LEGAL INSTRUMENTS OF INTERNATIONAL LABOUR ORGANIZATION AND UKRAINIAN LABOR LEGISLATION: COMPARATIVE AND LEGAL ANALYSIS OF NORMS AND STANDARDS

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Abstract. Comparative jurisprudence is a theory or scientific discipline in legal science of Ukraine, including labour law too. Presented article is a continuation of comparative and legal research, started by the author and aimed to widening and better understanding of labour law as a world civilization value.

The basic task of labour law is to be a regulator of social relations within labour, to regularize relationship of people, who work and earn for living. However, all these tasks remain unrealized without active government role. We regard, state's position in protection of employees in relations with employers should express itself through establishing of norms, aimed to intercession and support of workers. These are in certain extent forms of expression of social character of state activity in Ukraine, where a human is the highest social value, and the activity of all its institutions are aimed to implementation and providing of human rights and freedoms.

Having ratified the line of international acts, regarding proactive of using of forced labour and having banned it at Constitutional level, Ukraine didn't set reliable legal guarantees of opposition towards this shameful phenomenon. Paragraph 31 of the Code of Labour Laws of Ukraine prohibits to demand carrying out of work, not provided by law agreement. But the part 2 of the paragraph 33 of this Code doesn't contain yet this absolute rule about the exclusive of forced labour among the rules, regarding temporary relocation of the employee without his consent by the employer. The Code so far doesn't provide the norm, categorically forbidding using of forced labour (though the ILO Convention № 105 is ratified by Ukraine in 2000), as well as the norm, providing legal liability for that. Paragraph 265 of the Code of Labour Laws of Ukraine neither provides grounds for administrative liability for demanding or using of forced labour.

The main international act, regarding breach of labour agreement by the employer is the ILO Convention № 158Termination of Employment Convention, 1982. According to the paragraph 4 of the ILO Convention № 158labour relations with employees can't be terminated if there are no legal grounds for such termination, connected with behaviour of employee or his skills or productive needs of enterprise, institution or service. Paragraphs 40 and 41 of the Code of Labour Laws of Ukraine provide exceptional list of grounds of breach of labour agreement by employer. Although, some other laws can also provide such grounds for certain categories of employees (for instance, the Law of Ukraine "About State Service"). In general, these grounds comply with criteria, provided by the paragraph 4 of the ILO Convention. However, there is one nuance – an employer has a right to fire an employee only in case of availability of legal judicial fact or legal definition. Absence of one element of legal definition proves dismissal to be illegal. Basis for this claim is a provision of part 1 of the paragraph 40: "labour agreement, concluded indefinitely and temporary employment agreement can be breached by employer before its expiration only in such cases: …". Definition "only in cases" determines exhaustive circle of grounds for dismissal. This position is also supported by the Full Supreme Court of Ukraine in Decision of Novemeber 6th, 1992 № 9 "About practice of the courts in labour disputes", regarding interpreting of separate grounds of breach of labour contracts by employers.

Analysis has proved, that labour legislation of Ukraine in separate issues is more progressive, than the ILO acts, contains higher norms and standards, although, has serious flaws in part of providing guarantees for dismissed employees.

Keywords: comparative jurisprudence, to intercession and support of workers, regarding proactive of using of forced labour, breach of labour agreement by the employer, norms and standards.

Introduction

Comparative jurisprudence is a theoretical or scientific discipline presented in a number of branches of Ukrainian legal science including labor law. Its purpose consists in studying and comparing bodies of law and legal systems to international legal norms, identifying similarities and differences between them, determining its global development trends [1, p. 4]. However, there are some objective threats and issues in this field that, if not solved, will not yield desired results for the legislator and society regardless of their efforts.

This article is a continuation of comparative and legal research, which has been started by the author [See 28], and is aimed at improving knowledge and understanding of labor law as global value of civilization.

First of all, it must be understood that no legal system is perfect. A country's effectiveness is determined by the timeliness and compliance of its law with certain stages of social development. Idealization of western law has been happening in Ukraine for some time now, with no regard to obvious and substantial disparities in the historical development of these two legal systems.

Thus, it appears that the worst approach for modernizing a country and its law which involves copying of foreign regulation models is being used. However, V. Kazymirchuk, a well-known legal scholar, started to draw attention to a crucial aspect of western law as early as 1960sand stated that "The main effort of western scholars is focused on identifying causes of partial realization of laws in a democratic society and meeting the requirements of studying law is action, finding and creating guarantees for realization of rights" [2, p. 151].

It means that western legal models are not always flawless, therefore require a meticulous study and an in-depth critical analysis. "Not only must actual laws be subject to comparison and review but also bylaws, judicial practice, collective agreements, customs and, most importantly, law enforcement practice. Consequently, direct comparison of laws on paper is equally as important as of those in action" [3, p. 9].

