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Implementation of the Employer's Authority through the Lens of Law Enforcement Practice

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ABSTRACT

The exercise of the employer's authority is closely intertwined with the bearing of entrepreneurial risk. Crucially, the rule that an employee's position should not be worsened prohibits transferring this risk to employees. However, realizing this rule is challenging when employers choose between alternative legal constructions, each compliant with the "letter" of the law, to mediate managerial decisions. This article aims to identify restrictions on employers' use of legal constructions that contradict the goals, objectives, and principles of labor legislation. It analyzes court practices concerning the prohibition of shifting entrepreneurial risk to employees within the context of business platformization, the nonlinkage of urgency in relations with counterparts to employment relations, and the interplay between remuneration and labor discipline. Additionally, it examines the "competition" between alternative legal constructions for terminating employment contracts due to unsatisfactory test results or disciplinary breaches. The study concludes that there is a trend in law enforcement practice to evaluate the competition of legal constructs based on their purposes and procedural safeguards provided to employees. Thus, labor legislation and law enforcement practice establish boundaries for exercising employer authority. The findings can inform the implementation and application of labor law.

Keywords: employment contract; fixed-term employment contract; termination of employment contract; remuneration; bonus; employer authority.

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Реализация работодательской власти через призму правоприменительной практики

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АННОТАЦИЯ

Реализация работодательской власти тесно переплетается с несением предпринимательского риска. При этом недопустимость переложения предпринимательского риска на работников вытекает в том числе из правила о недопущении ухудшения положения работника. Впрочем, данное правило весьма сложно реализуемо, когда речь идет о выборе работодателем для юридического опосредования своих управленческих решений альтернативных правовых конструкций, каждая из которых соответствует букве закона. Целью исследования является выявление ограничений по использованию работодателем правовых конструкций на основе противоречия такого использования целям, задачам и принципам трудового законодательства. Проводится анализ судебной практики о невозможности перенесения бремени предпринимательского риска на работников в рамках тенденции платформизации бизнеса; о невозможности увязывания срочности отношений с контрагентами со срочностью трудовых отношений; о взаимодействии оплаты и дисциплины труда по вопросу о «конкуренции» между альтернативными правовыми конструкциями по расторжению трудового договора при неудовлетворительном результате испытания и по дисциплинарному основанию; о «конкуренции» расторжения трудового договора по инициативе работодателя и прекращения трудовых отношений по причине отказа от продолжения работы в связи с изменением определенных сторонами условий трудового договора и др. Делается вывод о том, что в правоприменительной практике прослеживается тенденция, выражающаяся в оценке конкуренции конструкций реализации работодательской власти, исходя из целей их применения, а также процедуры и гарантий, предоставляемых работникам. Таким образом, трудовое законодательство и правоприменительная практика устанавливают работодателю пределы реализации такой власти. Результаты исследования могут быть использованы в реализации и применении права.

Ключевые слова: трудовой договор; срочный трудовой договор; расторжение трудового договора; оплата труда; премия; работодательская власть.

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INTRODUCTION

Radical socioeconomic and technological changes induce increased competition in international and national markets. Under their influence, the relations that develop in the labor sphere are being transformed. Moreover, the volatility of the market situation forces employers to adapt to these changes, including labor management. As Sergey P. Mavrin noted, "labor management as a legal category can be presented as a set of means of legal influence on the subjects of the social labor process in the conditions of coordination and reordination interaction of management participants for the purpose of optimal organization of labor, efficient use of various resources of the enterprise and achieving high socially useful production results based on it" [1, p. 6]. At once, the mechanism of legal regulation of labor as a fundamental part of a market economy encompasses a system of norms from various branches of law and legal relations, aiming to augment the organization of collective labor [2, pp. 15–16].

MAIN PART

Employers must have flexibility, which may include the identification of the structure of the local organization of labor[1] and modification of the number of employees in the organization. The local organization of labor determines the choice of the consumer of labor in favor of those statutory concepts that the legislator allows for the implementation of one or another form of interaction on the use of labor (both labor and civil law relations). In the context of such choice, legal regulation of the flexibility of labor relations and the elasticity of the labor function, considering its certainty, is very important. These parameters form the interest in the choice of labor relations as a form of interaction on the use of labor, namely a wide opportunity for discretion in the implementation of employer power and in the contents of the subject of the employment contract (performance of the labor function). Moreover, on the one hand, the flexibility of labor relations is implemented by providing the employer with a choice of the most suitable statutory concepts from the standpoint of economic efficiency. The state has a significant interest in the competitiveness of national employers, which entails the economic aim of labor law. However, the social aim of labor law necessitates the implementation of a particular statutory concept depending solely on the goals of its legislative consolidation. This limits employers in choosing alternative statutory concepts that imply a worsening of the employee's position. In this regard, the issues of maximum disclosure of the potential of labor relations when opting a particular labor statutory concept, considering the interests of their subjects, as well as the interests of the state, are relevant. In the context of the implementation of employer power, statutory concepts should be understood as a set of legal norms that mediate not only the legally significant decision of the employer but also the procedure for its implementation, as well as guarantees for the employee.

Thus, the interest of the employer is associated through exercising his fullest authorities, applying the most effective statutory concepts. Meanwhile, the employee's interest is manifested in maintaining and enhancing his positions as protected by social partnership regulation. Conversely, the state's interest is exhibited by ensuring the teleological application of a statutory concept enshrined in labor legislation, balancing the general goals, principles, and labor norms. In this regard, the parties to labor relations and the state must achieve a reconciliation of interests in selecting alternative statutory concepts and exercising employer power. Notably, the development of legal regulation in the labor sphere should be based on fairness [4].

