

Loss of Confidence as Grounds for Termination of a Labor Agreement

Втрата довір'я як підстава розірвання трудового договору

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labor agreement, labor duties, loss of confidence, disciplinary dismissal, the draft of Labor Code of Ukraine.

Ключові слова:

трудоий договір, трудові обов'язки, втрата довір'я, дисциплінарне звільнення, проект Трудового кодексу України.

The Code of Laws on Labor of Ukraine provides additional grounds for termination of a labor agreement on the initiative of an employer with certain categories of employees under certain conditions, such as a loss of confidence to an employee. This named reason, in the context of the regulatory uncertainty of the definition "loss of confidence", of the subject composition of the scope of persons it extends on, of a large number of unresolved issues in the procedure for its implementation raises complexities both for employers and judicial bodies when dealing with cases of reinstatement of employment. The provisions of the draft Labor Code do not resolve the above-mentioned problems since the draft law is almost identical to the relevant provisions of the current Code of Laws on Labor of Ukraine. Fairly diverse worldwide legal practice of termination of an employment relationship with an employee on way which this basis also adds a further controversy to this issue. In this regard, the study of these legal categories and the practice of their application seems obviously problematic and relevant.

State of research. Problems of legal regulation of the grounds for termination of a labor agreement on the initiative of the employer and the procedure of implementation have always been the subject of a wide discussion among researchers in the field of labor law. Such scientists as O.T. Barabash, P.A. Bushchenko, V.S. Venedyktov, V.V. Zhernakov, S.M. Prylypko, O.H. Sereda, A.M. Slyusar, N.M. Hutoryan, H.I. Chanyшева, O.M. Yaroshenko have devoted their studies to research problematic issues of termination of labor relations on the employer's initiative. At the same time, the issue of termination of labor agreement remains unsolved since the draft Labor Code of Ukraine has not been adopted yet.

The purpose of the article is to highlight the discussion, problematic issues of termination of a labor agreement on grounds of employer's loss of confidence to an employee, find legal ways to resolve them in the draft Labor Code of Ukraine.

Based on the provisions of the current legislation, the essence of labor relations and the goal sought by their participants, the relationship between an employer and an employee should be built on the principles of honesty, integrity, respect, recognition and consideration of mutual confidence. The necessary attribute of interpersonal relations, which are formed between the parties to labor relations is and is meant to be – mutual confidence. It is precisely on the condition that the atmosphere of confidence dominates and the employer may delegate to the employee the material values and funds, production, commercial and trade secrets in order to fulfill of his/her obligations, entrust tasks that require confidentiality, share business plans, rely on him/her in case of assigning certain work tasks, etc.

The Academic Definition Dictionary of the Ukrainian language defines "confidence" as an attitude to someone arising from the belief in someone's righteousness, honesty, sincerity, etc¹.

Following from the definition above, one could claim that an employee may trust the employer, be sure in his righteousness, honesty and sincerity, and this trust should be mutual.

¹ Словник української мови: у 11 тт. / АН УРСР. Інститут мовознавства; за ред. І.К. Білодіда. Київ: Наукова думка, 1970–1980. Т. 2. С. 335.

That is why, positions that are related to the direct maintaining of commodity, monetary and cultural values, generally are accepted by persons that are in the confidence with an employer, and sometimes it goes even to the detriment of the professional skills of the employee. The role of confidence here is decisive because when managerial or economic decisions are made, the employer takes into account not only rational calculations but also the factor of confidence. At the same time, nobody can be sure of further actions of a person (employee). Against this background, the legislator in the Code of Laws on Labor of Ukraine has provided an independent basis for the termination of a labor agreement with employees of the specified category in case of misconduct that gives grounds to the loss of confidence from the employer's side – paragraph 2 of Art. 41 the Code of Laws on Labor of Ukraine.

According to the above-mentioned provision, a labor agreement, on the initiative of the owner or the authorized body, may be terminated due to the misconduct of an employee who directly maintains monetary, commercial or cultural values, if such an action provides grounds for the loss of confidence by the owner or his/her authorized body.

This provision refers to additional grounds for the termination of a labor agreement since this action extends only to special subjects – persons directly maintaining commodity, monetary and cultural values.

The definition of "commodity values" is absent in the law, therefore, it is necessary to refer to the Resolution of the Plenum of the Supreme Court of Ukraine No. 9 dated November 6, 1992², where it is explained that direct maintaining of monetary and commodity values is their acceptance, preservation, transportation, distribution, etc. Key terms that reflect the understanding of the direct maintaining of monetary and commodity values are "acceptance" and "preservation". Following this definition we can conclude that the main scope of persons of employees directly maintaining monetary and commodity values are those who receive them under certain report. As a general rule, written agreements on full personal liability are concluded with such employees. At the same time, it should be remembered that under paragraph 2 of Art. 41 of the Code of Laws on Labor of Ukraine a dismissal is possible even when there is no any agreement on full liability concluded with an employee, but according to the law an employer is entitled to enter into agreement.

