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Z.B. Zhukova [1], O.V. Miroshnikova [2], E.A. Bryzgalova [3], M.N. Myrzakhanova [4]

[1,2,3]North Kazakhstan State University. M. Kozybayeva;
[4]Kokshetau State University. Sh. Ualihanova
zara01.07@icloud.com, mob0802@mail.ru, katyu_mila@mail.ru, myrzahanova@mail.ru

ISSUES OF SELECTING THE APPLICABLE NATIONAL LAW TO THE LABOR CONTRACT: EXPERIENCE OF THE REPUBLIC OF KAZAKHSTAN AND FOREIGN COUNTRIES

Abstract. According to the authors, the issues of choosing the applicable national law to an employment contract in Kazakhstan has a big difference compared with foreign countries, in particular with developed countries. In general, there are a number of problems that, when compared with international standards, reveal weaknesses in the legal framework, the term of the employment contract with the executive body should be regulated separately from other categories of workers. The time limits for the application of disciplinary measures to managers should be extended. An example is given of the choice of applicable national law to an employment contract in the Republic of Kazakhstan, which despite the differences with the labor laws of the EU countries, nevertheless, there is a tendency towards a convergence of the provisions of national labor laws.

Keywords: international commercial contract, conflict of laws rule applicable to the contract law, the law of the country most closely associated with the contract.

INTRODUCTION

Kazakhstan firmly stood on the rails of a market economy, which inevitably entails a shift in priorities towards the protection of production interests. World practice shows that a market economy is always aimed at the prevalence of production interest over social, and therefore it is impossible to reduce the tasks of labor legislation exclusively to ensuring the interests of the employee.

From January 1, 2016, the new Labor Code of the Republic of Kazakhstan came into force. Then the leaders of the Kazakhstan trade union organizations were concerned about the innovations that they made in the new document. They believed that the rights of the wage worker were minimized, and the powers of the employer were expanded.

The adoption of the new Labor Code has more influenced employers, who must now harmonize personnel documentation and reflect all new provisions in them. At the same time, according to their information, the entry into force of the code also raised some additional questions from both employers and employees.

The new Labor Code has determined that it applies to employees and employers located in Kazakhstan, including branches and representative offices of foreign legal entities.

This opinion is confirmed by several experts in the document. For example, earlier, the Labor Code provided for compensation in the amount of not less than the average salary per year upon termination of an employment contract without a procedure for notifying an employee to an employer. Now, according to their information, the new Labor Code, with this type of dismissal, provides for compensation, which is established by agreement of the parties. Therefore, lawyers recommend to pay attention to the amount of compensation payments and if the compensation does not suit the employee, he has the right to offer his own conditions.

MAINPART

The average monthly nominal wage of employees of large and medium-sized enterprises in Kazakhstan in the reporting period of 2018 amounted to KZT 167,458 and increased compared to the previous year by 6.2%, in real terms, a decrease - by 1.1%.

Differences in pay are characterized by types of economic activity. The maximum wage was recorded in the mining industry and quarrying - 341775 tenge *, the minimum - in agriculture, forestry and fisheries - 91084 tenge.

In the reporting year, the average monthly nominal wages for men reached 1,79575 tenge, having increased compared to the previous year by 6%, for women - respectively 121793 tenge and by 4.9%.

Among the countries of the Commonwealth of Independent States, Kazakhstan ranks second in terms of the average monthly nominal wages in dollar terms. In 2017 According to the CIS Statistical Committee, the average monthly nominal wage in Kazakhstan was $ 463, in the Russian Federation - $ 671, in Belarus - $ 422.

The amount of employer expenses for the maintenance of labor in 2017. amounted to 7335 million tenge and increased over the previous year by 7.7%. The wage fund of employees amounted to KZT 6,351.6 million or 86.6% of the labor cost.

Number of employees in 2017 amounted to 3,712.5 thousand people and increased compared to the previous year by 1%, of which men amounted to 1,829.4 thousand people, or 49.3% of the number of employees, women - 1,883.1 thousand people, or 50, 7%.