S. Ivanov, who has established the framework for solving the aforementioned issues, notes, "Use of foreign experience cannot and should not become the foundation in development of labor law during either the transitional period before the establishment of market relations orthe period of their stable functioning. The path to addressing the problems is through keeping the existing legal norms and creating new norms and models that correspond to the current social and economic conditions, traditions, national specificities etc." [4, p. 38].And later in his study S. Ivanov warns that "We must only abandon those ideas, norms and model that actually hamper work and development of enterprises in an emerging market-based environment [4, p. 38].

It is only natural for countries to use foreign experience in the area of labor relations. But, according to the opinion of V. Kazymirchuk, any legal form should never be considered in its pure form, when it is detached from all social and political conditions. A case in point was Turkey's attempt at reception of Swiss legislation in 1926. Reception of foreign law, when regarded as a mechanical adaptation of other country's legislation, cannot be considered as a result of creative development of law; it contradicts basic rules governing democratic procedures for drafting, discussing and passing laws; ignores country's national and local characteristics. As a consequence, adopted law remains only as a foreign matter within the social fibers of the other country [2, p. 105-106]. However, it must be noted that, there was a successful attempt of jurisprudential transplantation in the world's history. One such example was the trans-plantation of German and French labor regu-lations to the Labor Code of Russian SFSR in 1922 [5, p. 18].

Literature review. The theoretical basis of this study consists of educational and scientific works of eminent Soviet, Ukrainian and Russian scholars, as follows: L. Tal, M. Bahlai, I. Voitynskyi, L. Hintsburh, V. Do-hadov, B. Zharkov, S. Ivanov, I. Kyselov,

A. Pasherstyk, V. Esenin and others. Among modern scholars of international and comparative labor law particular persons must be noted, including V. Andriiva, N. Vyshnevska, A. Dovhert, N. Liutova, K. Rekosh, A. Silina, H. Shiutte and others. The author's critical comparative-legal approach has been heavily influenced by the works of H. Volmani, V. Kaskel, H. Kelzen (Germany), F. Kollen, R. Dokua, P. Hutier and other scholars.

Research methodology. It was the failure to resolve the issue of reformation of labor legislation from a conceptual perspective that motivated the author to carry out a comparative and legal analysis of main norms and standards provided for in certain acts of International Labour Organization and Ukrainian labor legislation. It is also important to know whether the national labor legislation complies with the international norms and standards that are frequently spoken of by scholars and reformers.

Research results. The main function of labor law is to act as a social relations regulator in employment, regularize relationships of working people. In accordance with the preamble of Ukraine's labor code, as amended by the Act № 871-XII of 20 March 1991, the Code determines the legal basis and guarantees for effectuation of right to manage the capacity for productive and creative work by Ukrainian citizens. However, regulation of labor relations, establishment of higher standards of working conditions, protection of worker's rights remain the main tasks of labor legislation. These tasks are clearly set out in the article 1 of Ukraine's labor code [6].

But the implementation of the aforementioned tasks is only possible with the state's active participation. In our view, a state expresses its position on the issue of protection of employees in their relations with their employers through the establishment of norms aimed at protection and support of employees. Such actions demonstrate the social orientation of the Ukrainian state, where human beings are considered the highest social value and all state institutions are aimed at ensuring and affirmation of human rights. "Social equity is one of the main principles of law and its purpose should be seen as protection of weak subjects of law" [See 7]. K. Rekosh supports the same approach in his works and states: "Labor relations development throughout the twentieth century has shown that an employer naturally misuses of subordinate relationships with their employees and a state in this case must intervene and defend employees as the weaker party in labor relations" [See 8]. T. Zavorotchenko's position on this subject is consequently also correct, since she argues that only a democratic, socially oriented and a law-based state is the true guarantor of rights and freedoms of man and citizen. All other organizational-legal guarantees that ensure human rights and freedoms are linked to and depend on the functioning of a state [9, p. 10].

It is worth mentioning that soviet scholars already had this issue as the subject matter of their studies in the 1970s. M. Matuzov wrote: "It is clearly defined in both modern soviet and foreign general theoretical legal literature, that under socialism a state acts as the main institution designed to ensure the interests of its citizens; the institution with moral and political commitments to its people; the institution that sees the full development of personality as its mission" [10, p. 28]. And so if the Ukrainian State has rights and freedoms of man and the citizen defined in the second section of its Constitution [11], then "...it is the state itself that undertakes to ensure such rights, to create necessary conditions for their implementation, defense and protection" [10, p. 28].