In order to decide whether an employee belongs to the category of individuals who directly maintain monetary, commodity or cultural values, it is necessary to clarify the range of his/her duties that are determined in the labor agreement and the relevant job descriptions. In each case it is necessary to find out whether the fulfillment of operations related to the maintaining of values is the main essence of his/her labor duties or one of the main responsibilities and whether he/she performs the indicated actions responsible, accountable in the existing records, control of movement and preservation of values.

The above-mentioned interpretation Such a legal position is reflected in the level of up-to-date judgments of the Supreme Court of Ukraine, in particular, in the Act dated April 20, 2016 in the case No. 6-100ц16³ and in the Act dated September 27, 2017 in the case 520/2850/16ц⁴, where the Court emphasizes that the termination of a labor agreement under paragraph 2, part 1, Art. 41 of the Code of Laws on Labor of Ukraine on the grounds of a loss of confidence could be considered as a justified action if an employee who directly maintains monetary or commodity values (handling them by accepting, preserving, transportation, distribution, etc.) has intentionally or carelessly committed such actions that give the owner or his/her authorized body grounds for the loss of confidence to him/her (in particular, the violation of the rules of transactions with material values).

At the same time, sometimes in, on the basis of the acts of the Supreme Court⁵, persons who can be dismissed on this basis, are recognized as the chief accountants of companies. The grounds for such a conclusion is their statutory authority to sign documents together with the executive management of companies, that is the basis for the acceptance and transferring of material and commodity values and funds, as well as operating, credit and financial obligations, vising of commercial agreements, etc. Following this Under such logic, the executive officer of a company can also be recognized as a subject that directly maintains commodity and monetary

² Про практику розгляду судами трудових спорів: постанова Пленуму Верховного Суду України № 9 від 06.11.1992 р. URL: <http://zakon5.rada.gov.ua/laws/show/v0009700-92> (дата звернення 10.10.2018).

³ Постанова ВСУ від 20.04.2016 р. у справі № 6-100ц16. URL: [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/c9b2fb5a118e54cbc2257fa40030228a/\\$FILE/6-100%D1%86%D1%8116.doc](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/c9b2fb5a118e54cbc2257fa40030228a/$FILE/6-100%D1%86%D1%8116.doc) (дата звернення 10.10.2018).

⁴ Ухвала ВССУ від 27.09.2017 р. у справі № 520/2850/16-ц. URL: <http://www.reyestr.court.gov.ua/Review/69371672#> (дата звернення 10.10.2018).

⁵ Застосування судами цивільного і цивільно-процесуального законодавства. Київ: Ін Юре, 2002. С. 158.

values. However, we believe that such wide an extended interpretation of this rule of law does not correspond to the language stipulated in paragraph 2 of Art. 41 of the Code of Laws on Labor of Ukraine.

It is also not allowed to dismiss an employee due to the loss of confidence, who has a certain relationship to the values but is not related to their direct maintenance.

The legislation of Ukraine does not contain any other provisions that would entail the termination of a labor agreement with an employee as a result of the loss of confidence.

However, in certain former USSR⁶ countries, in addition to this category of workers, public servants may also be dismissed for the loss of confidence.

In particular, the reasons for the loss of confidence of a public servant can be:

- failure of the official to take measures in order to prevent and/or resolve conflict of interest;
- participation of an employee on a paid basis in the activities of the management body of the commercial organization;
- carrying out an entrepreneurial activity;
- the entry of an employee into the management body, the supervisory board of foreign non-profit, non-governmental organizations;
- failure of the employee to provide an information about income, expenses, property and obligations of property specificity and members of his family, providing inaccurate or incomplete information;
- violation by the employee and his family of the prohibition to open and keep accounts, to keep cash and valuables in foreign banks abroad, to have and use foreign financial instruments.

For example, in the legislation of the Republic of Moldova⁷, the grounds for the loss of confidence are not disclosed, the law only indicates that the reason for dismissal of employees – the members of the “Cabinet of persons that are executing responsible official appointments” is the loss of personal confidence on the part of such person.

Moreover, a particular attention deserves an example from the legislation of the Republic of Armenia. In a few years, with the formulation of the grounds for the dismissal of an employee, the legislator has changed the approaches to the category “loss of confidence”. In the original version of the Labor Code of the Republic of Armenia (in the edition dated December 14, 2004⁸) (hereinafter – LC RoA), Art. 122 provided that dismissal from work on the grounds of loss of confidence is possible if the employee:

- 1) has damaged, damaged or lost the property of the employer, and also committed misappropriation at the place of employment;
- 2) put at risk preservation of the employer’s property;
- 3) aroused mistrust among the customers, clients or partners of the employer, and as a result, the employer bore or could bear damages.

