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THE MECHANISM OF EXERCISING THE EMPLOYEE'S RIGHT TO CONCLUDE AN EMPLOYMENT CONTRACT AND THE FORMATION OF ITS CONTENT

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The subject of the research is the problems of developing an adequate, understandable for the employee and the employer mechanism of exercising the right to conclude an employment contract.
The purpose of the scientific article is to confirm the hypothesis that the employment contract in modern conditions is not yet an agreement in its traditional sense, that the defect of will and/or expression of will, which the employee insists on challenging the terms of the employment contract, must be proved by him
The methodology of the study includes a systematic approach, formal-legal and logical interpretation, analysis and synthesis.
The main scientific results, conclusions on the achievement of the purpose of the study. Conclusion of the employment contract is a complex, multi-motivated, multi-stage process as from the position of the content and the ways and the limits of the right of the employee and the employer. As a weak party of labor legal relations, the employee agrees to the conditions of the employment contract initiated by the employer under the fear of refusal to conclude the said contract. Using the opportunities of the Labor Code of the Russian Federation, employers determine the terms of this contract with minimal risks for themselves,
which causes the emergence of numerous lawsuits from employees about the defects of will when entering into labor legal relations, about the illegality of certain terms of the employment contract.
The mechanism of concluding a labor contract by its parties, established by the labor legislation, is imperfect, and the process of forming its content is so formal that it does not allow the employee and the employer to reach a real compromise on mandatory and / or additional conditions of the contract. In the article there are proposals aimed at improving the mechanism of exercising by employees and employers of the right to conclude a contract of employment. It seems necessary to amend the Labor Code of the Russian Federation in terms of establishing a special period of appeal of an employee to the court to recognize a particular condition due to a defect of will in the conclusion of the employment contract as illegal (the beginning of the period should be defined as the day of the employment contract, since it is the day on which the employee learned or should have learned about the violation of his right); identified factors that influenced the emergence, evolution of the employee and employer will and deformed it (such factors include Only from the moment the necessary information is provided can the entitled person demand the implementation of the preferences established by labor law.

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1. Introduction

The execution of an employment contract implies a certain standard of the behavior, efficiency, and stability of the parties and their legal relations. "Legal norms expressed in the law are a normative and clear determinant of persons' legal rights" [1, c. 23]. The idea of the Russian Labor Code (RLC) is based on the establishment of a permissive way of interaction between the employee and the employer. The mechanism of executing an employment contract is not legally specified, which significantly complicates the realization of legal norms, when "a formal legal instruction becomes valid in law through legal behavior of the subject" [2, p. 49].

Individual contract regulation is legal, and exercising an individual contract is the main method of regulating labor relations [3, p. 9] and the main method of exercising the freedom of labor and legal equality of the parties to employment contracts [4, p. 93].

This paper addresses the following questions. Does exercising an individual employment contract providing the rights and duties of the parties to the employment contract satisfy the interests of the parties to the legal employment relationship? Can the employment contract be effective in establishing the rights and duties of its parties? Are the employer and employee free to establish the terms of the contract in compliance with the law (part 2, article 9 of RLC)? Is an employment contract stable, or does the employee have the right to challenge the terms of a signed contract both during its term and after its termination?

2. Employment contract: normative and doctrinal approaches

Normative and doctrinal perceptions of labor contracts provide an opportunity to address the theses stated below in order to answer the questions posed above:

1. An employment contract is an agreement between the parties. An agreement means reaching a compromise between an employee and an employer when developing the content of the contract. When the parties sign the contract, they express at least the absence of a defect of will and/or a defect of expression of will. Courts point to the following evidence proving that the parties have reached the balance of interests on the agreed terms of the contract:

(a) The terms of the employment contract have been discussed and agreed upon by the parties when signing it. The employee understood and was aware of the consequences of signing the employment contract. The consent is expressed by the employee's signature.[1]

b) The employee has not objected to any condition in the contract.

c) The employee has performed a number of actions indicating his intention to sign the employment contract and has actually started to work on the agreed conditions.

2. The parties of an employment contract are free to form its content, despite the fact that the employee is subordinate to the employer. According to Khokhlov "the ability of the parties to an employment contract to set the conditions of interaction by their agreement is a natural form of freedom of employment contract" [6, p. 281].

3. The employment contract is stable. The Russian Constitutional Court has ruled that "the conditions of the employee's labor are agreed upon by the parties to the employment contract at its signing and must be observed. They can be changed only by mutual consent of the parties" and that "arbitrary refusal to fulfill any condition of the employment contract is inadmissible". The constitutional guarantee of respect for human labor consists in stable labor relations [7, p. 161-162]. "The concept of a stable employment contract is associated with the guarantee of an employee's labor rights, the prohibition to worsen the position of the employee against state and international legal standards of labor rights" [8, p. 64].