The aforementioned statements mainly concern the issues of ensuring the implementation and protection of socio-economic and labor rights, as the most vulnerable ones under the market relations. First of all, in matters of employment and capital a state must act as a defender of the economically weaker party - an employee. "Defender is the one who protects and represents someone else" [12, p. 146]. However, the reason why a state assumes the role of a defender is not because an employee is a party to a certain kind of social relations, but because the state itself made a commitment to be not an arbitrator, but a guarantor of human rights and freedoms in this sphere. Secondly, a social state is an institution that protects the weak and provides assistance to those in need. And since an employee is institutionally, economically and financially weaker than an employer in every case, a state must guarantee its support to the former one in certain life circumstances.

"To support means to encourage and help someone" [12, p. 332].

In accordance with the first paragraph of article 8 of the Constitution [11], Ukraine recognizes and applies the principle of the rule of law. Which means that Ukraine, being a member of the world community, a participant to international organizations and unions, recognizes the primacy of international law over domestic law. This position of our state is clearly defined in the first paragraph of article 9 of the Constitution, under which international treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine. Article 8-1 of Ukraine's labor code [6] stresses the priority of international legal norms over domestic norms within the realm of labor regulations. Under the norms of this article if an international agreement to which Ukraine is a party establishes rules other than those specified under national labor law, the rules of the international agreement are applied.

In our view, prevailing majority of constitutional and international legal norms are protective in nature and therefore should form the basis for Ukraine's new labor legislation.

Discussion of research results. Now let us look at some international and domestic legal norms that entail state protection as a form of protection of employees.

First of all, when undertaking a study on such an issue primary focus should be given to guarantees of freedom of work. According to Declaration on Social Progress and Development proclaimed by General Assembly of 11 December 1969 [13], social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice, which requires immediate and final elimination of all forms of inequality, exploitation of peoples and individuals.

International Labor Organization Forced Labour Convention, 1930 [14] defines the term forced or compulsory labor shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. Article 8, paragraph 3 (a) of International Covenant on Civil and Political Rights [15] stipulates that no one can be required to perform forced or compulsory labor. Article 1 of ILO Abolition of Forced Labour Convention, 1957 [16] provides that each member of the International Labour Organization which ratifies the afore-mentioned Convention undertakes to suppress and not to make use of any form of forced or compulsory labor: (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilizing and using labor for purposes of economic development; (c) as a means of labor discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.

Article 43, paragraph 3 of the Constitution of Ukraine [1] prohibits the use of forced labor. Military or alternative (non-military) service, and also work or service carried out by a person in compliance with a verdict or other court decision, or in accordance with the laws on martial law or on a state of emergency, are not considered to be forced labor. Thus, forced labor in Ukraine can only be used under exceptional circumstances and in the cases provided by law. Such circumstances are defined in article 33, paragraph 2 of Ukraine's Labor Code [6]. The owner or authorized by him/her body shall be entitled to transfer the employee to another job not stipulated by labor contract for the period of up to one month without his/her consent, if it is not against medical advice for health reasons solely for the purpose of reproduction or liquidation of consequences of natural disaster, epidemics, epizootics, industrial accidents, as well as other circumstances which endanger or may endanger life or normal living conditions of people, with remuneration of labor for performed work, however not lower than average salary at previous job.

It is crucial to know what actions of legal nature, aside from expressing caution, the Ukrainian state takes to prevent cases of unlawful use of forced labor.

Article 31 of Ukraine's Labor Code [6] prohibits to demand performance of work not stipulated by labor contract. But this norm is nowhere to be found when studying paragraph 2 of article 33 of the Code. Such a legal norm that would categorically prohibit the use of forced labor still has not been established

(even though Ukraine ratified the Abolition of Forced Labour Convention as early as 2000) and other norms imposing liability for such actions. Neither article 265 of Ukraine's Labor code nor article 41 of Ukrainian Code on administrative offences [17] set any grounds for administrative liability or sanctions for forced labor or use of forced labor.

Article 25 of ILO's Convention №29 [14] stipulates that illegal exaction of forced or compulsory labor is punishable as a penal offence. But articles 172 and 173 of the Criminal Code of Ukraine [18] contain no rules that explicitly and unquestioningly establish liability for the use of forced labor. And only the first paragraph of article 173 of the Criminal Code of Ukraine establishes criminal liability for gross violation of an employment contract, caused a person by coercion, to perform any work not provided for in the contract.

Even though Ukraine has successfully ratified a number of international acts on prevention of forced labor, which prohibited such actions at the constitutional level, the state still has not established reliable legal guarantees that could counteract this shameful phenomenon.

