DOI 10.52468/2542-1514.2023.7(2).153-162

THEORETICAL APPROACHES TO THE GROUNDS OF DIFFERENTIATION IN LABOUR LAW

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Article info
Received –
2021 December 29
Accepted –
2023 January 20
Available online –
2023 June 20

Keywords
Differentiation, grounds for differentiation, particularities of labour regulation of certain categories of employees, part-time work, practice of application of labour law norms

The subject. Differentiation in the science of labor law is examined as a feature of its sources; it is named among the principles of the branch and features of the method of legal regulation. The article analyzes the formation and development of the doctrine of differentiation (with an emphasis on its foundations) in the science of Soviet labor law, as well as modern problematic aspects of differentiation in labor law. Alongside the traditional division of the grounds for differentiation into objective and subjective, in the modern science of labor law it is proposed to conduct it on the basis of the structure of the employment relationship and the factor of working conditions. Subjective differentiation is proposed to be associated not only with the personal characteristics of citizens who are the subjects of employment legal relations, but also with the individual characteristics of the employer.
Purpose of the study. It is proposed to specify the criteria according to which the grounds for differentiation are divided into objective and subjective ones (whether the need for special regulation is dictated by the specifics of work or is related to the special qualities of an employee). In addition, proposals are made to improve labour law in order to ensure the effective protection of labour rights.
Methodology. The research was carried out with the application of the formally legal interpretation of legal acts as well as the comparative analysis of Russian and European legal literature. Method of rather-legal analysis are also the basis of the research.
The main results. Thus, the criterion at the foundation of classification of differentiation factors of labour law norms is fairly obvious: whether the need for special regulation is dictated by the specifics of work (that said it does not matter which person will perform it) or whether the specificity of legal regulation is related specifically to the special characteristics of the employee and will appear regardless of the nature of his work.
Consequently, employee's loss of special status entails termination of the specific rules of labour law, regardless of the will of the employer. At the same time, it is advisable to amend the Labor Code of the Russian Federation by establishing the obligation of the employee to inform the employer of such legally significant changes within a reasonable time. At the same time, the norms establishing benefits in respect of such employees should cease to be effective from the moment the employee loses his/her special status (e.g. due to removal of disability, termination of powers as a member of an election commission or member of an elected body of a trade union), while the rules imposing additional obligations and restrictions on the employee may be linked to the moment the employee notifies the employer.
Conclusions. The authors clarified the criteria for classification the grounds for differentiation in labour law and, as a result, proposed amendments to labour law.

ISSN 2542-1514 (Print)

1. Introduction

Differentiation in the science of labour law is examined as a feature of its sources [1, p. 58; 2, p. 572]; it is named among the principles of the branch [3, pp. 123-130] and as a feature of the method of legal regulation.

Thus, I. S. Wojtinsky among the main features (principles) of the Soviet labour law singled out its unity, by which he meant the equality of rights and obligations of all employees, the spread of labour law norms to all workers under an employment contract. However, this unity did not exclude the differentiation in the legal regulation of labour relations taking into account gender, age, geographical location and other characteristics [4, p. 62-120]. Subsequently, characterizing the principles of labour law from the perspective of the method of legal regulation, O.V. Smirnov also noted the unity and differentiation of working conditions established by the norms of labour law [5, p. 65]. However, in the current Labour Code of the Russian Federation (hereinafter - LC RF) this principle is not enshrined in text, which is noted as a shortcoming of the list of principles of legal regulation of labor and directly related relations recorded in article 2 of the LC RF [2, p. 515].

The first comprehensive study of differentiation was the dissertation of S.L. Rabinovich-Zakharin [6], in which he first identified grounds for differentiation in the legal regulation of labour: depending on the conditions associated with the nature of labour relations (collective farm membership) and the specifics of a given job (seasonal nature of work, work at home), or on conditions unrelated to these factors (special labour protection for women and teenagers, benefits for students and demobilised people, etc.). Although no classification of the grounds for differentiation as such has been made, the division of the differentiation criteria into two groups, which later became traditional, can already be traced: 1) objective, i.e. not related to personal characteristics of citizens as subjects of labor law; 2) personal factors, characterizing citizens who enter into labor relations (subject differentiation) [7, p. 328].