In general, the flexibility of the implementation of employer power in employing economic activity can be expressed through several aspects [3, pp. 153–154]:

- Termination of labor relations due to economic reasons and the associated possibility of concluding employment contracts based on the different levels of termination complexity;
- Use of various forms of interaction with labor performers ("typical workers"; remote employees; workers referred by a private employment agency; work performers under civil contracts; etc.), which, in essence, forms the structure of the local labor organization and determines a set of statutory concepts within one or another form that are available to the consumer and the work performer to mediate their interaction;
- The implementation of flexible labor relations, in accordance with the Labor Code of the Russian Federation[2] (LC RF), integrates the following: additional duties or a separate labor function via agreement, employment contract term changes upon mutual agreement of the parties (Article 72), employment contract term

[1] Local organization of labor is a system-structured interaction between the consumer and the performers regarding the use of labor (ensuring collectively the performance of a certain economic activity), implemented in various legal forms through legal means corresponding to these forms (an employment contract, etc. in case of the labor relations; an agreement on the provision of labor of employees (personnel); an agreement for paid services, a work and labor contract, etc. within the civil law relations) [3, p. 51].

[2] Labor Code of the Russian Federation, Collection of the Legislation of the Russian Federation, No. 1 (Part I), Article 3 (with latest amendments 2002).

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changes due to organizational or technological conditions (Article 74), unpaid leave; part-time work; and downtime;
– Implementation of the flexibility (elasticity) of the labor function.

Hence, termination of labor relations due to economic reasons and the use of different forms of interaction with workers can be attributed to the quantitative flexibility of the local labor organization, and the last two aspects can be attributed to the qualitative one. All four aspects are interconnected and, considering the implementation of the private interests of subjects in the labor sphere and the public interest, can influence the employer's choice in favor of a particular aspect deemed the most acceptable. From the standpoint of quantitative flexibility of labor organization, this means the direction of labor consumers by the legislator to the choice of labor relations as a form of interaction in the use of labor. From the standpoint of qualitative flexibility, this means directing them to the choice of those alternative statutory concepts that are consistent with the labor law's goals and objectives. Notably, the Russian Federation is characterized by a direction in favor of maintaining labor relations in the context of both the development of labor law regulation of nontypical forms of employment and a clear definition of the legal status of performers. The latter is implemented, among other things, bearing in mind the possibility of reclassifying civil law relations into labor relations in accordance with Article 19.1 of the LC RF, which protects the workers' interests. In fact, labor statutory concepts contribute to the competitiveness of labor relations as a form of interaction in the use of labor.

Under present-day conditions, employers are in a rapidly changing environment and must be able to maintain their competitiveness [5]; therefore, they must have certain characteristics, including a high degree of adaptability and rapid response to these changes. In consequence, there is a transformation of the process of managing hired labor and its intersection with bearing the burden of entrepreneurial risk. It is important to remember that the employer performs entrepreneurial activity at his own risk and, therefore, is responsible for its results.

The employer determines the structure of the local organization of labor, choosing the most effective statutory concepts for interaction with employees. Conducting entrepreneurial activity is associated with the independent determination by the employer of the number of employees whose labor functions will collectively ensure the implementation of this activity. This will also ascertain the choice of statutory concepts for interaction with employees, aimed at increasing the efficiency of this interaction (e.g., the choice between performing work in a stationary way or doing work in a remote manner). At first glance, such choice is made by both parties to the employment contract, but it is the employer who creates the local organization of labor within the exercise of his power. The employee can often only refuse to apply a certain statutory concept to him, which leads, for example, to the failure to conclude an employment contract for remote work if the remote performance of the labor function does not meet the interests of the employee, or to the termination of labor relations as a result of the refusal to continue work due to a change in the terms of the employment contract determined by the parties (Clause 7, Part 1, Article 77 of the LC RF). Thus, the employee is under the employer's control and has a limited choice of actions due to his position.

Presently, employers increasingly resort to attempts to shift the burden of bearing entrepreneurial risk to employees, which naturally contradicts the nature of labor relations. One of the most striking examples of this situation is the widespread use of business platformization, which leads to the shifting of entrepreneurial risk to labor performers, if the latter conduct economic activity individually rather than nonindependent-hired labor. However, the legal status of platform workers does not allow the application of labor legislation to them (e.g., due to the very formal approach established in judicial practice, which has analyzed only superficially the nature of interaction on the use of platform workers' labor).[3] Thus, the decision of the Tushinsky District Court of Moscow on June 26, 2019 in case No. 2-2238/19, instead of identifying the signs that testify in favor of or against the entrepreneurial nature of the activities of platform workers, which is significant in the modern distinction between labor and civil contracts in the case of platform employment, examined only the "formal" contractual terms,[4] which was supported by the Moscow City Court in its appellate ruling.[5] Such formal approach, given the unequal economic position of the parties to labor relations and the resulting inequality in negotiating power, leads to the spread of fictitious self-employment.

The Resolution of the Constitutional Court of the Russian Federation (hereinafter referred to as the CC RF) on May 19, 2020 in case No. 25-P "On the case of verifying the constitutionality of paragraph 8 of part 1 of Article 59 of the LC RF in connection with the complaint of citizen I.A. Sysoev"[6] is indicative in terms of preventing the transfer

[3] The detailed analysis of issues that the courts (using the example of the decision of the Tushinsky District Court of Moscow on June 26, 2019 in case No. 2-2238/19 and the decision of the Zamoskvoretsky District Court of Moscow on May 14, 2019 in case No. 2-2792/2019) do not examine [6].

[4] Decision of the Tushinsky District Court of Moscow on June 26, 2019 in case No. 2-2238/19, computer-based legal research system Garant.

[5] Appellate ruling of the Moscow City Court on November 22, 2019 in case No. 33-53437/2019, computer-based legal research system ConsultantPlus.