There is also another problem that arises from the research matter, namely how to address the issue of organizing work flow by employers at the legislative level in a way so as to avoid violation of the founding constitutional principle of labor law, that is freedom of work; and derived principles that include explicit definition of employee's duties and stability of labor relations that are embodied in articles 21, 23, 31-34 of the Labor Code of Ukraine [6].

Clearly, norms of labor law should be exploited as guarantees against arbitrary actions of employers in the use of labor force. These actions are particularly evident in the cases of unlawful transfer or dismissal of employees on the initiative of the employer. It appears that there is a reason why paragraph 6 of article 43 of Ukraine's Constitution [11] received the following wording: "Citizens are guaranteed protection from unlawful dismissal". However, the actual state of protecting these rights in Ukraine will be described in more detail below.

O. Smirnov has formulated the principle of explicit definition of employee's duties [21, p. 179].It means that an employee may expect clear organizational and legal determination of one's duties when entering into labor contract with an employer and makes it impossible for the latter one to take arbitrary actions regarding the alteration of contract. Stability of labor relations is the core element of the norms of labor law that reflects a state's protection function. This includes norms regarding clear definition of employee's functions, limitations on the use of term labor contracts and arbitrary termination of labor contract by an employer.

There are, however, other opinions that treat these principles of labor law in a less categorical manner. The main idea of law, according to R. Livshitsya, is reflected by the impossibility of changing work duties without the mutual consent of parties to the labor contract [19, p. 168]. Scholar Ershova believes that ILO Convention 29does not classify temporary transfer of employee to another job to fill vacant posts in cases of operational needs as violation of clear definition of work duties principle[See 23].

Most market economy countries have enshrined in their domestic legislation the principle which entitles employers to transfer employees to another job at their discretion. Production efficiency, profitability of enterprises and technological rationality are considered to be key elements in this regard. Interests of employees, however, are either completely ignored or become the very last priority. An employee may only expect material compensation if a court finds evidence of abuse of power or deems an employer's actions as un founded. In such an instance an employee's legal status becomes highly unstable [Quote. 22, p. 121,122].

Most cases of violation of the principle of freedom of work are related to legal prohibition of temporary transfer of employees to another job without their consent in cases of operational needs (article 33 of the Labor Code of Ukraine[6] as amended by the Act No. 1356-XIV of 24 December 1999).

In our opinion, the use of such transfers, that are in fact a latent form of forced labor, is only possible if a country's law provides strict guarantees needed to ensure that rights and freedoms are respected. This is also a matter of applying material sanctions for the use of forced labor and infringement of personal freedom, since without state interference such phenomena are nothing but slavery.

Operational need should nevertheless be incorporated into the system of exceptional

circumstances that allow employers temporary transfer employees to another job without their consent. Such actions, however, should only be carried out due to specific reasons and must be limited in duration. These actions include the need to ensure smooth operation, the need to avoid significant losses or shutdown of enterprises, institutions and organizations. Moreover, a transfer to another job must be carried out with due regard to the employee's specialty and level of qualification, including a higher remuneration when demanding performance of work not stipulated by labor contract. Ukraine's new Labor Code therefore should contain a clause concerning temporary transfer to another job due to operational needs. The following wording for the aforementioned article is proposed:

"Transfer of the employee to another job not stipulated by labor contract, without his/her consent shall be used only as a means to ensure smooth operation of enterprises, institutions and organizations under the following conditions:

- in the event of unforeseen organizational and production factors that may entail disruptions in the work of an enterprise, institution, organization or its structural subdivisions;
- duration of transfer period shall not exceed 30 working days per working year;
- any transfer to another job shall be carried out with due regard to the employee's specialty and level of qualification;
- the employee is guaranteed payment for performed work in double amount."

Protection upon termination of labor contract is considered as crucial factor in implementing protective function of labor law. Scholar G. Schütteonce stated that legal regulation of dismissals constitutes one of the most important areas of social protection of workers in Germany [Quote. 24, p.73].

The ILO Termination of Employment Convention, 1982 (No. 158) is the main international act concerning termination of employment at the initiative of the employer [25].

While assessing the quality of state's protective function in the legislation the need arises to ensure its compliance with the aforementioned Convention regarding grounds and procedures for termination of labor contract at the initiative of the employer.

According to article 4 of ILO Termination of Employment Convention, 1982 (No. 158) [25], employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 40 and 41 of the Labor Code of Ukraine include a list of grounds for termination of labor contract on employee's initiative. For certain categories of employees these grounds are provided for by other laws, for example, by Law of Ukraine on Public Service [35].These grounds generally comply with the criteria established in article 4 of the aforementioned Convention.

