike the law, it is not limited by the state or the system of law of a certain type. There are cases of reception by the national law of states of legal doctrines of self-defence of labour rights, preventive protection of labour rights, industrial actions, etc.

At the same time, the legal doctrine of the compliance with workers' labour rights should be considered conservative. This state of affairs is primarily due to the fact that in the individual labour relations there is no equality of the parties to the employment contract. That is, an employee is always a "weaker" party of an employment contract. Moreover, the employer, as a rule, basing on economic factors, has an interest in abusing the law within the framework of an employment contract. The conservatism of the doctrine of compliance with labour rights manifests itself in the presence of more stringent restrictions on the freedom of the labour contract, the imperative rules governing the subjective labour relations. This approach allows us to adhere to high international standards in the field of labour.

The formation of a legal doctrine for the compliance with workers' labour rights is dictated by the need to ensure the proper implementation, protection of subjective labour rights of employees. This is due to the fact that labour rights of an employee are subject to the will of an employer and there is a tendency to unfair infringement of the rights in question. Also, labour relations, to a greater extent, are endowed with signs of risk to an employee's life and health. For example, in case of violation by an employer of norms of labour legislation on labour protection, etc.

It is worth noting that in the legal doctrine it is necessary to distinguish between two main approaches to the problem of compliance with workers' labour rights.

According to the first approach, the labour rights of workers are considered the basic principles of all labour legislation, they are defined as constitutional guarantees of labour rights, but as objects of protection are not allocated separately, as they are an integral (and at the same time important) element of a holistic mechanism for the pro-

vision of these rights. This position is followed by the overwhelming majority of modern Ukrainian scholars of labour (V. M. Andriyev, N. D. Hetmantsev, I. V. Lagutina, A. M. Yaroshenko, S. M. Prilipko, etc.).

According to the second approach, the labour rights of workers, by virtue of their special legal nature, are the object of protection and defence. First of all, scientists who are engaged in studying problems of compliance with constitutional rights and freedoms of a human and citizen within the limits of constitutional law are inclined to him. It is defended by V. O. Demidenko, T. O. Zavorotchenko, L. M. Lipachov, I. L. Litvinenko, O. V. Pushkin, S. Ye. Fedik, etc.).

Today, this awareness is partly taking place in labour law, that is confirmed by, in particular, theoretical developments, for example, developments of V. I. Shcherbyna concerning the allocation of general, based on the security norm of the Constitution of Ukraine, and the specific security legal relationships in labour law where the legal relationship include own object – relevant rights. The supporter of such an approach is also E. V. Krasnov, who analyses international standards and labour rights enshrined in the Constitution of Ukraine. As we see, the second doctrinal approach is currently underdeveloped, therefore, in determining the positions of scientists regarding the compliance with labour rights of workers, we will mainly deal with the views and observations of scientists who support the first concept; they introduce their own corrections, proposals and remarks taking into account the new doctrinal position in the labour law regarding the expediency of isolating the labour rights of workers as an independent object of guarded legal relations.

Innovations in the market economy have significantly limited individual freedom of a worker in terms of protecting rights and legitimate interests. An employee is not in a position to satisfy interest in joining dispute with an employer regarding the protection of employee's labour rights and legitimate interests guaranteed by the Constitution and sectoral legislation. The state authorities, in turn, without active actions of an employee, do not interfere in the process of their implementation. In connection with the above, from the point of view of N. D. Hetmantseva, it should be noted that under present conditions, virtually there is no force capable of providing effective protection of workers' labour rights [8].

In this sense, it would be appropriate to recall comments of V. S. Venediktov, who, while investigating the compliance with labour rights, stressed that the changes taking place in society and the economy, the emergence of various forms of entrepreneurial activity, the loss of state functions of a single employer, reducing the level of control on its part in the workplace have led to the fact that guarantees for hired workers have often turned into anti-guarantees that formally protect workers, but in reality significantly reduce their chances in the labour market. [9]. It should be noted that N. D. Hetmantseva also draws attention to the failure to comply with legal safeguards in the field of the protection of workers' rights and points out that new economic realities allow employers to strengthen their positions in social and labour relations, mainly by reduc-

ing the level of legal guarantees of employees. In today's conditions, it is very difficult to make employers comply with the rights of workers laid down in labour legislation. This is explained by the fact that in most cases it is difficult for an employee to find suitable employment, and therefore he is forced to do his utmost to maintain a work relationship with an employer who benefits from his position [8].