In 2017 the distribution of workers according to the size of wages (according to a one-time registration of workers who worked in June completely) showed that 2.6% of workers received monthly wages up to 30,000 tenge, from 3,0001 to 45,000 tenge - 10.8%, from 45,001 to 75,000 tenge - 21.8%, from 75001 to 105000 tenge - 19.7%, from 105001 to 240000 tenge - 34.5%, from 240001 and higher - 10.6%.

The draft of the new Labor Code has improved the legal regulation of a number of issues, closed some existing gaps in the legislation, introduced new legal institutions. In general, the structure of the document has become much more convenient for use by both lawyers and non-professional "users" of this document.

However, there are still some contradictory or insufficiently regulated provisions that could be corrected during the subsequent work on the project.

In the current edition it is not clear whether the elected representatives of the workers will represent the interests of the entire team as a whole, including those who voted “against” at the general meeting of workers, or only those workers who voted “for” these representatives.

At the same time, in view of the contradiction in the conceptual apparatus, the question remains whether the representatives of the employees can be third parties by proxy. In the case when the participation of representatives of employees is mandatory (for example, in the work of the attestation commission), should representatives of specific (in particular, attested) employees participate in the established procedure, or is any other employee representatives allowed to participate? And what if there is no representative of a particular certified employee, and he does not want to elect him? In this case, the employer's rights to conduct certification may be paralyzed.

We believe that in the draft of the new Labor Code, the legislator should solve the currently existing problems of employee representation and eliminate contradictions. This is all the more important since the bill contains a new big problem - with the resolution of disputes.

It is assumed that a person (an employee, an employer) can apply to a court only if the dispute is not settled by the conciliation commission or his decision is not executed. This rule may lead to the fact that the parties will not be able to go to court if the conciliation commission is not formed (and it can be assumed that there will be an overwhelming majority of such cases). At the same time, a specific person does not have legal mechanisms for the prompt formation of such a commission, if there is none, or no employee representatives are elected, or there is no general meeting on the appointment of representatives to the commission, or an agreement between the representatives and the employer has not been reached. In addition, disputes may arise regarding the procedure for holding the aforementioned general meeting.

Thus, the constitutional right to judicial protection is violated: “Everyone has the right to judicial protection of his rights and freedoms” (clause 2 of article 13 of the Constitution). As the Constitutional

Council of the Republic of Kazakhstan pointed out in its Resolution No. 5 of August 5, 2002, “this constitutional right implies the protection of human rights and freedoms of a person, a citizen, both from arbitrariness of any kind and erroneous court decisions”; “The said constitutional norm implies the free will of a person and citizen in the choice of legal means of protecting their interests.”

For example, the Code of Administrative Offenses contains the rule that, in pursuance of the constitutional right to judicial protection, a person has the right to apply for the transfer of the case to the court when the case is subject to consideration by the authorized state body (part 4 of article 683) . And in the draft Labor Code it is intended to deprive citizens and their employers of this right.

In addition, when a dispute arises between the head and the employer (in the person of participants / shareholders, etc.), the mechanism of the conciliation commission provided for in the draft code is defective, because Representatives of the highest governing bodies of the legal entity (in fact, those who hired the head) are excluded from participation in the commission, and the head acquires a lot of legal opportunities for abuse. With this approach, the rights of participants / shareholders are significantly violated.

There is a need to resolve issues related to the peculiarities of the activities of executive bodies. First of all, members of the collegial and sole executive bodies should be equated in legal regulation, since when forming the current Labor Code on the existence of the sole executive body, they simply forgot that they had to be corrected in the course of law enforcement.

The hiring of managers and the termination of their employment relationships have their differences from ordinary workers. It is necessary to give the right to founders, participants or other management bodies of a legal entity to determine who will issue orders on these issues.

It is necessary to provide employers with the right to independently settle the specifics of concluding an employment contract, determining the procedure and conditions of remuneration, bringing to disciplinary responsibility, resolving individual labor disputes, granting vacations, exercising rights and acting as managers.