There is, however, a crucial aspect of this matter that must be discussed first. The employer is entitled to dismiss the employee only when certain legal facts are present. The absence of just one of these facts points to the illegal nature of such a dismissal. Justification for this argument can be found in provisions of paragraph 1 of article 40 of the Labor Code of Ukraine which establish that" labor contract entered into for indefinite period of time, as well as term labor contract prior to completion of its validity period may be terminated by the owner or authorized by him/her body only in the following cases:...".The part "only in the following cases" highlights the existence of an exhaustive list of grounds for dismissal of employees. This position is also advocated by the Plenum of the Supreme Court of Ukraine in its resolution №9 "On practice for hearing cases involving labor disputes" of 6 November 1992 [26].

Interpretation of the notion of "justification for termination" is the main issue with reasons for termination of employment set out in the ILO Termination of Employment Convention, 1982 (No. 158).Article 4 that is contained in the division "A" of the aforementioned Convention regards justification as existence of valid reasons for such termination. The issue of justification for termination, in our view, is not only related to existence of valid reasons for such an action, but also to proving the lawfulness of employer's actions. An employee is a human being who is recognized in Ukraine as the highest social value, according to the Constitution of Ukraine [11].Thus, in cases of termination of labor contract the employer must treat his/her employees not as labor force of means of

production, but as human beings. Justification for termination is therefore the main criteria for determining the lawfulness of such an action. Legislation of the United Kingdom contains a significant legal concept regarding justification for termination. "The owner of the enterprise should prove to the court his or her confidence in the justification for dismissal of the employee" [Quote, 27, p.58].

Justification of such an action can also be considered from a different perspective. This includes finding dismissal of employees at the initiative of the employer that is a state enterprise, institution or organization unfair due to its social unreasonableness. The state, in certain cases, may sacrifice these organization to ensure the implementation of its social function. The grounds for such statement are contained in a number of articles of the constitution of Ukraine. According to article 1 of the Constitution, Ukraine is a social state. Paragraph 4 of the article 13 of the Constitution establishes social orientation of Ukraine's economy. Paragraph 1 of article 3 of the Constitution recognizes an individual as the highest social value in Ukraine; and paragraph 2 of this article determines human rights and freedoms, and guarantees as the essence and course of activities of Ukrainian state. Therefore, prevention of dismissal of employees from enterprises, institutions and organizations where the state acts as the employer represented by its authorized bodies is an independent legal basis for limiting the authority of employers to dismiss employees due to social unreasonableness of such actions.

Defining the boundaries of grounds for termination of contract at the initiative of the employer is another significant issue that requires consideration. It is only partially regulated by articles 5 and 6 of the ILO Termination of Employment Convention, 1982 (No. 158) [25]through establishing reasons that are not valid for termination of employment.

The described issue goes beyond being simply a subject matter of scientific studies and is present in real-life employment relations in the form of "cleansing" of personnel after change of ownership or appointment of a new director of an enterprise, institution or organization. It must be noted that over the years this issue has become a serious challenge for the Ukrainian state. Ukrainian Parliament Commissioner for human rights has issued a monitoring report revealing massive and systemic violations of right to employment, right to timely and full payment of a just remuneration ensuring for workers and their families an existence worthy of human dignity and other labor rights guaranteed by the Constitution and laws of Ukraine, international norms and standards. In 2017, a total of 1.3 thousand reports regarding violation of right to employment was submitted to the Office of the Ukrainian Ombudsman, which is 18% less than in 2016.In the course of implementation of the cooperation agreement between Ukrainian Parliament Commissioner for human rights and Ukrainian Trade Union Federation nearly15 thousand cases of labor law violations had been reported to the Ukrainian Parliament Commissioner for human rights in the first half of 2017. 40,4% of those were remuneration violations, 30% and 6% were respectively violations of dismissal procedures and transferring of employees [29].

Notice of dismissal is a significant guarantee that ensures the lawfulness of dismissals of employees. According to article 11 of the ILO Termination of Employment Convention, 1982 (No. 158) [25], a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period. This norm states that an advance notice must be given to any employee before termination of his/her employment, except for the cases when the employee committed a serious disciplinary offence or other action that hinders the continuation of employment relationship. Ukrainian labor legislation contains a single instance when giving an advance notice of dismissal is compulsory. It is envisaged in paragraph 1 of article 40 of Labor Code of Ukraine [6] and is only possible in cases of changes in production and labor organization, including liquidation, reorganization, bankruptcy or conversion of enterprise, institution, organization, reduction of number or staff of employees. Part one of article 49-2 of Labor Code of Ukraine states that employees must be personally informed about their dismissal within at least two months prior thereto. This provision of the

Ukrainian labor legislation is generally consistent with norms set out in the aforementioned Convention. Although, to our mind, it should be complemented by a clause entitling employees to a compensation for termination of employment during notice period or for employer's failure to provide the employee with an advance notice of dismissal. This legal gap has been partially eliminated by the judicial practice.

