

SUSPENSION OF THE EMPLOYMENT CONTRACT: LEGAL NATURE AND PERSPECTIVES OF LAW ENFORCEMENT

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The subject of the paper is legal nature of suspension of the employment contract.

The main aim of the paper is to confirm or disprove the hypothesis that it would be reasonable to provide for the possibility of suspension of the employment contract.

The methodology of the study includes general scientific methods (analysis, synthesis, description) as well as particular academic legal methods (formal-legal method, interpretation of legal acts).

The main results and scope of their application. Changes in industrialization and the global economic crisis inevitably lead to the fact that the standard schemes of relations between the employee and the employer do not meet the requirements of modern times. It needs to revise the structures of regulation of labour relations in Russian labor law. The suspension of an employment contract must be temporary and must continue until the circumstances giving rise to the suspension have been eliminated. The usage suspension of the employment contract entails the need for direct determination of the following guarantees for employees for the entire period: preservation of the employee's place of work (position); prohibition of dismissal of an employee on the initiative of the employer; inclusion of suspension period in the length of seniority for annual basic paid leave; preservation of the employee's right to get a job with another employer on a part-time basis.

The usage of suspension of the employment contract will allow to regulate new forms of employment activity: temporary redeployment of the employee to another employer and secondment into the labor law.

Conclusions. It would be reasonable to provide for the possibility of suspension of the employment contract.

1. Introduction.

Today, taking into account the globalization of the economy, improvement of production, changes in the labor market situation, the task of labor law is to search for the necessary structures for regulating labor relations.

One of these constructions can be suspended employment contract [1- 4].

2. Regulation of the suspension of an employment contract in foreign countries.

The rules on the suspension of a labor contract precisely in this sense are enshrined in the legislation of some foreign countries.

For example, in the USA such peculiar form as “temporary dismissal due to lack of work” is used. In this case, the workers are not paid wages, but within the specified time (no more than 1 year) workers are registered in the state of the enterprise, retain their seniority and, if the company will expand production, they will be able to return to work. After 1 year, such a temporary dismissal becomes permanent. [5, p. 161].

The suspension of an employment contract with an employee who, due to a medical opinion, cannot perform work is provided for by French labor law (L1226-3 of the French Labor Code). The suspension of the contract occurs for the entire period of professional retraining of such an employee [6].

According to the UK employment law, during the period when the employer warns an employee or the employer to terminate an employment contract, an employee has the right to “garden leave”. “Garden vacations” are practiced under employment contracts with managers, and on the basis of case law, it can be implied. The employee has the right to refuse it. During the period of “garden leave” it is forbidden to be at work and even on the employer's premises; contacts with clients are impossible. The employer may request the return of equipment and other property. According to some experts, for the period of “garden

leave” the employment contract is suspended, despite the fact that the employee may have the right to pay for it [7, p. 431-432].

The Labor Code of the Republic of Moldova contains a special chapter IV “Suspension of the individual labor contract”. Under the suspension of the individual labor contract, the employee is expected to suspend the work and pay him remuneration (wages, allowances, other payments) by the employer. For the entire period of suspension of the individual labor contract, the rights and obligations of the parties, other than those specified in Part 2, continue to apply, unless otherwise provided by applicable regulations, collective agreements, collective and individual labor contracts. The code also identifies cases of suspension of an individual labor contract due to circumstances beyond the control of the parties (for example, maternity leave, illness or injury, participation in a strike declared in accordance with the legislation, urgent military service, reduced military or civil service), by agreement of the parties (for example, a leave without pay for more than one month, a course of training or internships with a separation from the employee for more than 60 days, technically simple) or on the initiative of one of the parties (for example, leave to care for a child under the age of six years, non-payment or partial payment of not less than two consecutive months, wages or other obligatory payments, unsatisfactory conditions of health and safety at work, for the duration of an internal investigation conducted in accordance with the requirements of this Code).

3. Regulation of the suspension of the employment contract in the Russian legislation.

In Russian labor law, at present, such a structure is used to regulate the labor relations of athletes [8] and civil servants of certain types of civil service [9-12].