Subsequently, the grounds (criteria, factors) of differentiation of labour law were analyzed in detail in the works of B.K. Begichev [8, p. 137-139], Yu.P. Orlovsky [7, p. 328-342]. Some authors have touched upon these grounds in relation to the particularities of legal regulation of labor of certain categories of citizens, based on the same classification [9].

However, modern science proposes to change the approach to the allocation of differentiation criteria [10; 11].

2. Methodology

The research was carried out with the application of the formally legal interpretation of legal acts as well as the comparative and systematic analysis of the phenomena. The article analyzes the labour legislation of the Russian Federation and the practice of its application from the position of unity and differentiation of legal regulation. Traditional and new approaches in the science of labour law to the grounds (criteria) of differentiation are also considered. Formal-logical methods of research allow to conclude that in allocating the criteria of differentiation the authors often violate the principle of a single basis for their classification. This logical contradiction can lead to errors in law enforcement practice.

As an example of special norms, some specific features of the legal regulation of the work of part-time employees were examined. An analysis of judicial practice has shown that the courts often take a rather controversial position, believing that the loss of the main job does not change the nature of the employment contract for the second job. It appears that such approach is based on a misunderstanding of the criterion for differentiation of legal regulation of part-time employment as objective.

3. Main trends in the development of labour law and scientific understanding of the grounds for differentiation

Among the main trends in the development of the Russian labour law is the expansion and deepening of the grounds (factors) of differentiation of its norms [12, p. 4]. Such new grounds for prohibitions and restrictions on work are the person's belonging to the civil service; remote working [13, pp. 91-92], other atypical forms of employment [14, p. 107]. The spread of atypical

ISSN 2658-4050 (Online)

forms of employment and the resulting need for specific legal regulation of labour is not only typical for Russia, but is a general trend in the development of labour law [15; 16]. At the same time many authors noted the significant gap between the Russian labour law and the European and American laws [17; 18].

The literature also notes the development of new subjective factors (personal circumstances of the employee), which can be the basis for a differentiated approach in the regulation of labour relations, such as the employee's need to comply with religious norms [19, p. 28].

However, despite the expansion and deepening of differentiation, the scientific classification of the grounds for differentiation of labour law norms into objective and subjective developed back in the Soviet period has not lost its legal significance [20, pp. 86-87]. Recall that the first group traditionally includes sectoral specificity of labor; specific working conditions (harmfulness, special temperature conditions, etc.); territorial feature; nature of labor relations between an employee and an employer (work of seasonal and temporary workers). The second group of factors usually includes gender and age peculiarities of the subjects of labour law, physiological features of their organism [7, p. 328; 21].

Meanwhile, the emergence of new factors that lead to differentiation often demonstrates a misunderstanding in science and law enforcement practice of the criteria underlying the classification of these factors. Thus, part-time work is cited as an example of a special nature of employment relationship, and therefore falls into the group of differentiation grounds caused by objective factors [22, pp. 12-13; 11, pp. 5-6].

However, it is not enough, in our opinion, to link subjective factors of labour law differentiation only with physiological features of the worker's body. Their main quality that can form the basis of a legally meaningful classification is independence from the sphere of labour application [9, p. 9]. Thus, the circumstance that dictates the need for specific legal regulation may refer to the characteristic of the work itself (at that, it does not matter who performs it), or to the characteristic of a worker (will be taken into account in the performance of each work). It seems that, given this clarification, we should classify the differentiation factors of labour law into objective and subjective ones.