According to indent 6, paragraph 19of the Resolution №9 (1992)of the Plenum of the Supreme Court of Ukraine "Judicial practice for reviewing cases concerning labor disputes" [26], in case of employer's failure to notify the employee of his/her future dismissal during notice period, the court shall change the date of termination taking into account the notice period during which the employee continued to perform his/her work duties, except for cases when the employee cannot be reinstated for other reasons. However, the second sentence of paragraph 3 of article 235 of the Labor Code of Ukraine contains a clause that entitles the employee to a compensation for employer's failure to give him/her notice of dismissal or doing it late but only when the cause of dismissal stated in the employment record book hinders the employee in obtaining future employment. Therefore, it can be stated that norms of articles 49-2 and 235 of the Labor Code of Ukraine do not fully comply with the requirements on establishment of norms concerning advance notification of dismissals set out in the ILO Termination of Employment Convention, 1982 (No. 158) [25].

The establishment of dismissal is governed by Section B of the mentioned Convention, which defines the procedures applicable before and during the termination of employment. According to Art. 7 of ILO Convention № 158 (1982), the employment relationship with the employee shall not be terminated for reasons related to his behavior or work until he has been afforded the opportunity to defend himself in connection with the allegations against him, unless the entrepreneur cannot reasonably be expected to give the employee such an opportunity. The current labor law of Ukraine justifiably establishes a rigid procedure for termination of an employment contract in case of violation of labor discipline by an employee. The case-law also clearly reflects this position of the legislator. Thus, in accordance with the paragraph 22 of the Resolution of the Plenum of the Supreme Court of Ukraine of November 6, 1992 № 9 "On the practice of consideration of labor disputes by courts" [26], in cases of renewal at work of persons dismissed for violation of labor discipline, courts need to find out, what specifically manifested the breach, which led to the dismissal, whether it could be the basis for termination of the employment contract under items 3, 4, 7, 8 Article. 40 and cl. 1 of Art. 41 of the Labor Code, whether the rules and procedure for disciplinary sanctions imposed by the employer are provided by Articles 147-1, 148, 149 of the Labor Code. It seems that in order to avoid misunderstandings between the employee and the employer in the case of dismissal of the first for violation of discipline, the norm with the content similar to item 22 of the Resolution should be contained in the new Labor Code of Ukraine.

Section III of ILO Convention № 158 (1982) [25] contains additional provisions concerning the termination of employment for economic, technological, structural or similar reasons. The first requirement for dismissal concerns consultations with employee representatives, as provided for in Art. 13 of the Convention. The provisions of the rules of this article are fully reflected in Part 3 of Art. 22 The Law of Ukraine "On Trade Unions, Their Rights and Guarantees" [30]. In addition, Art. 14 of the Convention provides for the obligation of the employer, in the case of dismissal of employees for economic or organizational reasons, to notify the competent authority of the State and state in writing the reasons for the dismissal, the number and categories of workers it may affect, and the period within which it is intended to be completed. A similar rule contained in Part 3 of Art. 49-2 Labor Code of Ukraine [6]: "At the same time as the employee's notice of dismissal, the employer shall inform the State Employment Service of information about the subsequent dismissal of the employee, indicating his profession, specialization, qualification and amount of remuneration." However, the Law of Ukraine № 77-VIII of 28.12.2014 has radically changed the content of this provision. Now it is only about informing the authorized state bodies (public employment service) in case of mass layoffs.

Article 48 of the Law of Ukraine of July 5, 2012 "On employment" [31] regulates in

detail the mass dismissal of employees on the initiative of the employer.

Part 5 of Art. 20 of the Law of Ukraine of March 1, 1991 “On employment” [32] contained an important norm-guarantee for the dismissed persons: “Upon dismissal of employees (including working pensioners and disabled persons) in connection with changes in the organization of production and labor, including the liquidation, reorganization or re-organization of enterprises, institutions, organizations, redundancies or staff, enter-prises, institutions, organizations, regardless of ownership, shall notify this in writing within two months at the latest. Well employment service, indicating the reason and timing of release, name of professions, professions, skills, wage, and ten days after the release sent lists actually redundant workers, indicating they have disabilities. Failure to submit or breach the deadline for submitting this information shall be subject to a fine of one year's pay for each dismissed employee."

Thus, before the corresponding changes, the norms of the labor legislation of Ukraine set more significant requirements for the employer to comply with the procedure for dismissal of employees for economic reasons. Currently, Section IV “Promoting Employment” of the Law of Ukraine of July 5, 2012 “On Employment” does not even imply legal guarantees of employment promotion for persons who are being released for economic, technological, structural or similar reasons.