According to Article 37 of the Federal Law "On service in law enforcement bodies of the Russian Federation and the Introduction of Amendments to Certain Legislative Acts of the Russian Federation" service in the internal affairs bodies is suspended in the case of:

- appointing (electing) an employee of internal affairs bodies to a state post of the Russian Federation, a member of the Council of Federation of the Federal Assembly of the Russian Federation or a deputy of the State Duma of the Federal Assembly of the Russian Federation, a deputy of the legislative (representative) state authority of a constituent entity of the Russian Federation, a deputy of a representative body of a municipality, the head of a municipal education or appointment of an employee to the position of head of local administration;
- empowering an employee of the internal affairs bodies with the authority of the highest official of a constituent entity of the Russian Federation (the head of the highest executive body of a government of a constituent entity of the Russian Federation) or the appointment of an interim executive of a constituent entity of the Russian Federation (the head of the highest executive body of a constituent of the Russian Federation);
- referral of an employee of the internal affairs bodies by decision of the head of the federal executive body in the field of internal affairs or an authorized manager to an international organization on the basis of an international treaty of the Russian Federation or in other cases established by regulatory acts of the President of the Russian Federation, in the manner and on the conditions that are in effect this international organization;
- unknown absence of an employee of the internal affairs bodies;
- in other cases related to the performance by the employee of the internal affairs bodies of state duties established by federal laws and (or) regulatory legal acts of the President of the Russian Federation.

Similar cases are provided for by Article 43.1 of the Federal Law “On the Prosecutor’s Office of the Russian Federation”, Article 45 of the Federal Law “On Military Responsibility and Military Service”.

In article 348.4 of the Labor Code of the Russian Federation the legislator tried to determine the legal nature of the suspension of the employment contract [13]. Thus, during the period of a temporary transfer of an athlete to another employer, the action of the originally concluded employment contract is suspended, that is, the parties suspend the exercise of the rights and duties established by labor law and other regulatory legal acts containing labor law norms, local regulations, and obligations arising from the terms of the collective agreement, agreements, employment contract, with the exception of the rights and obligations established part two of article 348.7 of the Labor Code.

However, the understanding of the suspension of the employment contract laid down in the Article 348.4 of the Labor Code of the Russian Federation, is extended and does not correspond to its actual legal nature.

4. The legal nature of the suspension of the employment contract.

Labor function is the abiding working condition of the contract. Additional are the conditions that do not themselves characterize the content of the employment contract, but only clarify, develop or supplement the basic conditions. These include: the condition on the combination of professions, the term of the employment contract, on probation at work and others.

The nature of the main and additional conditions is such that the fact of reaching or not reaching an agreement on them gives rise to different legal consequences. Failure to reach an agreement on the basic conditions cannot lead to the conclusion of an employment contract. Failure to reach agreement between the parties on additional conditions cannot affect the fact of entering into an employment contract

Based on the ideas of Professor L. Yu. Bugrov (as the founder of the idea of allocating a sub-institution for the suspension of an employment contract) [7, p. 121-122], I believe that the suspension of the employment contract should be associated with the suspension of the duties of the employer provide the employee with work and, consequently, to the suspension of performance of the employee's work performance. At the same time, this suspension occurs both in respect of the parties and third parties. This is explained by the fact that the legal nature of the employment contract, labor relations is such that their full suspension is impossible. Certain rights and obligations of the parties, expressly provided by the employment contract or arising from the fact of its conclusion (on personnel records, liability of the parties, non-disclosure of confidential information, etc.) will always be valid if there is no termination of the employment contract.

The suspension of the employment contract is temporary and lasts until the elimination of the circumstances that were the basis for the suspension.

Due to the fact that labor relations are associated with an employment contract, the suspension of the employment contract will inevitably entail a suspension of labor relations. However, the suspension of labor relations does not take place in full, since their existence can continue directly on the basis of labor law norms, and the suspension, instead of terminating the employment contract, allows the labor legislation to be applied to the parties.