As you can see, in this edition there were no requirements for the professional belonging of an employee. On this basis, any employee could be dismissed, and this fact raised complaints and labor disputes. In fact, according to the legislation of the Republic of Armenia for the dismissal according to this reason only the improper performance of the employee’s work duties was important (the practice shows the possibility of the school principal’s⁹ or three underground engineers’ dismissal on this basis for participating in the organization of strikes against the accumulative pension system of the country¹⁰).

⁶ О государственной гражданской службе Российской Федерации: Федеральный закон от 27.07.2004 г. № 79-ФЗ. URL: <http://kremlin.ru/acts/bank/21210> (дата звернения 10.10.2018).

⁷ О статусе персонала кабинета лиц, исполняющих ответственные государственные должности: Закон Республики Молдова № 80 от 07.05.2010 г. URL: <http://lex.justice.md/ru/335147/> (дата звернения 10.10.2018).

⁸ Labor Code of the Republic of Armenia #3P-124 dated on December 14, 2004. URL: <https://www.ilo.org/dyn/travail/docs/961/Labour%20Code%20ENG.pdf> (дата звернения 10.10.2018).

⁹ Директор спецшколы № 11 Нубарашена освобожден от должности. PanARMENIAN.Net. 2010. URL: <http://www.panarmenian.net/m/rus/news/49393> (дата звернения 10.10.2018).

¹⁰ У уволенных сотрудников ереванского Метрополитена уже есть адвокат. 1in.am Armenian News & Analyses. 2014. URL: <https://ru.1in.am/40692.html> (дата звернения 10.10.2018).

The next, current edition of this Article 122 LC RoA (in accordance with the amendments dated June 24, 2010)¹¹ has got rid of this disadvantage. The legislator has taken a more balanced approach to the formulation of grounds for dismissal as a result of the loss of confidence, removing from the provision the general statements. The ground for dismissal became more specific, both in the set of subjects (though this scope of persons is still broad enough) and in the essence. An employer has the right to terminate a labor agreement after the loss of confidence if the employee:

- 1) conducted acts during the maintenance of monetary or commodity values that caused financial loss to the employer;
- 2) an employee who carries out educational and training functions committed an offence incompatible with further work;
- 3) disclosed the national, service, commercial or technological secrets, or reported them to a competing organization.

This practice that exists in the world foresees that other categories of employees may be dismissed for the loss of confidence, not only a state servant or an employee who directly maintains commodity, monetary and cultural.

For instance, the legislation of a significant part of world economically developed countries (e.g. (the USA, Canada, the United Kingdom, the Netherlands, France) does not contain a clear and precise list of grounds for dismissal of an employee, because it is impossible to provide such a list of disciplinary offenses since – in practice, they have many implementations and forms. In these countries such countries, the loss of confidence can be the reason of any dismissal. This situation is especially noticeable among managerial staff with management powers. The isolation of the chief officer from other management bodies of the company, the reluctance of chief executive to disclose his/her company development plans, the necessity to change or restore the company's image, the owner's desire to change the style of company management or the course of its development – the element and component of the decision on dismissal on the basis of loss or reduction of confidence to such manager¹².

Another example is Germany where employees that have committed marital unfaithfulness in private life were dismissed from religious institutions. Such behavior, even outside of the direct place for exercising labor duties, according to the canons of the churches to which they belonged and where they worked, was considered as unacceptable. It could cause the loss of confidence to the entire religious institution, and therefore the dismissal of the employees who performed these acts was determined as the loss of confidence and the necessity of restoration of the authority of the church¹³.

The loss of confidence in current the up-to-date Ukrainian realities as the reason is often put within the grounds for the dismissal of an employee. Employees who in their work deal with trade, commercial secrets of the enterprise, have an access to the intellectual property of the employer and may transfer them to competitors for mercenary purpose. Appeals to law-enforcement authorities or courts about such incidents can affect the investment attractiveness and business reputation of a company and therefore the employer is forced to 'say goodbye' to such an employee. Due to the lack of legal possibility to use a genuine reason (loss of confidence) that could form the negative image of the dismissed employee in the future, the employer has to artificially "choose" for him/her other grounds that does not reflect the essence of the conflicts between these subjects. In these circumstances the question arises: Is it worth to expand the range of subjects (i.e. employees) in national legislation who may be dismissed due to the loss of confidence? Will this reason turn into a reason for an employer to get rid of any employee under the disguise of legal manner?

In the draft Labor Code of Ukraine¹⁴ in Art. 92 there are several grounds for termination of a labor agreement on the initiative of the employer related to the failure to perform or improper performance of the employee's employment duties, which to some extent relate to the loss of confidence to the employee:

¹¹ Labor Code of the Republic of Armenia #3P-124 dated on December 14, 2004 URL: http://www.translation-centre.am/pdf/Tran-slat/HH_Codes/Labour_code_en.pdf (дата звернення 10.10.2018).