However, unlike the Convention, the labor law of Ukraine provides for other additional guarantees for dismissed workers. Thus, the assistance of the employer to the employment of dismissed workers is the essence of the rules of labor law provided for in Art. 13, 42, 43 and Art. 49-2 Labor Code of Ukraine [6]. The law sets out at least two criteria for the preferential promotion of the employment of dismissed persons: higher qualification and productivity of the employee; availability of work in the relevant profession or specialization. The practical significance of these criteria is difficult to overestimate. For jurisprudence, these are the main guidelines for determining the lawfulness of re-dundancies. Thus, “qualification” is the degree and type of professional training required to perform the work [33, p. 181]. Labor productivity characterizes the employee in terms of the effectiveness of his work (its effectiveness, quality and value for the employer). Occupation as a criterion indicates the scope and type of permanent, stable employment. "Qualification" - knowledge and practical skills required to perform certain job functions within the profession [33, p. 468]. Thus, taking into account the dismissal of employees of these criteria makes it transparent and understandable to the employee, and in case of dispute - gives the court the opportunity to reasonably evaluate the actions of the employer.

In addition, Art. 43 of the Labor Code of Ukraine provides for the sanctioning of the vast majority of dismissals by the elected body of the primary trade union organization or trade union representative. For members of the elected trade union body of the enterprise, institution, organization (including structural units), its leaders, trade union representative cl. 3 and 4 Art. 252 Labor Code establishes additional guarantees to sanction their release. Norms of Art. 184 and 198 of the Labor Code provide additional guarantees for the dismissal of pregnant women and women who have children and workers under the age of eighteen. However, unfortunately, the legislation of Ukraine does not give workers who are subject to dismissal (even for objective reasons) time to seek job that the employer would pay or at least recognize as a valid reason for the absence of an employee at work.

Article 12 of ILO Convention No. 158 (1982) [25] lays down general rules for the payment of employees who terminate employment, severance pay and other types of income protection. Article 44 of the Labor Code of Ukraine [6] establishes a considerable number of grounds for payment of severance pay to an employee and differentiates its amounts depending on these grounds. However, the norm of Art. 44 of the Labor Code does not fully comply with the norm of cl. “a” of Part 1 of Art. 12 of the Convention, which sets out the criteria for determining the amount of severance pay paid by the employer: length of service and salary. Legal construction, which provides for Art. 44 of the Labor Code, "average monthly earnings", reflects only the second criteria provided for in the Convention.

Part 1 of Art. 8 of ILO Convention No. 158 [25] guarantees an employee who considers that he or she has been dismissed unreasonably entitled to challenge this decision by applying to the appropriate

jurisdiction provided for by national law. Such jurisdictions in accordance with Part 1 of Art. 221 of the Labor Code are district or city courts. According to para. 2 cl. 3 of the Resolution of the Plenum of the Supreme Court of Ukraine of November 6, 1992 No. 9 “On the Practice of Consideration by Labor Courts” [26], in any case, directly in district (city) courts, dismissed employees' applications for resumption of work independently on the grounds of termination of employment contract, change of date and formulation of reasons for dismissal, payment for the time of forced absenteeism or performance of paid work. This is where the main problem arises. Part 2 of Art. 9 of the Convention provides for the possibility of using two mechanisms to carry the burden of proving the merits of dismissal. Clause 2 Art. 9 of the Convention, the burden of proving the existence of a legitimate reason for dismissal rests with the employer, and clause "b" establishes a rule according to which the bodies empowered to rule on the cause of dismissal (and such a body in Ukraine is a court - note), taking into account the evidence submitted by the parties and in accordance with the procedures provided for by national law and practice. Such procedures in Ukraine are subject to civil procedural law.

According to Part 1 of Art. 12 of the Code of Civil Procedure of Ukraine (hereinafter - the CPC of Ukraine) [34] civil proceedings are conducted on the basis of the parties' competitiveness. Part 3 of Art. 12 and Part 1 of Art. 81 of the CPC of Ukraine oblige each party to the dispute to adduce the circumstances to which it refers, as the basis of its claims or objections, except as provided by this Code. No civil cases for resumption of work due to unlawful dismissal are excluded. Therefore, neither the labor nor the civil procedural legislation of Ukraine places the burden of proving the validity of the dismissal on the employer, which, of course, adversely affects the level of legal protection of the dismissed workers.

Moreover, according to paragraph 4 of Art. 19 of the CPC of Ukraine in the wording of Law № 2475-VIII of 03.07.2018 for cases arising from labor relations, provides for summary proceedings. These categories of cases have been equated by the Ukrainian legislator with minor cases or cases of minor complexity and other cases for which prompt resolution of the case is a priority. Part 1 of Art. 274 of the CPC of Ukraine clearly indicates that cases arising from employment relations are considered in the order of simplified lawsuit.