[6] Resolution of the Constitutional Court of the Russian Federation on May 19, 2020 in case No. 25-P "On the case of verifying the constitutionality of paragraph 8 of Part 1 of Article 59 of the Labor Code of the Russian Federation in connection with the complaint of citizen I.A. Sysoev," computer-based legal research system ConsultantPlus.

of entrepreneurial risk to employees. Therefore, the CC RF considered the constitutionality of legislative norms that allow a situation where employers, in fact, linked the term of concluding civil contracts aimed at performing their entrepreneurial activities to the term of concluding employees' employment contracts directly performing their labor functions within the execution of the aforementioned contracts. Simply put, when entering contractual relations with a counterparty, employers transferred the characteristics of such relations to employees, primarily regarding their urgency.

The CC RF indicated that the employer is an independent participant in civil turnover, who performs economic activity and is responsible for the conclusion, modification, and termination of civil contracts with counterparts. In this regard, the employer bears the burden of the risks of the entrepreneurial activity, and not the employee who is not a participant in the economic activity of the employer, because he only performs the labor function defined by the employment contract. The opposite situation would entail a deterioration in the employee's position, a violation of the balance of rights and freedoms of the employee and the employer, as well as an erroneous definition of the very nature of labor relations. Thus, the CC RF indicated the impossibility of shifting the burden of entrepreneurial risk to employees. If the contract for the provision of services between the employer and the counterparty is terminated upon contract expiration, and the next contract for the provision of services has not yet been concluded (i.e., there is a certain period of time between the termination and conclusion of the contracts), then downtime due to the employer's fault is declared to the employee. If concluding a new civil law contract with the counterparty is not possible, the employment contract with the employee is terminated at the initiative of the employer under Clause 2 of Part 1 of Article 81 of the LC RF (reduction in the number of employees or staff of an organization and individual entrepreneur), considering all accompanying guarantees. In this case, essentially, there was a competition between alternative statutory concepts, namely concluding an employment contract for a certain period and its termination due to the expiration of this period; referring the employee on downtime due to the employer's fault (in the case of temporary unemployment); and reducing the number of employees or staff (in the case of permanent unemployment). Law enforcement practice certainly respond by directing the employer to use statutory concepts that provide employees with more guarantees. However, the key should be the intended purpose of a particular concept.

On the one hand, the employer's interests include maximum freedom to exercise their power, which includes the selection of the most effective statutory concepts (primarily in terms of economic efficiency). However, this interest cannot contravene the very nature of labor relations. Thus, employees, as to their position under the influence of the employer, are interested in not worsening their situation compared to the one established by law. Employers often utilize statutory concepts established in legislation, mediating circumstances to which, in accordance with the intended purpose of the norms, other statutory concepts are more suitable (providing employees with more rights and guarantees). Legalistically, the employer only uses one of the statutory concepts present in the legislation. However, in fact, the employee's situation worsens for the reason that concepts should be used, which imply a higher level of rights and guarantees for them.

One of the pressing issues of the impossibility of transferring the burden of entrepreneurial risk to employees is the interaction between wages and labor discipline. Thus, the decision of the Oktyabrsky District Court of Lipetsk on April 26, 2022 in Case No. 2-760/2022 considered the following circumstances.[7] An employee (sales manager) was brought to disciplinary responsibility and ultimately dismissed for repeated failure (two or more times) by the employer to fulfill his work duties without good reason (Clause 5, Part 1, Article 81 of the LC RF) due to failure to accomplish the sales plan. At the same time, sales plans for the employee and other managers were set daily and monthly, respectively. The employee was hampered in performing his work function by changing his workplace, failing to take measures to improve communications, depriving him of access to the 1C program (which is required to answer promptly the customer requests), transferring clients to other managers, among others. Disciplinary action was found to be illegal, and the employee was reinstated.

Notably, failure to fulfill the sales plan may not only be the result of dishonest actions by the employee in the performance of his/her job duties but also reflect the external market situation, changes in consumer financial solvency, or loss of competitive advantages in the market compared to similar goods, and the like. In this case, the subject of the employment contract is the performance of a labor function without a defined labor result (the employer is responsible for organizing labor, because the employee is under his/her control), unlike civil law contracts. Therefore, the legal nature of labor relations is extraneous to linking the implementation of the disciplinary power of the employer with the achievement of a certain labor result, which is expressed not only and not so much in specific actions (e.g., calling clients and informing them about the product) but also in the response of clients (which is not directly based on

[7] Decision of the Oktyabrsky District Court of Lipetsk on April 26, 2022 in case No. 2-760/2022, computer-based legal research system ConsultantPlus.

employees' actions). Such situation actually means transferring entrepreneurial risk to employees. However, fulfilling the sales plan can be fully integrated into the framework of remuneration. Achieving the following conditions is vital to avoid the transfer of business risk to employees:

- Fulfillment of the sales plan must be enshrined as the employee's responsibility (e.g., in the position description);
- The procedures for establishing specific sales plan indicators and familiarizing employees must be examined;
- The procedure for monitoring and recording the fulfillment of the sales plan must be established;
- The necessary working conditions must be provided.

The absence of unequal treatment of employees is a significant aspect of establishing a sales plan. In essence, the assessment of an employee's fulfillment of the sales plan must be associated with questions about the fulfillment of sales plans by other employees (Is a sales plan being established for other employees? Do other employees fulfill the sales plan indicators? What actions does the employer take in the event of fulfillment/nonfulfillment? In what order and based on what criteria are the sales plan indicators of different employees differentiated?).

Remarkably, the assessment of sales plan fulfillment can also be indirectly implemented by monitoring the performance of specific work duties of employees that affect the sales plan fulfillment but are related only to the employee's actions that are not associated with customer reactions (e.g., offering additional products to customers; introducing new marketing mechanisms and sales technologies; and searching for entry into new markets).