Thus, the subject grounds for differentiation of the legal regulation of work may be due, in addition to physiological qualities, to other characteristics of an employee, such as in-service education; presence or absence of citizenship; special legal status (refugee or person affected by radiation or man-made disasters), participation in an election campaign [23, p. 449], etc. All these features are inherent properties of the employee himself, and do not depend on the type of work he performs. And if the employer is sometimes able to influence the objective factors of differentiation (for example, to improve working conditions, to transfer production from areas with special climatic conditions to ordinary ones or to organize work remotely), the employer cannot in principle exclude the effect of special characteristics of the employee.

Obviously, the specifics of the legal regulation of secondary employment, if established by the national legislation, are also caused by the specifics of the employee himself as a person who has the main regular paid job. Russian labour legislation, on the one hand, contains a number of protective norms (limiting the duration of working hours, regulating the use of leave), and on the other hand, reduces the level of his social protection by allowing conclusion of an employment contract for a fixed term and establishing an additional ground for dismissal of a person who works for a second job. Without going into a debate on the admissibility of establishing grounds for concluding a fixed-term contract without regard to the nature of work and conditions of its performance [24; 25, p. 86], we note only that part-time workers, perhaps, is the only category of employees specified in part 2 of Article 59 of the LC RF, which can really be interested in concluding a fixed-term contract. This is due to the fact that the additional ground for dismissal of part-time employees set out in Article 288 of the LC RF applies only to an employment contract concluded for an indefinite term.

The judicial practice shows that a great number of disputes in relation to part-time employees arises precisely due to their dismissal on the mentioned

ISSN 2542-1514 (Print)

additional ground - hiring a worker for whom this job will be the main one. Among the grounds for workers' claims for reinstatement, the following is of the greatest interest in the context of the topic under consideration: at the time of dismissal the employee, who had a second job contract, does not have a principal job. The legal literature repeatedly indicates that courts, as well as state executive bodies have different views on the possibility of extending to such an employee the specifics of legal regulation of part-time employment [26, p. 236; 27, pp. 72-76]. At the same time, practice has also revealed absurd situations when an employee was hired as a part-time without having a main job at all. In such cases, the courts recognize the terms of the employment contract as invalid insofar as they refer to the nature of part-time work[1].

The Federal Service for Labor and Employment has clarified that when an employee's main job relationship is terminated, the employment contract for secondary job "must be amended (to state that the job is main, as well as in the event that the employee's working hours and other conditions change)"[2]. However, there are conditions that cannot be changed without the agreement of the parties. In our opinion, it is necessary to distinguish, on the one hand, particularities of the legal regulation of labour that are specific for persons working part-time (additional ground for dismissal established by Article 288 of the LC RF; the obligation to grant leave without pay at the request of the employee). On the other hand, it is possible to point out features that, although established in connection with part-time work, can be included in any employment contract by agreement of the parties (part-time work, special working hours and rest periods etc.). When an employee loses the special status, the rules regulating the first category are no longer applicable to the employee and it does not require any agreement by the parties; it is sufficient that the employer is notified of the loss of the main job (the labour law could therefore provide a way to notify the employer of this fact). Conditions of the second group, which, without violating the requirements of labour law, may also be contained in the employment contract for the principal job, which can only be changed by agreement of the parties. A similar point of view was expressed by T.Yu. Korshunova, pointing out that while maintaining the same working conditions, "the contract should be excluded the condition of job combining, as by itself part-time work is not the main feature of job combining" [28, p. 29].

Meanwhile, the Federal Service for Labour and Employment in the cited letter further states that "part-time work becomes the employee's main job, but this does not 'automatically' happen", which has been perceived by employers as an opportunity to ignore the change in status of those who have lost their main job and to refuse their request to make an entry in their work record book. Some courts also agree with the above position, refusing to reinstate persons who did not have their main job at the time of dismissal (of which the employer, who dismissed them based on Article 288 of the LC RF, was aware)[3].

4. Problems in determining the grounds for differentiation in labour law

Russian labour law continues to pay close attention to certain aspects of differentiation in labour law. The authors critically rethink traditional and propose new criteria for differentiation.