A ban on termination of an employment contract while the employee is “on sick leave” or on leave should not be extended to managers in order to avoid causing significant harm to the employer due to the specifics of corporate procedures for convening general meetings of shareholders and participants. In the presence of such a ban, the executive bodies can consciously prevent the termination of labor relations with them by going on leave or opening “hospital”. Unfortunately, such cases are regularly encountered when terminating employment relations with managers of legal entities, but at present the courts refuse to reinstate them at work. We hope that the new Labor Code will include a direct rule that the ban in question is not applicable to this category of workers, which will eliminate grounds for further disputes on this issue.

The practice also requires extending the peculiarities of labor regulation of managers of legal entities to the heads of branches and representative offices, as well as to other elected bodies.

The International Labor Organization recognized as legitimate "borrowed" labor in 1997, adopting Convention No. 181, which is dedicated to private employment agencies. This convention gives private employment agencies, by which any natural or legal person, the right to hire workers for the purpose of placing them at the disposal of a third party (the client company). The Convention has now been ratified by 22 states. Unfortunately, the Republic of Kazakhstan is not yet among the ratifications of the convention. The term, in our opinion, is most appropriate for reflecting the essence of the secondment process, outstaffing and staff leasing from the point of view of Kazakhstan legislation - the personnel provision contract (DPP), we will use this term in the future. In this case, we will try to combine in our DPP those moments that, in our opinion, most closely correspond to the tasks of the society within the framework of the current legislation of the Republic of Kazakhstan.

DPP should be distinguished from outsourcing, which has become widespread in Kazakhstan. Outsourcing refers to the transfer of certain non-core functions of a specialized company. The most frequently outsourced accounting and tax accounting, payroll, administrative IT support, office cleaning, security and others. In accordance with the DPP, one organization places at the disposal of another organization the necessary qualifications for performing certain functions in the interests of that other organization. At the same time, the organization providing personnel does not assume obligations to provide any services. Its only obligation is to provide qualified personnel.

DPP is concluded by two parties - the customer and the employer, thus, the risk of recognizing it as an employment contract in accordance with article 24 of the Labor Code, according to which the parties are the employer and the employee, disappears. It should be recognized that elements of the employment contract are still present in the DPP.

The DPP should reflect the condition that the employee will perform the labor function not in the employer's enterprises, but in the organization of the employer (customer), which entails the need to follow the labor regulations of this particular organization. Determination of employment by the norms of labor legislation is an essential condition of an employment contract (Article 28 of the Labor Code of the Republic of Kazakhstan). A place of work means the location of an enterprise with which an agreement is concluded.

Bringing the labor legislation of the Republic in accordance with international standards is aimed at:

- ensuring the implementation of generally accepted principles and norms of international law, as well as obligations arising from international treaties ratified by the Republic of Kazakhstan;
- creation of necessary conditions for further expansion and deepening of international cooperation;
- consolidation in the Labor Code of world experience in the regulation of labor relations, which contributes to the improvement of the investment climate in the Republic of Kazakhstan;
- minimization of negative social consequences in the period of the republic's accession to the World Trade Organization.

European labor law includes EU norms and norms contained in Council of Europe acts. EU norms, as a rule, relate to the regulation of socio-economic issues, and the norms of the Council of Europe - the regulation of issues in the field of human rights. One of the EU bodies is the European Commission, which initiates the adoption of EU norms and ensures their compliance with each EU member state. If the state violates these norms, the European Commission may apply to the EU Court.

There is also a larger entity - the Council of Europe, consisting of 47 states. The bodies of the Council of Europe are the Committee of Ministers (which includes foreign ministers) and the Parliamentary Assembly of representatives of the national parliaments of the Council of Europe member states. Member States, when developing European law, should take into account Council of Europe guidelines.

EU legal norms can be grouped into three main categories: norms of treaties, EU legislation and norms of judicial practice.

The main EU document - the Lisbon Treaty of 2007 includes two treaties (Maastricht 1992 and Rome 1957) and the Charter of Fundamental Rights of the EU 2000, in fact, it is the EU Constitution. In addition, the Council of Europe treaties are important for regulating the social block of rights: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the 1950 Convention) and the European Social Charter of 1996 (hereinafter referred to as the Charter).