Examples of alternative statutory concepts can also include "competition" between "bringing an employee to disciplinary responsibility" and "nonpayment or reduction of the amount of the incentive portion of remuneration (bonus) due to violation of labor discipline (which, based on Part 2 of Article 135 of the LC RF, is often enshrined in local regulations)." This competition was considered in the Resolution of the Constitutional Court of the Russian Federation dated June 15, 2023, No. 32-P,[8] where Part 2 of Article 135 of the LC RF was established to be contrary to the Constitution of the Russian Federation[9] (Parts 1 and 2 of Article 19, Part 3 of Articles 37 and 55, and Part 5 of Articles 75 and 75.1). Thus, the CC RF revealed in this article of the LC RF the possibility of an employer arbitrarily establishing in local regulations the rules for calculating incentive payments added in the salary and the possibility of reducing the salary of an employee who has an unremitted or unextinguished disciplinary sanction, despite the fact that labor legislation does not allow material influence on an employee in the context of bringing him to disciplinary responsibility, including a fine and other material measures (by virtue of Article 192 of the LC RF). This truly means a material influence on an employee who has committed a disciplinary offense. Such situation violates the principles of justice, equality, proportionality, and the employee's right to fair wages. Moreover, in this context, the significance of other factors of material incentives for labor is leveled, such as the fulfillment of indicators (conditions) established for acquiring the right to receive them and the quantity and quality of labor actually expended by the employee. The constitutional significance of the issue under consideration consequently leads to a violation of not only the general principles of legal, including disciplinary, responsibility (fairness and equality) and the principles of the institution of remuneration (ensuring equal payment for work of equal value and prohibiting any discrimination in establishing and changing the terms of remuneration) but also constitutional provisions concerning the working person and the labor itself, as well as constitutionally approved goals of possible restrictions on the rights and freedoms of man and citizen. In this regard, it is crucial to emphasize the need to distinguish between bringing an employee to disciplinary responsibility and linking the payment of the incentive (bonus) part of the remuneration with disciplinary offenses.

The CC RF concluded that the admissibility of the possibility and limits of nonpayment or reduction of the amount of incentive payments (bonuses) if an employee has an unremitted or unextinguished disciplinary sanction must be provided for by law, proportionate to the severity of the offense committed and its economic, organizational, and other consequences for the implementation of the employer's activities. In addition, a disciplinary offense done by an employee may have a negative impact on the employer's activities only during the period of time when it was committed, and not for the entire period of bringing to disciplinary liability (until the term expiration or early remission).

Thus, when assessing the "competition" of alternative statutory concepts for the implementation of employer power, the courts consider the assessment of statutory goals and concepts, labor law principles and procedures, and employees' guarantees.

It must be noted that nonpayment or reduction of the bonus is possible based on the employee's violation of labor discipline without holding him/her liable within the due procedure. In fact, in this case, the violation of labor discipline

[8] Resolution of the Constitutional Court of the Russian Federation on June 15, 2023 in case No. 32-P "On the case of verifying the constitutionality of Part 2 of Article 135 and Part 1 of Article 193 of the Labor Code of the Russian Federation in connection with the complaint of citizen E.V. Tsaregorodskaya," computer-based legal research system ConsultantPlus.

[9] Constitution of the Russian Federation, adopted by popular vote on December 12, 1993, *Rossiyskaya Gazeta*, December 25, 1993, No. 237 (with amendments).

has legal significance only in terms of the payment of the bonus, but without bringing to disciplinary responsibility. The analysis of this kind of situation was given by the Ninth Cassation Court of General Jurisdiction in its ruling of 08/032023 No. 88-7163/2023.[10] Based on the circumstances of the case, the local regulatory act of the employer on the terms and amounts of material incentives stipulates that if facts of violations are established within the accounting period, the amount of the employee's bonus is reduced by 20%. The employee violated the code of ethics and official conduct set in the organization (according to the position description, the employee was obliged to comply with the rules of this code) by negligently performing official duties such as keeping the workplace clean and tidy at the end of work. In this regard, he was paid a bonus in the amount of 80% of the maximum. Moreover, the employee was not brought to disciplinary responsibility, and this violation had only consequences in the aspect of payment, but not labor discipline. The court noted that the deprivation of a bonus or monetary reward is not classified by law as a disciplinary measure, and this measure of influence in relation to persons who do not perform their work duties in good faith is established by local regulations. Distinguishing between bonuses that are part of the remuneration system and bonuses provided for in Part 1 of Article 191 of the LC RF as one of the types of incentives for employees by the employer is vital for conscientious and effective work, which application is within the competence of the employer. The final bonus is not a guaranteed payment (guaranteed income) for the employee but is only an additional measure of his material incentives and incentivization. The provision of final bonus is applied at the discretion of the employer, who determines the procedure and frequency of its payment, the amount, the criteria for assessing the work duties performed by the employee, and other conditions affecting both the payment of the bonus and its amount, including the results of the economic activity of the organization (employer) itself.