4. The employment contract is voluntary signed by the employee and the employer. "The crucial incentive to finish the preliminary stage of the subjective right is the will of the employee,

[1] Ruling of the Second Cassation Court of General Jurisdiction of 16.11.2021 No. 8G-24686/2021.

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developed by their conscious interest" [9, p. 23]. The legal model of the process can be the person in authority is aware of needs; their wishes and goals are formed by cognition of motives; the type of behavior is chosen; a decision is made and the subjective right is realized/implemented; the results of the legal implications are evaluated. These processes cannot be considered in isolation as each act of volition has a will component provided by a volitional decision.

5. The court cannot participate in the development of an employment contract. When resolving a labor dispute on the illegality of a particular condition of an employment contract, the court establishes the actual circumstances of the case by interpreting the terms of the employment contract, other normative legal acts containing norms of labor law, and orders of the employer.

Analysis of legal precedents makes us doubt the unambiguity of these theses.

3. Employment contract: causal interpretation

Nowadays, courts have developed the following approach to the execution of an employment contract: the employee, as the weaker party in the legal employment relationship, needs increased social protection, and the signed contract should not always be understood literally, since the employee's will and/or expression of will may not be free,[2] and the inaction of the employee to challenge the contract does not deprive them of the right to refer to the illegality of the contract.[3]

The situation is ambiguous as the parties may sign an employment contract on agreed terms. However, this does not deprive the employee of the right to appeal the content of the contract, which can be exercised both during the term of the employment contract and after its termination.[4] How does this correlate with the stability and predictability of the contract? Why did the employee not express their opinion on the terms that they believed violated their rights when signing the employment contract?

The answer is obvious: the employee's disagreement with the content of the contract will lead to the refusal to sign it. However, court practice regards the improper execution of the employment contract as an offense on the part of the employer (the moment of discovery of the violation of rights depends on objective and subjective factors)[5] which is not a remedy, because it enables the employee to abuse the right to file a claim on the illegality of the employment contract regardless of the date of its execution.

4. Procedure for exercising the employee's right to sign an employment contract: challenging the content of an employment contract

The employee's subordinate position in relation to the employer puts them in a dilemma: to accept the content of the employment contract and enter into legal employment on unacceptable terms or not to agree and to be unemployed. Therefore, employees behave in the following way: they sign the employment contract and then apply to the court, challenging the illegality of its content due to the defective formation of will and/or defects of the expression of will when signing it through, for example, their own carelessness; ignorance of labor law; unwillingness to work under the current conditions; dependents, the deprivation of preferential terms for prestigious education for employees' children; tough economic conditions, credit problems,[6] unwillingness to lose their source of income.[7] Employees also object to the duties imposed on them,[8] and to the name of the position

[2] Ruling of the First Cassation Court of General Jurisdiction of 14.02.2022 No. 88-3343/2022.

[3] Ruling on Appeal of the Judicial Chamber for Civil Cases of the Arkhangelsk Regional Court of 24.03.2016 No. 33-1652/2016.

[4] Ruling of the Judicial Chamber for Civil Cases of the Supreme Court of the Russian Federation of 29.06.2020 No. 16-KG20-6.

[5] Resolution of the Plenum of the Supreme Court of the Russian Federation of 20.05.2018 No.15 "On the Courts' Application of Legislation Regulating the Labor of Employees Working for Individuals and Small Business Entities Classified as Microenterprises" (para.13) (hereinafter - Resolution of the Plenum of the Supreme Court of the Russian Federation No. 15).

[6] Ruling of the Fourth Cassation Court of General Jurisdiction of 25.01.2022 No. 88-2748/2022.

[7] Ruling of the Judicial Chamber for Civil Cases of the Supreme Court of the Russian Federation of 29.06.2020 No. 16-КГ20-6.

[8] Ruling of the Sixth Cassation Court of General Jurisdiction of 10.06.2021 No. 88-11474/2021.

in the contract.[9] Referring to the defect of will as a reason for the illegal execution of the employment contract, employees use the defect (or lack) of will in legal regulation to their advantage They do not prove the violations committed by employers and, focusing on their dependent position on the employer, confirm the necessity of signing the contract on the conditions initiated by employers.