The Charter contains the most comprehensive list of social rights that apply in the field of labor, and complements the 1950 Convention. The Charter provides for a number of obligations for signatory states. Thus, these states undertake to fulfill conditions ensuring the effective implementation of the rights enshrined in the text of the Charter. States must create the conditions for the rights provided for in the Charter to be realized. The Charter contains the right to earn a living by freely chosen labor, rights in the field of working conditions, occupational safety and health, the right to fair remuneration, information, collective labor rights, etc. The rules of the Charter apply not only to European workers and employers, but also to migrant workers and members of their families, and the recognition of the right to personal dignity is the basis for regulating the work of all workers.

Monitoring compliance with the Charter is carried out by the European Committee of Social Rights of the Council of Europe through periodic reports of the participating States with a list of measures taken to ensure compliance with the Charter, and through the possibility of filing collective complaints by trade unions about non-compliance with a specific provision of the Charter by the State party. A committee cannot impose sanctions on a state, but the court of a given state has the right to rely on the provisions of the Charter and on decisions of the European Committee of Social Rights when considering a particular case.

The second type of European labor law sources is EU law. It includes regulations, regulations and directives - rules adopted at the proposal of the European Commission by the EU Council and the

European Parliament. Unlike decisions and regulations that are instruments of direct action, directives are introduced through the national legislation of EU member states. The directive obliges the state to take measures within a certain period of time, aimed at achieving the goals indicated in it. Like treaties, acts of EU law are superior to national law. Even if the state does not bring national legislation in line with the directive, its violation may be appealed to the EU Court of Justice.

A significant part of European labor law is exactly the directive. The directive establishes objectives and leaves the EU Member State free choice of means to achieve these objectives. The usual period to bring the national legislation into compliance with the directive is 3 years. It will not be enough to copy the directive text into the labor code, it is necessary to take all legal and administrative measures so that the tasks set by the directive are achieved.

The third source of European labor law is the practice of the European Court of Justice and the European Court of Human Rights, residing in Luxembourg and Strasbourg, respectively. If necessary, the interpretation of European law judge of any EU member state may, and sometimes is obliged to appeal to the EU Court. Decisions of the EU Court of Justice and the European Court of Human Rights are binding on EU member states.

The norms of European labor law regulate issues relating primarily to the health of workers and the safety of their work. The Single European Act of 1986 provides for the right of the Council of the EU to adopt guidelines, basic norms in the field of European labor law, that is, minimum requirements that must be followed by all EU member states. These requirements relate to working conditions, their goal is to increase the level of protection of the health and safety of workers. This goal is dynamic and implies a forward movement in the direction of improving working conditions, increasing the level of occupational safety. This is confirmed by the provisions of the Lisbon Treaty. Thus, EU member states set standards in the field of employee health and safety, and EU standards complement the national legislation of EU member states.

The Charter also provides that employees have the right to rely on fair remuneration, including an increase in wages for hours of additional work. In this regard, it is worth paying attention to cases of confrontation of the norms of the Charter with national law. In conclusion, it should be noted that despite the existing differences in the national labor laws of some EU member states with European labor laws and the present reluctance of state authorities of these countries to bring national labor laws in line with European legal norms, there is an objective tendency for convergence of provisions national labor legislations of EU member states through the general rules of European labor law. This is confirmed by the fact that not only the European judicial authorities in Luxembourg and Strasbourg, but also the national courts of the EU member states, considering the appeals of workers and trade union organizations, give priority to European labor law.

З.Б.Жукова[1], О.В. Мирошникова [2], Е.А. Брызгалова [3], М.Н. Мырзаханова [4]

[1,2,3]Солтүстік Қазақстан мемлекеттік университеті. М.Қозыбаева;
[4]Көкшетау мемлекеттік университеті. Ш.Уәлиханова

ҚОЛДАНЫЛАТЫН ҰЛТТЫҚ ЗАҢДЫҢ ЕҢБЕК ҚЫЗМЕТІНІҢ ТАҢДАУЫНЫҢ МӘСЕЛЕЛЕРІ: ҚАЗАҚСТАН РЕСПУБЛИКАСЫ ЖӘНЕ ШЕТЕЛ МЕРДІГЕРЛЕРІНІҢ ТӘЖІРИБЕСІ