Notable examples of "competition" of statutory concepts include the employment termination due to an unsatisfactory probationary period (Article 71 of the LC RF) and the employment contract termination due to disciplinary grounds (Clauses 5–10 of Part 1 of Article 81 of the LC RF). Such issue was considered, for example, in the ruling of the First Cassation Court of General Jurisdiction on November 21, 2022 in case No. 88-30187/2022.[11] According to the circumstances of this case, a three-month probationary period was established for the employee in the employment contract. During this period, according to the administrator's official notes, the employee committed disciplinary violations, namely he ate at the workplace, argued with senior management, was distracted by reading a tablet, rolled homemade cigarettes, and refused to fulfill assignments. Based on this, the employee received a notice of termination of the employment contract in accordance with Article 71 of the LC RF, and three days after receiving this notice, a corresponding order was issued in a timely manner. The employee challenged this termination of the employment contract in court. At first instance, the court sided with the employer, but the appellate court concluded that the procedure for recognizing the failure of the probationary employee had been violated. The fact is that the notice of termination of the employment contract and the dismissal order did not indicate the reasons that constituted the basis for termination, did not specify the job responsibilities that the employee failed to perform, and did not record the factual circumstances that made the employer conclude that the employee had not passed the compliance test with the assigned work. In particular, the violations set out in the official notes were not correlated with the position description, and no assessment was made of the extent to which they affected the performance of duties. Thus, in this case, the concept of establishing a probationary period and terminating the employment contract due to its unsatisfactory result was used incorrectly and concealed the termination of the employment contract due to disciplinary offenses (repeated failure of the employee to fulfill his/her work duties) at the initiative of the employer with a set of guarantees provided for the employee (primarily procedural).

Statutory concepts must be used according to their purposes. Thus, the condition of the employee's probationary period is established in the employment contract to verify his/her compliance with the assigned work (Article 70 of the LC RF). This determines a simple procedure for terminating the employment contract in case of an unsatisfactory probationary period, namely compliance with the probationary period, warning the employee of the termination in writing no later than three days in advance, indicating the reasons as basis for acknowledging the failure of the probationary employee. Thus, passing the probationary period is, in essence, a matter of the employer's assessment of the practical application of the employee's professional qualities to a specific job ("compliance with the assigned work"). Bringing to disciplinary responsibility is aimed at maintaining labor discipline by demonstrating negative incentives for violating labor discipline both to the employee who committed the disciplinary offense (e.g., it is noted in judicial practice that the purpose of bringing an employee to disciplinary responsibility is the employer's right not only

[10] Ruling of the Ninth Cassation Court of General Jurisdiction on August 3, 2023 in case No. 88-7163/2023, computer-based legal research system ConsultantPlus.

[11] Ruling of the First Cassation Court of General Jurisdiction on November 21, 2022 in case No. 88-30187/2022, computer-based legal research system ConsultantPlus.

to point out to the employee the improper performance of his labor duties but also to provide the undisciplined employee with the opportunity and time to improve),[12] and to other employees, and in some cases established by law, termination of the employment contract (when the significance of the violation is of material importance, which, at the discretion of the employer (because it is a right, not an obligation) excludes the use of other influence not related to termination).

Article 192 of the LC RF states that an employee is brought to disciplinary responsibility for performance failure or improper performance of his or her job duties due to his or her fault. It is based on the general principles of legal and, therefore, disciplinary responsibility (in particular, e.g., fairness, proportionality, and legality). In this regard, a complex procedure for bringing to disciplinary responsibility has been established, which is fundamentally different from the one described previously in connection with unsatisfactory probationary results. Violation of the established procedure will result in the illegality of bringing the employee to disciplinary responsibility, namely detection and recording of the offense, demanding a written explanation from the employee, compliance with the deadlines for applying disciplinary action, and assessment of the objective circumstances of the offense. Considering the severity of the deed, application of only one disciplinary sanction for one disciplinary offense, application of a limited list of disciplinary sanctions, and issuance of an order on bringing the employee to disciplinary responsibility and familiarizing the employee with it under signed receipt are evaluated.

Thus, the statutory concepts of termination of an employment contract due to an unsatisfactory test result and on disciplinary grounds have different purposes and procedures and should be applied in accordance with their purposes and not applied at the discretion of the employer. Therefore, termination of an employment contract for reason that the employee has not passed the compliance test with the assigned work should be performed in accordance with Article 71 of the LC RF, and termination of an employment contract due to violation of labor discipline should be executed pursuant to the procedure for bringing to disciplinary responsibility, so as not to deprive the employee of the protective procedure enshrined in labor legislation (as noted by the CC RF, Part 1 of Article 193 of the LC RF is of a guarantee nature and is intended to provide the person under disciplinary responsibility with the opportunity to state his position regarding the disciplinary offense imputed to him, as well as to provide the motives and circumstances of its commission).[13] For example, in the aforementioned ruling of the First Cassation Court of General Jurisdiction dated 11/21/2022 in case No. 88-30187/2022, the administrator's explanatory notes on the employee's violations actually replaced the procedure for bringing to disciplinary responsibility, which violated his rights and deprived him of the opportunity to receive guarantees. Notably, disciplinary sanctions may be a criterion for failing the test. However, first, this must be enshrined in a local regulatory act on the test procedure (which adoption significantly reduces legal risks), and second, disciplinary sanctions must be imposed lawfully and in compliance with the procedure. In conclusion, the competition of alternative statutory concepts should be clearly limited in cases where one of the concepts provides more guarantees to employees according to the purposes of its application. However, this purpose should prevail in determining its use under certain circumstances. Simply put, it is not the rule of the most favorable position of the employee but the target compliance of the application of the statutory concept that should be observed. Moreover, the deterioration of the situation should be used as one of the criteria for the employer's incorrect choice of a statutory concept.

A situation of interest in this context was considered by the Bratsk City Court of the Irkutsk Region in its decision of 01/26/2017 No. 2-129/2017.[14] Based on the circumstances of the case, the employee was dismissed under Clause 5 of Part 1 of Article 81 of the LC RF. Failure to fulfill duties, according to the employer, will lead the employee to repeatedly fail the test of knowledge on labor protection because of ill-preparedness. In particular, passing the test of knowledge on labor protection was a mandatory requirement for the performance of the employee's job function in the position held. At the same time, he did not refuse to undergo such knowledge test. After unsatisfactory passing of the exams on labor protection, the employee was asked for an explanation in writing, which was provided by him. Following the consideration of this explanation, the acting engineering director of the employer proposed in an official note to the general director to terminate the employment contract with the employee under Clause 5 of Part 1 of Article 81 of the LC RF, because of the employee's outstanding and uncancelled disciplinary sanctions, and it

[12] Ruling of the Ninth Cassation Court of General Jurisdiction on August 11, 2022 in case No. 88-6922/2022, computer-based legal research system ConsultantPlus.