Based on the above, the following definition of suspension of an employment contract is true: this is a temporary non-fulfillment of the duty of employees to perform work (both part of the employee's work function and any other) due to the suspension of the duty of the employer to provide the employee with work due to reasons specified in the legislation on his own initiative, or on the initiative of the employee, or on the initiative of third parties with one side.

Introduction to the design of suspension of the employment contract entails the need to go straight definitions for the slave of the following guarantees for the entire period:

- saving for the employee his place of work (position);
- prohibition of dismissal of an employee on the initiative of the employer (except for the case of liquidation of the organization or termination of activity by an individual entrepreneur);
- inclusion in the experience, giving the right to the employee to the annual basic paid vacation;
- preservation of the right to get a job to another employer on the basis of combination.

5. Temporary transfer of the employee to another employer as a result of the suspension of the employment contract.

The use of suspension of an employment contract will allow for the temporary transfer of an employee to another employer , when in the conditions of the economic crisis in some organizations the process of releasing workers is underway, and in others - a shortage of qualified personnel. An employer interested in returning to him workers who he does not provide with work today could, in agreement with another employer and with the employee's written consent, transfer him to another employer for a period determined by agreement of the parties.

Introduction of this norm will certainly provide a prerequisite for increasing flexibility and labor mobility, but in turn, employers, for their part, need to change their attitude to labor resources, because

sometimes in a crisis situation it is easier and cheaper to stop labor relations than to try to “preserve” them.

I note that such a temporary transfer of an employee to another employer was provided for in Soviet labor law.

Article 37.1 of the Labor Code of 1922 enshrined the right of the administration of an enterprise or institution in cases of industrial need to transfer workers for up to one month to another job in the same or another enterprise or institution in the same area, and in the case of downtime for the entire period of inactivity. At the same time, for the period of idle time, the temporary transfer of workers to another job was not only a right, but also a direct responsibility of the administration of the enterprise. At that time, the scientific literature noted the axis that in the case of a temporary transfer of an employee to another enterprise, the worker or employee remains an employee of the enterprise where he worked before the transfer, the labor relationship with this enterprise is not interrupted, but its daily implementation is suspended. In this case, the employee enters into a parallel relationship with the main employment relationship at the place of permanent employment. However, despite the fact that a temporarily transferred employee submits to the internal labor regulations at the place of his temporary work, bears disciplinary responsibility to the administration of this enterprise, is responsible to him for material damage, etc., this does not mean that the employee is in any or self-employment relationship with the company to which it is temporarily transferred. All work in this enterprise proceeds precisely in fulfillment of the duties that lie on the worker as the subject of an employment relationship at the place of his permanent job. It was also noted that the “other” enterprise or institution must be located in the same system in which the employee is in full-time work, otherwise an employee agreement is required [14, p. 170 - 171].

The Labor Code of 1971 adopted the above norm and enshrined it in Articles 26, 27. Thus, the Soviet labor legislation made it possible for the administration of the enterprise to sufficiently regulate employment of the population.

The construction of the suspension of the employment contract (labor relations) will also allow the introduction of Russian labor law "such a phenomenon, which in foreign practice has been called "secondment". This term used in the field of personnel management means a temporary transfer to another employer while maintaining the employment relationship with the main (original) employer. It is believed that the secondment is a topical way for a seconded employee to acquire a new work experience, specific knowledge and skills, which he will later be able to use for the benefit of his main employer. In other words, the secondment is considered primarily as a tool for staff development, an effective means of training and internships for employees. Temporary detachment can be widely used for other purposes, namely, to ensure the mobility of personnel within clusters, transnational corporations, a group of companies, rotation of personnel both within and outside the company. A temporary transfer to another employer may be necessary to develop new or improve existing business processes, to participate in the creation and implementation of new products of intellectual activity, to introduce innovative models of economic management" [15, p. 380].

6. Conclusions.

In this regard, it is appropriate to apply the mechanism of suspension of the employment contract, not only the athletes and civil servants, but also to all the employees, and strengthen the relevant rules, relating to the suspension of the employment contract.