Thus, P. S. Govorov proposes new grounds for the classification of differentiation criteria in the legal regulation of labour: on the basis of the structure of labour legal relations and the factor of working conditions. [10, c. 12-18]. Since the structure of labour legal relations includes a subject, object and content, then depending on the relevance to one or another element should be classified criteria of differentiation. At that, the author also singles out as an independent criterion working conditions, which in the content of labour legal relations are transformed into relevant rights and obligations of

1 Decision of the Zheleznodorozhny District Court of Khabarovsk dated 7 August 2017 in case No. 2-2363/2017; Decision of the Sochi Central District Court of 31 August 2017 in case No. 2-3463/2017

2 Letter N 4299-6-1 of 22 October 2007 from the Federal Service for Labour and Employment "On the application of labour law provisions in the event that a second job becomes the employee's main job"

3 Decision of the Orenburg District Court of the Orenburg Region of 16 August 2017 in case No 2-1576/2017; Decision of the Leningrad District Court of Kaliningrad of 16 August 2017 in case No 2-2920/2017

ISSN 2658-4050 (Online)

parties, due to which it is not clear, firstly, what single basis is used in classification, and secondly, by what criteria are distinguished circumstances that affect the content of labour legal relations and circumstances that reflect working conditions.

F. B. Shtivelberg among the objective reasons cites the specificity of labour activity, the territory where the work is carried out, the special organization of the labour process and the dual legal regulation of the employee's activity. At that, it is the special organization of the labour process that is associated with the need for specific regulation of the labour of part-time workers, home workers, persons working on a rotational basis etc. [11, c. 5-6]. However, even if it is possible to speak about special organization of labour process for part-time workers (at least, their work mode does not coincide with the general work mode in this organization), it is not an objective property of the job performed. Similarly, an employer must create special working conditions for an employee recognized as disabled in accordance with medical recommendations, but it would be strange to link the specifics of their work regulation on that basis to an objective factor of differentiation of the labour law.

Subjective grounds, according to F. B. Shtivelberg, should be associated with the properties of both parties of labour legal relations - both the employee and the employer. Thus, particularities of labor relations involving employers - small business entities, individuals and religious organizations are established on subjective grounds [11, p. 15]. In our opinion, the criterion by which exactly these types of employers are attributed to special subjects, is not clear. At the same time, the features of labour legal relations on the provision of personnel with participation of specialized organization hiring employees to perform their work for third parties, the author refers to objective grounds of differentiation (special organization of labor process) [11, p. 6, p. 17-18]. Taking into account our proposed clarification of the basis for classification of differentiation factors of labour law, all these cases should be attributed to objective factors, since the circumstance that dictates the need for specific legal regulation does not rely on which person performs it.

It is the employee's special status (availability of main job) that dictates the need for special regulation of his work in combination; hence, if this status is lost, the basis for applying specific rules on combination to the employee disappears. In this regard, we cannot agree with the views expressed in the legal literature on the need, by changing the normative definition of secondary job, to include the sign of an employee's main job to the list of optional ones [29, pp. 158-159]. Obviously, with this approach the grounds for specific legal regulation disappear, and an employment contract on secondary job will be concluded with the sole purpose - to reduce the level of social protection of an employee by establishing in his respect an essentially unmotivated reason for dismissal - hiring another employee, which the employer will not consider a secondary job. Meanwhile, the main purpose and purpose of differentiation is the elimination of unjustified objectively existing differences that cannot be excluded [30, p. 93]. Without taking into account these purposes and limits of differentiation in legal regulation, it risks turning into its opposite - discrimination [31, p. 71; 32].