The claims of employees of the illegality of their employment contracts due to the defect of their will during the registration of labor relations, filed long after signing the contract or even after its termination, pose the greatest threat to the stability of labor law. We would like to emphasize the fact that an employee has the right to enter into an employment contract, but with peculiarities determined by their legal position; and if it is complicated for them as the weaker party to the legal relationship to participate in the formation of the contract, it is quite feasible to recognize the conditions as illegal, and it is advisable to do it soon after the signing of the employment contract. A period of three months from the date of signing the employment contract is reasonable for appealing to the court, since it is only during this period the employee learns or should learn about the violation of their labor rights (Article 392 of RLC). Setting longer terms, or even waiting for the end of the employment relationship subjects workers to abuse, and suggests the legitimization of forced labor.

The problem of proving the defect of the employee's will when signing a labor contract is not the only one. It is impossible to agree with the opinion of Kharitonov [11, p. 30] about the supporting role of labor law in proving the forced dismissal of an employee. It seems that the use of a conceptual framework non-typical for labor law ("defect of will") requires taking into account the specifics of legal relations. Today, courts justify the employee's defect of will by the objective impossibility of realizing the equitable right granted by the labor legislation[10] and the absence of a voluntary expression of will when performing certain actions.[11] Such an interpretation creates the risk of an incorrect qualification of the employee's behavior and determines the imbalance of the procedure for exercising the equitable rights of the parties. A defect of will is marked by the absence or incorrect formation of will or the incorrect expression of will; the will and expression of will do not match. Such contracts can be conditionally divided into contracts made without internal will (under the threat or use of violence) and contracts in which the internal will was formed defectively (under delusion, deceit, sham or simulated contracts).

We suppose that it is necessary to establish the factors that influenced the emergence and evolution of the employee's will or its deformed it in RLC. An employee who applies to the court to recognize the illegality of a condition of an employment contract, referring to the absence of will or to the erroneous nature of its formation, should provide relevant evidence.

The legislator should determine the legal implications of entering into an employment contract with a defect of will. To recognize such a contract as invalid due to a defect of the employee's will at the time of its signing is incorrect. The range of opinions on this issue is extremely wide: from a complete rejection of this idea to the development of provisions aimed at adjusting the RLC, or the need to apply a legal analogy to overcome the legal gap in the issue of applying the consequences of the invalidity of a labor law contract [12–19].

Applying futurology methods [20, pp. 66-67; 21, pp. 308-309], we consider a rational approach to setting the legal consequences of a defect in the employee's will at the time of signing an employment contract to be a mechanism that depends on objective and subjective factors. Objective factors include the existence of a legal employment relationship (whether it continues at the time of the employee's appeal to the court or has ceased), subjective factors include the

[9] Ruling of the Seventh Cassation Court of General Jurisdiction of 15.06.2021 No. 88-8439/2021.

[10] Resolution of the Constitutional Court of the Russian Federation of 20.01.2022 № 3-P "On the case of verification of the validity of Article 74, paragraph 7 of part one, Article 77 of the Labor Code of the Russian Federation on the complaint of A.A. Peshkov".

[11] Resolution of the Plenum of the Supreme Court of the Russian Federation of 17.03.2004 No. 2 "On the Application of the Labor Code of the Russian Federation by the RF Courts" (para. 22).

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employees' proof that the formation of their will and/or its expression was negatively affected.

If, at the time of the employee's application to the court with a claim for cure (according to the terminology of Lushnikova [22, p. 31]) of the employment contract, the employment relationship has been terminated, the employee cannot refer solely to the defect of will at the signing of the employment contract. The court may refuse to grant them the claims due to abuse of rights, and the employer should not be responsible for adverse consequences resulting from unfair actions on the part of the employee (paragraph 27 of the Resolution of the Plenum of the Russian Supreme Court No. 2 of 17.03.2004). Moreover, if the employment contract was signed and then terminated after a considerable period of time, it would appear that the employee has missed the deadline for appealing to the court. The fact that employee expressed their will to conclude an employment contract fulfilling the terms of the contract supports this conclusion. We agree with the idea of Bugrov about the need to recognize a "tacit decision" or "tacit agreement", implied by facts and reaching a compromise on this or that condition of the contract [24, p. 98].

Other legal consequences must be established in a legal employment relationship.

1. If the employee can prove the fact of undue influence exerted on them by the employer when signing the employment contract, the employment contract should be cured;[12] and only if the parties are unable to reach a consensus on the illegal (in the opinion of the employee) conditions, the employment contract should be terminated (in this case, Article 83 of RLC should be supplemented with appropriate grounds). Since there is no bad faith in the employee's actions, they are entitled to demand payment of reasonable compensation, the amount of which can be determined similarly to Articles 181, 279 of RLC.