[13] Ruling of the Constitutional Court of the Russian Federation on May 30, 2023 in case No. 1121-O "On the refusal to accept for consideration the complaint of citizen Alexander G. Khokhlov regarding the violation of his constitutional rights by paragraphs two through four of Part 2 of Article 21, Part 1 of Article 192, and Part 1 of Article 193 of the Labor Code of the Russian Federation," computer-based legal research system ConsultantPlus.

[14] Decision of the Bratsk City Court of the Irkutsk Region on January 26, 2017 in case No. 2-129/2017. URL: https://sudact.ru/regular/doc/ZyUVOexzqdxj/ (date of access 03/02/2024).

was performed. The employee managed to challenge this dismissal in court, because the court found in this case an unlawful use of the disciplinary dismissal structure as an alternative to terminating the employment contract with an employee who is not suitable for the position held or the work performed due to insufficient qualifications, as confirmed by the certification results.

Indeed, Clause 5 of Part 1 of Article 81 of the LC RF assumes that repeated performance failure or improper performance of work duties by an employee without good reason includes violations of both the direct duties that make up the work function and the requirements of legislation and local regulations. For example, in the context of the case under consideration, such violations due to the mandatory admission to work may include the employee's refusal to undergo the necessary training and pass exams on labor protection, safety precautions, and operating rules during working hours. However, the employee did not refuse to undergo special training or pass the exam, which the court also noted. Therefore, unsatisfactory knowledge cannot constitute a disciplinary violation. In this case, there is a disguise of the certification, revealing the employee's inconsistency for the position held or the work performed due to insufficient knowledge in the field of labor protection. At the same time, certification-based dismissal varies from disciplinary dismissal and implies a number of guarantees for employees. These assurances are as follows: employee representative participates in the certification committee; dismissal is permissible if the employer is unable to transfer the employee to another available position with his written consent; and the employee's health is considered in determining his appropriate roles.

Thus, this decision signifies a teleological interpretation in the selection of statutory concept, prioritizing and maximizing employee's rights and guarantees. An illustration highlighting the difference between disciplinary responsibility and certification conduct is the situation where an employee failed to pass the exam about knowledge not known and essential for his/her work function, namely knowledge on local regulatory acts (e.g., labor protection). Thus, the very fact of unsatisfactory demonstration of such knowledge in the exam does not mean noncompliance with local regulatory acts, performance failure, or improper performance of work duties. The Industrial District Court of Samara considered the following circumstances in its decision on January 29, 2019, in case of No. 2-299/2019.[15] The employee was assigned to study the products being sold and pass a test on this knowledge. However, the testing revealed an insufficient level of the employee's knowledge. On this basis, the employer that the employee could not perform his job responsibilities efficiently (which was indicated in the official notes) and brought him to disciplinary responsibility in the form of a reprimand. At the same time, the testing was performed on paper without the signature of the person being tested, the objectivity of the testing and the evaluation of the test results were not regulated in any way, and the level of knowledge of the products was not provided for by the regulatory act.

In this case, disciplinary action was also brought instead of certification. It must be emphasized that only certification is a legitimate way to assess the employee's adequacy for the position held. The court sided with the employee.

It should be concluded that in law enforcement practice, there is a tendency expressed in the assessment of the competition of the structures of the implementation of employer power. Thus, the courts often proceed from the aims of applying statutory concepts, procedures, and guarantees given to employees. Even though the employer himself implements his power within the structure of a local labor organization, labor legislation and law enforcement practice establish the limits of the employer's implementation of such power.

Furthermore, the grounds for termination of an employment contract come into actual "competition," namely "by agreement of the parties" (Article 78 of the LC RF), "at the initiative of the employer" (Article 81 of the LC RF), "at the initiative of the employee (on own volition)" (Article 80 of the LC RF), and "refusal to continue work due to a change in the terms of the employment contract determined by the parties" (Clause 7 of Part 1 of Article 77 of the LC RF). At first glance, this situation seems quite paradoxical, because each of these employment contract terminations has its own specific legal regulation, including their implementation and guarantees provided to the employee. However, the employer exercises his power, and therefore, within the local organization of labor, he chooses certain statutory concepts for the implementation of his management decisions. In this regard, it is absolutely relevant to raise the question of the alternative nature of such terminations as "at the initiative of the employer" (e.g., due to a reduction in the number of employees or staff) and "by agreement of the parties." Moreover, by putting pressure on the employee, the employer can even disguise the employee's own desire as termination at his own initiative. It is no coincidence that the courts carefully examine all the circumstances of the termination of an employment contract at the employee's own volition, and, for example, such factor as a short period between writing the application and writing the dismissal (on the same day) is considered as evidence of the employer's initiative to terminate the employment relationship and

[15] Decision of the Industrial District Court of Samara on January 29, 2019 in case No. 2-299/2019. URL: https://sudact.ru/regular/doc/BdlFDtUR4pJ/ (date of access 03/02/2024).

pressure on the employee.[16] In addition, as Tatiana V. Erokhina rightly noted, violation of the dismissal procedure has legal significance in the case of dismissal at the initiative of not only the employer but also the employee [7, p. 280].