Аннотация. Авторлардың пікірінше, Қазақстандағы еңбек келісім шартына қатысты қолданыстағы ұлттық заңнаманы таңдау мәселелері шетелдермен салыстырғанда, әсіресе дамыған елдермен салыстырғанда үлкен айырмашылық қаие. Жалпы алғанда, халықаралық стандарттармен салыстырғанда нормативтік құқықтық базадағы кемшіліктерді анықтайтын бірқатар мәселелер бар, атқарушы органмен еңбек шартының мерзімі қызметкерлердің басқа санаттарынан бөлек реттелуі керек. Менеджерлерге тәртіптік шараларды қолдану мерзімі ұзартылуы тиіс. ЕО елдерінің еңбек заңнамасымен келіспеушіліктерге қарамастан, Қазақстандағы еңбек келісім шартына қолданылатын ұлттық заңнаманы таңдау туралы мысал келтірілген, дегенмен, ұлттық еңбек заңнамасының ережелерін жақындатуүрдісі бар.

Түйін сөздер: халықаралық коммерциялық келісім-шарт, келісім шарттық заңға қолданылатын заңдар қақтығысы, келісім шартқа неғұрлым тығыз байланысты елдің заңы.

З.Б. Жукова[1], О.В. Мирошникова[2], Е.А. Брызгалова[3], М.Н. Мырзаханова[4]

[1,2,3]Северо-Казахстанский государственный университет им. М. Козыбаева;
[4]Кокшетауский государственный университет им. Ш. Уалиханова

ВОПРОСЫ ВЫБОРА ПРИМЕНИМОГО НАЦИОНАЛЬНОГО ПРАВА К ТРУДОВОМУ ДОГОВОРУ: ОПЫТ РЕСПУБЛИКИ КАЗАХСТАН И ЗАРУБЕЖНЫХ СТРАН

Аннотация. По мнению авторов, вопросы выбора применимого национального права к трудовому договору в Казахстане имеет большое различие по сравнению с зарубежными странами, в частности с развитыми странами. В целом, имеется ряд проблем, которые при сравнении с международными стандартами, выявляют слабые стороны правовой основы, так срок трудового договора с исполнительным органом должен регулироваться отдельно от других категорий работников. Должны быть увеличены сроки для применения мер дисциплинарной ответственности к руководителям. Приведен пример выбора применимого национального права к трудовому договору в РК, который несмотря на имеющиеся различия с трудовым законодательством стран ЕС, тем не менее имеется тенденция к сближению положений национальных трудовых законодательств.

Ключевые слова: международный коммерческий договор, коллизионная норма, применимое к договору право, право страны, наиболее тесно связанной с договором.

Сведения об авторах:

Жукова Зара Борисовна - кандидат юридических наук, кафедра «Правовые дисциплины», Факультет истории, экономики и права, Северо-Казахстанский государственный университет им. М. Козыбаева, Республика Казахстан, СКО, г. Петропавловск, ул. М. Жумабаева, 114, zara01.07@icloud.com, https://orcid.org/0000-0001-7400-2752;

Мирошникова Олеся Викторовна - магистр юриспруденции, кафедра «Правовые дисциплины», Факультет истории, экономики и права, Северо-Казахстанский государственный университет им. М. Козыбаева, Республика Казахстан, СКО, г. Петропавловск, ул. М. Жумабаева, 114, mob0802@mail.ru, https://orcid.org/0000-0001-6986-0795;

Брызгалова Екатерина Александровна - магистр юриспруденции, кафедра «Правовые дисциплины», Факультет истории, экономики и права, Северо-Казахстанский государственный университет им. М. Козыбаева, Республика Казахстан, СКО, г. Петропавловск, ул. М. Жумабаева, 114, katyu_mila@mail.ru, https://orcid.org/0000-0001-6242-0447

Мырзаханова Маржан Ноуркеновна - кандидат медицинских наук, и.о. Профессор, Кокшетауский государственный университет им. Ш. Уалиханова, myrzahanova@mail.ru, https://orcid.org/0000-0002-6301-7040

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