According to Professor A. Petrov, dismissal from the main place of work cannot entail automatic transformation of a second job contract into a regular contract. In order for a part-time worker to become a main employee, the expression of will of the parties to labor legal relations for part-time work is necessary [33, p. 192]. To substantiate his position the author refers to part 4 of Article 282 of the LC RF, according to which the second job condition must be in the employment contract, and to change the contractual terms in accordance with Article 72 of the LC RF is allowed only by the parties' agreement in writing. Similar arguments can be found in the legal literature [34, pp. 124-146] and in court decisions[4].

It seems that the Article 282 of the LC RF should be interpreted primarily as a requirement to state in writing in the contract that the employee is hired as a second job. In the absence of such an indication, the employment contract is deemed to be for the

4 Appeal decision of the Saratov Regional Court of 19 March 2015 in case no. 33-1271/2015

ISSN 2542-1514 (Print)

main job. This is not expressly provided for by the law, but the same consequences apply if the employment contract does not contain a fixed term (which is deemed to be an indefinite term, part 3 of Article 58 of the LC RF) or a trial period (which means the employee is hired without the trial period, part 2 of Article 70 of the LC RF).

Without disputing that the reference to combining jobs in an employment contract becomes one of its conditions, we would like to point out that the parties' agreement is not the only way to change them. Thus, if the terms and conditions of the employment contract are changed for reasons connected with technological changes or changes in the organization of work, the employer may change certain contractual conditions without the employee's consent, but only by giving the employee advance notice of the upcoming modification and the reasons for it (Article 74 of the LC RF). We emphasize that such is allowed if the previous conditions cannot be retained for objective reasons. If, for example, due to replacement of equipment the working conditions have ceased to be harmful, and this is confirmed by a special assessment of working conditions at the workplace, this must affect the content of the employment relationship with the employees occupying the workplaces by changing the terms of their employment contracts (in terms of reduced working hours, additional leave, and compensation allowances). It seems that the loss of the employee's “primary job holder” status is similar to the described situation, only this time the employee informs the employer of the change in the contractual conditions for objective reasons. However, the LC RF requires that all exceptions to the general rule on changing the employment contract are set out in the Code itself (Article 72 of the LC RF), so it is formally impossible to remove information from the employment contract that the work is part-time on the basis of a unilateral request from the employee who has lost the main job. At the same time, we have already highlighted that extending the special legal regulation to the employee, who is not a dual employer, is inconsistent with the subjective basis of differentiation of labour law provisions, therefore, even though formally, under the contract, the employee may still be deemed a dual employer, there is no reason to apply special rules to him.

5. Conclusions

Thus, the criterion at the foundation of classification of differentiation factors of labour law norms is fairly obvious: whether the need for special regulation is dictated by the specifics of work (that said it does not matter which person will perform it) or whether the specificity of legal regulation is related specifically to the special characteristics of the employee and will appear regardless of the nature of his work.

Abiding by a unified basis for classification of differentiation criteria, we can conclude that the specifics of legal regulation of the work of part-time employees; citizens taking part in election campaigns (members of election commissions and registered candidates); employees making up elected collective bodies of trade union organisations etc., are due to the characteristics of the employee himself (who has a main job or performs other socially important activity) and do not depend on the nature of the work to which the norms setting out the specifics of legal regulation of work apply.

It is thus advisable to amend the LC RF by establishing the obligation of the employee to inform the employer of such legally significant changes within a reasonable time. At the same time, the norms establishing benefits in respect of such employees should cease to be effective from the moment the employee loses his/her special status (e.g. due to removal of disability, termination of powers as a member of an election commission or member of an elected body of a trade union), and the rules imposing additional obligations and restrictions on the employee may be linked to the moment the employee notifies the employer.

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ISSN 2658-4050 (Online)

BIBLIOGRAPHIC DESCRIPTION

Mihailenko Yu.A., Parubov A.I., Shakhanina S.V. Theoretical approaches to the grounds of differentiation in labour law. *Pravoprimenenie = Law Enforcement Review*, 2023, vol. 7, no. 2, pp. 153–162. DOI: 10.52468/2542-1514.2023.7(2).153-162. (In Russ.).