The First Cassation Court of General Jurisdiction in its decision of 11/09/2020 in case No. 8G-23106/2020[17] considered the circumstances in which, as part of the exercise of its power, the employer used the statutory concept "termination of the employment contract by agreement of the parties" as an alternative to the statutory concept "termination of the employment contract at the initiative of the employer." The employer and the employee entered an agreement to terminate the employment contract after one year. Before the expiration of this period, the employee expressed a desire to terminate this agreement, but the employer refused. The employee applied to the court. The courts of first and appellate instances sided with the employer and drew attention to the fact that the cancelation of agreement to terminate the employment contract as concluded by the employee and the employer is possible only by the joint will of the parties. The cassation court, in turn, concluded that the fact that the agreement was ended long before the termination of the employment relationship, and the employee subsequently attempted to cancel the agreement, testifies to the lack of the employee's will to terminate the employment contract. The courts of first and appellate instances did not study a number of factors that are important in determining the actual presence of the employee's will to terminate the employment relationship when concluding the agreement, while confining themselves to a formal statement of the impossibility of refusing unilaterally to terminate the agreement. In general, law enforcement practice does not support the possibility of unilateral refusal to terminate an employment contract upon agreement of the parties.[18] Thus, in order to exclude forced entry into such agreement, it is necessary to assess whether the employee's actions were voluntary, whether the employee was aware of the consequences of the signed agreement, whether the employer explained them, and whether he knew the reasons for the employee signing such agreement. In this regard, it is possible to state the interpretation of Article 78 of the LC RF de rigor juris, according to which an employment contract may be terminated at any time without specifying a time limit, and the cancelation of such agreement is possible only by the consensus of the parties and without the need to perform any procedure. Moreover, law enforcement practice, when determining the presence of the employee's will to terminate an employment contract, actually prescribes that the employer conducts a procedure for checking the voluntariness and awareness of the actions taken, which includes explaining to the employee the legal consequences of his actions and finding out the reasons for signing the agreement by the employee. Such procedure actually excludes the possibility of disguising the termination of an employment contract at the initiative of the employer by termination upon agreement of the parties, which was present in the case under consideration. Thus, in particular, dismissal by agreement of the parties will not be lawful if the parties have not reached an agreement in terms of such dismissal, which means voluntariness and a coordinated expression of the will of the employee and the employer.[19] In contrast, termination upon mutual agreement as an alternative to dismissal on defamatory grounds will not be considered pressure on the employee.[20] However, there is also an opposite practice in a similar situation.[21] In addition, termination upon mutual agreement is permissible after the start of the procedure for reducing the number of employees and the delivery of a notice of reduction,[22] as well as, generally, an alternative to reduction (especially if this is accompanied by the payment of severance pay exceeding the payments upon dismissal due to a reduction in the number of employees or staff).[23]

The role of law enforcement practice is vital in establishing the criteria, which aids in the selection and evaluation of alternative resolutions, ensuring a fair and lawful selection process. Thus, termination of an

[16] Ruling of the Second Cassation Court of General Jurisdiction on February 8, 2024 in case No. 88-2402/2024, computer-based legal research system ConsultantPlus.

[17] Decision of the First Cassation Court of General Jurisdiction on November 9, 2020. URL: https://1kas.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=6415047&delo_id=2800001&new=2800001&text_number=1 (date of access 03/21/2024).

[18] Resolution of the Plenum of the Supreme Court of the Russian Federation on March 17, 2004 in case No. 2 "On the application of the Labor Code of the Russian Federation by the courts of the Russian Federation," computer-based legal research system ConsultantPlus; Ruling of the Eighth Cassation Court of General Jurisdiction on February 8, 2024 in case Nos. 88-2641/2024 and 2-1209/2023, computer-based legal research system ConsultantPlus; Ruling of the Second Cassation Court of General Jurisdiction on September 14, 2023 in case No. 88-23689/2023, computer-based legal research system ConsultantPlus; and Ruling of the Sixth Cassation Court of General Jurisdiction on February 1, 2024 in case No. 88-1515/2024, computer-based legal research system ConsultantPlus.

[19] Ruling of the Seventh Cassation Court of General Jurisdiction on October 24, 2023 in case No. 88-18467/2023, computer-based legal research system ConsultantPlus.

[20] Ruling of the Seventh Cassation Court of General Jurisdiction on September 5, 2023 in case No. 88-16191/2023, 2-223/2022, computer-based legal research system ConsultantPlus.

[21] Ruling of the Second Cassation Court of General Jurisdiction on February 9, 2023 in case No. 88-3065/2023, computer-based legal research system ConsultantPlus.

[22] Ruling of the First Cassation Court of General Jurisdiction on April 24, 2023 in case No. 88-13105/2023, computer-based legal research system ConsultantPlus.

[23] Ruling of the Seventh Cassation Court of General Jurisdiction on January 10, 2023 in case No. 88-949/2023, computer-based legal research system ConsultantPlus.

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employment contract upon mutual agreement cannot be characterized by coercion of the employer to sign it. In the case of termination on the employee's own volition, such coercion can even be revealed in a simple proposal by the employer to the employee to terminate the employment contract under the relevant article. Hence, the most important factor is not just the presence of the employee's will for such terminations but also the stability of this will, i.e., its independent formation in the absence of pressure from the employer and with a clear understanding of the legal consequences of his actions. In particular, revealing the reasons why the employee wants to resign (the circumstances preceding the signing by the plaintiff of the agreement on termination of the employment contract)[24] and familiarizing employees with the legal consequences of signing the agreement on termination or an application for termination of the employment contract on their initiative will reduce the legal risks of challenge. In law enforcement practice, various factors indicating the employee's intent to voluntarily quit, such as searching for new job and analyzing mortgage obligations, are examined. Reciprocally, the employer's behavior is assessed for compliance with the "rules and norms of business turnover." Yet, problems arise, when termination happens mid-shift, prohibiting completion; equipment is not returned and relevant documents are not signed; exit checklist is not filled out; and directorship facilitates dismissal. These disparities weaken claims of complying to business norms.[25]