2. If the fact of exerting pressure on the employee is not proved, the employment contract is subject to termination on the special grounds provided in Article 83 of RLC (as mentioned above), without relevant compensation to the employee; the preservation of the employment contract is seen as inexpedient, since despite the existence of the employment contract (as a document), a real agreement between the parties has not taken place; the employee should not perform work to which they do not agree; and forced labor is prohibited (Article 4 of RLC).

This variant of the employee's right to protect their right to conclude an employment contract in the case of a defect of will illustrates the concept of an employment contract being an agreement between the parties. However, modern judicial practice demonstrates the possibility of adjusting the content of the labor contract by the court. This way of overcoming defects in the content of the employment contract is aimed at protecting the rights of the employee and stabilizing the legal relationship. According to the logic of the courts, legal ways of curing a labor contract with a defect of the employee's will during the duration of the legal employment relationship are as follows.

1. If the employee is able to prove the fact of undue influence exerted on them at the time of signing the employment contract, the employment contract is subject to curing (by contractual and/or judicial procedure).

2. If the employee fails to prove the fact of pressure being exerted on them when signing the employment contract, the employment relationship continues, since it is illegal to terminate the contract based only on the circumstances that the contract is extremely disadvantageous for the employee. The parties have no obligation to take actions aimed at overcoming defects in the content of the employment contract.

[12] I believe that the idea expressed the literature about the need to include the norm on the consequences of the invalidation of an employment contract depending on the guilt (and its degree) of the employee and the employer in RLC should be corrected: an employment contract, which by its content or manner of conclusion is erroneous or defective, should not be recognizes as invalid. Instead, such a contract is subject to cure depending on the guilt of one or another party to the contract. The employee, whose will or expression of will was deformed by the employer, should not be disadvantaged in the realization of opportunities provided by RLC, and they have the right to demand the provision and/or exercise of subjective rights guaranteed by RLC [23, p. 32].

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5. Conclusion

A causal interpretation of the employment contract made it possible to draw a number of conclusions that are conceptually different from its normative and doctrinal understanding.

1. The employment contract is not an agreement between the parties, because it does not express a compromise between the employee and the employer; the involuntary nature of the performance by employees of their assumed duties is caused by various "psychological, informational, state-administrative, social, and economic properties" [10, p. 45].

2. The freedom of the parties to form the content of the employment contract is significantly limited by judicial interpretation. I agree with the opinion of Lyutov that "the Soviet system of legal regulation of labor reduced contractual regulation to a minimum; accordingly, employers had very little leeway to establish working conditions" [25, pp. 1042-1043]. In resolving disputes, courts have wide scope of interpretation (reclassifying the terms of the employment contract; establishing the defect of the employee's will when signing the employment contract; applying an interbranch analogy of the law).

1. The employment contract is unstable (the employee's right to challenge the employment contract can be labeled as "absolute").
2. The process of concluding an employment contract is qualified by the courts as an unconscious act of the employee who does not fully understand what result from signing the contract.

The problem of the development and implementation the subjective right to conclude an employment contract based on the interests of the employee and the employer requires a legislative solution, which has been discussed in [21; 26; 27; 28].

The execution of an employment contract has many motivations and is a complex, multistage process in terms of the content and limits of the implementation of subjective rights on the part of the employee and the employer. Malinovsky says that the realization of subjective rights is both objective and subjective [2, p. 49; 29, p. 102-104]. According to Chegovadze and Deryugina, the realization of subjective rights is similar to the process of will formation and volition [5, p. 272]. In ideal labor legal relations, will and the expression of will agree with each other, so the formation of will and its expression, preceding the decision of a person to enter into a legal employment relationship, have no legal significance, and should not be subjected to legal assessment by the courts. However, the courts, presuming the quasi-freedom of the employee to agree on the terms of an employment contract, analyze the subjective rights of the employee to enter into a contract from the stage of formation of their need to enter into a legal relationship (i.e. before the formation of a legal employment relationship). In order to eliminate the one-sided position of the employee and the employer, this approach may be correct, but for the establishment of social peace [30, p. 57] it is inappropriate, because the parties are legally equal before signing a labor contract.

The article suggests improving the mechanism of exercising the subjective rights of employees and employers to enter into an employment contract. Thus, it seems necessary to make the following amendments to RLC:

1) to supplement Article 83 of RLC with a special reason for the termination of an employment contract ("a defect of the employee's will when signing an employment contract");

2) to identify and fix the factors affecting the emergence and evolution of the employee's will and its deformation (sham, sham labor contract, delusion, deceit, bondage of the legal employment relationship, threat from the employer); the party that refers to them as the basis of its claims should prove these factors;

3) to establish the employee's obligation to properly and in a timely manner inform the employer of the occurrence of legally significant circumstances affecting the provision of benefits and guarantees.

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