The low level of compliance with workers' labour rights is also due to the fact that using gaps in legislation employers try to level the boundary between subjective labour and civil legal relations. The above is manifested in that an employer and an employee conclude not of an employment contract but a civil-law contract for the performance of works or services. However, in reality, an individual, who has entered into such a civil law contract with the counterparty, carries out the organisational arrangements of the latter, adheres to the rules of his internal labour regulations. In other words, such an individual is in fact an employee of the counterparty, but due to the application of the civilised contract structure, it lacks legal and labour protection, the right to protection, and the preventive protection of labour rights. In this case, it is necessary to agree with the thesis of Professor D. Fadj, who noted that today the classical question of labour law on whether such a person is an employee was transformed into the question of whether a certain legal norm is applicable to a certain person [10]. Indeed, under the substitution of a labour contract with a civil law, it is needed to stimulate the transformation of labour legislation into the widening of the boundary of means of protection by providing such a person with an additional set of rights with signs of labour rights. In particular, in Canada, at the level of the judicial precedent, these individuals have the right to a longer notice of termination of contractual relations on the initiative of a legal entity (employer), not including the provisions of the civil law contract. [11] Under these circumstances, the Canadian labour and legal doctrine and jurisprudence suggest that account be taken of the criteria for distinguishing between labour and civil relations. Thus, D. Berner, J. Velje and S. Jobin, relying on precedents, suggest applying the criteria of economic reality, the intention of the parties, the personal performance of work [12].

B. A. Shelomov also points out this problem. He noted that the legal reform is intended to ensure the rule of law in all spheres of society's life. At the same time, the scientist stressed that recently the number of violations of labour and other social rights of citizens, cases of illegal dismissals has increased considerably, untimely payment of wages and the sending of employees to forced unpaid leave has taken place in large numbers, and in many commercial organisations, labour relations are not executed in accordance with the law order [13]. The statistics also demonstrate the similar problems. Thus, only in January-October of 2017, at the level of the State Labour Organisation in Ukraine, 1605 employees were found who were admitted to work without proper registration of labour relations [14]. A. Chernobay, studying the issue of illegal employment in Ukraine, emphasises that there is no precise indicator of the balance of labour resources in the state, which, of course, contributes to the violation of the norms of

legislation on the conclusion of labour contracts, the conclusion of civil law contracts instead of labour ones, or, in general, the lack of any contract between an employee and an employer. According to assessments of various sources, in particular, data of the Ministry of Social Policy of Ukraine, the World Bank, the Institute of Demography, now in many sectors from 2 to 4.7 million people are illegally employed that is 14 – 33% of officially employed. According to the World Bank, almost 5 million able-bodied Ukrainians work without official registration of labour relations. First of all, the researcher emphasises, it is about building industry, trade, restaurant business, catering establishments, transportation of passengers in minibuses and taxis, repair shops, agriculture. [15]

CONCLUSIONS

To conclude, the legal doctrine of compliance with labour rights of workers is possible to be considered in three senses: 1) as the general scientific legal concepts of ensuring the labour rights of workers; 2) as legal concepts of ensuring the labour rights of workers formed by the courts; 3) from the perspective of the views of scholars of labour on certain issues and problems of the mechanism for the provision of labour rights. Features of the mobility and conservativeness of the doctrine of compliance with labour rights are outlined. Taking into account the analysis of judicial practice and the fact that scholars have unanimously asserted that there are both latent and explicit legal problems in the implementation of the doctrine of compliance with labour rights, it must be stated that Ukraine faces an urgent need to reform the labour legislation in view of the Basic Law and international labour standards.

In today's conditions, there is the necessity to introduce at the level of the labour legislation the doctrine of preventive protection and defence of labour rights that is developed by scholars and national courts. The legislator taking into account the doctrine of compliance with workers' labour rights is called upon to fix the right to preventive protection and defence of labour rights; the main elements of the mechanism of preventive protection and defence of labour rights: the ways, measures of preventive protection and defence of labour rights.

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