The fact that the employee submitted a termination application of the employment contract and signed an agreement, at the employer's command, could be regarded as evidence of pressure by the court, holding substantial worth.[26]

The employer, as the stronger party in the labor relationship, has the legal and actual opportunity to take actions to clarify the employee's position and his true will to terminate the employment contract.[27]

In the Resolution of the Constitutional Court of the Russian Federation on January 20, 2022 in case No. 3-P "On the case of verifying the constitutionality of Article 74 and Clause 7 of Part 1 of Article 77 of the LC RF in connection with the complaint of citizen A.A. Peshkov,"[28] a situation was examined, where an employer outsourced part of the functions previously performed by a separate structural unit by concluding a civil law contract with a counterparty. In this regard, the employee's labor function in this unit and its area became redundant. Under Article 74 of the LC RF, the employer initiated the procedure to modify the employment contract terms by the parties due to organizational or technological changes in working conditions, specifically relocating the workplace to a separate unit in a different area. Because of the refusal to make these changes, the employment contract with the employee was terminated under Clause 7 of Part 1 of Article 77 of the LC RF.

The Constitutional Court of the Russian Federation noted that employee's dismissal cannot be anchored solely on the employee's refusal to work because of modified employment contract terms (Clause 7 of Part 1 of Article 77 of the LC RF). However, dismissal is based on the objective impossibility, when the employer is unable to provide a work suitable to the employee's labor functions in the specific structural unit. The situation is similar to an employee who underwent position elimination (Clause 2 of Part 1 of Article 81 of the LC RF), due to the transfer of work to a third party. The competition between alternative statutory concepts in the context of an employment contract termination under Clause 7 of Part 1 of Article 77 of the LC RF (as a result of using the procedure under Article 74 of the LC RF) and dismissal due to staff reduction under Clause 2 of Part 1 of Article 81 of the LC RF indicates a crucial evaluation of the purposes of the norms to resolve opposition. Thus, the initial intended purpose of Clause 7 of Part 1 of Article 77 of the LC RF consists only in preventing the imposition of the employment contract terms on the employee under Article 74 of the LC RF. To some extent, this statutory concept is the implementation of the employee's will and not the employer's initiative to terminate the employment relationship (if there is his initiative to change the terms of the employment contract, in addition to labor function conditions). At the same time, Article 81 of the LC RF is certainly aimed at terminating the employment relationship at the employer's initiative. Moreover, under Clause 2 of Part 1 of Article 81 of the LC RF, this employer's initiative is caused by objective impossibility, which results from outsourcing (work transfer to a third party via civil law contract) and discontinued employment.

The statutory concepts differ significantly in material guarantees, namely a severance pay of two weeks' average

[24] Ruling of the Seventh Cassation Court of General Jurisdiction on July 27, 2021 in case No. 88-11840/2021 in case No. 2-1472/2020, computer-based legal research system ConsultantPlus.

[25] Appellate ruling of the Moscow City Court on March 3, 2022 in case No. 33-5104/2022, computer-based legal research system ConsultantPlus.

[26] Ruling of the Eighth Cassation Court of General Jurisdiction on August 15, 2023 in case No. 88-16784/2023, computer-based legal research system ConsultantPlus.

[27] Ruling of the Fourth Cassation Court of General Jurisdiction on August 31, 2023 in case Nos. 88-29140/2023 and 2-2055/2022, computer-based legal research system ConsultantPlus.

[28] Resolution of the Constitutional Court of the Russian Federation on January 20, 2022 in case No. 3-P "On the case of verifying the constitutionality of Article 74 and Clause 7 of Part 1 of Article 77 of the Labor Code of the Russian Federation in connection with the complaint of citizen A.A. Peshkov," computer-based legal research system ConsultantPlus.

earnings after dismissal (Clause 7 of Part 1 of Article 77 of the LC RF) and a reduction of staff as most costly dismissal (Clause 2 of Part 1 of Article 81 of the LC RF). Additionally, alternative guarantees vary. Thus, under Article 74 of the LC RF, the CC RF noted that the employment contract condition on the labor function (Part 1) and the status of the employee's workplace can be modified by the employer, when such unit is located outside the employer's location (Article 57 of the LC RF). In simpler terms, the CC RF considered that changing the employee's workplace site is a job transfer, as permitted by the employee's consent (Articles 72 and 72.1 of the LC RF). Any other interpretation would negate the meaning and intended purpose of the legislative norms on job transfer and would entail an infringement of constitutional rights beyond the permissible restrictions of rights and freedoms. In this regard, the CC RF also presented a teleological interpretation of the competition of the statutory concepts of "an employee transfer" and "change in the terms of the employment contract determined by the parties for reasons related to a change in the organizational or technological conditions of work." Although Article 74 of the LC RF contains a direct ban on changing the labor function conditions, which constitute a job transfer as stipulated in Articles 71 and 72.1 of the LC RF, the CC RF also excluded a change of workplace location, which also constitutes a job transfer as per mandatory workplace indication in the contract.

In general, both the acts of courts of general jurisdiction and the acts of the Constitutional Court[29] have had a great influence on the development of labor legislation, including employer's ability to choose statutory concepts for the implementation of his power.

CONCLUSIONS

Employers often select the most economically effective statutory concept among alternative choices, risking the situation of the employees. In response, labor law enforcement practice develops a targeted approach to protect the workers' rights and ensure their welfare.

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[29] For more information on the influence of the decisions of the Constitutional Court of the Russian Federation on the development of labor law, see [8].

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