This can be done by introducing a separate chapter “Suspension of an employment contract” in section III of Part III of the Labor Code of the Russian Federation or by including relevant standards in Chapter 12 “Amendment of an employment contract”, changing the name “Amendment and suspension of an employment contract”, since the suspension of an employment contract and does not change it in the sense that the legislator gives to the amendment of the employment contract, but undoubtedly transforms the rights and obligations of the employee and the employer.

To eliminate terminological uncertainty in the chapter on the suspension of an employment contract, it would be logical to define the corresponding concept, indicate its main forms with references to other norms of the Labor Code of the Russian Federation or other federal laws, and establish basic guarantees for employees.

Assuming the fact that legislative consolidation of the suspension of the employment contract will improve relations between the employee and the employer and will contribute to the emergence in the Russian labor law new forms of employment (such as for example "Secondment"), which will affect the mobility of the labor force.

REFERENCES

1. Bondarenko E. N. The dynamics of the employment relationship. Moscow, NORMA Publ., INFRA-M Publ., 2015. 192 p. (In Russ.).
2. Ershova E. Labor relations of the state civil and municipal employees in Russia. Moscow, Statute Publ., 2008. 668 p. (In Russ.).
3. Izbienova T.A., Tselishchev, A.A. The suspension of the employment contract as an ensuring mechanism of the "stability" of labor relations. *Trudovoe Pravo = Labor Law*, 2009, no. 8, 86-90 pp. (In Russ.).
4. Bugrov L.Yu. Suspension of the employment contract. *Rossiiskij yuridicheskij zhurnal = Russian law journal*, 2009, no. 1, 112-124 pp. (In Russ.).
5. Frenkel E.B. (Ed.). Labor and social law of foreign countries: basic institutions. Comparative legal research. Moscow, Yurist Publ., 2002. 687 s. (In Russ.).
6. Features of legal regulation of labor under the legislation of Russia and France. Comparative legal research: monograph. Nizhny Novgorod, Nizhny Novgorod state University Publ., 2016. 115 pp. (In Russ.).
7. Bugrov L.Yu. The Employment contract in Russia and abroad. Perm, 2013. 642 p. (In Russ.).
8. Features of regulation of athletes' and trainers' work in Russia. *Trudovoe pravo v Rossii i za rubezhom = Labor law in Russia and abroad*, 2010, no. 1, pp. 41-51. (In Russ.).
9. Pozin A.A. Peculiarities of transfer or reinstatement in the Department of the Ministry of the interior. *Rossiiskij sledovatel' = Russian investigator*, 2013, no. 20, pp. 42-46. (In Russ.).
10. Bessarabov V. G., Kashaev K. A. Protection of human and civil rights and freedoms by the Russian Procuracy. Moscow, Gorodets Publ., 2007. 464 p. (In Russ.).
11. Zakharov I. V. Features of exercise of the powers of local government's elected officials by the staff of the bodies of internal affairs in the Russian Federation. *Konstitucionnoe i municipal'noe pravo = Constitutional and municipal law*, 2011, no 8, pp. 62-65. (In Russ.).
12. Akchurin Z.H., Fedulova M.N. Topical issues of legal regulation of military service not in military positions. *Pravo v Vooruzhennyh Silah = Law in the Armed Forces*, 2006, no. 5, pp. 8-14. (In Russ.).
13. Gusov K.N., Krylov K.D., Lushnikov A.M. et al. Labor agreements within the labour law: textbook. Moscow, Prospect Publ., 2010. 256 p. (In Russ.).
14. Astrakhan E.I., Karinskii S., Starczewa A. The role of the Soviet labour law in the planned staffing of the national economy. Moscow, Gosyurizdat Publ., 1955. 192 p. (In Russ.).
15. Golovina S.U. On some trends in the development of labor law in Russia with modern economic conditions in: Abshilava G.V., Akinfieva V.V., Afanas'ev A.B. The fifth Congress of the Perm legal scholars: featured content. Moscow, Statut Publ., 2015. 400 p. (In Russ.).

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