However, the consequences of such an "innovation" can hardly be overestimated. For example, according to Part 3 of Art. 389 of the CPC of Ukraine are not subject to cassation appeal in small cases except in the cases specified in this Code. The law leaves the final decision on the plaintiff's right of appeal to the court. It is alarming that labor disputes, having been legally procedurally in the same order with minor cases, may, by a court decision, be in the category of cases that do not appeal in cassation. Given the trends of the Supreme Court's case-law on employment-related matters, the likelihood of such developments is very high.

To our opinion, the above mentioned innovations in the CPC of Ukraine regarding the consideration of labor disputes, in particular, concerning disputes on resumption at work, contradicts the norm of Part 1 of Art. 55 of the Constitution of Ukraine [11], because according to it, the rights and freedoms of the individual and the citizen are protected by the court and the norm of part 6 of Art. 43 of the Constitution on guarantees to citizens of protection against unlawful dismiss.

The interpretation of the words "protected" and "defended" gives grounds for asserting the active position of the court in civil proceedings. In the Ukrainian language, the words "protection" and "protection" are synonymous. The New Interpretative Dictionary of the Ukrainian Language states that the word "guard" must be understood as "to protect against anything" [36, p. 170]. Protection is "protection, patronage, support" [37, p. 110]. The Dictionary of the Ukrainian Language defines protection as "patronage, protection, support." To defend means "to defend, to protect anyone, anything from attack, assault, attack by enemy, dangerous and other actions" [38, p. 379, 380].

Labor and socio-economic rights under Art. 43-46 of the Constitution, are part of the rights and freedoms of man and citizen in Ukraine. Therefore, defense is the patronage and support of someone or something, that is, the active activity of the subject, not contemplation of who and how will provide more convincing evidence to substantiate their claims, which provides for existing civil procedural legislation for the consideration of

cases, arising from labor relations. The parties' ability is not an element of protection of the citizen's right, but only one of the principles of establishing the truth in a dispute. That is why the issue of labor justice, with a different role for the court in resolving labor disputes, both individual and collective, is now over.

Instead, a special provision that would contain a clear clause prohibiting the dismissal of an employee for filing a complaint of misconduct by an employer, as provided for in Clause “c” of Art. 5 of ILO Convention No. 158 (1982) [25], the CPC of Ukraine for some reason does not contain. Although the principle of the rule of law is enshrined in Art. 8 of the Constitution of Ukraine.

However, the norm of Art. 234 of the Labor Code of Ukraine [6] contains more substantial guarantees for the protection of the right to work, because it provides for such a legal construction as the renewal of court deadlines, which were missed due to valid reasons. While part 3 of Art. 8 of the Convention establishes a rule according to which an employee may be considered to have waived his or her right to challenge the dismissal unless he/she exercised that right within a reasonable time after termination of employment. That is, if within one month from the date of service of a copy of the order of dismissal or from the date of issue of the employment record the employee did not exercise his right to appeal, then the employee is considered to have waived this right. In our opinion, the norm of Art. 234 of the Labor Code is more progressive in terms of the rule of law than the relevant provision of the Convention. However, the one-month period for appeal to the court in case of wrongful release, provided for in Part 1 of Art. 233 of the Labor Code, does not fully meet the criteria for the reasonableness of the period for applying to a judicial authority, provided for in Part 3 of Art. 8 of the Convention, at least in view of the fact that an employee must have an alternative: to employ another employer, to be registered in the employment service, and not in the status of unemployed to fight for their right to work.

The problem mentioned above is correlated with the problem of payment of compensation or resumption at work in case of unlawful dismissal, which is referred to in Art. 10 of ILO Convention No. 158 [25]. Note that the norm of Art. 10 of the Convention does not strictly prescribe the reinstatement of employees in the case of unlawful dismissal, providing for the compulsory alternative of "payment of appropriate compensation or other such assistance as may be considered appropriate". That is, in the Convention, in contrast to the provisions of Part 1 of Art. 235 of the Labor Code of Ukraine [6], the emphasis is on monetary compensation for the violation of the right to work, not the actual restoration of that right.

Conclusions

Thus, the analysis showed that the labor legislation of Ukraine in some issues is more progressive ILO acts, contains higher norms and standards, but in other positions, especially in the provision of legal guarantees to dismissed employees has significant disadvantages. Given the prospect of adopting the Labor Code of Ukraine, it is unacceptable to adopt norms that narrow the content and scope of existing rights and freedoms provided for by international instruments and national legislation, as this is a direct violation of the provisions of Part 3 of Art. 22 of the Constitution of Ukraine [11].

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