¹² Сухорукова Е. Санofi нашла нового ген директора. Электронное периодическое издание «Ведомости» (Vedomosti). 2015. URL: <https://www.vedomosti.ru/business/articles/2015/02/20/sanofi-nashla-novogo-gendirektora> (дата звернення 10.10.2018).

¹³ Роанья И. Защита права на уважение частной и семейной жизни в рамках Европейской конвенции о защите прав человека. Серия пособий Совета Европы. Воронеж: ООО Фирма «Элист», 2014. С. 105–106. URL: <https://rm.coe.int/16806f15ac> (дата звернення 10.10.2018).

¹⁴ Трудовий кодекс України: проект закону № 1658 від 27.12.2014 р. [Електрон. ресурс] . URL: http://http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221 (дата звернення 10.10.2018).

paragraph 2 of Art. 92 of the draft, which refers to the termination of a labor agreement in case of disclosure of a national secret, commercial secret or other law-protected information that has been known by an employee who has signed an obligation not to disclose it or a labor agreement concluded obtains the condition that the protected information should not be disclosed in connection with the performance of employment duties; denial of access to state secrets;

- paragraph 5: committing an act of indecency by an employee who fulfills educational functions, including cases when these actions are not directly related to the work;
- paragraph 4, that almost reproduces the current provisions of the Code of Laws on Labor of Ukraine.

Despite the fact that the basis for all these grounds for dismissal is the confidence factor, the legislator states only in paragraph 4 of Art. 92 of the draft Labor Code about its loss in relation to the employee. Other cases are established as independent reasons for termination of a labor agreement. The legislator's approach to the raised question is not acceptable. Excluding from the category of "confidence" circumstances that are generic for the confidence and that employer uses for substantiation of the termination of an employment relationship with an employee is unjustified. This approach does not solve the problem of search for a fake reason in the case when this dismissal is based on a loss of confidence. The legislator needs to group similar circumstances related to the loss of confidence in their essence and consolidate them as grounds for termination of the labor agreement with the employee.

In addition, the procedure for dismissal for loss of confidence should be subjected to the rules of bringing the employee to disciplinary responsibility, but with the exception of the length of the procedures. The peculiarity of this reason is that the period when the employer can find out about employee's violation is significantly greater than the time limits for bringing disciplinary responsibility. Therefore, for this reason, the draft Labor Code should provide longer terms of bringing employees to responsibility, or not apply them at all, guided by their application criterion of reasonableness of time, taking into account the following behavior of the employee and other circumstances that are relevant for the proper resolution of the dispute. Such an approach would allow to unify the approaches to dismissal on this ground, expressed in the Labor Code of Ukraine and in judicial practice.

Conclusions. We believe that the extension of the reason (loss of confidence) to a wider range of employees and its introduction into the draft Labor Code of Ukraine will help to prevent cases of industrial espionage and unfair competition, and promote the preservation of intellectual property products of companies. In addition, the existence of this reason will positively impact on the behavior of employees, will make them implement their obligations more responsible, because the dismissal on this basis can ruin a career for anyone. At the same time, it is very important for the employer in order to implement this provision to adhere to the provisions and guarantees provided for by labor legislation, in particular, always remembering that the loss of confidence should be based on objective evidence of the employee's fault, and should also be documented.

Summary

The article discussed is devoted to the problems of additional grounds for termination of a labor agreement on the initiative of the employer with certain categories of employees under certain conditions. In particular, the article raises the problematic issues of termination of a labor agreement under paragraph 2 of Art. 41 of the Code of Laws on Labor of Ukraine. The subject composition of the provision, the grounds and the procedure for its application has been determined on the basis of the analysis of the current labor legislation and law enforcement practice. There has been carried out a comparative legal study of legal regulation of dismissal on this basis in several countries of the world. The author analyzes the provisions of the draft Labor Code of Ukraine, devoted to the mentioned issues, and proposes recommendations for improving their content.

Анотація

Стаття присвячена проблематиці додаткових підстав розірвання трудового договору з ініціативи роботодавця з окремими категоріями працівників за певних умов. Зокрема, в статті підіймаються проблемні

питання розірвання трудового договору за п. 2 ст. 41 КЗпП України. На основі аналізу чинного трудового законодавства та правозастосовної практики визначені суб'єктний склад зазначеної норми, підстави та порядок її застосування. Проведено порівняльно-правове дослідження нормативно-правового регулювання звільнення з цієї підстави в окремих країнах світу. Автором проведений аналіз норм проекту Трудового кодексу України, присвячених зазначеній тематиці, та запропоновані рекомендації щодо вдосконалення їх змісту.

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